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I

The Statute: Its Origin

THE Judicial Code provides, in section 265, that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State," except where authorized by the Bankruptcy Act.[1] This provision, minus the bankruptcy exception, first appeared in an act of 1793, amending the Judiciary Act of 1789.[2] We know next to nothing of the parliamentary history of this statute.[3] We do, however, know that the basic political issue in

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[1] Judicial Code, sec. 265, 28 U. S. C. A., sec. 379, Rev. Stat., sec. 720, U. S. Comp. Stat., sec. 1242.

[2] 1 Stat. 334, sec. 5, March 2, 1793. This act contained several provisions which had little relation to each other except that all concerned the judiciary. Section 5, after placing restrictions on the use of the writ of *ne exeat*, proceeded, "nor shall a writ of injunction be granted to stay proceedings in any court of a state," and closed with a provision forbidding injunction in any case without notice to the adverse party. This statute stood until the Revised Statutes of 1874 re-enacted the provision, as sec. 720, in precisely the form now carried as sec. 265 of the Judicial Code. While no other than the bankruptcy exception has been introduced by amendment of this provision, Congress created another exception by the Insurance Interpleader Act of 1926 (44 Stat. 416), which expressly authorizes injunction against suits in state courts "notwithstanding any provision of the Judicial Code to the contrary." Compare the provision that, in certain admiralty cases, "all claims and proceedings shall cease." 46 U. S. C. A., sec. 185, case note 21, and Langnes v. Green, 282 U. S. 531, 51 Sup. Ct. 243, 75 L. ed. 520 (1931).

[3] The Annals of Congress, the authoritative record of this period, gives mere

the framing of the Constitution was that of states' rights, the question how far the new government should be a nation, how far a federation of sovereign states, and we know that ratification was achieved with the aid (perhaps could not have been achieved without the aid) of an understanding that there should be immediate amendment by way of limitation upon the powers of the central government. We also know that the first Congress proposed, and the states promptly ratified, the first ten Amendments, all restrictive in character, five of them aimed at the judiciary, and that, in the deliberations of this Congress upon the first Judiciary Act, the question of states' rights was to the fore.[4] We also know that the third Congress framed the Eleventh Amendment, which privileged the states from suit in the federal courts, and that this measure was being formulated at the moment the injunction statute was passed.[5] With this political setting, we are justified in assuming that Congress, without thinking the matter through to the end, meant precisely that *no* injunction should be granted to stay *any* proceedings in state courts.

minutes of the proceedings and throws no light upon the meaning of the provision. See Annals, 3d. Congress, col. 143 (1793).

Mr. Charles Warren, in his "Federal and State Court Interference," 43 HARV. L. REV. 345, 347 (1930), says, "This provision was undoubtedly made in consequence of a report by Attorney General Edmund Randolph to the House of Representatives, December 27, 1790, as to desirable changes in the Judiciary Act of 1789, in which he recommended that the Act provide that 'No injunction in equity shall be granted by a District Court to a judgment at law of a State Court.' In a note, Randolph stated:

> 'This clause will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and other in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts.' "

Mr. Warren did not draw from this any conclusion as to the meaning of the statute (and he hardly could, in view of the material points of difference between the recommendation and the act) but, standing on the general history of the times, proceeded to say: "The restriction, thus enacted, was a significant illustration of the strong apprehension felt by early Congresses at the danger of encroachment by federal courts on state jurisdiction."

Mr. Warren's article deals broadly with conflict of state and federal courts, of which the federal injunction against state suit is but one phase. We are happy to be able to refer to Mr. Warren's work for the larger aspects of the subject and develop here a closer study of the injunction problem.

[4] See Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 (1923), and FRANKFURTER AND LANDIS, BUSINESS OF THE SUPREME COURT.

[5] See Annals, 2d Congress, col. 651 (1793); 3d Congress, cols. 25, 30, 225, 477 (1794).

II

THE DECISIONS PRIOR TO THE RECONSTRUCTION PERIOD

The first decision under the statute was *Diggs & Keith v. Wolcott* (1807).[6] A suit was brought in a Connecticut court to cancel promissory notes and to enjoin an action thereon in another Connecticut court. The equity suit was removed to the federal circuit court, where complainant obtained a decree. The Supreme Court reversed this decree, and is reported as saying merely that "a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court."[7] That being the stated ground of reversal, and the meager report furnishing inadequate material for examination of other aspects of the case, it must be assumed that the decree at circuit was proper from the point of view of equity jurisdiction and from the point of view of federal jurisdiction so far as concerned the provisions of the statute governing removal. That means that the court interpreted the Act of 1793 as over-riding two sections of the earlier Judiciary Act: section 12, providing for removal of causes, and section 14, giving all federal courts power to issue "writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions." The decision commands approval. It was, however, a strong decision, or, more precisely, it made the Act of 1793 a strong statute. It would seem to follow that injunction against proceedings in a state court could not be issued by a federal court in any case, whether based on diversity of citizenship or on federal questions arising under the Constitution, statutes, and treaties of the United States, except to the extent that the statute might be limited by the provisions of the Constitution which vest original jurisdiction in the Supreme Court.[8]

[6] 4 Cranch 179, 2 L. ed. 587 (1807).

[7] The report contains no mention of the statute but, in Peck v. Jenness, 7 How. 612, 625 (1849), this case is treated as resting on the statute, as it probably did. But see STORY, COMMENTARIES ON THE CONSTITUTION, sec. 1753 (1833); and 2 STORY, EQUITY, sec. 900 (1836), where the statement of law, with citation of the *Diggs* case, seems, in the context, to be rested on the Constitution. It might be argued that the Diggs case was rested on this theory by reason of the statement that the court was without jurisdiction, it being now settled that the statute does not go to the jurisdiction of the court, but only to the equity of the bill. Smith v. Apple, 264 U. S. 274, 44 Sup. Ct. 311, 68 L. ed. 678 (1924). But the term "jurisdiction" has always been used loosely, in regard both to federal jurisdiction and equity jurisdiction, so that no significance can be attached to the use of this word when the context does not make its meaning clear.

[8] In the Slaughter House Cases, 10 Wall. 273, 298, 19 L. ed. 915 (1870), it was held that the statute applied to the Supreme Court in the exercise of its appellate

For more than sixty years the line so projected was fairly followed. There were, to be sure, deviations. In *Cropper v. Coburn*,[9] a circuit court enjoined levy on complainant's property under process of a state court issued in a suit to which complainant was neither party nor privy, on the plausible ground that levy of process on the property of a stranger to the action was not a "proceeding" in the state court, but a mere trespass.[10] But even this modest inroad on the terms of the statute did not go unchallenged. On similar facts it was later held, in other circuits, that the court was without authority to issue the injunction.[11] And circuit court authority for a departure in cases of bankruptcy[12] was shaken, if not overruled, by the decision of the Supreme Court in *Peck v. Jenness*.[13] Until the seventies it was, to say the least, doubtful whether there was any exception to a literal reading of the statute. It must have become increasingly apparent that the statute seriously impaired the federal judicial power, but the courts bowed to the mandate of Congress.

jurisdiction. But the appellate jurisdiction of the Court was vested by the Constitution, "with such exceptions, and under such regulations as the Congress shall make." The question with respect to the original jurisdiction of the Court, which is not so qualified, seems never to have been raised.

[9] (C. C. Mass. 1855) Fed. Cas. No. 3416.

[10] This reasoning is suggestive of that by which it is held that a suit to enjoin state officers from enforcing unconstitutional statutes or, perhaps, from other acts under color of authority, is not a suit against the state, within the meaning of the Eleventh Amendment. Smyth v. Ames, 169 U. S. 466, 518, 18 Sup. Ct. 418, 42 L. ed. 819 (1898). Since an injunction to restrain judicial proceedings is, or at least should be, addressed to the parties litigant, not to the court, an injunction against private litigation in a state court raises no question under the Eleventh Amendment, while an injunction against suit by a state officer in a state court raises that question as well as a question under the statute of 1793. We must regard as inadvertent the remark of Mr. Justice White that the statute was "but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the eleventh Amendment." Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. ed. 477 (1906).

[11] Daly v. Sheriff (D. C. La. 1871) 1 Woods 175, expressly disapproving the Cropper case; Ruggles v. Simonton (D. C. Wis. 1872) Fed. Cas. No. 12,120.

[12] Ex parte Foster (D. C. Mass. 1842) Fed. Cas. No. 4960; Yeadon v. Planters' & Mechanics' Bank (D. C. S. C. 1843) Fed. Cas. No. 18,130; Fiske v. Hunt (C. C. Mass. 1843) Fed. Cas. No. 4831. The bankruptcy exception was not written into the statute until 1874.

[13] 7 How. 612, 625, 12 L. ed. 841 (1849). While it was not necessary to the decision, the court asserted the policy of the statute in vigorous terms which, in the context, amounted to a ruling that a federal court could not, by an order ancillary to a proceeding in bankruptcy, enjoin an action in a state court even though it worked a preference in derogation of the Bankruptcy Act.

III

DECISIONS IN AND SINCE THE RECONSTRUCTION PERIOD

Times changed. War and reconstruction put the federal government in the hands of nationalists, and their political temper came all too near to hysteria. The consequence was increased activity and power in the central government. The Bloody Shirt was finally buried but, in the meantime, new factors had appeared which likewise made for centralization. Of chief importance was the industrial growth of the country and the development of interstate and foreign commerce, which required both the protection and the control of a strong federal government. The story, then, of the half century following the outbreak of the Civil War was one of progressive nationalization.[14] The courts could hardly have resisted these political forces if they had wished to, and, on the whole, they probably did not wish to, for the judges were men of their time. It was inevitable that the injunction statute should bend before the current, or break.[15]

1. *Ancillary Injunctions*

On this stage was cast the perfect case to shake the seventy-year tradition. In 1869, French, a citizen of Virginia, filed a bill in a Virginia court against Hay, a citizen of Pennsylvania.[16] It set out transactions with property in Alexandria which began before the War and continued after French and those whom he represented had been driven behind the rebel lines, and charged Hay with misappropriation of the property during the enforced absence of the Virginians. An appearance was entered for Hay and a decree taken *pro confesso*. Hay then applied to the court, showed that the appearance was unauthorized, and obtained vacation of the decree. At the same time, however, and by the same order, a new decree was entered against

[14] This period brought forth counter forces in agrarian radicalism and labor radicalism, but the immediate effect was strengthening of the federal government, particularly in its judiciary, to meet the new "menace." Here enters, among other things, exuberant interpretation of the Fourteenth Amendment.

[15] The Revised Statutes of 1874 re-enacted the provision of 1793, but introduced the bankruptcy exception. Rev. Stat., sec. 720. That might be expected to stiffen the statute in all other respects by virtue of the canon of interpretation, *expressio unius*. But this interposition of Congress, with other amendments of the Judiciary Act which enlarged the jurisdiction of the federal courts (12 Stat. 755; 14 *ibid.* 27, 306, 558; 15 *ibid.* 267; 16 *ibid.* 140, 433; 17 *ibid.* 44; 18 *ibid.* 470), merely served to show the direction of the political wind.

[16] In form, this was an amendment of a bill filed against Hay and others in 1866, but in substance it was a new bill.

Hay for $2389, and the cause was continued for further action. Hay thereupon removed the case to a federal court, where the decree was vacated and the bill dismissed. On appeal to the Supreme Court, this decree was affirmed.[17] In the meantime, before Hay had secured removal of the case from the Virginia court, French had taken a transcript of the decree of that court and sued thereon in a Pennsylvania court. Hay then filed a bill in the federal court to which he had removed the original action, and obtained an injunction against further proceedings, in Pennsylvania or elsewhere, upon the Virginia judgment. This decree was also appealed to the Supreme Court, where, in 1875, it was affirmed.[18] It could hardly have been otherwise, for the case bristled with suggestion of local prejudice, against which the federal courts were designed to protect the citizen, and injunction was the only method, or at least the only effective method, of rescuing the loyal Hay from the clutches of the rebels. But what could the court say of the statute and the earlier cases? The cases were wholly ignored (apparently *Peck v. Jenness* was the only one cited) and the statute was disposed of by Mr. Justice Swayne with this rationalization:

> "This bill is not an original one. It is auxilliary and dependent in its character, as much so as if it were a bill of review. . . . If it [the injunction] could not be given in this case the result would have shown the existence of a great defect in our Federal

[17] French v. Hay, 22 Wall. 238, 22 L. ed. 854 (1875).

[18] French v. Hay, 22 Wall. 238, 250, 22 L. ed. 854, 857 (1875). The trend of affairs had appeared two years earlier in Fisk v. Union Pacific R. Co. (D. C. N. Y. 1873) Fed. Cas. No. 4830. The notorious Jim Fisk filed a bill in a New York court against the malodorous Union Pacific and even more offensive Credit Mobilier, seeking an accounting. The cause was removed to the federal court. Thereafter, the Credit Mobilier instituted a proceeding in the state court for its own dissolution, the effect of which would have been an evasion of the jurisdiction of the federal court. An injunction was granted, relying on the provision of the Act of 1789 that the courts shall have power to issue all writs which may be necessary to the exercise of their jurisdiction. As this was dubious reasoning to dispose of the Act of 1793 and ran counter to the whole current of decision in the Supreme Court, including the Slaughter House Cases (10 Wall. 273, 298, 19 L. ed. 915) decided in 1870, the case can not be considered significant except as further evidence of the temper of the time and another illustration of the untoward consequences of a literal application of the statute.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666 (1872), seems to us not inconsistent with the earlier cases. As the court pointed out, the injunction did not interfere with the enforcement of the decree of the state court. The case can hardly be said to stand for more than this, that an exercise of jurisdiction by a state court does not for all time and for all purposes place the parties and the property involved in the case beyond the injunctive reach of a federal court.

> jurisprudence. . . . The prohibition in the Judiciary Act against the granting of injunctions by courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

This decision can be reconciled with *Diggs & Keith v. Wolcott*, the initial case and also one of removal, on some such formula as this: When a federal court has acquired jurisdiction, whether originally or by removal, of a case not involving the forbidden element, it may enjoin proceedings in a state court for the incidental purpose of making effective its "prior jurisdiction," terms used by Mr. Justice Swayne and appropriate to *French v. Hay;* but proceedings in a state court may not be stayed by an injunction which is primary, in the sense that it is the business, or part of the business, of the first resort to the federal court, as it was in the *Diggs* case. This is a line of distinction which has been made much of in later cases, usually in terms of "ancillary" jurisdiction.[19] It amounts to an amendment of the statute — at least it involves a rewriting of some of the earlier decisions.[20] It is, however, statesmanlike, in the sense that it deals with the problem of adjustment of relations between state and federal courts with legislative wisdom. It might be called a rule of necessity, understanding, of course, that "necessity" is a relative term. We must postpone discussion of the scope of this exception to the statute,[21] in the meantime pursuing decisions which go beyond any notion of ancillary injunction.

2. *Original Injunctions*

(a) *A Distinction Based on the Chronology of the Statutes. Bondurant v. Watson* (1881)[22] was like *Diggs & Keith v. Wolcott*, and unlike *French v. Hay*, in that the controversy first came to the federal

[19] Dietzsch v. Huidekoper, 103 U. S. 494, 497, 26 L. ed. 497 (1881); Julian v. Central Trust Co., 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. ed. 639 (1904); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. ed. 462 (1905); Riverdale Cotton Mills Co. v. Alabama & Georgia Mfg. Co., 198 U. S. 188, 195, 25 Sup. Ct. 629, 49 L. ed. 1008 (1905); Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. ed. 477 (1906); Looney v. Eastern Texas R. R. Co., 247 U. S. 214, 38 Sup. Ct. 460, 62 L. ed. 1084 (1918).

[20] Peck v. Jenness, 7 How. 612, note 13, supra, and the Slaughter House Cases, 10 Wall. 273, note 18, supra, while they can both be "explained," require more than the bare formula of "ancillary" jurisdiction for that purpose.

[21] See Kline v. Burke Construction Co., 260 U. S. 226, and cases therewith discussed, infra, p. 1161.

[22] 103 U. S. 281, 26 L. ed. 447 (1881).

court by way of removal of a suit to stay proceedings in a state court. Enforcement of a Louisiana judgment, void for want of jurisdiction, was enjoined.[23] The decision was rested upon the ground that the applicable removal statute had been enacted, by way of amendment, in 1875, while the anti-injunction statute could not be dated later than the revised statutes of 1874. Mr. Justice Woods said:

> "It would not be according to the well-settled rules of statutory construction to import an exception into this statute from a prior one on a different subject." [24]

This chronological interpretation of the statutes reconciled the decision with the *Diggs* case,[25] and presented a new mode of approach to our problems. It was, of course, a questionable method. This is not the case where two statutes are so contradictory that one or the other must go by the board, but the case of a statute fixing, in general terms, the limited jurisdiction of the federal courts, and another statute which can mean nothing unless it means that, in some cases otherwise within this jurisdiction, a particular type of relief shall not be granted. Nor do we commonly indulge the violent presumption that, when a legislature tinkers with one part of a complicated code, it intends to give this part predominance over others. It is not, therefore, surprising that this method has not been generally accepted.

[23] Complainant alleged want of service of process and staleness of the cause of action. The opinion discussed only the latter point, but it must be understood that want of jurisdiction was taken for granted, because the other point would go merely to the merits of the judgment and would not found equity jurisdiction to stay its enforcement.

[24] That the decision was rested solely on the removal statute, was emphasized by this distinction: "If Watson had filed his petition for injunction in the State Court, and before it was allowed had petitioned for removal of the cause to the Circuit Court [in fact an injunction *was* granted in the state court and *defendant* removed], with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute." We understand the theory to have been that the case, though in form removed, would in substance be original, and therefore subject to the injunction statute. The case put by Mr. Justice Woods was presented and his dictum was followed in Lawrence v. Morgan's Railroad & Steamship Co., 121 U. S. 623, 7 Sup. Ct. 1013, 30 L. ed. 1018 (1887), but this refinement was immediately rendered obsolete by the acts of 1887-1888, which abrogated plaintiffs' right of removal altogether, restoring the practice which had existed prior to 1867. See 28 U. S. C. A., sec. 71, historical note, and case notes 619, 665, *et seq.*

[25] That case involved the removal provisions of the Act of 1789 and the injunction statute of 1793. But Peck v. Jenness, 7 How. 625, note 13, supra, involved a bankruptcy act of later date than the injunction statute. Neither case was cited by Mr. Justice Woods.

We do not find any other than the *Bondurant* case[26] which has adopted chronological interpretation of the injunction statute.[27]

(b) *A Distinction between Injunction to the Court and Injunction to the Parties.* The next case to claim our attention is *Marshall v. Holmes* (1891),[28] which held that a suit to enjoin enforcement of judgments, obtained by fraud in a Louisiana court, was removable to a federal court. The opinion, written by Mr. Justice Harlan, did not recognize any distinction between removed and original cases. Neither did it cite any of the prior decisions in which the interpretation of the statute was considered, but relied on half a dozen cases which, though more or less in point on the facts, had ignored the statute.[29] Aside from quotations from these cases, all that was said was this:

> "While it [the circuit court] cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court."

[26] Perhaps we should except the Lawrence case, 121 U. S. 634, note 24, supra, though this theory was not stated, and Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 599, 3 Sup. Ct. 379, 27 L. ed. 1038 (1883), an admiralty case in which chronological interpretation was suggested but decision was avoided. There is no need to except the decision of the Bondurant case at circuit. 2 Woods 166 (1875).

[27] Even do we find the Bondurant case cited as an authority of general significance, without reference to its chronological theory. It is fortunate that prior decisions are not scrutinized with respect to the then history of the legislation. If these points had to be observed, in addition to all the other factors in the problem, the lawyer would need a research staff to analyze the cases. And the result would be a dizzy shifting of the law touching our problem. For example, the Judicial Code of 1911, enacting contemporaneous provisions on removal and injunction, would have rendered obsolete the Diggs, Bondurant and Lawrence cases, together with the Marshall case to be discussed presently, which are the only Supreme Court cases dealing with removal of suits to enjoin proceedings in state courts. Subsequent amendments of the removal provisions would have brought these cases into action again, and so forth.

[28] 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870 (1891).

[29] In common law problems, we often treat a decision as authority for a principle not announced in the opinion, and it is more than common to regard a decision as authority on its facts though the opinion indicates that the court overlooked pertinent principles. But should this be done on a problem of statutory construction, thereby attributing to the courts the power to interpret the mandate of the legislature, though unconscious, apparently, of its existence? If so, there is plain truth, not humor, in the observation that we treat the courts as being, like Balaam's ass, irrational but divinely inspired.

This is interesting indeed. The whole course of practice, ancient and modern, in cases of injunction against legal proceedings, has been to address the writ to the party litigant, not to the court. Departure from this practice has always been error.[30] That being so, Mr. Justice Harlan's distinction was purely formal. It left nothing of the statute. Can we suppose that he was unaware of this elementary feature of equity practice? Or shall we understand that he intended a judicial repeal of the statute? Neither answer is satisfactory. We can, of course, treat this case as a decision on its facts, and draw a veil over the opinion. We suppose that would be done by any court to which the shabbiness of the reasoning was exposed. But, as things go, we can not count upon exposure. Mr. Justice Harlan's reasoning has several times been cited with approval, both in the Supreme Court and in the lower courts,[31] and it has never been repudiated by competent authority. There it stands, one of the "sources of the law," a possible inspiration to the judicial process.

As we now have before us all of the Supreme Court decisions involving removal of suits to enjoin proceedings in state courts, it might seem wise to consider the possible modes of reconciling them, with a view to spelling out the law upon this important class of cases.[32]

[30] 5 POMEROY, EQUITY, 2d ed., sec. 2058 (1919). In Peck v. Jenness, 7 How. 612, note 13, supra, it was said that the fact that an injunction issues only to the parties "is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." In Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1890), holding that the full faith and credit clause of the Constitution did not preclude the courts of one state from enjoining proceedings in the courts of another state, though the majority relied on this feature of equity practice, Justices Harlan, Field and Miller dissented on the ground that this point was formal, rather than substantial.

In the formative period of English equity this feature of the practice undoubtedly facilitated the Chancellor's assumption of jurisdiction to deal with proceedings in courts of law, over which he could not claim supervisory power. See Barbour, "Some Aspects of Fifteenth Century Chancery," 31 HARV. L. REV. 834, 843 (1917). But one also finds that, while this may have made chancery interference somewhat less galling than direct action, some of the judges were quite conscious that this sort of thing constituted a very real interference with their jurisdiction. *Ibid.* 844. The memorable Coke-Ellesmere controversy throws not a little light on Mr. Justice Harlan's reasoning.

[31] See, for example, its quotation in Simon v. Southern Ry. Co., 236 U. S. 115, 126, 35 Sup. Ct. 255, 59 L. ed. 492 (1915); and in Wells Fargo & Co. v. Taylor, 254 U. S. 175, 184, 41 Sup. Ct. 93, 65 L. ed. 205 (1920).

[32] (1) The Marshall case, as well as the Bondurant case, could have been rested on Mr. Justice Woods' chronological interpretation of the statutes, for the Act of 1875 was still in force at the time the suit was removed. That would reconcile all of the cases. (2) Both the Bondurant and Marshall cases involved injunction against enforcement of state judgments, whereas the Diggs case appears to have been a

But any conclusions reached by that process are of doubtful value, by reason of the positions which the court has taken in other cases, say nothing of the fact that, since 1887, jurisdiction in removal has been defined by the statutes in terms of cases "of which the Circuit [now District] Courts are given original jurisdiction." [33] At every turn, one finds that his efforts at nice discrimination among the cases of one type come to grief because of the developments elsewhere.

(c) *A Distinction between Proceedings before Judgment and Proceedings after Judgment.* The first case of original jurisdiction, as distinguished from ancillary jurisdiction and from jurisdiction in removal, was *Simon v. Southern Ry. Co.* (1915).[34] On a bill filed in the federal court, Simon was enjoined from enforcing a judgment against the Railway which he had recovered in a Louisiana court without service of process.[35] The decree was affirmed in the Supreme Court. The opinion, written by Mr. Justice Lamar, presents an interesting study in the judicial process. He relied heavily upon *Marshall v. Holmes,* stating the facts, quoting Mr. Justice Harlan's opinion, and restating "the difference between enjoining a court and enjoining a party." Simon attempted to distinguish that case as one of removal, but Mr. Justice Lamar disposed of the distinction by saying, ". . . it seems always to have been assumed that the prohibition of sec. 720

suit for injunction instituted before judgment was obtained and it may have come to hearing in the circuit court before judgment was obtained. But the Lawrence case, 121 U. S. 634, note 24, supra, is, in this respect, identical with the Bondurant and Marshall cases. For this reason, and because the distinction is unsatisfactory (we shall say more to this point presently), we hesitate to import it into decisions which did not assert it. (3) It also happens that, in both of these cases, the state suits, both the enjoining and the enjoined, were in the same court, while in the Diggs case they were in different courts. We cannot, however, see that this is significant, and we do not find that anyone else has thought it so, and, again, it does not explain the Lawrence case. (4) On the other hand, the Diggs case involved cancellation of notes, to which the injunction might, in one sense, be considered ancillary, while the later cases involved injunction alone.

[33] See 28 U. S. C. A., sec. 71, historical note, and case notes 72 and 73.

[34] 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492 (1915). There were earlier cases in the lower courts; National Surety Co. v. State Bank of Humboldt (C. C. A. Neb. 1903) 120 Fed. 593.

[35] Process had been served upon the secretary of state, in pursuance of a Louisiana statute providing for such service upon foreign corporations doing business within the state. But the cause of action arose outside of Louisiana and it was held, in this case, that the state could not, by this sort of substituted service, give its courts jurisdiction of such an action. One seeking for microscopic distinctions might make something of the fact that the Simon case involved both diversity of citizenship and a federal question. He would, however, find it impossible to carry that point through the whole series of cases.

[Rev. Stat., sec. 720, Judicial Code, sec. 265] applied to cases removed to United States Courts, as well as those originally instituted therein," citing the *Diggs* case. Then, to reinforce the point, he said, "In later decisions it has been pointed out that if there was a difference between cases brought and cases removed, it would have been easy, as the law then stood,[36] for the nonresident to bring a suit for injunction in a state court, remove it to the Federal court, secure therein the injunction sought, and thus evade the statute." For this, he cited the *Bondurant* case. In review, it is obvious that the court was lifting itself by its judicial boot-straps. First it held "that a United States court could not (even on removal) 'stay proceedings in a state court' " — Mr. Justice Lamar's statement of the *Diggs* case; then, in the *Bondurant* case, it excepted from the statute cases removed from the state courts; next, in the *Marshall* case, it ignored the ground on which Mr. Justice Woods had distinguished cases of removal; finally, denying the distinction, it brings up the original foot to the level of the removed foot.[37]

But *Simon v. Southern Railway* is chiefly important as the cradle of a new diversity which has gained wide acceptance. After referring to the statute as based on "principles of comity" and citing *Diggs &*

[36] In its context, this is clearly a reference to the state of the law at the date of the Diggs case. Yet the law did not, at that time, permit removal by plaintiff. See note 24, supra.

[37] The Judiciary Act of 1789, though not quite explicit on the point, was interpreted as confining the jurisdiction in removal to cases which might have been brought originally in the federal courts. The statutes in force from 1867 to 1887 were held not to impose this limitation. But, since 1887, the statutes have explicitly restored the original limitation. See 28 U. S. C. A., sec. 71, historical note, and case notes 72 and 73. This goes some way toward explaining our series of removal cases. It is, however, obvious that the later legislation could not reasonably be interpreted as enlarging the original jurisdiction to bring it into harmony with the jurisdiction in removal which existed under the statutes of the Reconstruction Period. On the face of the statutes, the levelling process ran the other way.

There was also boot-strap technique in Mr. Justice Lamar's use of Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. ed. 639 (1904). Observing that the court in that case enjoined enforcement of a judgment which was "perfectly valid in itself," he argued that "if, in a proper case, the plaintiff holding a valid state judgment can be enjoined by the United States court from its inequitable use — by so much the more can the Federal courts enjoin him from using that which purports to be a judgment but is, in fact, an absolute nullity." He overlooked the fact that he was taking a step from ancillary injunction to original injunction. Again, he relied upon Ex parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. ed. 429 (1908), ignoring the fact that there, upon habeas corpus to contempt proceedings on a preliminary injunction issued in the same cause, there was a collateral attack upon the injunction while the court now faced a direct attack upon the injunction.

Keith v. Wolcott as a "typical instance" of its application, Mr. Justice Lamar said:

"But when the litigation has ended and a final judgment has been obtained — and when the plaintiff endeavors to use such judgment — a new state of facts, not within the language of the statute may arise." And again: "While sec. 720 prohibits United States courts from 'staying proceedings in a state court,' it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the Federal courts from enjoining a party from using that which he calls a judgment but which is, in fact and in law, a mere nullity." [88]

Laying aside the cases of ancillary injunction, which come more and more to be regarded as a distinct group, the prior decisions squared with this position. They had not, however, asserted it. Nor can the distinction be found in the language of the statute. The word "proceedings" embraces, in common usage, proceedings after judgment as well as before judgment. And, if we consider the purpose of the statute, we must regard it as political and practical. It aims to prevent federal interference with that vital function of state government, the administration of justice, in which the rendition of judgment is merely a step toward fruition of judgment. To defer the injunction may in some measure spare the feelings of the state judge, but it makes no difference whatever with respect to the substance of states' rights, or states' power.[89]

[88] It will be observed that the first statement is general, while the second is tied to the case of the judgment obtained by fraud or void for want of jurisdiction. Possibly the purpose of the latter statement was to impose limitations upon this interpretation of the statute, but it seems more likely that it was merely designed to combine with this interpretation of the statute a statement of the ground of equitable relief in the case at bar. Some other passages in the opinion bear this out.

[89] Speaking of injunction after judgment, which he called "the common mode," Story said: "This was supposed to trench upon the jurisdiction of the Courts of Common Law, from its tendency to destroy the conclusiveness and to make nullities of their judgments, since an execution is properly said to be *fructus, finis, et effectus legis;* and therefore the life of the law." 2 STORY, EQUITY, sec. 874 (1836). This has been clear enough to the federal courts when state interference with enforcement of their own judgments was in question. McKim v. Voorhies, 7 Cranch 279, 3 L. ed. 342 (1812); Freeman v. Howe, 24 How. 450, 455, 458 *et seq.*, 16 L. ed. 749 (1861) (not an injunction case, but in other respects particularly pertinent); Riggs v. Johnson County, 6 Wall. 166, 187, 18 L. ed. 768 (1868); Amy v. Barkholder, 11 Wall. 136, 20 L. ed. 101 (1871); Central National Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. ed. 807 (1898). For the long story of the Supreme Court's attitude toward state court habeas corpus interfering with the enforcement of federal judgments and decrees, see Mr. Warren's article, 43 HARV. L. REV. 345, 353, *et seq.* (1930).

As a ground for excepting cases from the operation of the statute, Mr. Justice Lamar's distinction is unconvincing. But that is not its sole significance. His distinction is an intellectual coin which has a tail as well as a head. It implies that the statute precludes an injunction against proceedings in a state court prior to judgment. As earlier decisions had made it doubtful whether anything was left of the statute, this was the more significant side of the distinction. The implication became explicit in *Essanay Film Co. v. Kane* (1922).[40] The case was substantially like *Simon v. Southern Railway*, except that the Film Company filed its bill in the federal court before Kane had obtained final judgment. The decree of the district court dismissing the bill was affirmed. Mr. Justice Pitney distinguished the *Simon* case thus:

> "This is an attempt to use the process of the federal court to restrain further prosecution of an action still pending in a state court, while that cited was a case of enjoining a successful litigant from enforcing a final judgment of a state court. . . ." [41]

In spite of the logical relation between the two sides of the distinction, they actually present very different problems. The obverse side, that presented in the *Simon* case, though it may do violence to the statute, has the practical advantage of giving to the federal courts greater freedom to work out the problem of their relations to the state courts with the discrimination which the cases, in their several varieties, demand. On the other hand, the reverse side of the distinction asserted in the *Essanay* case, though it has its virtues, is open to serious objection from the practical point of view. If the federal court should interfere at all, why should it wait until judgment, with consequent delay and accumulation of expense to the parties and the state? If the statute required this, that would be reason enough. But the distinction is judge-made. It can only be spelled out of the statute by a forced reading of the word "proceedings." [42]

[40] 258 U. S. 358, 42 Sup. Ct. 318, 66 L. ed. 658 (1922).

[41] This sentence carried the further clause, "held void because procured without due process." We think it proper to omit this clause because the first branch of the statement, referring to the case at bar, could with equal propriety have carried a similar clause. We do not believe it was the intention of the Court to draw a distinction between valid actions and void judgments. It must have meant to differentiate void actions from void judgments, valid actions from valid judgments.

[42] Compare the recommendation of Attorney General Randolph, which probably inspired the Act of 1793. Note 3, supra. His statute prohibiting injunction "to a judgment at law" would rather explicitly indicate the same line of distinction, but

In the *Essanay* case, Mr. Justice Pitney, after distinguishing between this case and the *Simon* case, proceeded:

> "As was pointed out in that case, . . . the prohibition originated in the Act of Congress of March 2, 1793, c. 22, sec. 5, 1 Stat. 334, was based upon principles of comity, and designed to avoid inevitable and irritating conflicts of jurisdiction. But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of 1793 to avoid."

The argument is that there are irritating conflicts of jurisdiction in the one case but not in the other. Or is the proposition merely comparative, that there is greater conflict, more irritation, in the one case than in the other? The absolute assertion runs counter to obvious fact. A comparative difference may exist, but the question remains whether the difference in fact is sufficient to justify the decision, whether the commodity is worth the price we must pay for it.[48]

with reverse consequences. In support of that recommendation, he offered the reasonable argument that, "if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun."

[48] As between the courts of independent sovereigns, there has never been such limitation on the injunction. It issues first or last, "according to the exigencies of the particular case." 2 STORY, EQUITY, sec. 874 (1836). But the relation between federal and state courts is not the same as that between courts of independent sovereigns. For some purposes the federal courts are superior. Among other things, they exercise a larger injunctive control over state proceedings than they permit state courts to exercise over their own. Note 39, supra. It would not be absurd nor obviously unwise to go much further in this direction. On the other hand, it would not be absurd nor obviously unwise to restrict federal jurisdiction more closely than has been the practice at any time in our history. In the latter direction, it might be proper, in civil cases other than the federal specialities such as bankruptcy and admiralty and patents, to deny entrance to the federal courts until remedies in the state courts were exhausted. Particularly reasonable would be the abrogation of the curious doctrine that federal equity jurisdiction is to be tested by the adequacy of legal remedies in the federal courts, without regard to legal remedies in the state courts. But one could subscribe to such programs of restriction and still question the wisdom of denying injunction before judgment, though permitting it after judgment without exhaustion of available remedies in the state courts by appeal or by suit for injunction.

The principle of necessity, which is advanced as the basis of the ancillary injunction, might be argued here. If the state court is allowed to proceed to judgment, it may reach the right result and federal interference will be unnecessary. But, even if the wrong result is reached, federal interference is still unnecessary, until remedies

In *Western Union Telegraph Co. v. Tompa*,[44] an injunction was issued during the pendency of the state suit, but confined to stay of any judgment that might thereafter be recovered. Though he recognized the rule prohibiting an injunction against prosecution of the suit to judgment, Chase, J., said that the court should "so act now that the defendant may proceed in that action, if proceed she must, with knowledge in advance of the futility of doing so." Is this decision to be regarded as a merely colorable observance of the law and therefore erroneous, or shall we say that it satisfies the principle on which Mr. Justice Pitney rested the *Essanay* case, viz., that a federal court may interfere after judgment "without the conflict which it was the purpose of the Act of 1793 to avoid"? Not being favorably impressed by the doctrine of the *Essanay* case, we are inclined to approve the decision of the court of appeals. It preserves some vestige of the principle of courtesy adopted by the Supreme Court, without paying the price in practical inconvenience which a more generous application of that principle would exact.[45]

Another and even more important question concerns the scope of the rule. To what cases is it applicable? There are several decisions of the Supreme Court sustaining ancillary injunctions before judgment.[46] Are they overruled, or are they to be distinguished? Though there was no direct statement in the *Essanay* case that the rule does not apply to ancillary injunctions, one can spell that out of the opinion,

in the state courts by appeal or suit for injunction are exhausted. The question remains — Why enjoin after judgment but not before?

[44] (C. C. A. 2d, 1931) 51 F.(2d) 1032 (Chase, Learned Hand, and Augustus Hand, JJ., sitting.)

[45] Suppose judgment has been rendered in the state court of first instance, but an appeal is pending. Is injunction proper? Held yes, in American Surety Co. v. Baldwin (C. C. A. 9th, 1932) 55 F.(2d) 555. See also Marshall v. Holmes, 141 U. S. 589, note 28, supra. Compare Grubb v. Public Utilities Comm., 281 U. S. 470, 50 Sup. Ct. 374, 74 L. ed. 972 (1930).

One of the many problems which we are ignoring in this paper is that of injunction against future proceedings, suits not yet commenced, usually suits by public officers to enforce regulatory statutes and commission orders. On this subject see Mr. Warren's article (note 3, supra) at p. 373, and the two articles which follow it.

[46] Dietzsch v. Huidekoper, 103 U. S. 494, 497, 26 L. ed. 497 (1881); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. ed. 462 (1905); Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co., 198 U. S. 188, 25 Sup. Ct. 629, 49 L. ed. 1008 (1905); Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. ed. 477 (1906); Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032 (1910); Looney v. Eastern Texas Ry. Co., 247 U. S. 214, 38 Sup. Ct. 460, 62 L. ed. 1084 (1918).

and it was not an ancillary injunction which was refused.[47] In *Sand Springs Home v. Title Guarantee & Trust Co.*,[48] Judge Booth, citing some of the earlier cases but not the *Essanay* case, said,

> "In cases where the federal court may with propriety enjoin proceedings in the state court in order to protect its own jurisdiction or its own judgment, it may enjoin as well before the state court proceeding goes to judgment as afterward." [49]

(d) *A Distinction between Proceedings in Rem and Proceedings in Personam. Kline v. Burke Construction Co.* (1922),[50] was decided at the next term after the *Essanay* case. The construction company, a Missouri corporation, brought an action at law in the federal district court against Kline and other members of the board of an Arkansas improvement district, seeking damages for breach of contract. Federal jurisdiction was based solely on diversity of citizenship. Thereafter the board instituted a suit in equity in an Arkansas court against the company and the surety on its bond. The bill alleged breach of the same contract by the company and sought a money decree. "Thus the two cases," said Mr. Justice Sutherland, "presented substantially the same issues." The company sought to remove the equity suit to the federal court but failed, because the surety had the same citizenship as plaintiffs, and the controversy between plaintiffs and the company was held not to be separable. Thereafter the company filed in the federal court a bill ancillary to its action at law, seeking to enjoin the board from further prosecuting its equity suit in the Arkansas court. The injunction was refused and that decree was affirmed by the Supreme Court. After referring to sec. 265 of the Judicial Code

[47] After the passage in the opinion quoted above, Mr. Justice Pitney devoted a page to a general discussion of the statute, in which he did not again advert to the distinction between proceedings before judgment and proceedings after judgment. Toward the end of this passage he said: "In exceptional instances the letter [of the statute] has been departed from while the spirit of the prohibition has been observed; for example, in cases holding that, in order to maintain the jurisdiction of a federal court properly invoked, and render its judgments and decrees effectual, proceedings in a state court which would defeat or impair such jurisdiction may be enjoined." It would seem that the court recognized two wholly independent exceptions to the statute, (1) injunction after judgment, resting on the theory that no conflict, or relatively small conflict, of jurisdiction was involved, and (2) ancillary injunction, resting on necessity.

[48] 16 F.(2d) 917 (C. C. A. 8th, 1926).

[49] In Kline v. Burke Construction Co., 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226, (1922), an ancillary injunction before judgment was refused, but the decision was put on other grounds, without any hint of the rule of the Essanay case.

[50] 260 U. S. 226, 229, 43 Sup. Ct. 79, 67 L.ed. 226 (1922).

and the exception regarding ancillary injunctions, Mr. Justice Sutherland said:

> "Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached."

He then turned to a discussion of general principles of comity, citing twenty decisions of the Supreme Court and lower federal courts, few of which were concerned with the statute.[51] His final conclusion he put in these terms:

> "The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The wholesomeness of this decision is debatable. It may be viewed as entailing a regrettable multiplicity of suits and an unseemly race for priority of judgment.[52] On the other hand, it may be regarded as

[51] Only three of these cases referred to the statute, though three others involved federal injunction against proceedings in state courts. Ten of the cases concerned the effect of prior state suits upon subsequent federal suits.

In presenting this analysis of the cases, we do not mean to imply that they were mis-cited. The only conclusion which can be drawn is that, although Mr. Justice Sutherland opened his opinion with a reference to the statute, yet, when he came to the point of the case, the statute substantially fell out of view and traditional principles of comity governed. That being so, it would seem that the same result would have been reached without the statute.

[52] A note in 36 HARV. L. REV. 461 (1922) suggests, guardedly, the objection. It was assumed in the Kline case that the judgment first procured in either of the two suits would conclude the parties in the other suit. See 260 U. S. 226, 230. In Grubb v. Public Utilities Commission, 281 U. S. 470, 50 Sup. Ct. 374, 74 L. ed. 972 (1930), an order of the Utilities Commission was appealed to the supreme court of the state after commencement of the federal suit to enjoin enforcement of the order. When the order was affirmed by the state court this was held to conclude the parties in the federal suit. As the state court denied Grubb's claims under the Constitution of the United States, its judgment could have been taken by appeal to the Supreme Court, but there was no basis for such procedure in the Kline case.

Holding the state judgment conclusive seems inconsistent with the rule of the Simon and Essanay cases, which relieve *after* judgment but not *before*. That rule applies, however, to cases where the judgment is void for want of jurisdiction or

a wise act of self-restraint in the exercise of federal jurisdiction.[53] It is, of course, free from the objection of dilatoriness to which the *Essanay* case is subject. It classifies cases vertically, as within or without the statute at all stages of the progress of the state proceeding.[54]

It is of the very nature of the ruling in the *Kline* case that it applies only to ancillary injunctions. No other case could possibly satisfy the principle invoked. But what precisely is the rule pronounced? The terms *in rem* and *in personam* are somewhat slippery.[55] Furthermore, we are not told explicitly whether injunction is improper merely where both suits are *in personam* (as they were in the *Kline* case), or, more broadly, where either suit is *in personam*. We are not, however, wholly without light upon these questions. The passage which we first quoted from the opinion suggests that the ancillary injunction is to be limited to cases where it is necessary to prevent state courts from defeating or impairing the federal court's control of a *res*. Later, Mr. Justice Sutherland quoted from an opinion[56] which said: "When one [court] takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty." Mr. Justice Sutherland added, "The same rule applies where a person is in custody under the authority of the court of another jurisdiction. But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending." Further, he quoted:[57] "The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies

impeachable on principles of equity. In the Kline and Grubb cases there was nothing wrong with the state suit except that a prior suit was pending in the federal court. If it had been held in the Essanay case that injunction could issue before judgment, we would have complete contrast and logical symmetry between the two types of case, the one subject to relief at all stages, the other at none.

[53] Mr. Warren's article, although it does not discuss the Kline case, voices general approval of restriction upon federal jurisdiction. See especially the opening and closing passages.

[54] But see Julian v. Central Trust Co., hereinafter discussed.

[55] See Cook, "Powers of Courts of Equity," 15 COL. L. REV. 37, 106, 228 1915); Carey, "Jurisdiction over Decedent's Estates," 24 ILL. L. REV. 44, 170.

[56] Opinion of Mr. Justice Matthews, in Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. ed. 390 (1884).

[57] Opinion of Judge Jenkins, in B. & O. R. Co. v. Wabash R. Co. (C. C. A. 7th, 1902) 119 Fed. 678, 680.

as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature."

With more discussion of the same sort, it becomes clear that the major premise of the decision, the legal theory on which it rests, is that ancillary injunction is not justified except in cases where the control (not necessarily possession) of the federal court over specific things or persons is at stake. That is not, of course, adequately summarized in the final passage of the opinion which speaks only of "actions *in rem*" and "actions *in personam*, involving a question of personal liability only." For example, if an ordinary personal action in a state court results in a money judgment, and the sheriff attempts to levy process upon things in the custody of the federal court, we conceive that this makes as good a case for injunction as if the proceeding in the state court were an "action *in rem*." [58] We take it, then, that the concluding passage in the opinion is not to be understood as a statement of the law, but as an application of the law to the facts of the case. It will be remembered that the case was that of two suits seeking compensation for breach of contract, neither of which had reached judgment. It fell so clearly within the principle expressed in the opinion that nice formulation of the law was unnecessary.

What, then, is the law? We do not believe it possible to summarize it in any mechanical formula. Generalization must turn on the word "necessity," which figured so largely in Mr. Justice Sutherland's opinion, and that word must be distinctly understood as a relative term. For further light one must look at the many cases of ancillary injunction decided by the Supreme Court, none of which, presumably, were overruled by the *Kline* case, and even turn to decisions of the lower courts.

In *Julian v. Central Trust Co.* (1904),[59] on original bill in the federal court, a railway mortgage was foreclosed and the property sold, the court retaining jurisdiction to determine all claims against the property. Money judgments against the mortgagor were recovered in the state court, and process levied upon the property sold in foreclosure. The sale of this property by the sheriff was enjoined. The case squares with what was said in the *Kline* case about control of a *res*.[60]

[58] See Julian v. Central Trust Co., 193 U. S. 93, and Riverdale Cotton Mills v. Alabama and Georgia Mfg. Co., 198 U. S. 188, hereinafter discussed.

[59] 193 U. S. 112, 24 Sup. Ct. 399, 48 L. ed. 639.

[60] Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co., 198 U. S. 188,

It is, however, difficult to find any *res* in *Looney v. Eastern Texas Railway* (1918).[61] A temporary injunction had been issued against institution of suits to enforce Texas rate laws. In violation of this injunction the attorney general commenced such a suit. On a supplemental bill, injunction against further proceeding in this suit was granted. Was the railroad the *res*, or was the rate the *res*, or was the controversy the *res*? We are clear on only one point, that the authority of the federal court and the effectiveness of its original injunction were at stake. That was what the opinion of the court brought out.

In *Gunther v. Atlantic Coast Line R. R. Co.* (1906),[62] the final decree of a federal court had held the railroad exempt from taxation during the life of its charter, and enjoined collection of taxes. Twenty-five years later a suit was instituted for collection of such taxes. Ancillary injunction was granted against further prosecution of the suit. The property or charter of the railway might be called a *res*, but the opinion rests the decision upon the necessity of making good the court's adjudication that the railway was exempt.[63]

In all of the cases we have referred to, the original federal suit had gone to judgment, or at least an interlocutory order, before the state court proceedings were commenced. This is perhaps enough to distinguish them from the *Kline* case.[64] But this condition did not exist in *French v. Hay* (1875).[65] A state suit for accounting was removed to the federal court. While that suit was pending, state court proceedings were had upon a money decree which had been rendered before removal. Ancillary injunction issued before the hear-

25 Sup. Ct. 629, 49 L. ed. 1008 (1905), was similar, except that the state court proceeding was a suit to redeem, the bill alleging that the foreclosure proceeding in the federal court was void. Both suits were *in rem*, in the sense in which we understand Mr. Justice Sutherland to have used the term. In the latter respect, Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032 (1910), was similar to the Riverdale case, but neither suit had reached judgment at the time the injunction issued.

[61] 247 U. S. 214, 38 Sup. Ct. 460, 62 L. ed. 1084.

[62] 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. ed. 477.

[63] Compare Hickey v. Johnson (C. C. A. 8th, 1925) 9 F.(2d) 498, and Sand Springs Home v. Title Guarantee Trust Co. (C. C. A. 8th, 1926) 16 F.(2d) 917, similar cases except that the original decrees were not injunctive, so that institution of the state suits could not be said to "violate" the decrees. It was a pure matter of preserving the effect of the decrees as adjudications of the rights of the parties.

[64] In suggesting this distinction, we do not mean to appeal to the rule of the Essanay case, which seems not to apply to ancillary injunctions and, even if it did, requires judgment in the state court, not judgment in the federal court. We merely suggest a possible conception of necessity.

[65] 22 Wall. 250, 22 L. ed. 857 (1875).

ing of the original (removed) suit. The opinion we have already examined. Let him who will, search for a *res*. What stands out clearly is the fact that, if there were no way of stopping the state proceeding, it would be possible for the state court to make the federal jurisdiction in removal a mere jest. The difficulty might, of course, be met by appeal from the state courts to the federal courts, or in other ways,[66] but injunction is the cheapest and most expeditious mode of effecting the result, and can hardly be thought more humiliating to the state courts than other modes of relief. We do not suppose that *French v. Hay* and other cases of ancillary injunction based on suits removed from the state courts are overruled.[67]

With these removal cases we come very close to *Kline v. Burke Construction Co. French v. Hay* is an almost exact counterpart of that case. Yet the *French* case enjoined enforcement of a judgment rendered by the state court before the case came to the federal court, while the *Kline* case refused to enjoin the state court from proceeding to judgment in a suit which was instituted after that in the federal court although, if the state court won the race of diligence, its judgment would conclude the federal court. Why should a defendant who removes to the federal court be protected against such state action, while a plaintiff who invokes the original jurisdiction of the federal court is not? Of course, the whole scheme of removal is explicitly aimed at taking cases *out* of the hands of the state court, while the scheme of original jurisdiction is less explicit to this point. From that it follows (and perhaps this is the explanation of *French v. Hay* and *Kline v. Burke Construction Co.*) that state court interference with cases removed from the state court has more the character of a practical joke.

[66] See Mr. Warren's article (cited in note 3), at p. 369, *et seq.*

[67] Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497 (1881). A replevin suit was removed and judgment rendered for plaintiff. The state court proceeded with the action and gave judgment for defendant. An action of debt was then brought in the state court on the replevin bond. This action was enjoined. Here there was a *res*, without doubt, but the state action would not have interfered with control of the property by the federal court. It would merely have nullified its judgment, practically speaking.

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. ed. 462 (1905). A condemnation suit was removed and the state court was enjoined from proceeding with the cause. In one sense, the state court's action would interfere with the federal court's control of the property, but the nub of the matter here, as in the other cases, is that the state action might make the federal judgment fruitless.

In the Dietzsch case, the federal suit had apparently gone to judgement before

CONCLUSIONS

The most serious attempt of the Supreme Court to review its decisions and spell out their meaning was made in *Wells Fargo & Co. v. Taylor* (1920).[68] Mr. Justice VanDevanter wrote the opinion. He said of the statute:

> "The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts."

With this introduction, Mr. Justice VanDevanter proceeded to an analysis of the cases, which he marshalled in three groups.

> "The provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States, . . .[69] or prevent them from maintaining and protecting their own jurisdiction properly acquired and still subsisting, . . .[70] or prevent them from depriving a party . . . of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience."[71]

The third proposition, which alone reached the case at bar, was most fully developed. Mr. Justice Harlan's opinion in the *Marshall* case was quoted at length, including his distinction between injunction

the state proceeding on the bond was instituted, in which respect the case resembles some of those previously examined. That is not, however, true of the Madisonville case. And see dicta in Chesapeake & Ohio R. Co. v. McCabe, 213 U. S. 207, 217, 219, 29 Sup. Ct. 430, 53 L. ed. 765 (1909), supporting French v. Hay. The case came to the Supreme Court by appeal from the state court proceeding.

[68] 254 U. S. 175, 41 Sup. Ct. 93, 65 L. ed. 205.

[69] Here the court cited cases of injunction against future institution by public officers of suits to enforce regulatory statutes or commission orders. See note 45, supra.

[70] Here the court cited several cases of ancillary injunction.

[71] Here were cited Marshall v. Holmes, and Simon v. Southern Railway, previously discussed in this paper, and other cases.

to the court and injunction to the parties. Then came what had obviously been impending since the decision in *French v. Hay*, forty-five years earlier. Mr. Justice VanDevanter quoted a statement of Judge Sanborn, in the circuit court of appeals:[72]

> "The Circuit Courts of the United States have the *same* jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a *state* court, which has been procured by fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a *federal* court." (Our italics).

If the apparently limiting terms, "fraud, accident or mistake," are not sufficiently expansible to cover all cases within the traditional principles of equity, they may be disregarded, because the case is cited by Mr. Justice VanDevanter for his broad assertion in terms of the "principles of equity and the standards of good conscience." Here we seemed to have a clear statement from the Supreme Court that the statute meant nothing, except that it might preclude injunction to stay proceedings in a state court prior to judgment.

But, on the heels of this decision, came the *Essanay* case and the *Kline* case, and these were significant beyond the precise points they decided, for they may be regarded as exhibiting a new attitude toward the whole problem. In both cases the court urged, and so revivified, the principle of comity. And, in the *Essanay* case, Mr. Justice Pitney made two important remarks about the statute. He said, "That section would be of little force did it not apply to cases where, save for its prohibition, good ground would exist for enjoining the prosecution of a pending suit." This was implicit in some of the earlier cases, but never before, we believe, had it been said. Then the learned justice observed that "since 1793, the prohibition of the use of injunction from a federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld." Regarded as history, this statement is extravagant, but it may be viewed as a prophesy which the court intends to make good. If the codifications of 1911 and 1926 can be said to constitute an adoption by Congress

[72] National Surety Co. v. State Bank of Humboldt, 120 Fed. 593 (1903). Complainant sought injunction against a judgment based on constructive service on a state officer. It was assumed *arguendo* that the state court had jurisdiction but, no actual notice having reached the surety company, it was held to be entitled to equitable relief because of "accident."

of previous judicial interpretations of the statute,[73] the court can not now turn back to the letter of the statute without contemning Congress as much as it did in any of the decisions of the preceding epoch. But there is the alternative road of comity. The statute does not *demand* injunction in any case.

This paper is a study of the life of the Act of 1793, rather than an attempt to analyze the whole problem of federal injunctions against state suits. It is therefore appropriate that we should pose the question — Does the statute have any effect upon our practice today? The last half century has produced plenty of cases in which the statute was invoked and injunction denied. But would a different result have been reached if there had been no statute? [74] That question is impossible of positive answer, since it turns on merely hypothetical conditions. It can not be tested by reference to the practice in interstate and international cases, because the relations between the courts of coordinate sovereigns are not the same as those between federal courts and state courts. Neither can we test it by the practice with respect to state injunctions against federal suits, for, though it has sometimes been said that comity between state and federal courts is reciprocal, this is not true in more than a limited sense. Nor can we get much light from the federal decisions. The practice of those courts in respect to injunction to suits in other federal courts is only remotely analogous, and, with respect to injunction to proceedings in state courts, the federal courts have operated under the statute continuously, since the first meager years. We venture, however, the wild surmise that, if Congress should repeal the statute and so furnish us a laboratory for comparative study of the practice with and without that legislation, we would find that, except for the prohibition, in some cases, of injunction before judgment, the statute has long been dead.

[73] See Sessions v. Romadka, 145 U. S. 29, 42 (1892), dealing with the Revised Statutes of 1874.

[74] See Haines v. Carpenter, 91 U. S. 254, 23 L. ed. 345 (1876); Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644 (1878); Sargent v. Helton, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. ed. 412 (1885); United States v. Parkhurst-Davis Co., 176 U. S. 317, 20 Sup. Ct. 423, 44 L. ed. 485 (1900); Hull v. Burr, 234 U. S. 712, 34 Sup. Ct. 892, 58 L. ed. 1557 (1914). In some of these cases the language of the court would suggest that there are no exceptions whatever to the letter of the statute. We believe, however, that none of them would have been differently decided in the absence of the statute. In this connection it should be remembered that the authorities relied on in the Kline case were chiefly decisions which did not rest upon the statute.

It is worth observing that in Watson v. Jones, 13 Wall. 679, 20 L. ed. 666 (1872), where the majority of the court held that the statute was *not* a bar to the injunction (see note 18, supra), two justices, dissenting, thought the injunction was inconsistent with the traditional principles of comity, citing miscellaneous cases but not referring to the statute.