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## IMPLIED LIMITATIONS ON THE DIVERSITY JURISDICTION OF FEDERAL COURTS

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"The judicial power shall extend . . . to controversies . . . between citizens of different states. . . ." U. S. Const. art. III, § 2.  
"(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between: (1) citizens of different states; . . ." 28 U.S.C. § 1332 (1952).

The grants of power from which the federal courts derive their diversity jurisdiction are extremely broad. The constitutional language seems to indicate that the federal courts could, if given the power by Congress, exercise jurisdiction over any controversy between citizens of different states, while the statement presently found in 28 U.S.C. § 1332 seems to indicate that, subject to the jurisdictional amount requirement, the federal district courts have been given such power.<sup>1</sup>

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1. See, for example, Mr. Justice Black dissenting in *Chicago, Rock Island & Pacific R. R. v. Stude*, 346 U. S. 574, 582 (1954), where he states: "Congress has given such courts power to try any case that is (1) a 'civil' action, (2) between 'Citizens of different States', (3) a 'controversy,' and (4) involves a matter which 'exceeds the sum or value of \$3,000 exclusive of interest and costs.' . . ."

Such a broad generalization is somewhat misleading. See also Mr. Justice Frankfurter dissenting in *Burford v. Sun Oil Co.*, 319 U. S. 315, 336 (1943). Of course, there are specific limitations spelled out in statutes and in the Constitution. For example, suits against a state are not included, U. S. Const. Amend. XI, and there must be a case or controversy, *Muskrat v. United States*, 219 U. S. 346 (1911). The statute indicates that "original" proceedings only are covered. Appeals from state proceedings are not here authorized. *Chicago, Rock Island & Pacific R. R. v. Stude*, 346 U. S. 574 (1954); *Snook v. Industrial Commission*, 9 F. Supp. 26 (E.D. Ill. 1934). Compare *Range Oil Supply Co. v. Chicago, Rock Island & Pacific R. R.*, 140 F. Supp. 283 (D. Minn. 1956). For a general discussion of the jurisdiction and judicial power of federal courts, see *Cyclopedia of Federal Procedure*, § 53 *et seq.* (2d ed. 1943).

The grant of power found in 28 U. S. C. § 1332 is very close to the original grant found in the Acts of 1789 at c. 20, § 11, which provided:

That the circuit court shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of cost, the sum of value of Five Hundred Dollars and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State . . .

## GENERAL STATEMENTS

The first problem that arises in an analysis of this particular area of the law is one of interpretation. Is the legislative grant of power one to be exercised at the discretion of the federal courts, or is the exercise of jurisdiction a matter of right with the litigants concerned? Does a federal court have the right to decline jurisdiction of a particular cause of action simply because it feels that some other court could handle the case more properly or more expeditiously than could the federal courts? In the early case of *Cohens v. Virginia*<sup>2</sup> the United States Supreme Court said:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.<sup>3</sup>

This quotation seems to reflect the view that if a case falls within its jurisdiction, a federal court must decide that case. This view is found in cases decided quite recently.<sup>4</sup>

On the other hand, the federal courts have set out a number of exceptions to this so-called general rule. The Supreme Court of the United States has stated that:

Obviously the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the grounds that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.<sup>5</sup>

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2. 19 U. S. (6 Wheat.) 264 (1821).

3. *Id.* at 404.

4. For example, the Court of Appeals for the Ninth Circuit recently held that a federal district court should not decline jurisdiction on the ground that the same suit might be brought in a state court whose judges are elected rather than appointed and thus presumably are more responsive to the public. *Romero v. Weakley*, 226 F. 2d 399 (9th Cir. 1955).

5. *Canada Malting Co. v. Paterson Steamships*, 285 U. S. 413, 422-23 (1932).

In this particular case, not based on diversity of citizenship, a district court had refused to exercise jurisdiction in an admiralty suit between foreigners, and on appeal, the United States Supreme Court affirmed that decision. In *Rogers v. Guaranty Trust Company*,<sup>6</sup> the Supreme Court in a corporation case<sup>7</sup> suggested the same idea. The Court therein stated:

While the district court had jurisdiction to adjudicate the rights of the parties, it does not follow that it is bound to exert that power. . . . It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum.<sup>8</sup>

A few years later, the Supreme Court of the United States in a third case referred to the exception to the general rule in an action wherein there was an attempt to file an original bill in the Supreme Court of the United States.<sup>9</sup> The controversy between Massachusetts and Missouri and several citizens of the state of Missouri involved an estate and the taxation of that estate. In discussing whether the Supreme Court of the United States should exercise jurisdiction the Court referred to the *Cohens* case and stated:

We have observed that the broad statement that a court having jurisdiction must exercise it . . . is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. . . . Grounds for justifying such a qualification have been found in 'considerations of convenience, efficiency, and justice' applicable to particular classes of cases.<sup>10</sup>

The same idea is stated somewhat differently in *Meredith v. Winter Haven*<sup>11</sup> where the Supreme Court pointed out:

The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was

6. 288 U. S. 123 (1933).

7. For a discussion of the problem of the supervision of a corporation by a court not of the state of incorporation, see *infra*, page 10.

8. 288 U. S. at 130-31.

9. *Massachusetts v. Missouri*, 308 U. S. 1 (1939).

10. *Id.* at 19. This case, of course, did not involve diversity jurisdiction, but it does indicate the existence of implied limitations upon the exercise of jurisdiction by the federal courts.

The federal courts have refused to exercise jurisdiction in areas other than diversity cases although apparently having jurisdiction. *Meredith v. Winter Haven*, 320 U. S. 228, 236 (1943) (discussion of use of extraordinary remedy for the protection of federal rights). Admiralty courts have on occasion refused to exercise jurisdiction although apparently having it.

For reasons peculiar to the special problems of admiralty . . . the courts exercising admiralty . . . powers have been permitted at times to decline to exercise their jurisdiction.

Mr. Justice Black dissenting in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 513-14 (1947).

11. 320 U. S. 228 (1943).

generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. . . . When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.<sup>12</sup>

These cases suggest that although there are exceptions to the general rule concerning the exercise of jurisdiction, the district courts do not have unlimited discretion, *i.e.*, that the district courts have the right to refuse to exercise jurisdiction only in certain types of cases and under certain conditions. It is the purpose of this survey to see if some definite rules can be ascertained concerning the exercise of diversity jurisdiction by the federal courts. Mr. Justice Frankfurter has stated:<sup>13</sup>

. . . a right created by state law and enforceable in the state courts can also be enforced in the federal courts where the parties to the controversy are citizens of different states. . . . the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts.

That is the theory of diversity jurisdiction.

This survey was made to determine whether the remedies afforded are in fact "coextensive."

#### CAVEAT

Care must be exercised to differentiate between cases where federal courts do not have or exercise jurisdiction and cases where the federal courts refuse as a matter of discretion to give relief on the merits.<sup>14</sup> In the first situation the federal courts do not get to the question of the merits and simply hold that they do not have

12. *Id.* at 234-35.

13. Dissenting in *Burford v. Sun Oil Co.*, 319 U. S. 315, 336-37 (1943).

14. Mr. Justice Frankfurter seems to have confused these two concepts in his dissenting opinion in *Burford v. Sun Oil Co.*, 319 U. S. 315, 336 (1943). It should be noted, too, that when a federal court is faced with a difficult problem of state law, that court can hold the case in abeyance while the state question is determined in an adjudication in the state court. *Albertson v. Millard*, 345 U. S. 242 (1953); *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101 (1944); *Chicago v. Fieldcrest Dairies*, 316 U. S. 168 (1942); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U. S. 496 (1941); see also *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940). This idea

jurisdiction or that they will not exercise their jurisdiction; in the latter situation the federal courts examine the merits and then refuse to grant any form of relief. This latter situation is found in a number of cases in equity before federal courts.

An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity. . . . Exercise of that discretion by those, as well as by other courts having equity powers, may require them to withhold their relief in furtherance of a recognized, defined public policy. . . . It is for this reason that a federal court having jurisdiction of the cause may decline to interfere with state criminal prosecutions except when moved by most urgent considerations . . . or with the collection of state taxes or with the fiscal affairs of the state . . . or with the state administrative function of prescribing the local rates of public utilities . . . or to interfere, by appointment of a receiver, with the liquidation of an insolvent state bank by a state administrative officer, where there is no contention that the interests of creditors and stockholders will not be adequately protected. . . .<sup>15</sup>

In a number of cases the federal courts have declined to assist the parties litigant because they have found that public policy was against the enforcement of such rights.<sup>16</sup> It seems quite clear that:

was articulated in *Meredith v. Winter Haven*, 320 U. S. 228 (1943), where the Court, at page 236, stated:

So too a federal court . . . may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented.

Mr. Justice Frankfurter, dissenting in *Burford v. Sun Oil Co.*, 319 U. S. 315, 338 (1943), referred to this doctrine as an "affirmation and not a denial of federal jurisdiction." *But see*, *Pierce v. Hildebrand*, 103 F. Supp. 396 (S.D. Iowa 1952) (court dismissed action after discussion of *Pullman* case).

15. *Meredith v. Winter Haven*, 320 U. S. 228, 235 (1943).

16. In some rather recent cases the federal courts have decided not to act because the cases involved state regulations of certain areas of activities. In *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943), noted in 56 Harv. L. Rev. 1162 (1943), faced with a case invoking the regulation of oil production in Texas, the Court, at page 318 stated:

. . . we find it necessary to decide only one [question]: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

The Court then answered that question in the affirmative. For similar ideas, see *Meredith v. Winter Haven*, 320 U. S. 228 (1943), and *Harris v. Connecticut Light and Power Co.*, 125 F. Supp. 395 (D.C. Conn. 1954).

In a dissenting opinion in the *Burford* case, Mr. Justice Frankfurter attempted to cast the problem in terms of a diminution of the diversity jurisdiction of the federal courts. An examination of the opinion of the majority and the concurring opinion of Mr. Justice Douglas suggest that the Court's holding is in terms of discretionary refusal to act rather than in terms of a diminution of jurisdiction.

See also *Gray v. Blight*, 112 F. 2d 696 (10th Cir.), *cert. denied*, 311 U. S. 704 (1940); *Meinsen v. Order of United Commercial Travelers*, 43 F. Supp. 756 (W.D. Mo. 1942), *aff'd*, 131 F. 2d 176 (8th Cir. 1942); and *Lauria v. E. I. DuPont De Nemours & Co.*, 241 Fed. 687 (E.D. N.Y. 1917).

In diversity of citizenship cases federal courts must follow the conflict of laws rule prevailing in the states in which they sit, . . . Federal courts consistently refuse to enforce contracts which are against public policy of the state in which the court sits.<sup>17</sup> (Emphasis Supplied.)

It should be understood, however, that this goes to the question of the relief to be granted and not to the essential jurisdiction of a federal court in such controversies.

Although this suggested, traditional division is not always easy to ascertain, and although there may be shadings of grays between the black and white, nonetheless the division is important. The courts talk in such terms. More important there is historical justification for such a distinction, and in such an analysis, because of stare decisis, one can find a certain measure of predictability.

### *Erie Railroad v. Tompkins*

In considering the problem of the jurisdiction of federal courts, one immediately thinks of *Erie Railroad v. Tompkins*<sup>18</sup> and its possible application. Whether the doctrine of that case embraces jurisdictional questions is a problem that has perplexed the federal courts for some time.

*Angel v. Bullington*,<sup>19</sup> arose out of a suit by a citizen of Virginia against a citizen of North Carolina in a North Carolina state court. The action was for a deficiency judgment on a note for the purchase price of land in Virginia, the note being secured by a deed of trust on the land. The court was faced with the question of the application of the *Erie Railroad* doctrine to a jurisdictional question. A North Carolina statute provided that the holder of such a note "shall not be entitled to a deficiency judgment."<sup>20</sup> The state supreme court, while disclaiming any intention to pass on the plaintiff's argument that the federal Constitution precluded North Carolina from closing the doors of its courts to him, ruled that the statute in question deprived state courts of jurisdiction over the cause.<sup>21</sup> No appeal was taken by the plaintiff from that dismissal; instead he brought a new

17. *Jameson Coal and Coke v. Goltra*, 143 F. 2d 889, 895 (8th Cir. 1944). See also *Griffin v. McCoach*, 313 U. S. 498 (1941); *Reed v. Kelly*, 177 F. 2d 473 (7th Cir. 1949); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 82 (6th Cir. 1943) (" . . . where an agreement, made in one state, violates public policy of another state in which action is brought, it will not be enforced either by the courts of the forum or by federal courts sitting therein.").

18. 304 U. S. 64 (1938).

19. 330 U. S. 183 (1947).

20. *Id.* at 185.

21. *Bullington v. Angel*, 220 N. C. 18, 16 S. S. 2d 414 (1941).

suit in a federal district court for North Carolina seeking a judgment against the same defendant on the same claim.<sup>22</sup> The Supreme Court of the United States held that the identical issue had been adjudicated in the state court and that the cause having been barred there could not be relitigated again in the federal courts. It would seem that the decision was based upon *res judicata*, except for certain language found in the opinion :

What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.<sup>23</sup>

In a dissenting opinion in the *Angel* case, Mr. Justice Rutledge pointed out that the decision "rests on an 'and/or' hodgepodge of *res judicata* and *Erie* doctrines."<sup>24</sup> It is interesting to note that in the *Angel* case the Supreme Court did not feel it necessary to consider the merits of the constitutional question. This would support the conclusion that the decision is based on *res judicata*, for if based on *Erie* considerations, the validity of the statute and the policy which it established would be directly in issue.

In spite of the questionable nature of the ruling in the *Angel* case, the Supreme Court has clearly indicated that it feels the *Angel* case is controlling on the question of the applicability of state jurisdictional policy at least in some areas. In three consecutive cases in Volume 337 of the United States Reports, *Ragan v. Merchants Transfer & Warehouse Co.*,<sup>25</sup> *Woods v. Interstate Realty Co.*,<sup>26</sup> and *Cohen v. Beneficial Industrial Loan Co.*,<sup>27</sup> a state practice was viewed as limiting the availability of a remedy in a federal court. Mr. Justice Rutledge dissented indicating his belief that the decisions carried *Erie Railroad* to unintended and unjustifiable lengths.<sup>28</sup>

The effect of these Supreme Court decisions is well illustrated by a series of cases in the Seventh Circuit's Court of Appeals, all of which involve statutes denying jurisdiction to state courts over actions for wrongful deaths occurring outside the states, when such

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22. 330 U. S. at 185.

23. *Id.* at 192.

24. *Id.* at 201.

25. 337 U. S. 530 (1949).

26. 337 U. S. 535 (1949).

27. 337 U. S. 541 (1949).

28. *Id.* at 557.



actions could be maintained where the tort was committed.<sup>29</sup> In *Stevenson v. Grand Trunk Western Ry.*,<sup>30</sup> decided before *Angel v. Bullington*, it was held that such a statute did not affect jurisdiction of a federal district court in a diversity case. After the *Angel* decision was handed down, *Davidson v. Gardner*<sup>31</sup> held that the *Stevenson* case was still controlling and that the contrary remarks in *Angel v. Bullington* were mere obiter.<sup>32</sup> In 1950, however, after the *Ragan, Cohen* and *Woods* cases were decided, the Seventh Circuit's Court of Appeals reversed its position and held that the federal district court could not entertain such an action.<sup>33</sup> In defending their new view against the oft-made argument that a state statute cannot control the jurisdiction of federal courts,<sup>34</sup> the Court of Appeals' opinion pointed out "implicit in the diversity statute, is the limitation resulting from the Supreme Court's interpretation of diversity jurisdiction. . . . If, as has been suggested, diversity jurisdiction has been limited, that limitation arises not from the action of the state but exists inherently in the federal statute itself as authoritatively interpreted."<sup>35</sup> It would thus appear that at least in this case of a state created remedy the state jurisdictional limitation was held to be controlling.

This does not, however, definitely answer the question of the application of *Erie Railroad* to all jurisdictional problems which may arise in the federal courts. Is it proper to conclude that whenever a state court would exercise jurisdiction the federal courts under *Erie Railroad* and the *Angel* case must also exercise jurisdiction, or can we in fact find diversity situations where implied jurisdictional limitations are applied regardless of the state practice? In other words, are there certain exceptions to the *Erie Railroad* doctrine? There are certain areas that should be examined to establish definitely the federal pattern of conduct.

#### FORUM NON CONVENIENS

One of the developing doctrines in this general area is that of forum non conveniens which, broadly defined, means that an in-

29. It should be noted at the outset of this discussion that the Supreme Court of the United States in a later case held such a statute unconstitutional as violative of the full faith and credit clause of the Constitution. *First National Bank v. United Airlines*, 342 U. S. 396 (1952).

30. 110 F. 2d 401 (7th Cir. 1940).

31. 172 F. 2d 188 (7th Cir. 1949).

32. *Id.* at 190.

33. *Trust Co. of Chicago v. Pennsylvania R. R.*, 183 F. 2d 640 (7th Cir. 1950).

34. See, for example, *Hyde v. Stone*, 61 U. S. (20 How.) 170 (1857); *Davidson v. Gardner*, 172 F. 2d 188, 191 (7th Cir. 1949); and *Stephenson v. Grand Trunk*, 110 F. 2d 401 (7th Cir. 1940).

35. 183 F. 2d. at 644.

convenient forum will not exercise jurisdiction. The classic example of a forum non conveniens situation is where both litigants are nonresidents.<sup>36</sup> The rationale behind the doctrine is that there is a more convenient forum for the vindication of the rights of the parties and that therefore the instant court should not exercise jurisdiction. The exact limitations of the doctrine are not clear.<sup>37</sup> A number of state courts have adopted forum non conveniens and some federal courts have applied it in diversity cases.<sup>38</sup>

One of the most troublesome problems involved in the application of forum non conveniens in federal courts involves the interrelation of the doctrine with *Erie Railroad v. Tompkins*. Among many cases recognizing the problem is *Gilbert v. Gulf Oil Corp.*,<sup>39</sup> where Judge Clark stated for the Second Circuit Court of Appeals:

We are clear, however, that New York law should not control in this situation. It is true that in *Weiss v. Routh*, [149 F. 2d 193 (2d Cir. 1945)], the court looked to New York law for light as to the extent to which courts would interfere with the internal management of a corporation. But that appears to us much nearer substantive law—that of corporate supervision—than is this question of the place of enforcement of a claim for money damages, and hence much closer to that mystic line past which we dare not venture without state tutelage.

It might be thought that the case of *Angel v. Bullington* and the others of that line<sup>40</sup> had solved this problem of *Erie* and forum non conveniens but at least they have not been so considered by the circuits. In *Sheridan v. American Motors Corporation*,<sup>41</sup> the state law was applied on the authority of the *Weiss* case which, as will be seen,<sup>42</sup> had been effectively overruled in its own circuit. On the other hand, in *Josephson v. McGuire*,<sup>43</sup> Judge Wyzanski said in a forum non conveniens case:

And though it may be that this state rule does not govern a federal court sitting in Massachusetts, the policy expressed in

36. See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947).

37. See, for example, *Burt v. Isthmus Development Co.*, 218 F. 2d 353 (5th Cir. 1955); *Gore v. United States Steel Corp.*, 15 N. J. 301, 104 A. 2d 670 (1954). In the latter case the court applied the doctrine of forum non conveniens to a controversy between a resident of Alabama and a corporation originally incorporated in New Jersey and which still retained domicile in that state. The case is noted in 11 N. Y. U. Intra. L. Rev. 29 (1955).

38. *Johnson v. Chicago, Burlington & Quincy R. R. Co.*, 243 Minn. 58 (1954); Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380 (1947); Note, *Forum Non Conveniens, A New Federal Doctrine*, 56 Yale L. J. 1234 (1947).

39. 153 F. 2d 883, 885 (2d Cir. 1946).

40. See *supra* notes 25 *et seq.*

41. 132 F. Supp. 121 (E.D. Penn. 1955).

42. See text *infra* at 12.

43. 121 F. Supp. 83 (D. Mass. 1954).

state decisions ought not to be regarded as entirely without weight in the exercise of this Court's discretion.

The application of the doctrine of *forum non conveniens* in the federal courts has been somewhat confused by 28 U.S.C. § 1404(a), which authorizes the transfer of a case from one district court to another in the interest of justice. In *Norwood v. Kirkpatrick*,<sup>44</sup> the Supreme Court of the United States considered the application of this section and its relation to *forum non conveniens*. In a rather short opinion delivered by Mr. Justice Minton it was indicated that the doctrine of *forum non conveniens* is no longer part of the federal jurisprudence, and that section 1404(a) now stands in its stead. The Court said:

The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification.<sup>45</sup>

In a rather strong dissenting opinion, Mr. Justice Clark, Chief Justice Warren and Mr. Justice Douglas objected to the interpretation placed upon section 1404(a) by the majority.<sup>46</sup>

It seems entirely possible that section 1404(a) has for all practical purposes excised *forum non conveniens* from federal jurisprudence. Perhaps it has the effect of overriding *Erie Railroad v. Tompkins*, and the application of the *forum state's* doctrine of *forum non conveniens*. This would mean that *forum non conveniens* is no longer an implied limitation upon the exercise of jurisdiction by a federal court and that the only question now is whether a federal court should exercise its power under 28 U. S. C. § 1404(a) to transfer the case to another district court.<sup>47</sup>

#### INTERNAL AFFAIRS OF FOREIGN CORPORATIONS

At one time the Supreme Court of the United States stated:

. . . a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation

44. 349 U. S. 29 (1955).

45. *Id.* at 32.

46. *Id.* at 33.

47. *Collins v. American Automobile Ins. Co.*, 230 F. 2d 416 (2d Cir. 1956); *Willis v. Weil Pump Co.*, 222 F. 2d 261 (2d Cir. 1955). On the question of the law which should be applied in a case transferred under section 1404(a) see *Hedrick v. Atchison, Topeka & Santa Fe*, 182 F. 2d 305 (10th Cir. 1950); Currie, *Change of Venue and the Conflicts of Laws*, 22 U. of Chi. L. Rev. 405 (1955); Currie, *The Erie Doctrine and Transfer of Civil Actions*, 17 F. R. D. 353 (1955); Comment, *Section 1404(a) and Transfers of Substantive Law*, 60 Yale L. J. 537 (1951).

organized under the laws of another State but will leave controversies as to such matters to the courts of the State of domicile.<sup>48</sup>

This statement was made in deciding a suit brought by certain stockholders of a corporation organized in the state of New Jersey. The action was commenced in a New York state court and removed to the United States District Court. That court refused to exercise jurisdiction because of the nature of the action. On appeal to the court of appeals it was reversed; the Supreme Court ordered the decree of the district court to be reinstated. This would support the idea that the federal courts are limited jurisdictionally because of the rule against interfering in the internal affairs of a foreign corporation.

In the case of *Rogers v. Guaranty Trust Company*,<sup>49</sup> the mere fact that the internal affairs of a corporation or concern were involved was evidently deemed sufficient to justify a district court's refusal to take cognizance of the case. In *Alm v. American Hair and Felt Company*<sup>50</sup> the court of appeals noted that:

We are convinced that the controlling issue, and in fact the only issue, here presented must turn upon whether the acts complained of concerned only the management and internal affairs of appellee, a foreign corporation. That question must be answered in the affirmative.

But the rule has not been maintained in its pristine simplicity. In *Williams v. Green Bay & Western R.R.*,<sup>51</sup> the district court's dismissal, affirmed in the court of appeals, was set aside, on the ground that there were no real problems existing which would justify refusal of the case since forum non conveniens was designed as an instrument of justice. In the most recent Supreme Court case, *Koster v. Lumbermens Mutual Casualty Company*,<sup>52</sup> the majority speaking through Mr. Justice Jackson declared:

There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show

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48. *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 130 (1933). On the general topic of intervention in the internal affairs of a foreign corporation, see Note, *Jurisdiction of Actions Involving Internal Affairs of Foreign Corporations*, 42 Iowa L. Rev. 90 (1956).

49. 288 U. S. 123 (1933). For an example of the rigidity of the earlier decisions, particularly the views of the circuit courts of appeal, see *Williamson v. Missouri-Kansas Pipe Line Co.*, 56 F. 2d 503 (7th Cir. 1932).

50. 91 F. 2d 354, 358 (7th Cir. 1937).

51. 326 U. S. 549 (1946).

52. 330 U. S. 518, 527 (1947). And see the recent case, *Clifton Park Manor v. Mason*, 137 F. Supp. 326 (D. Del. 1955).

convenience of parties or witnesses, the appropriateness of trial in a form familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.

Whatever the import of previous decisions, the *Koster* case makes it very clear that the refusal to take jurisdiction of such cases is based upon the broad concept of forum non conveniens. From this observation, two important consequences appear to follow. First, a federal court probably is no longer justified in dismissing a suit because it involves the internal affairs of a foreign corporation. The remedy in such situations is transfer under section 1404(a) since that section replaces the common law concept of forum non conveniens for the federal courts. And it would seem to follow that the statutory provisions are not limited by the old circumscriptions upon forum non conveniens because the harshness of dismissal is no longer present.<sup>53</sup> Second, there is some confusion about the integration of the foreign corporation limitation and *Erie Railroad* considerations. It seems quite clear that the federal courts have not definitely decided this particular problem. This is amply illustrated by the decisions in the Second Circuit. In *Weiss v. Routh*,<sup>54</sup> Judge Learned Hand noted that there was a good deal of discretion in the court in these cases but that:

. . . although judicial discretion does indeed imply that the limits are not rigidly fixed, it does not mean that there are none; and in dealing with the question at bar, we are to remember the purpose of conformity in 'diversity cases'.<sup>55</sup>

Although this appeared to have settled the questions for the Second Circuit's Court of Appeals, the calm was short-lived, for a few months later in *Gilbert v. Gulf Oil Company*<sup>56</sup> it was held that New York law was not controlling in determining whether federal district courts in New York should exercise jurisdiction in an action for negligent destruction of property by a Virginia resident against a

53. See *Norwood v. Kirkpatrick*, 349 U. S. 29, 32 (1955), where it is said:

The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, . . . intended to permit courts to grant transfers upon a lesser showing of convenience.

However, a dissenting opinion in the *Norwood* case indicates that the limitations placed upon forum non conveniens by *Koster v. Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947), and by *Gilbert v. Gulf Oil Co.*, 330 U. S. 501 (1947), should apply to transfers under section 1404(a).

54. 149 F. 2d 193 (2d Cir. 1945).

55. *Id.* at 195.

56. 153 F. 2d 883 (2d Cir. 1946). This decision was reversed in 330 U. S. 501 (1947).

Pennsylvania corporation, which had filed certificates for doing business in New York and Virginia. The *Weiss* case was distinguished on the ground that the instant case did not involve the internal affairs of a corporation. Just a few pages later in the same report, a footnote in an internal affairs case, *Koster v. Lumbermens Mutual Casualty Company*,<sup>57</sup> declared that New York law was not controlling and cited the *Gulf* case as authority. To add insult to injury the original *Weiss* case was cited in the body of the *Koster* opinion, but was omitted in that particular footnote. Both the *Gulf* and *Koster* cases went up to the Supreme Court and in both of them the *Erie* question was avoided.<sup>58</sup> The same question had been left open earlier in *Williams v. Green Bay and Western R.R.*<sup>59</sup> On the particular question of the application of *Erie Railroad* to internal affairs of foreign corporation cases, as in the related, broad question of forum non conveniens, there has been no definitive ruling.

#### PROBATE PRACTICE

One of the most widely stated generalizations in the area of federal jurisdiction is that federal courts can exercise no probate jurisdiction. Statements have been made to that effect in approximately 250 reported federal cases. The *holdings* of the cases, however, do not support the generalization. To understand the vast body of case law on the subject, it is necessary to classify the cases into specific areas where a more or less common problem is to be found. When such categories are recognized, the opinions become more meaningful and the state of the law more understandable.

It is clear from a multitude of decisions that federal courts will take cognizance of actions at law, or in proper cases, of suits in equity, to establish a claim against an estate of a decedent, even though that estate is already in the hands of a state court. And the federal courts will exercise jurisdiction at any time before a final decree is made in the state proceedings.<sup>60</sup> There are, however,

57. *Koster v. Lumbermens Mutual Casualty Co.*, 153 F. 2d 888 (2d Cir. 1946).

58. *Koster v. Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 529 (1947). The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. . . . It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 509 (1947).

59. 326 U. S. 549, 559 (1946).

60. *Markham v. Allen*, 326 U. S. 490 (1946); *Ingersoll v. Coram*, 211 U. S. 335 (1908); *Lawrence v. Nelson*, 143 U. S. 215 (1892); *Blark v. Bever*, 139 U. S. 96 (1891); *Hess v. Reynolds*, 113 U. S. 73 (1885); *Payne v. Hook*, 74 U. S. (7 Wall.) 425 (1869); *Green's Adm'rix v. Creighton*, 64 U. S. (23 How.) 90 (1859); *Suydam v. Broadnax and Newton*, 39 U. S. (14 Pet.) 67 (1840); *Foster v. Carlin*, 200 F. 2d 943 (4th Cir. 1952); *Rosenberg v. Baum*, 153 F. 2d 10 (10th Cir. 1946); *Miami County Nat'l Bank v. Ban-*

limitations upon the prosecution of suits in federal courts to establish claims against an estate, these limitations stemming from the hesitancy of the courts to interfere with property in the control of a state tribunal.<sup>61</sup> Thus, in the case of creditors, the holding is uniform that levy of execution on a federal court judgment is not available; the plaintiff must present the judgment to the probate court for payment.<sup>62</sup> In suits by an heir at law, although an accounting may be ordered if necessary to determine his share in the estate,<sup>63</sup> the federal courts will refuse to order an accounting which looks only to distribution of the estate.<sup>64</sup> A fortiori, the federal courts will not order an actual distribution when the property is in the hands of a state court.<sup>65</sup>

croft, 121 F. 2d 921 (10th Cir. 1941); O'Connor v. Slaker, 22 F. 2d 147 (8th Cir. 1927); Chase Nat'l Bank v. Sayles, 11 F. 2d 948 (1st Cir. 1926); United States v. Swanson, 75 F. Supp. 118 (D. Neb. 1947); American Baptist Home Mission Soc'y v. Stewart, 192 Fed. 976 (C.C. N.D. W. Va. 1911). The case of Miami County Nat'l Bank v. Bancroft, *supra*, indicates that such suits can be maintained concurrently with equivalent suits in state courts. A contrary result was reached in DuVivier v. Hopkins, 116 Mass. 125 (1874). The traditional jurisdiction of equity courts in this area is based upon a trust theory. See Underground Electrical Rys. v. Owsley, 176 Fed. 26 (2d Cir. 1909).

61. In some cases the federal courts have examined the state practice to ascertain whether such a suit would be cognizable in a court of general jurisdiction within the state. *McCan v. First Nat'l Bank*, 139 F. Supp. 224 (D. Ore. 1954); *Sowls v. First Nat'l Bank*, 54 Fed. 564 (C.C.D. Vt. 1893). Similarly, it has been held that a federal court could not compel the surviving partner of deceased to render an accounting where, under the state practice, the probate court had jurisdiction of all such accountings. *Moore v. Fidelity Trust Co.*, 138 Fed. 1 (3d Cir. 1905). The better view, however, would seem to be that if the suit falls under one of the traditional heads of equity jurisdiction, the controlling question is whether the possession of the state court would be obstructed. If the state court's possession would be interfered with, the mere fact that a similar action could be maintained in a court of general jurisdiction within the state will not justify an exercise of jurisdiction by a federal court. *Robinson v. Georgia Sav. Bank & Trust Co.*, 106 F. 2d 944 (5th Cir. 1939); *In re McDonald's Estate*, 42 F. 2d 266 (D. Minn. 1930).

62. *Yonley v. Lavender*, 88 U. S. (21 Wall.) 276 (1874); *Thiel Detective Service Co. v. McClure*, 130 Fed. 55 (C.C. W.D. Ky. 1904); *Pufahl v. Estate of Parks*, 299 U. S. 217, 226 (1936) (dictum); *Bedford Co. v. Thonlinson*, 95 Fed. 208, 209-10 (7th Cir. 1899) (dictum). *But cf.* *Borer v. Chapman*, 119 U. S. 587 (1886) (creditor can follow property into hands of legatees through action in federal court); *Elliott v. Shuler*, 50 Fed. 454 (C.C. W.D. N.C. 1892) (particular remedy created by state statute); *Brown v. Ellis*, 86 Fed. 357 (C.C.D. Vt. 1898) (*semble*).

63. *Payne v. Hook*, 74 U. S. (7 Wall.) 425 (1869).

64. *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33 (1909); *In re McDonald's Estate*, 42 F. 2d 266 (D.C. Minn. 1930).

65. *Byers v. McAuley*, 149 U. S. 608 (1893); *Hastings v. Douglass*, 249 Fed. 378 (N.D. W. Va. 1918); *Northrup v. Browne*, 204 Fed. 224 (8th Cir. 1913). *But cf.* *McClellan v. Carland*, 217 U. S. 268 (1910).

This hesitancy to interfere with property in the hands of another court has also led to a refusal to set apart a widow's statutory year's support. *In re Seabolt*, 113 Fed. 766 (W.D. N.C. 1902); *cf.* *McCan v. First Nat'l Bank*, 139 F. Supp. 224 (D. Ore. 1954) (jurisdictional restrictions of Oregon state law viewed as controlling).

A really difficult problem in this area is that of whether a federal court of equity would entertain a suit for accounting and distribution on removal from a state probate court after letters testamentary had been issued by that court. The most analogous case presented thus far was decided by a circuit court in 1893, but the opinion entered there is anything but exhaustive.<sup>66</sup> It is believed that the appropriate action for a federal court in such a case would be to reject jurisdiction, perhaps on the ground of limited authority to exercise control over officers appointed by another court. In any event,<sup>67</sup> the situation set out above might test the extent to which federal courts are willing to go in rejecting jurisdiction over the estates of decedents.

A second group of cases is that in which a personal judgment against an executor or administrator is sought in a federal court. The cases which have sometimes resulted in a refusal to exercise jurisdiction are those in which there has been no final accounting in the estate.<sup>68</sup> Federal courts have not hesitated to go behind a fraudulent final accounting to impose liability upon the estate representative.<sup>69</sup> A clear distinction has been made between the two situations.<sup>70</sup> It is submitted that the cases in this group can best be explained on the basis of the rule which prevents one court from taking jurisdiction of a cause which involves interference with property in the hands of another court, or alternatively, which involves control of officers of another court.<sup>71</sup> Although many of the

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66. *Sowles v. First Nat'l Bank*, 54 Fed. 564 (C.C.D. Vt. 1893).

67. Where an action by a husband claiming his deceased wife's estate was removed to federal court, the cause was remanded when administration proceedings were started even though the federal court felt it had jurisdiction otherwise. *Peterson v. Demmer*, 34 F. Supp. 697 (N.D. Tex. 1940).

68. In the following cases there had been no final accounting and jurisdiction was declined: *Kittredge v. Stevens*, 126 F. 2d 263 (1st Cir. 1942); *McCrorry v. Harp*, 31 F. Supp. 354 (W.D. La. 1940); *Tussing v. Central Trust Co.*, 34 F. 2d 312 (E.D. Mich. 1929).

69. In the following cases there had been a final accounting, and jurisdiction was taken: *Lathan v. Edwards*, 121 F. 2d 183 (5th Cir. 1941); *Bertha Zinc Co. v. Vaughan*, 88 Fed. 566 (C.C. W.D. Va. 1893); *Pratt v. Northam*, 19 Fed. Cas. 1254, No. 11,376 (C.C.D. R.I. 1828).

70. The distinction has been made from a very early date. Thus in *Mallett v. Dexter*, 16 Fed. Cas. 542, No. 8,988 (C.C.D. R.I. 1852), where a bill against an administrator sought to open certain accounts which had been settled in probate court upon grounds of fraud, and also to require an account of assets not embraced therein, an accounting was ordered as to those matters which had been finally settled in probate court but not as to the matters not embraced in the previous accounting. As might be expected a federal court will not order an executor or administrator to turn over funds held for distribution to a representative of the estate appointed by another jurisdiction. *Watkins v. Eaton*, 183 Fed. 384 (2d Cir. 1910); *Graham v. Lybrand*, 142 Fed. 109 (7th Cir. 1905); *Hale v. Coffin*, 114 Fed. 567 (C.C.D. Me. 1902).

71. See *Tussing v. Central Trust Co.*, 34 F. 2d 312 (E.D. Mich. 1929). Although one recent case appears to take the position that the controlling



decisions in this area have been difficult, the conflicts are not based upon disagreement as to probate jurisdiction, but rather upon such considerations as the reality of the possession of the state court or the official nature of the person.<sup>72</sup> The only Supreme Court case involving an attempt to get a personal judgment against an executor or administrator resulted in a declining of jurisdiction, but the Court in that case treated the problem in large measure as one of impinging upon the jurisdiction of another court, since no final accounting had been made to the state tribunal.<sup>73</sup>

A third group of cases presents the problem of an attack upon a completed administration on the ground of fraud. It is in this area that the federal courts have most needlessly entwined themselves in reams of dicta concerning limitations on probate jurisdiction. Three cases are in large measure responsible for the confusion.

In 1844 the case of *Gaines v. Chew*<sup>74</sup> came before the Supreme Court, involving the probate of a will, executed in 1811, in a

question is whether a similar action could be maintained in a state court of general jurisdiction, it is submitted that the last two paragraphs indicate that the true basis for the decision is interference with the possession of another court. See *McCan v. First Nat'l Bank*, 139 F. Supp. 224 (D. Ore. 1954), especially at page 228. Another factor which is sometimes found in these cases is concurrent suits involving the same questions in state and federal courts. See *Vanderwater v. City Nat'l Bank*, 28 F. Supp. 89 (E.D. Ill. 1939).

72. See *Herron v. Comstock*, 139 Fed. 370, 377-78 (6th Cir. 1905) (discussion of whether state court had possession).

73. *Princess Lida v. Thompson*, 305 U. S. 456 (1939).

74. 43 U. S. (2 How.) 619 (1844). An interesting book has been written on the litigation over the estate of Daniel Clark, in which *Gaines v. Chew* is a step. Harmon, *The Famous Case of Myra Clark Gaines* (1946). For other decisions in the controversy, which extended over a period of more than fifty years, see *Ex parte Whitney*, 38 U. S. (13 Pet.) 404 (1839); *Gaines v. Relf*, 40 U. S. (15 Pet.) 9 (1841); *Patterson v. Gaines*, 47 U. S. (6 How.) 550 (1848); *Gaines v. Relf*, 53 U. S. (12 How.) 472 (1851); *Succession of Clark*, 11 La. Ann. 124 (1856); *Clark v. Gaines*, 13 La. Ann. 138 (1858); *De la Croix v. Gaines*, 13 La. Ann. 177 (1858); *Gaines v. Hennen*, 65 U. S. (24 How.) 553 (1861); *Gaines v. New Orleans*, 73 U. S. (6 Wall.) 642 (1868); *Gaines v. Lizardi*, 154 U. S. 555 (1868); *Gaines v. De la Croix*, 73 U. S. (6 Wall.) 719 (1868); *Gaines v. Lizardi*, 9 Fed. Cas. 1039, No. 5,174 (C.C.E.D. La. 1870); *Gaines v. New Orleans*, 9 Fed. Cas. 1051, No. 5,177 (C.C.E.D. La. 1871); *Fuentes v. Gaines*, 9 Fed. Cas. 973, No. 5,145 (C.C.D. La. 1871); *Gaines v. Mauseaux*, 9 Fed. Cas. 1049, No. 5,176 (C.C.E.D. La. 1871); *Gaines v. Agnelly*, 9 Fed. Cas. 1036, No. 5,173 (C.C.E.D. La. 1872); *Fuentes v. Gaines*, 25 La. Ann. 85 (1873); *New Orleans v. Gaines*, 82 U. S. (15 Wall.) 624 (1873); *Gaines v. Fuentes*, 92 U. S. 10 (1876); *Smith v. Gaines*, 93 U. S. 341 (1876); *Gaines v. Lizardi*, 9 Fed. Cas. 1042, No. 5,175 (C.C.E.D. La. 1877); *Gaines v. Hammond's Adm'r*, 6 Fed. 449 (C.C.E.D. Mo. 1881); *Davis v. Gaines*, 104 U. S. 386 (1881); *Gaines v. New Orleans*, 17 Fed. 16 (C.C.E.D. La. 1883); *Gaines v. Miller*, 111 U. S. 395 (1884); *Gaines v. New Orleans*, 27 Fed. 411 (C.C.E.D. La. 1886); *Louisiana Bank v. Whitney*, 121 U. S. 284 (1887); *New Orleans v. Gaines' Adm'r*, 131 U. S. 191 (1889); *Whitney v. New Orleans*, 43 Fed. 215 (C.C.E.D. La. 1890); *New Orleans v. Gaines' Adm'r*, 138 U. S. 595 (1891); *Semmes v. Whitney*, 50 Fed. 666 (C.C.E.D. La. 1892); *Goldthwaite v. Whitney*, 50 Fed. 668 (C.C.E.D. La. 1892); *Whitney v. New Orleans*, 54 Fed. 614 (5th Cir. 1893).

Louisiana probate court by means of fraudulent suppression of a revoking will drafted in 1813. The Supreme Court held that, although a federal court could not set aside the probate of the 1811 will, they could find the answers to the allegations of fraud, to be used in evidence in a subsequent proceeding before the state probate court.<sup>75</sup> It seems apparent that the only reason the court did not go ahead and set aside the judgment was that to do so necessitated a proof of the validity of the 1813 will as an effective disposition. To that extent the Court was unwilling to go, and to the same extent the case represents some authority for the view that federal courts will not admit a will to probate. Unfortunately, by citing the earlier case of *Tarver v. Tarver*,<sup>76</sup> which did not involve a similar question, and by discussing English authority, the opinion gave the impression that the Court would always refuse to strike down a fraudulent judgment of a court of probate. That such an inference was not intended is indicated by: (1) the fact that the leading English case cited, *Kerrich v. Bransby*,<sup>77</sup> involved a refusal of a chancery court to set aside a will, the execution of which was procured by fraud as contrasted with refusal to set aside a *fraudulent judgment* of a probate court; and (2) the decision of the court to consider the question of fraud in order to provide evidence for use before the Louisiana probate court.

The second case of the "unholy three" was *Fouvergne v. Municipality*,<sup>78</sup> in which an action was brought to set aside the probate proceeding conducted more than half a century before the action was brought. In refusing jurisdiction in such an uncomfortable situation, the Court cast wildly about and relied on *Tarver v. Tarver*.<sup>79</sup> The Court did not distinguish between the validity of the will itself, and the validity of the probate proceedings.<sup>80</sup>

The third case, *Simmons v. Saul*,<sup>81</sup> relied upon the case of *In re Broderick's Will*.<sup>82</sup> Insofar as *Broderick* involved the point

75. 43 U. S. (2 How.) at 646, where it is said: "These answers being obtained may be used as evidence before the Court of Probate to establish the will of 1813 and revoke that of 1811."

76. 34 U. S. (9 Pet.) 174 (1835).

77. 7 Bro. P. C. 437, 3 Eng. Rep. 284 (H.L. 1727).

78. 59 U. S. (18 How.) 470 (1855).

79. 34 U. S. (9 Pet.) 174 (1835).

80. See *Fouvergne v. Municipality*, 59 U. S. (18 How.) 470, 473 (1855) where it is said:

That question, in our opinion, is closed by the decree of the alcalde. That decree declares the will to be valid and subsisting, and directs its execution. We are obliged to treat the decree as the judicial act of a court of competent jurisdiction. In fact, it was the only judicial authority in the province of Louisiana, except that exercised by the governor.

81. 138 U. S. 439 (1891).

82. 88 U. S. (21 Wall.) 503 (1874).

under consideration here, that decision has not been followed.<sup>83</sup> The *Simmons* case, resting upon an abandoned principle, should not be viewed as much of a barrier to federal probate jurisdiction.

Insofar as the first two of the above cases refused jurisdiction because a judgment setting aside the probate would necessitate a decision as to the validity or invalidity of the will, their correctness should be assessed by a comparison with the following section on will contests. But insofar as the three cases are viewed as authority for the proposition that a probate cannot be set aside on grounds of fraud perpetrated upon the court, they are completely inconsistent with decisions regarding judicial sales<sup>84</sup> and those indicating the willingness of the federal courts to go behind a fraudulent final accounting.<sup>85</sup> An act of the Court invalidating the state judgment would not necessitate a judgment as to the validity of the will itself, since there is no reason to assume the will might not again be admitted in a fair proceeding. In any event, the Court in *Gaines v. Chew* adopted a solution which could well have been followed in the two subsequent cases.

To discuss situations where a party should be permitted to collaterally attack a judgment for fraud would go beyond the purposes of this article. However, it would seem that a federal court should have the right under the *Erie* doctrine to apply the laws of the state concerning collateral attacks upon a probate proceeding. That the judgment attacked was one of a probate court does not, without more, provide any basis for declining jurisdiction, and some federal cases have taken the position that such an attack would lie.<sup>86</sup> However, the confused thinking of the first three cases occasionally persists today.<sup>87</sup>

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83. The *Broderick* case rejected the attack on the probate on grounds there was an adequate remedy at law in the state probate court. This is clearly erroneous, since the question should be whether there was an adequate remedy at law in a federal court. Subsequent decisions involving personal judgments against administrators (*supra* note 69) and attacks on judicial sales (*infra* note 84), indicate that this aspect of the *Broderick* case has been ignored. On the *Broderick* case generally, see *infra* note 96 and text supported thereby.

84. It is clear that a federal court of equity has power to set aside a fraudulent judicial sale, even though the sale was incident to a probate proceeding. *Arrowsmith v. Gleason*, 129 U. S. 86 (1889); *Johnson v. Waters*, 111 U. S. 640 (1884). However, where the state probate proceedings are still open, the hesitancy of the federal court to interfere with the administration will prevent relief. *McCrary v. Harp*, 31 F. Supp. 354 (W.D. La. 1940); *Jordan v. Taylor*, 98 Fed. 643 (C.C.D. Mass. 1899). A federal court has refused to enjoin such a sale. *Evans v. Gorman*, 115 Fed. 399 (C.C.E.D. Ark. 1902).

85. Cases cited note 69 *supra*.

86. *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

87. The Supreme Court has prevented parties from profiting by a fraudulent combination in establishing illegal claims against the estate, by

The federal courts have frequently refused to adjudicate will contests both in original actions and upon removal.<sup>88</sup> Some of these cases can be disposed of on such obvious grounds as the fact that the joinder of indispensable parties would destroy the requisite diversity<sup>89</sup> or a previous binding judgment of a state court between the parties on the same issue.<sup>90</sup>

Aside from standard considerations such as these, the refusal of some federal courts to take cognizance of will contests seems to stem from the case of *In re Broderick's Will*.<sup>91</sup> In that case, the will was probated, and the statutory period for attacking the judgment had run. Long afterwards, an action was brought in federal court to set aside the probate and declare the will void on grounds the will was a forgery and its probate was procured by fraud. The Supreme Court held that there was no federal jurisdiction in the cause, relying primarily upon authority from the English chancery courts, especially *Kerrick v. Bransby*,<sup>92</sup> and *Webb v. Claverden*.<sup>93</sup> Neither of these cases answered the allegation of fraud in the procurement of the judgment; indeed, it is submitted that the opinion of the majority did not adequately consider this element of the case, seemingly holding that federal equitable relief was not available because it had not been shown that the parties had no remedy in the state probate court. It would seem that this rationale is faulty in that the question should be whether an adequate remedy at law was available in a federal court;<sup>94</sup> in any event, a consideration of this

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removing the cloud thereby cast upon real estate inherited by plaintiffs. *McDaniel v. Traylor*, 196 U. S. 415 (1905). A recent district court case appears to allow an attack on fraudulently obtained letters of administration. *Emmerich v. May*, 130 F. Supp. 426 (S.D. N.Y. 1955). Such an attack was also permitted in *Jennings v. Smith*, 232 Fed. 921 (S.D. Ga. 1916); but on appeal the Court of Appeals for the 5th Circuit reversed. *Smith v. Jennings*, 238 Fed. 48 (5th Cir. 1916), *cert. denied*, 243 U. S. 635 (1917). This case illustrates strikingly the injustice which can result from a refusal to take jurisdiction.

88. *Porter v. Bennison*, 180 F. 2d 523 (10th Cir. 1950). Some decisions have treated the state practice as controlling. *Lee v. Minor*, 263 Fed. 507 (9th Cir. 1920), *cert. denied*, 253 U. S. 488 (1920) (jurisdiction taken on basis of California law); *Thompson v. Nichols*, 254 Fed. 973 (D. Me. 1919) (jurisdiction refused on basis of Maine law); *cf. Montgomery v. Gilbert*, 77 F. 2d 39 (9th Cir. 1935) (jurisdiction refused after consideration of Montana law on collateral attack).

89. *O'Brien v. Markham*, 17 F. Supp. 633 (S.D. Cal. 1936); *Anderson v. Appleton*, 32 Fed. 855 (C.C. S.D. N.Y. 1887).

90. *O'Connor v. Slaker*, 22 F. 2d 147 (8th Cir. 1927); *Spencer v. Watkins*, 169 Fed. 379 (8th Cir. 1909).

91. 88 U. S. (21 Wall.) 503 (1874).

92. 7 Bro. P. C. 437, 3 Eng. Rep. 284 (H.L. 1727).

93. 2 Atk. 424, 26 Eng. Rep. 656 (Ch. 1742).

94. See *Ellis v. Davis*, 109 U. S. 485 (1883), where a suit in equity to set aside a probate could not be maintained in a federal court, because an action would lie at law in a federal court.

case will reveal that this aspect of the *Broderick* decision has not been seriously considered in most subsequent decisions.<sup>95</sup> Two members of the court dissented from this facet of the decision in the *Broderick* case.

The important part of the *Broderick* case insofar as subsequent decisions have been concerned was the Court's explanation of the refusal of the high courts of chancery to take jurisdiction:

Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts) the most satisfactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction.<sup>96</sup>

Although the court was using this rationale to augment a *res judicata* argument, it is submitted that this statement, appearing as it did almost at the beginning of the opinion, became the basis of a long line of cases considering the nature of the suit proposed according to the state practice, and whether the suit was in fact one *inter partes* or one *in rem*. This distinction was expressly made by the Supreme Court in *Farrell v. O'Brien*.<sup>97</sup> It may have resulted from an effort on the part of the court to reconcile *Broderick* with the apparently conflicting decision of *Gaines v. Fuentes*.<sup>98</sup>

Not all cases involving will contests have been made to turn upon a consideration of state practice. In three decisions<sup>99</sup> the federal courts have been held to be without jurisdiction on the ground they have no machinery for recording a will and for administering a probate proceeding generally. These cases are interesting ones, because the reasoning therein might possibly be applied to justify a refusal to take jurisdiction if anyone were so brash as to present a will to a federal court for probate in the first instance. As applied to will contests, however, they are not sound, since the will would still be admitted to probate in the state court; the function of the federal decision would be to bind the parties in any subsequent proceedings in the state tribunal.

In any event, it is now well established that in suits involving will contests, the state practice is viewed as controlling.<sup>100</sup> Although

95. See note 83 *supra*.

96. *In re Broderick's Will*, 88 U. S. (21 Wall.) 503, 509 (1874).

97. 199 U. S. 89 (1905), at 116.

98. 92 U. S. 10 (1875).

99. *Copeland v. Bruning*, 72 Fed. 5 (C.C.D. Ind. 1896); *Reed v. Reed*, 31 Fed. 49 (C.C. N.D. Ohio 1887); *Hargroves v. Redd*, 43 Ga. 142 (1871).

100. See *Sutton v. English*, 246 U. S. 199 (1918), for an example of the prevailing approach.

cases can be found laying down, on a piecemeal basis, rulings for a number of states,<sup>101</sup> it is not at all clear what the underlying criterion is. One principle which seems to have been applied in a number of cases is simply whether or not an independent action for the contest of a will could have been maintained in a state court of general jurisdiction.<sup>102</sup> Although this rule is easy of application, there is no patent reason why a state should be allowed to defeat the right of

101. *Alabama*: Mitchell v. Nixon, 200 F. 2d 50 (5th Cir. 1952) (jurisdiction refused).

*Arkansas*: Wahl v. Franz, 100 Fed. 680 (8th Cir. 1900) (jurisdiction refused on removal).

*Florida*: Strickland v. Peters, 120 F. 2d 53 (5th Cir. 1941) (jurisdiction refused as to wills; taken as to deeds).

*Georgia*: Meadow v. Nash, 250 Fed. 911 (N.D. Ga. 1918) (jurisdiction refused on removal where will had not passed through Ordinary's Court); Brodhead v. Shoemaker, 44 Fed. 518 (C.C. N.D. Ga. 1890) (jurisdiction taken on removal where will had passed the Ordinary, and the caveat was pending in Superior Court).

*Illinois*: Williams v. Crabb, 117 Fed. 193 (7th Cir. 1902) (jurisdiction taken).

*Iowa*: Wart v. Wart, 117 Fed. 766 (C.C. N.D. Iowa 1902) (jurisdiction taken).

*Kansas*: Rice v. Sayers, 198 F. 2d 724 (10th Cir.), *cert. denied*, 344 U. S. 877 (1952) (jurisdiction refused).

*Louisiana*: Fakouri v. Cadais, 147 F. 2d 667 (5th Cir.), *cert. denied*, 326 U. S. 742 (1945) (jurisdiction taken).

*Minnesota*: Spencer v. Watkins, 169 Fed. 379 (8th Cir.), *cert. denied*, 215 U. S. 605 (1909) (jurisdiction taken of suit to have bequest declared void).

*Mississippi*: Everhart v. Everhart, 34 Fed. 82 (C.C. S.D. Miss. 1888) (jurisdiction taken of suit to annul a will as muniment of title).

*Missouri*: Sawyer v. White, 122 Fed. 223, 227 (8th Cir. 1903) (dictum indicates that jurisdiction will be taken; dismissal on merits). It is submitted that the new Missouri probate code will also permit a federal court to exercise jurisdiction. Compare Mo. Ann. Stat. § 473.083 (Vernon 1955).

*New Hampshire*: *In re Cilley*, 58 Fed. 977 (C.C.D.N.H. 1893) (refusing jurisdiction on petition for removal).

*New Jersey*: *In re Lummis' Estate*, 118 F. Supp. 436 (D.N.J. 1954) (jurisdiction taken on removal).

*New York*: Quinlan v. Empire Trust Co., 139 F. Supp. 168 (S.D. N.Y. 1956) (jurisdiction taken).

*Oklahoma*: Cf. Wilson v. Simler, 350 U. S. 892 (1955) (per curiam).

*Oregon*: Richardson v. Green, 61 Fed. 423 (9th Cir. 1894) (jurisdiction taken after will had been admitted to probate). *But cf.* McCan v. First Nat'l Bank, 139 F. Supp. 224 (D. Ore. 1954) (no jurisdiction of action against executor for negligence; Oregon law considered).

*Rhode Island*: Atwood v. Rhode Island Hospital Trust Co., 34 F. 2d 18, 21 (1st Cir.), *cert. denied*, 280 U. S. 600 (1929) (dictum indicating that federal court has no jurisdiction to determine whether trust was properly authenticated as part of a will). *But cf.* Illinois State Trust Co. v. Conaty, 104 F. Supp. 729 (D.R.I. 1952) (jurisdiction to determine rights of child not provided for in maternal grandfather's will).

*Texas*: Sutton v. English, 246 U. S. 199 (1918) (refusing jurisdiction).

*Virginia*: Guilfoil v. Hayes, 86 F. 2d 544 (4th Cir. 1936), *cert. denied*, 300 U. S. 669 (1937) (jurisdiction refused).

102. Rice v. Sayers, 198 F. 2d 724 (10th Cir.), *cert. denied*, 344 U. S. 877 (1952); Williams v. Crabb, 117 Fed. 193 (7th Cir. 1902); Everhart v. Everhart, 34 Fed. 82 (C.C. S.D. Miss. 1888); Sawyer v. White, 122 Fed. 223, 227 (8th Cir. 1903) (dictum).

nonresidents to seek justice in a federal tribunal. A second group of cases has tended to emphasize a rule based upon whether the action, in view of the state practice, is a suit between parties, or is an adjudication in rem establishing the validity of the document against the world.<sup>103</sup> For the most part, courts have failed to recognize these tests as distinct concepts;<sup>104</sup> and in most cases, the results are the same. Nevertheless, it is conceivable that a suit might be in rem in the sense used by the courts in these proceedings, and yet maintainable in a court of general jurisdiction of that state.

It would appear that the second approach has the stronger historical justification. Under the decisions in some early cases, although state practice was considered, jurisdiction was rejected on the ground that will contests were not suits "at law or in equity" under the federal law.<sup>105</sup> Apparently these cases led to a consideration of the jurisdiction of British chancery courts over will contests,<sup>106</sup> where much attention was given to whether a suit was really inter partes. The final step in the development of the rule was evidently the decision that the test was whether a given suit was one inter partes according to the state practice, and hence a suit at law or in equity.<sup>107</sup> Although the second rule has the best logical basis, it is not easy to apply, since the inter partes concept does not fall within the traditional in rem-in personam dichotomy.<sup>108</sup> It would seem that even the second rule allows a state statute to regulate the jurisdiction of a federal court. This objection is best avoided by considering the right to maintain a will contest in an action inter partes as a new right, created by a state, but enforced in a federal tribunal.

103. *Mitchell v. Nixon*, 200 F. 2d 50 (5th Cir. 1952); *Fakouri v. Cadais*, 147 F. 2d 667 (5th Cir.), *cert. denied*, 326 U. S. 742 (1945); *Strickland v. Peters*, 120 F. 2d 53 (5th Cir. 1941); *In re Lummis' Estate*, 118 F. Supp. 436 (D.N.J. 1954).

104. *Richardson v. Green*, 61 Fed. 423 (9th Cir. 1894).

105. *Wahl v. Franz*, 100 Fed. 680 (8th Cir. 1900); *In re Gilley*, 58 Fed. 977 (C.C.D.N.H. 1893).

106. *The case of Kerrich v. Bransby*, 7 Bro. P. C. 437, 3 Eng. Rep. 284 (H.L. 1727).

107. For an excellent discussion see *Spencer v. Watkins*, 169 Fed. 379 (8th Cir.), *cert. denied*, 215 U. S. 605 (1909), where Judge Hook says at page 382:

We think that a controversy like that before us is not one strictly pertaining to probate and administration, but, on the contrary, has every element of a plenary suit inter partes, and that it belongs to a class of which the English courts of chancery were accustomed to take cognizance as involving the execution of trusts.

See also *Sutton v. English*, 246 U. S. 199 (1918); *Reed v. Reed*, 31 Fed. 49 (C.C. N.D. Ohio 1887).

108. Some light was shed on this aspect of the rule by the case of *In re Lummis' Estate*, 118 F. Supp. 436 (D. N.J. 1954), where a suit for instruction regarding an *in terrorem* clause was held to be in rem, thus justifying service by mailing, but sufficiently adverse to permit removal to federal court.

Finally, there are a number of cases that might be grouped together as suits for construction of a will. It has been well established from a very early date that such controversies are not beyond the jurisdiction of a federal court by virtue of any probate limitations.<sup>109</sup> Decisions considering whether a state court of general jurisdiction could consider such an action probably follow from a misinterpretation of the federal practice in will contests.<sup>110</sup> On the other hand, strong justification can be made for the now well-established rule that a judicial construction of the will by a state court of competent jurisdiction determines the extent and character of the interests taken by the devisees and legatees regardless of any questions of *res judicata*.<sup>111</sup>

From the above discussion it can be seen that, although there may be some hazy areas, the federal courts do, in fact, exercise jurisdiction in cases that apparently concern probate matters.

#### DOMESTIC RELATIONS

The broad and somewhat unclear topic of federal jurisdiction and domestic relations cases can be clarified to some extent by a division of the subject into specific areas. The category, domestic relations, generally includes two facets—status and property relationships. Many cases involve both aspects but in reality there are two distinct, perhaps interwoven, but nonetheless different concepts.

The United States Supreme Court has decided four outstanding domestic relations cases, *Barber v. Barber*,<sup>112</sup> *Sims v. Sims*,<sup>113</sup> *De LaRama v. De LaRama*,<sup>114</sup> and *Ohio ex rel. Popovici v.*

109. Some of the early cases in which wills were construed: *Colton v. Colton*, 127 U. S. 300 (1888); *Fontain v. Ravenel*, 58 U. S. (17 How.) 369 (1854) (involving problems of jurisdiction over charitable trusts); *Tarver v. Tarver*, 34 U. S. (9 Pet.) 174 (1835); *Smith v. Bell*, 31 U. S. (6 Pet.) 68 (1832) (majority opinion by Marshall, C.J., does not discuss a jurisdictional problem); *Wood v. Paine*, 66 Fed. 807 (C.C.D.R.I. 1895); *Toms v. Owens*, 52 Fed. 417 (C.C.E.D. Mich. 1891).

110. Cf. *Ferguson v. Patterson*, 191 F. 2d 584 (10th Cir. 1951); *Sherman v. American Congressional Ass'n*, 113 Fed. 609 (1st Cir. 1902).

111. *Uterhart v. United States*, 240 U. S. 598 (1916). This limitation on the construction of wills does not involve any implied jurisdictional limitations, but is rather a consequence of the policy of following state law in the construction, there being no clearer expression of the position of the state court possible than its adjudication with respect to the same instrument. On the necessity for following state law see *President and Fellows of Harvard College v. Jewett*, 11 F. 2d 119, 121 (6th Cir. 1925):

This is an Ohio will, and must be construed in accordance with the statutes and the decisions of the court of last resort of that state in reference to wills.

112. 62 U. S. (21 How.) 582 (1858).

113. 175 U. S. 162 (1899).

114. 201 U. S. 303 (1906).



*Agler*.<sup>115</sup> These are most frequently quoted and are cited as the definitive cases in the area of domestic relations. An examination of the factual situations and the holdings in these cases may be helpful in deciding the jurisdictional limitations of the federal courts in the so-called domestic relations area. *Barber v. Barber*<sup>116</sup> involves an action, brought by a wife against her husband in Wisconsin. The wife initiated the action in the federal court in that state alleging first, diverse citizenship and second, a judgment of a New York court of competent jurisdiction which had decreed a divorce *a mensa et thoro* between the husband and wife and which had allowed alimony to the wife. The wife claimed that the husband had left New York for the purpose of placing himself beyond the jurisdiction of the court which had handed down the judgment. The United States Supreme Court held that the husband and wife could in fact be citizens of different states so that there could be diversity of citizenship and held that the wife could sue in Wisconsin on the New York judgment.<sup>117</sup> In the course of the opinion the Court stated:

Our first remark is—and we wish it to be remembered that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts in the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.<sup>118</sup>

This last paragraph, dicta in the case, is much cited as establishing the law for federal courts in the area of domestic relations. There was a dissenting opinion in the *Barber v. Barber* case by Mr. Justice Daniel, concurred in by Mr. Justice Campbell and Chief Justice Taney.<sup>119</sup> Among other things the dissenters felt that the husband and wife could not have different residences, therefore, there could be no diversity of citizenship and thus no jurisdiction in the federal courts. Beyond that the dissenters felt that the federal government had no power to “control the duties of the habits of the different members of private families and their domestic intercourse.”

115. 280 U. S. 379 (1930). See also *Popovici v. Popovici*, 30 F. 2d 185 (N.D. Ohio 1927).

116. 62 U. S. (21 How.) 582 (1858).

117. *Id.* at 592 *et seq.*

118. *Id.* at 584.

119. *Id.* at 600.

In *Sims v. Sims*<sup>120</sup> the territorial district court of Arizona entertained a husband's suit for divorce. The trial court dismissed the complaint, decided the issues for the wife, and gave her alimony and counsel fees. The territorial supreme court affirmed the decision of the lower court. On appeal to the United States Supreme Court, that court held that it had jurisdiction to hear the case. In this case, after citing the dicta from *Barber v. Barber*, the United State Supreme Court then continued :

And from that proposition there was no dissent. It may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state, and not to the laws of the United States.<sup>121</sup>

The Court then continued and specified that the above restriction did not apply to suits in territorial courts or appeals to the United States Supreme Court from such decisions in territorial courts. The Court in reviewing the decision of the territorial supreme court indicated that :

So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on this appeal ; both because that was a matter the value of which could not be estimated in money ; and because the refusal of the divorce involved no matter of law, but mere questions of fact, depending on the evidence, and which this court is not authorized to reexamine.<sup>122</sup>

On the other hand the Court viewed the decree for alimony and counsel fees as severable and stated :

The decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal, for the same reason that a judgment for or against the defendant upon a counter claim of like amount would support the appellate jurisdiction.<sup>123</sup>

The third case is *De LaRama v. De LaRama*, which was an appeal from the Supreme Court of the Philippines, where the Supreme

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120. 175 U. S. 162 (1899).

121. *Id.* at 167. To support this proposition the Court cites *In re Burrus*, 136 U. S. 586, 593-94 (1890).

122. 175 U. S. at 168-69.

123. *Id.* at 169.

Court of the United States reversed the decision of the Philippine Supreme Court in a divorce case.<sup>124</sup> In considering the question of jurisdiction of the Court over divorces, the United States Supreme Court indicated that any limitation had no application to the jurisdiction of the Supreme Court over appeals from the Philippine courts. In the course of its decision the Court stated:

It has been a long established rule that the courts of the United States have no jurisdiction on the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the married relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.<sup>125</sup>

The Supreme Court of the United States then examined the factual situation and reversed the holding of the lower court. It should be noted that four justices dissented on the question of jurisdiction. The final one of the four oft-quoted, definitive cases is *Ohio ex rel. Popovici v. Agler*,<sup>126</sup> which involved a suit by the wife of the vice-consul of Romania against her husband for divorce and alimony in a state court in Ohio. The wife had initially brought an action in a federal court for divorce but the judge sitting in the district court had dismissed the action on the grounds that the federal courts had no jurisdiction in divorce cases.<sup>127</sup> The wife then started an action for divorce in the state court. The vice-consul then applied to the state supreme court for a writ of prohibition to stop the action in the lower court. This was denied and a petition for writ of certiorari to the Supreme Court was instituted. The United States Supreme Court held that the state court could grant a divorce where a foreign consul was involved. In the course of the decision the Court, suggesting that it had ". . . been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce," continued,

If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceed-

124. *De La Rama v. De La Rama*, 201 U. S. 303 (1906).

125. *Id.* at 307.

126. 280 U. S. 379 (1930), and see also *Duran-Ballen v. Duran-Ballen*, 180 Misc. 750, 158 N. Y. Supp. 617 (1943).

127. *Popovici v. Popovici*, 30 F. 2d 185 (N.D. Ohio 1927).

ings and not to include what formerly would have belonged to the ecclesiastical Courts.

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In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go.<sup>128</sup>

The Court's reasoning can very simply be stated: first, that the judicial code gives exclusive jurisdiction only when federal courts have jurisdiction; second, that federal courts have no divorce jurisdiction; and, third, that therefore the state court can grant a divorce—that is, they have jurisdiction of a divorce action brought against a vice-consul.<sup>129</sup> This decision seems to be based primarily upon the statute involved here.

It can be seen from these cases that there is no square holding on the question of the jurisdiction of federal courts over the simple determination of status in a diversity case. All of these cases involve other crucial factors. It is interesting to note that in each of four cases the wife involved got exactly what she requested. In the *Barber* case, the wife got the judgment in the Wisconsin court; in the *Sims* case the wife got her judgment of alimony affirmed and a denial of the divorce to her husband, since the action of the United States Supreme Court was in fact an affirmance of the decision of the lower court on that point. In the *De LaRama* case the wife got a reversal of the Philippine decision concerning the divorce. In the *Popovici* case the wife got a divorce, which is exactly what she wanted.

Three reasons to sustain the contention that the federal courts have no jurisdiction in divorce cases have been vigorously urged: first, that there is no diversity of citizenship and that there cannot be; second, that there is no monetary interest involved in the case;<sup>130</sup> and, third, that the federal courts have not been granted jurisdiction in this particular type of case. That is, either because of constitutional or statutory infirmities, the federal courts simply do not have power in this area. The possibility of diversity of citizenship between husband and wife was considered in *Barber v. Barber*. That action was brought by the wife against the husband after a divorce *a mensa et thoro* but no divorce *a vinculo* had been granted.

128. *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383-84 (1930).

129. A contrary view had been taken in New York state courts. See *Valarino v. Thompson*, 7 N. Y. 576 (1853); *Higginson v. Higginson*, 96 Misc. 457, 158 N. Y. Supp. 92 (Sup. Ct. 1916).

130. *Mutual Life Ins. Co. v. Thompson*, 27 F. 2d 753 (W.D. Va. 1928) where at page 755 the court stated: "But in bills for divorce, . . . it is not merely difficult, it is impossible, to make any, even the wildest, approximation of a value in money of the object sought."

Dicta in the case seem to indicate that a wife can have a different residence from that of the husband even though no divorce at all has been obtained.<sup>131</sup> It should be noted also that in the *De LaRama* case the court suggested that the rule concerning the diversity citizenship between a husband and wife has been "somewhat relaxed in recent cases," and a number of recent cases have held that there can be diversity between husband and wife.<sup>132</sup> As for the jurisdictional amount in divorce cases, certainly a persuasive argument can be made that a sufficient amount might be involved.<sup>133</sup>

Concerning the third basis for stating that the federal courts have no divorce jurisdiction, that is, that the federal courts simply have no power in this area, the United States Supreme Court has stated that:

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the States. . . .

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. . . The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are, therefore, justified in holding—more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature. . . .<sup>134</sup>

As a result of this background in the federal courts, the present position, correct or incorrect, seems to be that the federal courts will not exercise jurisdiction where a determination of status is involved. A number of cases would seem to support this conclusion.<sup>135</sup>

131. *Barber v. Barber*, 62 U. S. (21 How.) 582, 593-99 (1858); *Patuleia v. Patuleia*, 127 F. Supp. 60 (D. Mass. 1955) (wife brought action against her husband who also had been her guardian).

132. See for example, *Garberson v. Garberson*, 82 F. Supp. 706 (N.D. Iowa 1949). Compare text regarding jurisdictional amount in custody cases.

133. See for example, *Gonzales v. Gonzales*, 83 F. Supp. 496 (E.D. Pa. 1949). But see *Bowman v. Bowman*, 30 Fed. 849 (C.C. N.D. Ill. 1887).

134. *Maynard v. Hill*, 125 U. S. 190, 206, 209 (1887).

135. For example, see *Hastings v. Douglass*, 249 Fed. 378 (N.D. W. Va. 1918) where the heirs at law brought a suit in equity against the apparent widow of the decedent seeking to have his last minute marriage declared

At the same time the courts are deciding questions of status they can also be deciding questions of property rights of the individuals involved. These are separate questions that should be recognized as such. As the United States Supreme Court stated in discussing a divorce granted by the legislature:

. . . it is not perceived that any principle should prevent the legislature itself from interfering and putting an end to the relation in the interest of the parties as well as of society. *If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.*<sup>136</sup> (Emphasis Supplied.)

The courts are frequently faced, however, with questions involving only the property rights of members of a family where no determination of status is required. Such property rights of members of a family may come up in a number of different ways. For example, *Linscott v. Linscott*<sup>137</sup> involved a contract between a husband and wife. The husband brought an action in a federal district court asking that the court decree the contract wholly void. Another situation where the status is not in issue but property rights may be involved is in an action for separate maintenance. *Garber-son v. Garber-son* involved an action brought in a federal district court.<sup>138</sup> The action had originally been commenced in an Iowa state court and was removed to the Federal District Court for the Northern District of Iowa. The defendant in the action was a millionaire, while the plaintiff wife was a semi-invalid asking for separate maintenance. Although these cases generally involve husband and wife, they can, under certain circumstances, involve conflicts over property rights between other members of the family. The recent case of *Bercovitch v. Tanburn*<sup>139</sup> was an action brought by a mother-in-law for moneys expended in taking care of her daughter, the defendant's wife. Another example, *Albanese v. Richter*,<sup>140</sup> was an action by an illegitimate child against his putative father for an invalidation of the instrument which was alleged to be in fraud of the child's rights

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void because of mental incapacity and to establish the resulting property interests. See also *McCarty v. Hollis*, 120 F. 2d 540 (10th Cir. 1941) and *Calhoun v. Lange*, 40 F. Supp. 264 (D. Md. 1941).

There seems to be no question about the right of an individual to sue an ex-spouse where a divorce has been granted, alimony given and that alimony has been unpaid by the person against whom the judgment has been granted. *Gullet v. Gullet*, 188 F. 2d 719 (5th Cir. 1951); *Gonzales v. Gonzales*, 74 F. Supp. 883 (E.D. Pa. 1947), 83 F. Supp. 496 (E.D. Pa. 1949); cf. *Gitlin v. Gitlin*, 15 F. R. D. 458 (E.D. N.Y. 1954).

136. *Maynard v. Hill*, 125 U. S. 190, 206 (1887).

137. 98 F. Supp. 802 (S.D. Iowa 1951).

138. 82 F. Supp. 706 (N.D. Iowa 1949).

139. 103 F. Supp. 62 (S.D. N.Y. 1952).

140. 161 F. 2d 688 (3d Cir. 1947).

and for the award of a sum necessary for his education and support. Another case involving a husband and wife is *Patuleia v. Patuleia*<sup>141</sup> where the plaintiff was bringing an accounting action against her husband and against the surety on his bond as guardian. The defendant had been appointed the plaintiff's guardian in California, and there had been a California proceeding discharging the defendant as a guardian. In all of these cases the question was whether the federal court loses jurisdiction because of the parties involved. In all of these it is property rights of various individuals that are being considered. In the *Linscott* case the court stated:

Plaintiff flatly argues that this case does not involve domestic relations. However, so to agree would be to ignore the very source of the word. The word 'domestic' is a derivative one. The relation it implies suggests some relationship to house or home and extends to things outside of as well as within it. A home has an exterior as well as an interior and things connected with it on the outside clearly may be things of or pertaining to it and the family. . . . The term 'domestic relation' is to be given a broad liberal construction and its meaning depends much upon the connection with which it is used. Its significance must always be determined with reference to its subject matter and the relation in which it appears.<sup>142</sup>

In the *Albanese* case the court stated:

Plaintiff urges that 'domestic relations' does not include the putative father-illegitimate child relationship. Both New York and New Jersey, however, have indicated that the *parens patriae* doctrine in those states includes illegitimate children as well. Moreover, we have been unable to find any precedent for a suit based upon diversity of citizenship, in a federal court by an illegitimate child against his putative father.

. . . federal courts lack jurisdiction to entertain the three causes of action asserted in the complaint. . . .<sup>143</sup>

In the *Garberson* case the court stated:

. . . The language of the trial court in *Popovici v. Popovici*, supra, seems pertinent here, 30 F.2d at page 186:

'If the question were presented in the absence of such positive declarations by the Supreme Court of the United States, and were one of first impression, I would be inclined to the view

141. 127 F. Supp. 60 (D. Mass. 1955).

142. *Linscott v. Linscott*, 98 F. Supp. 802, 805 (S.D. Iowa 1951). The court, at page 804, seemed to use a very mechanical test to determine whether it was a domestic relations problem. This same type of mechanical reasoning was revealed in *Albanese v. Richter*, 161 F. 2d 688 (3d Cir. 1947), where at page 689, note 1, the court stated:

It should also be noted that the statutes upon which the second and third causes of action are based appear in domestic relations portions of the collected laws of each state, and that the right granted by the New Jersey statute is exactly that enjoyed by legitimate children.

143. *Albanese v. Richter*, 161 F. 2d 688, 689 (3d Cir. 1947).

that the case comes within the original jurisdiction of this court; but it would be presumptuous for an inferior court to announce a conclusion adverse to that clearly stated by the Supreme Court on several occasions, on the ground that the high court opinion was dicta because not necessary to a decision of the question before it, or that it was not supported by adequate legal reasons.

'These declarations are in unequivocal language and make no exception. It will be presumed that the Supreme Court had in mind and appreciated the full extent of its constitutional and statutory jurisdiction.'

In view of this well established limitation on the general jurisdiction of federal courts based on diversity of citizenship, it is the holding of this Court that the motion to remand the cause to the District Court of Iowa, in and for Woodbury County, be and the same is hereby sustained.<sup>144</sup>

It appears that some very serious questions may be raised about the position adopted by the federal courts where they refused to exercise jurisdiction simply because of the individuals involved. It would seem that the court should examine the nature of the action. If it is purely an action concerning a right to recover a judgment because of some contractual, quasi-contractual or tortious wrong that has been committed, the federal court should not decline jurisdiction.<sup>145</sup> The federal courts should refuse to exercise jurisdiction in domestic relations cases only where a problem of status arises. Where only property rights are involved jurisdiction should be taken.<sup>146</sup>

#### *Parens Patriae*

Another area where the federal courts have found and applied a limitation on their jurisdiction is in the area of custody of minors and incompetents. The definitive case is *In re Burrus*.<sup>147</sup> A father had sent his child to his grandparents when the child's mother was sick. Subsequently the mother died and the father remarried. The father then sought custody of the child by a petition for a writ of habeas corpus in the district court on the grounds that the child was unlawfully detained by the grandparents. The writ issued; the grandparents were ordered to release the child; they did so but regained custody by force; the grandfather then was sentenced for

144. *Garberson v. Garberson*, 82 F. Supp. 706, 710 (N.D. Iowa 1949).

145. See *Oxley v. Sweetland*, 94 F. 2d 33, 35 (4th Cir. 1938); *Patuleia v. Patuleia*, 127 F. Supp. 60 (D. Mass. 1955).

146. Having taken jurisdiction, the federal court is then faced with the question of the law to be applied. The applicable law may not allow a wife to recover a judgment against her husband. This is quite different, however, from saying that the court does not have jurisdiction.

147. *In re Burrus*, 136 U. S. 586 (1890).



contempt and he made application for a writ of habeas corpus in the United States Supreme Court. The United States Supreme Court held that the district court was without jurisdiction in the case of the original writ and that the grandfather was unlawfully detained and should be released. The Court indicated that its ground for the holding was that this involved a question of domestic relations. The Court said:

The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to possession does not depend upon any act of Congress, or any treaty of the United States or its Constitution.<sup>148</sup>

Although there may be some question about the basis of the Court's ruling, it seems that the Court felt that the basis of jurisdiction asserted here was not diversity of citizenship. As the Court states, "the jurisdiction of that court, is not founded upon citizenship of the parties; . . ." The Court concluded its opinion stating:

Whatever, therefore, may be held to be the powers of the Circuit Courts in cases of this kind, where necessary citizenship exists between the contestants, which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds two thousand dollars in value, we know of no statute, no provision of law, no authority intended to be conferred upon the District Court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or any other ground found in this case. According to this view of the subject, the whole proceeding before the District Judge in the District Court was *coram non judice* and void, and the attempt to enforce the judgment by attachment and imprisonment of Burrus for contempt of that order is equally void.<sup>149</sup>

The emphasis of course is upon the district court here because that court has no jurisdiction in diversity of citizenship cases, which could be brought only in the circuit court.<sup>150</sup>

In a note to *In re Burrus*, the Court included the full opinion of Judge Betts in *In re Barry*, a decision in the Circuit Court of the

148. *Id.* at 593-94.

149. *Id.* at 597.

150. *Id.* at 596 where it is stated:

. . . it is not perceived how that averment aids the parties in the present case, for the District Courts of the United States have not jurisdiction by reason of the citizenship of the parties.

United States for the Southern District of New York in 1844.<sup>151</sup> The fact that it is set out at length in the official United States Reports would indicate that it has the approval of a least one justice of the United States Supreme Court. In an extended opinion the circuit judge set forth the facts of the controversy and then concluded that the federal court had no jurisdiction in the matter.

. . . this court cannot exercise the common law function of *parens patriae*; and has no common law jurisdiction over the matter; . . .<sup>152</sup>

The circuit court in support of its conclusion stated that the United States government does not have the power to regulate the domestic relations of its citizens.

It is not designed, in its organization or aim, to regulate the individual or municipal relations of the citizens. These are left under the dominion of the state government; and there accordingly exists no relation between the nation and the individuals, which affords foundation for these prerogatives.

The social or personal duties or liabilities of the citizens come within the control of the general government only when remitted to its charge by a special cession of authority, and then solely to the end that such regulations as are of a federal character may be enforced,—as in relation to land and naval forces, and persons in the employ of the United States, the punishment

151. *In re Barry*, 42 Fed. 113 (C.C. S.D. N.Y. 1844) (opinion set out in full in note to *In re Burrus*, 136 U. S. 586 (1890) at the request of one of the justices of the Supreme Court). This decision is one step in the attempt of Barry, a resident of Nova Scotia and a "subject of the queen of Great Britain," (42 Fed. at 114) to gain custody of his daughter. In 1839 he brought habeas corpus proceedings in three different New York state courts. Only one of these is reported. 8 Paige 46 (1839). In all of these the detention was held not illegal. Barry was successful, however, on an appeal to the state supreme court from one of the above decisions. But on appeal from this unreported decision, the lower court's decision was reinstated. 25 Wend. 64 (1840). Pending the second appeal a writ was sued out in the Superior Court of New York, and in 1841 it was held that the detention was not illegal. Barry was successful in a habeas corpus to the supreme court in 1842, 3 Hill. 399 (1842), but this determination was evidently reversed, since Barry went on to litigate in the federal courts. It is not surprising that an attempt was made to enjoin Barry's perpetual attempts to obtain custody of his daughter. The injunction attempt was unsuccessful. See 4 Ch. Sent. 113 (1844). Apparently despairing of securing relief in the New York courts, in 1844 Barry brought a petition for a writ of habeas corpus in the United States Supreme Court. 43 U. S. (2 How.) 65 (1844). The application was rejected on jurisdictional grounds. The decision cited at the beginning of this footnote was then handed down as a result of Barry's petition to the Circuit Court for the Southern District of New York. After losing there on jurisdictional grounds, Barry sued out a writ of error to the United States Supreme Court. Unfortunately, when his case was called for argument he was sick, and it was placed at the foot of the docket. He was unsuccessful in his attempt to secure an argument during the same term. 45 U. S. (4 How.) 574 (1846). Finally, in 1847, his writ of error was dismissed. 46 U. S. (5 How.) 103. Apparently Barry gave up, and returned to Nova Scotia.

152. 136 U. S. at 626. For a discussion of the *parens patriae* power of the English courts see Chitty, Prerogatives of the Crown c. IX (1820).

of offences, etc.,—but in other respects the national government does not supply the law governing the citizen in his domestic or individual capacity. These particulars appertain to the institutions and policies of the respective States. . . .<sup>153</sup>

Since the decision of the United States Supreme Court in *In re Burrus* there have been a number of federal court decisions in child custody cases and in every case the federal courts have decided that they do not have jurisdiction of the subject matter of the action. In *Hoadly v. Chase* the federal court stated:

I understood Mr. Ketcham to state clearly that if this petition asked the exercise of the function of *parens patriae*; invoked that jurisdiction which the sovereign formerly possessed, and which now resides, the authorities show, in the states; if the question before us involved that peculiar jurisdiction—then this court has no jurisdiction to issue this writ. I think that the proposition is sound; that if the question now before us belongs to that jurisdiction, then this court has no jurisdiction.<sup>154</sup>

After an extended discussion in support of the *parens patriae* argument, the court then gave a second ground for its decision.

The only claim that is made that gives this court any appearance of jurisdiction is the claim that grows out of diverse citizenship. . . . It is well enough to read the statutes and the Constitution, which in general terms speak of the powers and jurisdiction of the United States courts, but, after all, these courts have no jurisdiction except that which is distinctly given. And in reference to diverse citizenship, in every section, in every clause, conferring jurisdiction because of diverse citizenship, there is included the element of the amount in controversy. Counsel for petitioner have not pointed out any exception to this. If it be true that a habeas corpus proceeding brought in a state court, where the defendant is a nonresident of that state, cannot be removed to the United States court, because, although being between citizens of different states, the controversy does not involve \$2,000, exclusive of interest and costs, the conclusion seems irresistible that this court is without original jurisdiction.<sup>155</sup>

In *Clifford v. Williams*,<sup>156</sup> the federal court was again faced with a question of the custody of a child. In this case there were conflicting orders from state courts and the question was presented for decision by a federal court. The court considered the grant of power to the federal courts and then stated:

If this grant of jurisdiction were absolute and unlimited, there would be no difficulty in resolving the question now under con-

153. 136 U. S. at 606.

154. *Hoadly v. Chase*, 126 Fed. 818, 820 (C.C.D. Ind. 1904).

155. *Id.* at 823.

156. 131 Fed. 100 (C.C.D. Wash. 1904).

sideration in favor of the court's jurisdiction; but the statute does not give jurisdiction of all cases arising under the Constitution, laws, or treaties of the United States, nor of all cases involving controversies between citizens of different states, but limits the jurisdiction of all such cases by a prescribed amount of money or pecuniary value involved; and this case cannot be brought within the terms of that statute, because the right of a parent to have the custody of a minor child is priceless, and the value of a person's liberty cannot be estimated in money.<sup>157</sup>

The most recent case involving the custody of a child is *Carqueville v. Woodruff*,<sup>158</sup> in which the court apparently examined the merits of the controversy and refused to override a state court's decision concerning the custody of a child. It seems that the federal court did not place its decision squarely on the basis of the lack of jurisdiction of the federal court. For example, the court stated:

The appellants, having failed to exhaust the state remedies available to them by not seeking a review of the ruling of the Ohio State Courts by its court of last resort, have no standing in this proceeding in the Federal District Court.<sup>159</sup>

The court, however, did use the language found in a number of other federal cases that:

. . . the whole subject of domestic relations of husband and wife and parent and child belongs to the jurisdiction of the State Courts.<sup>160</sup>

The problem of custody of incompetents involves the same considerations of *parens patriae* and the courts have tended to reach the same conclusion—lack of jurisdiction—as in the custody of minor cases.<sup>161</sup>

157. *Id.* at 102. See also *Ex parte Bell*, 240 Fed. 758 (N.D. Cal. 1917).

158. 153 F. 2d 1011 (6th Cir. 1946). See also *Albanese v. Richter*, 161 F. 2d 688 (3d Cir. 1947) (*parens patriae* concept held to include illegitimate; court held to have no jurisdiction in action brought to enforce putative father's obligation to support and educate child born out of wedlock).

159. 153 F. 2d at 1012.

160. *Ibid.*

161. See for example, *In re Ryan*, 47 F. Supp. 10, *rehearing denied*, 47 F. Supp. 1023 (E.D. Penn. 1942).

The power of the federal courts over insane persons has been tested recently by a federal statute providing for confinement of insane criminal defendants until they are competent to stand trial. 18 U. S. C. § 4246 (1952) provides that:

Whenever the trial court shall determine . . . that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General . . . until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided.

18 U. S. C. § 4247 (1952) deals with confinement of convicted prisoners, and

The power of federal courts to assume jurisdiction in the area of custody of children and incompetents may involve a question of the constitutional power of federal courts rather than a question of the jurisdiction granted by the applicable statutes. If in fact the states alone have the power to act as *parens patriae*, then the problem may be one not of statutory interpretation, but rather of the Constitution itself.<sup>162</sup> Of course, questions of custody may be cast in terms of constitutional rights. When this is done, the federal courts may have jurisdiction.<sup>163</sup>

#### CHARITABLE TRUSTS

[The Chancellor] is the general guardian of all infants, idiots, lunatics; and has the general superintendence of all the charitable uses in the kingdom; and all this over and above the vast

18 U. S. C. § 4248 (1952) specifies that the "commitment shall run until the mental condition is so improved that . . . he will not endanger the safety of the officers . . . of the United States. . . ." Lower federal courts found constitutional difficulties in the statute. Thus in *Wells*, by *Gillig v. Attorney General*, 201 F. 2d 556 (10th Cir. 1953), the statute was construed to apply only to cases of temporary insanity, in accordance with the maxim that a construction should be adopted which avoids constitutional questions. In *Wright v. Steele*, 125 F. Supp. 1 (W.D. Mo. 1954), it was held that accused must be discharged if after a reasonable time he is still incompetent to stand trial. More than one and one-half years was there held to be unreasonable. However, in *Greenwood v. United States*, 350 U. S. 366 (1956), the Supreme Court, by Justice Frankfurter, held that the statute applied not only to temporary mental incompetency but also to mental disability which seemed more than temporary, and that the statute was constitutional as so construed. The view of the court is well summarized in a statement at page 375 of 350 U. S.:

The petitioner came legally into the custody of the United States. The power that put him into such custody—the power to prosecute for federal offenses—is not exhausted. . . . [The] commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable national power. As such it is plainly within congressional power under the Necessary and Proper Clause.

Whatever the policy considerations behind the *Greenwood* decision, it would seem that the Court treated the difficult *parens patriae* problem a bit too summarily. Furthermore, it is submitted that any decision based upon the premise that persons accused but not convicted of crime are likely to wreck havoc if released upon society does violence to the traditional presumption of innocence. It would appear that *Craig v. Steele*, 123 F. Supp. 153 (W.D. Mo. 1954), adopted a reasonable solution when they noted that the Attorney General could hold the defendant either until his insanity was restored or until suitable arrangements could be made by the state of residence for his care. The confinement would thus be temporary, lasting until the first of the two events occurred. For a comment on the circuit decision in the *Greenwood* case, see 41 Iowa L. Rev. 303 (1956).

162. The federal courts, of course, do have the power to appoint guardians *ad litem*. *Mutual Life Insurance Co. v. Ginsburg*, 228 F. 2d 881 (3d Cir. 1956), but such authority does not give federal courts general power over persons or property of incompetents or minors. *In re Ryan*, 47 F. Supp. 10, *rehearing denied*, 47 F. Supp. 1023 (E.D. Penn. 1942); *Southern Ohio Sav. Bank & Trust v. Guaranty Trust*, 27 F. Supp. 485 (S.D. N.Y. 1939).

163. See for example, *Sklaroff v. Skeadas*, 351 U. S. 988 (1956).

and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery. . . .<sup>164</sup> . . . The king, as *parens patriae*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. . . .<sup>165</sup>

Having examined one area of the law, the custody of children and incompetents, where there is some implied limitation upon the jurisdiction of the federal courts because of the rights of the sovereign as the *parens patriae*, it is appropriate to examine the area of charitable trusts to determine the extent of the jurisdiction of the federal courts over such instrumentalities. In one of the first cases involving charitable trusts to reach the United States Supreme Court, that court stated:

The 2d section of the 3d article of the constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power, and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the king, as *parens patriae*, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred.<sup>166</sup>

The Court then continued and indicated that the prerogative powers which originally belonged to the sovereign as *parens patriae* now belonged to the various states. The court suggested that the various states can exercise control over the subject matter and that they may require any courts of the state to establish such charities and to carry them to completion. The Supreme Court, however, indicated that state laws cannot authorize a court of the United States to exercise any power that is not a judicial power. The Court then stated that:

For these reasons a court of chancery of the United States must, . . . deal with bequests and trusts for charity as they deal with bequests and trusts for other lawful purposes; and decide them upon the same principles and by the same rules. And if the object to be benefited is so indefinite and so vaguely described, that the bequest could not be supported in the case of

164. 3 Blackstone, Commentaries on the Laws of England 48 (1st Worcester ed. 1790).

165. *Id.* at 427. For a discussion of the *parens patriae* power of the English courts and its relationship to charities, see Chitty, Prerogatives of the Crown 161 (1820).

166. *Fontain v. Ravenel*, 58 U. S. (17 How.) 369, 393 (1854).

an ordinary trust, it can not be established in a court of the United States upon the grounds that it is a charity. And if, from any cause, the *cestui que trust*, in an ordinary case of trust, would be incapable of maintaining a suit in equity to establish his claim, the same rule must be applied where charity is the object, and the complainant claims to be recognized as one of its beneficiaries.<sup>167</sup>

This then suggests that a federal court can exercise jurisdiction over a charitable trust brought to the attention of the court but that the court cannot invoke the prerogative *cy pres* doctrine. In other words, this restriction may be one concerning the law which will be applied by the federal courts rather than one concerning the jurisdiction of the federal courts. Certainly the federal courts have not been reluctant to exercise jurisdiction in the general area of charitable trusts.<sup>168</sup> There are a number of examples of cases where the federal courts have, in fact, adjudicated controversies involving such trusts. In the outstanding case, however, where the question of the *cy pres* doctrine arose in a federal court, that court stated:

. . . the doctrine is laid down that in this country the prerogatives of the crown devolved upon the people of the states; that the states as a sovereign, is the *parens patriae*. In this connection I do not overlook the distinction between the exclusive prerogative of the crown in applying the *cy pres* rule in England, and administered by the courts of equity in the United States. An exhaustive examination of the authorities convinces me that the expression '*parens patriae*' is applicable in both instances. In England the chancellor, acting under the sign manual of the king, and executing the prerogative of the king, administered certain charities not recognizable judicially by courts of equity. Such prerogative power has never been granted nor assumed by courts of equity in this country. However, courts of equity in the several states, in pursuance of the public policy and law of such states, do administer public charities of the kind here under consideration, at the instance of the state as *parents patriae*; that is to say, it is generally recognized in this country that public charities are ultimately represented in the courts by the state in some form, when the stage has been reached that the particular object of the charity has, or is about to fail. . . .  
. . . . Neither upon the briefs of counsel, nor as a result of a long and I think thorough independent search of the authorities, have I been able to find an instance where a federal court has

167. *Id.* at 395-96.

168. See for example, *Jones v. Habersham*, 107 U. S. 174 (1882); *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1 (1868); *Vidal v. Mayor*, 43 U. S. (2 How.) 127 (1844); *King v. Richardson*, 136 F. 2d 849 (4th Cir.), *cert. denied*, 320 U. S. 777 (1943); *Nicholson v. Citizens and Southern Nat'l Bank*, 50 F. Supp. 92 (S.D. Ga. 1943).

ever perpetuated and administered a public charity with its situs within a state by application of the cy pres doctrine.<sup>169</sup>

It is interesting to note that in this case the court did not dismiss the action without giving any relief at all, but indicated that an order would be handed down that the status quo should be maintained until an action should commence in a proper tribunal to obtain judicial approval of the plan proposed by the parties. Here, then, there would seem to be a limitation upon the law to be applied, but not upon the essential jurisdiction of the court in such matters.

### CONCLUSION

There are some cases litigated in federal courts wherein questions are raised that cannot properly be decided by those courts—the so-called “political questions.”<sup>170</sup> In some cases the courts simply proceed to a final adjudication in the controversy, taking decisions of fact issues made by some other governmental agency as conclusive. The courts refuse to consider the validity of the challenged decision because of the nature of the question.<sup>171</sup> In other cases, when a controversy involves only an attempt to challenge the propriety of a decision of a “political question” by a governmental agency, a court may say that the controversy is beyond its jurisdiction and that a definitive decision cannot be made by a court.<sup>172</sup> Although these two situations are somewhat different—in one, the

169. *Scheil v. Leander Clark College*, 10 F. 2d 542, 554-57 (N.D. Iowa 1926). *But see*, *United States v. 263.5 Acres of Land*, 54 F. Supp. 692 (N.D. Calif. 1944) wherein the federal court applied the cy pres doctrine.

170. For example, see *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103 (1948); *Colegrove v. Green*, 328 U. S. 549 (1946); *Coleman v. Miller*, 307 U. S. 433 (1939); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118 (1912). Compare, with the *Colegrove* case, *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220 (Hawaii 1956), and *Remmey v. Smith*, 102 F. Supp. 708 (E.D. Pa. 1951) (redistricting suit dismissed for want of equity). See also Post, *The Supreme Court and Political Questions* (1936); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 Harv. L. Rev. 221 (1925); Weston, *Political Questions*, 38 Harv. L. Rev. 296 (1925); Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338 (1924). An area where this doctrine is found only in an incipient stage is the conflict between the civilian and the military. The seeds of a doctrine of judicial abdication in the face of the military can be found. See for example, Jackson, *Wartime Security and Liberty under Law*, 1 Buffalo L. Rev. 103, 115 (1951); Mason, *Inter Arma Silent Leges: Chief Justice Stone's View*, 69 Harv. L. Rev. 806 (1956).

171. See *Luther v. Borden*, 48 U. S. (7 How.) 1 (1849); *United States v. National City Bank*, 40 F. Supp. 99 (S.D. N.Y. 1941); and *The S.S. Denny*, 40 F. Supp. 92 (D.N.J. 1941).

172. *Chicago and Southern Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103 (1948); and see *Coleman v. Miller*, 307 U. S. 433 (1939). Note particularly the concurring opinion of Mr. Justice Black at page 456 and the opinion of Mr. Justice Frankfurter at page 460.



court accepting a fact as established conclusively because of the nature of the question; in the other, the court refusing to exercise jurisdiction because some other appropriate governmental body has made the decision—they are simply two facets of a single concept. Although, perhaps, correctness might call for a somewhat different articulation, courts do occasionally verbalize the doctrine in terms of jurisdiction.<sup>173</sup>

A final category which should be mentioned is the so-called "penal statute" limitation. All courts, federal as well as state, have refused to enforce the penal statutes of states other than the forum state.<sup>174</sup> On its face, this limitation seems to be rather clear: the difficulty arises in determining what provisions are in fact penal. The test has been articulated in terms of whether the wrong sought to be redressed is a wrong to the public or to an individual.<sup>175</sup> In other cases the verbalization is in terms of the interests being furthered; if the interests of a foreign state are being furthered, then the action cannot be maintained.<sup>176</sup> A third criterion would classify statutes as penal or not depending on whether an executive has the power to pardon and would not include as penal those statutes giving private action to individuals against wrongdoers.<sup>177</sup>

173. See *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2d Cir.), *cert. denied*, 332 U. S. 772 (1947), where at page 252 the court states:

As it stands, the District Court had no power to proceed; and, while it may not be proper, *stricti juris*, to say it had no jurisdiction, that is a mere question of words. It is enough that the court was powerless to move in it.

See also *Colegrove v. Green*, 328 U. S. 549 (1946), and the concurring opinion of Mr. Justice Rutledge. Quite clearly the court was split on characterizing the matter as jurisdictional.

See also Rutledge, *When is a Political Question Justiciable?*, 9 Ga. Bar J. 394 (1947).

174. *Huntington v. Attrill*, 146 U. S. 657 (1892); *Gwin v. Breedlove*, 43 U. S. (2 How.) 29 (1844); *Western Fruit Growers v. United States*, 124 F. 2d 381 (9th Cir. 1941); *Pryce v. Swedish-American Lines*, 30 F. Supp. 371 (S.D. N.Y. 1939). For a discussion of the enforcement of penal provisions, see Bowers, *Judicial Discretion of Trial Courts*, §§ 41-42 (1931); Leflar, *Extrastate Enforcement of Penal and Government Claims*, 46 Harv. L. Rev. 193 (1932). Concerning the right or duty of one jurisdiction to enforce the tax statutes of another, see *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935), and compare *Kotsonaros v. Minnesota*, 79 Ariz. 368 (1955). On the question of enforcement of federal penal provisions by state courts see 28 U. S. C. § 1355 (1952), and 23 Am. Jur., *Forfeitures and Penalties*, § 56 and 23 Am. Jur. Cum. Supp. 29-30 (1956).

175. *Doggrell v. Southern Box Co.*, 206 F. 2d 671, *rev'd*, 208 F. 2d 310 (6th Cir. 1953); *Abercrombie v. United Light and Power Co.*, 7 F. Supp. 530 (D. Md. 1934).

176. *Steckler v. Pennroad Corp.*, 136 F. 2d 197 (3d Cir. 1942), *cert. denied*, 320 U. S. 757 (1943).

177. *Jos. Riedel Glass Works v. Keegan*, 43 F. Supp. 153 (D. Me. 1942).

Quite clearly, then, there is some question about the nature of the action in some situations.<sup>178</sup> Here again the question of *Erie Railroad* might properly be raised. It might be argued quite persuasively that a forum state court's determination of whether a particular action was penal might bind the federal court sitting in that state.

In various fields, it becomes apparent that, although the language of the grant of power under diversity citizenship cases seems to be extremely broad, in fact the federal courts are very definitely limited in the jurisdiction that they can and do exercise. It is quite apparent that these restrictions are based upon a number of different considerations. There is no single thread running through the entire group of cases, but there are a number of restricting factors to be considered. Moreover, it seems that there are growing and diminishing considerations. Certain doctrines may be withering while others are gaining impetus as the years pass. It does seem fair to state, however, that the federal courts, in diversity cases, are not rigidly bound to the practice of the state in which the federal court is sitting. In many situations the federal courts make decisions regarding the exercise of jurisdiction quite different from the decisions that would be made by a state court sitting in exactly the same case. It seems quite certain that for all practical purposes the state courts have exclusive jurisdiction in certain areas. Finally it seems quite apparent that this is not an area controlled by the discretion of the district courts, but rather is an area where there are some absolutes which foreclose the use of the federal courts in certain types of litigation.

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178. See for example, *Tucker v. Cutler*, 185 F. 2d 853 (6th Cir., 1950), *cert. denied*, 340 U. S. 933 (1951), and cases cited therein.

