Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 25 | Issue 3 Article 7

Spring 1950

# Propriety of a Stay in Federal Court When Companion State Court Suit Runs Concurrently

# FEDERAL JURISDICTION

## PROPRIETY OF A STAY IN FEDERAL COURT WHEN COMPANION STATE COURT SUIT RUNS CONCURRENTLY

Beginning in June, 1947, nine derivative stockholders' suits on behalf of San-Nap-Pak, Inc., alleging raids upon the corporate treasury by its directors and others, were successively filed in the New York State Supreme Court. Later that year the New York court consolidated the nine actions into one. In June, 1948, Mottolese brought an identical derivative action[1] in the United States District Court for the Southern District of New York, basing jurisdiction on diversity of citizenship. The defendants moved in the federal court to stay the federal suit. Judge Samuel Kaufman granted the motion but without prejudice to an application for a modification or vacation of the stay if circumstances so warranted. Decision on a motion by defendant to prevent Mottolese from taking depositions under the liberal federal discovery procedure was held in abeyance. The Court indicated that it would not permit the use of discovery in the federal courts if defendants acquiesced in permitting examinations of equal scope in the state court. Mottolese petitioned the Court of Appeals for the Second Circuit for a writ of mandamus to compel Judge Kaufman to vacate the stay. The Court of Appeals, speaking through Chief Judge Learned Hand, denied the petition, on the ground that since the liberal examination before trial procedure was available to the plaintiffs in the state court by reason of the District Court's action, the possible remaining advantages which might accrue to plaintiff from a continuation of the action in the federal court did not outweigh the disadvantage to defendants of defending two simultaneous actions on the same claims. *Mottolese v. Kaufman,* 176 F. 2d 301 (2nd Cir. 1949).

When two simultaneous suits brought in different courts involve substantially identical parties or interests and substantially the same issues,[2] a pragmatic approach would require that only one proceed to final judgment. Such multiplicity of suits within a single jurisdiction can be readily remedied

1. The complaint in the state court set forth ten causes of action against the defendants; the *Mottolese* complaint stated nine. More defendants were served in the *Mottolese* action, although two less were named.

2. The issues should be enough alike so that decision in one suit decides the issues of the other. *Cf.* Landis v. North American Co., 299 U. S. 248 (1936).

by equitable relief in the form of a stay[3] or bill of peace[4]—eliminating one suit or the other. But where more than one jurisdiction is involved, principles of sovereignty have prevented interjurisdictional recognition of the other action.[5]

Where an action is brought in a federal court and another, on the same issues and between the same parties, in a state tribunal, the unqualified grant of jurisdiction to federal courts in the diversity statutes[6] was at first interpreted by federal courts to mean that once the litigant showed adequate grounds to get into federal court, his right to proceed to judgment was absolute.[7] Thus, even though an identical action was moving to judgment in a state court at the same time, the plaintiff was held to be entitled to a federal adjudication.[8] The result was friction between the state and federal

3. *Ibid.* The procedure of a stay might be said to permit a party's action to continue after the stay order, for judgment may subsequently be entered in the case, but that judgment will be based on principles of res judicata. Grubb v. Public Utilities Commission, 281 U. S. 470 (1930); 1 GAVIT, INDIANA PLEADING & PRACTICE § 128 (1941); see Scott, *Collateral Estoppel By Judgment,* 56 HARV. L. REV. 1 (1942).

4. *See* Sharon v. Tucker, 144 U. S. 533, 542 (1892). Burdick v. Burdick, 148 Wash. 15, 267 Pac. 767 (1928); *see also* Boise Artesian Hot & Cold Water Co., Ltd. v. Boise City, 213 U. S. 276, 286 (1909); 1 POMEROY'S EQUITY JURISPRUDENCE, Section IV, especially § 254 (5th ed. 1941).

5. Chief Judge Learned Hand's opinion apparently points to elimination of this interjurisdictional multiplicity of suits in federal and state courts, "Equity has always interfered to prevent multiplicity of suits, and the same considerations which persuaded the state to consolidate the nine actions there pending, make equally desirable a course as near that as the law permits." Mottolese v. Kaufman, 176 F.2d 301, 303 (2nd Cir. 1949).

6. The present statute is representative as to this, ". . . (a) The district courts shall have original jurisdiction of all civil actions . . . between:

(1) citizens of different states . . .," 28 U. S. C. §§ 1332, 1359 (1948).

7. In McClellan v. Carland, 217 U. S. 268 (1910), Mr. Justice Day, at 282, stated, ". . . an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case." *See* Willcox v. Consolidated Gas Company, 212 U. S. 19, 40 (1909); Huntington v. Laidley, 176 U. S. 668 (1900); Chicot County v. Sherwood, 148 U. S. 529, 533 (1893); Krause Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1004 (2nd Cir. 1933); City of Ironton v. Harrison Construction Co., 212 Fed. 353 (6th Cir. 1914). This general rule was followed almost without exception in derivative cases. Ratner v. Paramount Pictures, 46 F. Supp. 339 (S. D. N. Y. 1942); Consumers' Gas Co. v. Quinby, 137 Fed. 882 (8th Cir. 1905), *cert. denied,* 198 U. S. 585 (1905). *Cf.* Brendle v. Smith, 46 F. Supp. 522 (S. D. N. Y. 1942).

8. That the federal action severely affected a state court function was not a bar in itself to the right to federal trial. *See* Mr. Justice Frankfurter, dissenting, in Burford v. Sun Oil Co., 319 U. S. 315, 336 (1943). Later, however, exceptions were made allowing a federal court to dismiss even though the cases preceded a possible state action where the state had a policy of regulation, as in oil well drilling, Burford v. Sun Oil Co., 319 U. S. 315 (1943); where state tax collections or assessments were interfered with by the federal action, Great Lakes Dredge and Dock Co. v. Huffman, 319 U. S. 293 (1943); where state court interpretation of a state statute had not been made and it was challenged in federal court on constitutional grounds, Railroad Comm. of Texas v. Pullman Co., 312 U. S. 496 (1941); where a state had set up its own system of liquidation of insolvent banks and building and loan associations, Pennsylvania v. Williams, 294 U. S.

courts, a duplication of judicial work, and a waste of litigants' time and money. As a consequence a few exceptions were whittled out of the absolute right to federal decision.[9] The moving considerations behind these relaxations were an acceding to comity with state courts and a recognition of the possible ineffectiveness of the final federal remedy granted.[10]

Until the *Mottolese* opinion the propriety of ordering a stay was predicated on the possibility of fitting the case into one of two exceptions: *in rem* cases, and cases where a declaratory judgment was sought.[11] *Mottolese* can be treated either as having added a new exception in cases of derivative suits or as having swept away the few narrow exceptions to the absolute rule and substituting in all concurrency cases a broad doctrine of weighing considerations to determine whether the suit in the federal court ought to proceed to trial.[12] It would appear that the latter was intended, for the majority treated

---

176 (1935); where state administrative procedure had not been exhausted, Prentis v. Atl. Coast Line Co., 211 U. S. 210 (1908). *Cf.* Meredith v. Winter Haven, 320 U. S. 228 (1943), where it was said that even though a state law was difficult to determine, the federal court must interpret it. See note, 25 IND. L. J. 316 (1950), discussing when a federal court should refuse to proceed to judgment where the application of a federal statute or necessity for determining a constitutional question depends on interpretation of unsettled issues of state law.

Distinguish from the above the concurrency problem between state and federal court suits where federal jurisdiction is based on diversity discussed here.

9. The earliest exception related to actions *in rem*: The court first assuming jurisdiction maintained it to the exclusion of the other. Princess Lida v. Thompson, 305 U. S. 36 (1928); Butler v. Judge of the District Court, 116 F.2d 1013 (9th Cir. 1941). *See* Kline v. Burke Construction Co., 260 U. S. 226, 229 (1922). Later a second exception crystallized where the plaintiff sought a declaratory judgment in a federal court. The suit would be dismissed or stayed if a concurrent state suit were deciding the same issues for the same parties. Brillhart v. Excess Ins. Co. of America, 316 U. S. 491 (1942). *Contra*: Franklin Life Ins. Co. v. Johnson, 157 F.2d 653 (10th Cir. 1946); Aetna Life Ins. Co. v. Martin, 108 F.2d 824 (8th Cir. 1940) (where federal suits were filed first).

Mr. Justice Cardozo, in Landis v. North American Co., 299 U. S. 248 (1936), laid down strict rules for discretionary granting of stays. There the concurrency was between two federal court suits. It is submitted in addition that neither the direct holding there nor contemporaneous cases fully supported his test.

It must be remembered that the stays discussed in this note refer only to a federal court's stay of its own action, not of the enjoining of another action in a state court. For example where a federal court has decided an issue, it will not allow relitigation of that issue in the state courts. Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356 (1921); Gunter v. Atl. Coast Line Co., 200 U. S. 273 (1906); 28 U. S. C. § 2283 (1948). For a discussion of both types of stay in relation to federal courts, see MOORE'S COMMENTARY ON THE U. S. JUDICIAL CODE 395-417 (1949).

10. As, for example, it was recognized that two courts could not simultaneously control property *in custodia legis* and assure the successful party of the benefits of his judgment. See note 9 *supra*.

11. See note 9 *supra*.

12. The question arises, "Does the *Mottolese* reasoning include *in rem* cases?" The answer is that one of the bases for the doctrine is a possible ineffectiveness of a final federal remedy. This beyond doubt has been, under the old exception idea, and will continue to be under *Mottolese* a valid reason for not allowing two *in rem* suits, state and federal, to proceed concurrently.

the problem not as relating solely to derivative suits but as a general one of multiplicity of suits.[13]

The considerations to be weighed when the suits are of a derivative nature include those found in other types of concurrency cases as well as considerations which pertain only to derivative actions. Ordinarily the element most compelling toward grant or denial of a stay is priority in commencing the action.[14] Other considerations being equal, the first choice of forum should control. If a federal court were to grant a stay *merely* upon the pleading of a concurrent state action though filed after a federal suit or issue one conditionally upon the bringing of a state action, the statutory grant of diversity jurisdiction would be effectively nullified. Possibly the second most important consideration is the comparative advantages of the procedure in the two courts. The companion case to *Mottolese* in the state court illustrates some serious defects of antiquated state procedure, defects which form an effective shield for the real defendants. One of these is the availability of delaying tactics, such as interlocutory appeals.[15] Another is inadequate state deposition and discovery procedure.[16] Both of these factors should

13. *See* Mottolese v. Kaufman, 176 F.2d 301-303 (2nd Cir. 1949). Chief Judge Learned Hand's test which ". . . calls for the exercise of judgment which must weigh competing interests and maintain an even balance," would seem to be unduly narrowed in meaning if the stricter possible interpretation were accepted. Further, Judge Jerome Frank's dissent characterized *Mottolese* as meaning that ". . . merely the inconvenience to defendants of defending two actions, one in a federal and one in a state court in the same city, suffices to justify staying the federal action, unless plaintiff shows that that inconvenience to the defendants is outweighed by disadvantages to him." In his view the *Mottolese* "decision goes a long way towards wiping out a substantial part of the diversity of citizenship jurisdiction of the federal courts." *Id.* at 305.

14. Thus the federal court in *Mottolese* recognized that ". . . a federal suit, which has been brought *after* a state suit, may be stayed . . ." (emphasis added). This priority is the controlling factor in the *in rem* cases. Princess Lida v. Thompson, 305 U. S. 36 (1928). It also appears to be given great weight when the federal suit is for a declaratory judgment. *Compare* Brillhart v. Excess Ins. Co. of America, 316 U. S. 491 (1942), *with* Franklin Life Ins. Co. v. Johnson, 157 F.2d 653 (10th Cir. 1946).

Fraudulent or unethical delay should be taken into account to determine which court first has control or would have had control first had all dealings with the courts been bona fides. Harkin v. Brundage, 276 U. S. 36 (1928). It would seem, however, that a small differential in time should carry little weight in ruling on a stay. (In many instances attorneys for stockholders file in state and federal courts almost simultaneously.) In such a situation the fact that one suit or the other was actually under way at the time the stay was applied for should then become persuasive.

15. Mottolese v. Kaufman, 176 F.2d 301, 308 (2nd Cir. 1949); see Hornstein, *Legal Controls for Intracorporate Abuse,* 41 COL. L. REV. 405, 416-422 (1941). For a convincing picture of the dilatory character of such appeals, see the Annotations to §§ 588, 589 and 609 of the N. Y. CIV. PRAC. ACT.

16. Compare RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURTS. Rules 26—37 with N. Y. CIV. PRAC. ACT § 288; *see* Mottolese v. Kaufman, 176 F.2d 301, 308 (2nd Cir. 1949). Judge Frank forcefully characterized the New York deposition procedure in the following manner, ". . . under Federal Rules the deponent may be examined regarding any matter 'relevant to the subject involved in the pending action,' a phrase which has not received any restrictive interpretation similar to those given by the

weigh in favor of continuing the federal action. Although nothing was done about the interlocutory appeal situation,[17] *Mottolese* remedied the problem of inadequate state discovery procedure by making the stay of the federal action conditional upon the voluntary submission by the defendants in the state action to federal discovery rules.[18]

In derivative suits another factor need be weighed. Rule 23(c) of the Rules of Civil Procedure for United States District Courts requires notice to all stockholders before a settlement is approved and is an impelling inducement to continue federal trial.[19] As more derivative suits end in judicially approved settlements than in judgments on the merits,[20] the importance of such a rule to the protection of non-party stockholder interests against secret settlements becomes evident. Aside from Rule 23(c) a federal derivative suit offers an additional benefit, for the net recovery to the stockholder interests will be greater due to the federal strictness in allowance of attorneys' fees.[21]

One more facet to be considered when determining which of several derivative suits should continue is the amount of interest represented in the respective suits.[22] Naturally where a greater stock interest is formally represented as plaintiffs any settlement will prove to be satisfactory to more stockholders and the chances that the suit is of the so-called "strike"[23] variety

---

New York courts to the word 'necessary.' In a suit like this, where it is likely that none of the relevant facts are within the personal knowledge of the stockholder plaintiffs, full examination before trial is vital."

17. It would not seem objectionable to make the federal stay conditional upon the non-exercise by defendants of their state interlocutory appeal rights: forcing them to save those questions for presentation to the state appellate court after final judgment below on all issues.

The general rule is that failure to appeal from an interlocutory order is not prejudicial to a subsequent raising of the question, which would have been the basis of the interlocutory appeal, after a final judgment below. 2 GAVIT, INDIANA PLEADING & PRACTICE § 508, p. 2507 (1941).

18. *See* Mottolese v. Kaufman, 176 F.2d 301, 309 (2nd Cir. 1949) (dissent); Bachrach v. General Investment Corp., 31 F. Supp. 84, 86 (S. D. N. Y. 1940).

19. While a number of state courts have voluntarily adopted such procedure, no state statutes compel such action. See Hornstein, *New Aspects of Stockholder Derivative Suits*, 47 COL. L. REV. 1, 3 (1947).

20. *Id.* at 15—30.

21. See Hornstein, *The Death Knell of Stockholders' Derivative Suits*, 32 CALIF. L. REV. 123, 135 (1944), and Hornstein, *New Aspects of Stockholder Derivative Suits*, 47 COL. L. REV. 1, 11—13, 16—17, 27 (1947). Large attorneys' fees, contingent in most derivative actions, are not necessarily excessive. *See* Winkelman v. General Motors Corp., 48 F. Supp. 504 (S. D. N. Y. 1942); Hornstein, *The Counsel Fee in Stockholders' Derivative Suits*, 39 COL. L. REV. 784 (1939).

22. Possibly a corollary consideration is that state trial may be more desirable because certain defendants may be kept out of the federal action because of their non-diverse citizenships.

23. State statutes have recently been passed to remedy the *supposed* evil of "strike" suits. *See*, e.g., NEW YORK GENERAL CORP. LAW § 61-b; N. J. STAT. ANN. (1946 Supp.) Title 14, §§ 3—15 added by N. J. L. 1945, c. 131; WIS. STAT. (1947) § 180.13 added by L. 1945, c. 462. *But see* Hornstein, *The Death Knell of Stockholders' Derivative Suits*

will be smaller. Within a jurisdiction consolidation and intervention are means of attaining the greatest representation of interest. But consolidation is unavailable as between state and federal courts. Thus the federal court must determine and weigh the liberality of the rules of intervention in the respective jurisdictions and the status of represented interest in each to determine which suit will in the future represent the greatest possible amount of stock interest.[24]

Little argument need be made that suits should be consummated as quickly as possible, for delay may lead to mounting costs and unavailability of witnesses and evidence.[25] In an attempt to secure this goal the diligence[26] of respective counsel, adequacy of procedure, and a comparison of calendar conditions[27] in each court should be of some weight in determining the advisability of staying the federal action. Perhaps still another consideration is

---

*in New York,* 32 CALIF. L. REV. 123 (1944); Wolfson, *Striking out "strike suits,"* Fortune, March, 1949, p. 137. Their requirements were formerly termed procedure by a majority of lower federal courts. Boyd v. Bell, 64 F. Supp. 22 (S. D. N. Y. 1945). Thus, they were held inapplicable in federal courts under the *Erie* rule. Since these statutes made it difficult to bring derivative suits in state courts, they formed a basis for forcing derivative suits into the federal courts where alone they could be prosecuted. But after argument and before decision in *Mottolese,* the Supreme Court, in Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949), declared such statutory requirements applicable in federal courts. One of the grounds and probably the real reason for Mottolese's struggle for a federal court trial was lost.

24. *Compare* the RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURTS, Rule 24 *with* IND. STAT. ANN. (Burns Repl. 1946) § 2-222. See N. Y. CIV. PRAC. ACT § 193(3); Hornstein, *Problems of Procedure in Stockholders' Derivative Suits,* 42 COL. L. REV. 574, 575-582 (1942).

25. *See* Mr. Justice Reed, dissenting, in Koster v. Lumberman's Mutual Ins. Co., 330 U. S. 518, 533, 536 (1947); Hornstein, *The Counsel Fee in Stockholders' Derivative Suits,* 39 COL. L. REV. 784, 793 (1939); Wolfson, *Striking out "strike suits,"* Fortune, March, 1949, pp. 137, 138.

26. But what if a stay has been granted in federal court and issues are improperly handled in the state trial to the point of material damage to the stockholders' claims? In such a situation it may be necessary, when the federal stay is lifted and trial in federal court resumes, to use an analogous solution to that found in Winkelman v. General Motors Corp., 44 F. Supp. 960, 1020—1021 (S. D. N. Y. 1942), where the two trials ran concurrently and the state court reached decision first. The rule ordinarily is that where issues were litigated in good faith or could have been litigated, the judgment deciding the claims in which those issues are involved makes those issues res judicata. 1 GAVIT, INDIANA PLEADING & PRACTICES §§ 176, 177 (1941). But in the *Winkelman* case the federal court declined to regard as res judicata a decision in the state court granting a motion for summary judgment dismissing the complaint, the motion having been unopposed and the state court not having been informed that an action involving substantially the same matters was pending in the federal courts.

27. *See* Mottolese v. Kaufman, 176 F.2d 301, 303 (2nd Cir. 1949). Chief Judge Learned Hand's statement, "Indeed, we take judicial notice of the fact that the non-jury docket in the Southern District of New York is in the neighborhood of eleven months in arrears," is elusive, for it gives no comparison to the state of the calendar in the state court. What of the fact that at the time the petition was submitted to the Second Circuit in the principle case of the suits pending only *Mottolese* was on trial calendar and only in *Mottolese* had discovery proceedings been instituted? See Brief for Petitioner, p. 3, Mottolese v. Kaufman, 176 F.2d 301 (2nd Cir. 1949).

the presence of fraudulent or unfair practices in the state court or impending unfair settlement there—either of these in itself would be adequate reason for lifting or denying a stay of the federal action.[28]

The regulatory nature[29] of a derivative suit demands that all these considerations be weighed in order to assure stockholder plaintiffs of quick, efficient decision on their claims. The *Mottolese* doctrine of weighing competing interests results in placing the corporate derivative suit in the most effective jurisdiction, and not forcing defendants unnecessarily to defend multiple simultaneous actions on the same claims.[30] The question then becomes, how many of the considerations present when the suits are derivative apply in order to effectuate the *Mottolese* doctrine when the suits are non-derivative? The peculiar nature of the derivative suit provides the answer. Because it is a device of equity to prevent failure of fiduciary performance by management and is motivated by nominal plaintiffs, the duty to protect the real plaintiff, the corporation, falls upon the courts.[31] Where there are concurrent derivative suits, the real plaintiff, the corporation, has been unable to choose which forum should be used and the court must therefore decide. It can readily be seen that the latter disability does not inhere in ordinary non-class suits. In this latter category, at the very outset the plaintiff in a diversity case being in control of his own suit has the choice of what he considers the best forum, either state or federal.[32] As contrasted with the derivative suit, in which another member of the class in protecting

28. Additional criteria for ruling on a stay, beyond those listed above, exist when the federal and state suits are in different states. Documents or witnesses may be beyond the jurisdictional power of a court. The enforceability of a judgment may only be possible by a successful plaintiff bringing a subsequent suit in another jurisdiction on the judgment rendered.

The precedents for stay or dismissal in this type of situation are clearer, for the doctrine of *forum non conveniens* may be applied. Koster v. Lumberman's Mutual Ins. Co., 330 U. S. 518 (1946), 23 IND. L. J. 82 (1947). *Cf.* 28 U. S. C. §§ 1401, 1404 (1948).

29. Koessler, *The Stockholders Suit: A Comparative View,* 46 COL. L. REV. 238 (1946); BALLANTINE, CORPORATIONS § 149 (rev. ed. 1946).

30. An indication that state courts may adopt this doctrine as to derivative suits is evidenced by Milvey v. Sperry Corp., 36 N. Y. S.2d 881 (1939), and even perhaps as to non-derivative suits. In re Phelen, 225 Wis. 314, 274 N. W. 411 (1937).

31. The real plaintiff is that fictional being called the "corporation." If those responsible for the conduct of its affairs would sue for a remedy, one might with more reason say that it had a choice of forum (if the principle wrongdoers were citizens of another state). However, when the corporation, through its officers, will not sue, with the consequence that stockholders may press the claims for it, there is no central interested authority directing where they will seek trial, and even though they are only nominal, their citizenships may or may not give them a choice of forum. The forum which is chosen may be less convenient and efficient than another court entertaining a contemporaneous, parallel suit. With such a situation existing courts should act to maintain the central purpose of the derivative suit: To secure *all* stockholder interest a quick, efficient recovery upon causes of action.

32. Of course, defendant has a choice of removing or not when the original action is brought in a state court.

his own interest is also forced to sue in behalf of the corporation, the plaintiff in a non-class suit resues in another jurisdiction usually because he fears that he will lose the original action which he has instituted.[33] There is no need for regulation and the plaintiff should be bound by his first choice. Therefore the fact that the first forum chosen should control leads to the conclusion that time is the only pertinent criterion applicable in a non-derivative suit.

The propriety of diversity jurisdiction in the federal courts, the need for which has never satisfactorily been disproved,[34] is admittedly a question for Congress.[35] That body has repeatedly reenacted the oft criticized statute giving federal courts such jurisdiction.[36] But the fact that Congress has exercised its constitutional choice by giving federal courts diversity jurisdiction is not a basis for ruling that one has the right to proceed to judgment in federal court on a mere showing that this jurisdiction exists.[37] Perhaps taking such a position was a belligerent attempt to strike back at states adopting an uncooperative attitude. Today such hostilities are almost at an end. Even those most jealous of protecting diversity jurisdiction must realize that this slight destruction of that jurisdiction is more than compensated for by the fact that the *Mottolese* doctrine will further comity with state courts, expedite the remedy for the stockholder plaintiff, and cut down useless multiple litigation by non-stockholder plaintiffs.

---

33. *See* Kline v. Burke Construction Company, 260 U. S. 226 (1922), and Landis v. North American Company, 299 U. S. 248 (1936). If the first suit is in federal court, a party can keep a new suit in the state court by joining parties whose citizenship will eliminate complete diversity and conversely if the old suit is in a state court, a new suit can be brought in federal court if parties whose citizenships cause lack of complete diversity are not named (or perhaps the first suit could have been removed or brought originally in federal court but simply was not through choice or for some reason was not until it was too late to conform to the federal statutory requirements).

34. Compare Frankfurter, *Distribution of Judicial Power between United States and States Courts,* 13 CORN. L. Q. 499, 520 (1928) (criticising diversity jurisdiction), with Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction,* 79 U. OF PA. L. REV. 869, 887 (1931) (supporting diversity jurisdiction).

35. *See* Mr. Justice Frankfurter, dissenting, in Burford v. Sun Oil Co., 319 U. S. 315, 336 (1943).

36. 1 STAT. 78 (1789); 18 STAT. 470 (1875); 24 STAT. 552 (1887); 36 STAT. 1091 (1911), 28 U. S. C. § 1332 (1948); 54 STAT. 143 (1940), 28 U. S. C. § 1332(3)(b) (1948); 62 STAT. 930, 935, 28 U. S. C. § 1332, 1359 (1948). *But cf.* recent restrictions on diversity jurisdiction. 48 STAT. 775 (1934), 28 U. S. C. § 1341 (1948) (provision against enjoining by federal courts of state tax assessments or collections); 50 STAT. 738 (1937), 28 U. S. C. § 1342 (1948) (provision against enjoining orders of state rate making bodies by federal courts).

37. As pointed out in note 9 *supra,* there were a few exceptions to this absolute right.