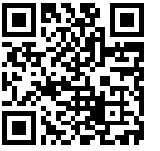

A BRIEF SURVEY

OF THE

# JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES

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SECOND EDITION



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# PREFACE TO SECOND EDITION

LEGISLATION since 1914 (particularly the act of September 6, 1916) has so changed the jurisdiction of the Supreme Court, that no statement of 1914 approximates accuracy in 1920. This edition attempts to state the latest statutes and decisions, and so bring the subject down to date.

C. W. B.

ST. PAUL, Dec. 1, 1920.

# PREFACE TO FIRST EDITION

LECTURES at the Law School of the University of Minnesota, designed to present a brief view of essentials, ignoring refinements, and to an extent exceptions, are printed in this book. It is not a complete statement or discussion, nor does it attempt to refer to all the cases. Its excuse is that perhaps absence of detail and elaboration may help to present a clearer outline and view of the subject as a whole and of its more essential parts.

C. W. B.

ST. PAUL, Jan. 6, 1914.

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# THE JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES

## CHAPTER I

### THE JUDICIAL POWER

The first section of the third article of the Constitution of the United States provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

By this language the Constitution establishes "one Supreme Court," but leaves it for Congress to ordain and establish from

time to time such inferior courts as it may think proper. Consequently Congress cannot abolish the one Supreme Court.

Congress under this power has established a District Court and a Circuit Court (now abolished) of the United States, and on March 3, 1891, it established a new court called the Circuit Court of Appeals. These courts rank in the following order, commencing at the lowest: District Court, Circuit Court of Appeals, Supreme Court.

The Supreme Court sits at Washington. It consists now of nine judges, though originally of six; and it holds one session each year, commencing on the second Monday of October, usually ending about the first of May. Congress has divided the United States into nine circuits, in each of which Circuit Courts, until January 1, 1912, were held in various places as provided by the acts of Congress. And by similar acts the country is divided into smaller divisions, called districts, for each of which a District Court is established. The Circuit Court of Ap-

peals is a separate court in each circuit, holding sessions as stated in section 126 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1132 [U. S. Comp. St. § 1118]) and at such other times and places as the judges of that court determine. Minnesota is in the Eighth Circuit, and the Circuit Court of Appeals holds each year one term at St. Louis, one at St. Paul and one at Denver or Cheyenne.

The jurisdiction of all these courts is limited by the Constitution. Congress can confer no power or authority on any of them beyond that enumerated in the second section of the third article of the Constitution, which reads:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizen of another state, between citizens of different states,

between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

In defining the judicial power of the United States Courts, the Constitution says it "shall extend to all cases, in law and equity." This language has been decided to refer to the known division in English jurisprudence between common law and equity law; and this distinction is preserved throughout the practice and proceedings of the United States Courts. It is of no moment in those courts that some of the states have abolished the distinction. The states can pass no laws which affect either the jurisdiction or the practice of the courts of the United States. *Sheffield Furnace Co. v. Witherow,* 149 U. S. 574, 579, 13 Sup. Ct. 936, 37 L. Ed. 853. State laws may be adopted by Congress or by the United States Courts as rules of decision, and in actions at common law Congress and the United States Courts have adopted to a certain extent the practice and rules of

decision in the several states. Rev. Stat. § 721 (U. S. Comp. St. § 1538). But the equity jurisdiction of the courts of the United States is vested in them by this language of the Constitution and is the jurisdiction of the English Court of Chancery substantially as it existed when the Constitution was adopted. The practice in equity in the federal courts is uniform throughout the United States, and these courts administer the same system of equity through the whole country. The law of no state affects the jurisdiction or practice of the federal courts in equity cases.

The Constitution next defines the cases that may be brought in the federal courts. First are named those "arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Any case which depends in whole or in part on the construction and effect to be given to the Constitution of the United States, or a law of Congress, or a treaty, comes under this language

and therefore under the judicial power of the United States Courts and under the jurisdiction which has been or may be conferred upon them. Next are named all cases affecting ambassadors, other public ministers and consuls, and then admiralty and maritime cases, "all controversies to which the United States shall be a party," and "controversies between two or more states."

The next clause, "between a state and citizens of another state," gave rise to an amendment of the Constitution of the United States. Soon after the Constitution was adopted a citizen of Massachusetts sued the state of Rhode Island in the federal courts. It was held in *Chisholm v. State of Georgia,* 2 Dall. 419, 1 L. Ed. 440, that the right to sue a state in the federal courts was given by the Constitution and this interpretation became a subject of great complaint among the states, which resulted in the Eleventh Amendment of the Constitution, providing:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The Eleventh Amendment exempts the several states from liability to suit in the United States Courts by a citizen of another state or an alien. But a foreign sovereign or state, for instance, the King of England, probably may sue in the federal courts one of the United States as one state of this country may sue another. And a state, though exempt from being sued, is capable of suing citizens of other states.

Suits between citizens of different states, between citizens of the same state claiming lands under grants of different states, and suits between a state or the citizens thereof and foreign states, citizens or subjects, are next enumerated and are within the constitutional grant of power to the courts of the United States and within the jurisdiction actually conferred or which lawfully may be conferred on those courts.

# CHAPTER II

## THE SUPREME COURT

Original Jurisdiction.
Appellate Jurisdiction.
(a) Over State Courts.
(b) Over Inferior Federal Courts.

### Original Jurisdiction

The next paragraph of the Constitution says:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

By this language the Supreme Court has original jurisdiction vested in it by the Constitution (which Congress cannot take away) of all cases affecting ambassadors, public ministers and consuls, and of all cases in which a state is a party. That is,

such suits may be begun in the Supreme Court. In all other cases its jurisdiction is appellate, that is, revisory of some inferior court; and the appellate jurisdiction is such as Congress shall confer, that is, Congress in its discretion may make the judgment of inferior courts final.

With respect to the original jurisdiction of the Supreme Court, it was decided at an early date (*Marbury v. Madison,* 1 Cranch, 137, 2 L. Ed. 60) that the affirmative grant of certain original jurisdiction implied a negative, and that Congress could not confer on the court any other original jurisdiction. It has been held also that the original jurisdiction is not exclusive; that is, while Congress cannot take away any of the original jurisdiction, that it *may* grant to other courts concurrent jurisdiction. For instance, the District Court may be given concurrent original jurisdiction of cases affecting ambassadors. *Bors v. Preston,* 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419.

In determining what cases fall within the language "cases in which a state shall be a

party" it is not sufficient that a state is interested in the suit or even exclusively interested. It must be a party on the record. *Bank of the United States v. Planters' Bank,* 9 Wheat. 904, 6 L. Ed. 244. The judicial power extending "to controversies between two or more states" and the grant of original jurisdiction to the Supreme Court including all cases in which a state is a party, one state may sue another in the Supreme Court. There have been several cases of this sort. *Iowa v. Illinois,* 151 U. S. 238, 14 Sup. Ct. 333, 38 L. Ed. 145, involved a question of boundary. In *Missouri v. Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497, the original jurisdiction was sustained of a suit brought by the state of Missouri to restrain pollution of the waters of the Mississippi by the Chicago drainage canal, built under authority of the state of Illinois. *Kansas v. Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, was a suit by Kansas to restrain diversion in Colorado under its authority of the waters of the Arkansas river which flow-

ed through both states. In *South Dakota v. North Carolina,* 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448, an original suit was sustained to recover upon bonds made by the state of North Carolina.

A state may sue in the Supreme Court a citizen of another state. Among such suits are *State of Texas v. White,* 7 Wall. 700, 19 L. Ed. 227, *State of Washington v. Northern Securities Co.,* 185 U. S. 254, 22 Sup. Ct. 623, 46 L. Ed. 897, and *State of Wisconsin v. Pelican Ins. Co.,* 127 U. S. 290, 8 Sup. Ct. 1370, 32 L. Ed. 239. The United States also may sue a state in the Supreme Court. *United States v. Texas,* 143 U. S. 621, 12 Sup. Ct. 488, 36 L. Ed. 285. As to when a suit is against a state because officers of the state are joined compare *Osborn v. Bank,* 9 Wheat. 738, 6 L. Ed. 204, *Bank of U. S. v. Planters' Bank,* 9 Wheat. 904, 6 L. Ed. 244, and *Ex parte Young,* 209 U. S. 123, 149, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

With respect to the practice of the Su-

preme Court under its original jurisdiction, there is no act of Congress on the subject. The Supreme Court passed the following rule:

"This Court considers the former practice of the Courts of King's Bench and of Chancery in England as affording outlines for the practice of this Court; and will, from time to time, make such alterations therein as circumstances may render necessary."

Generally speaking, the practice under the original jurisdiction is that the right to commence suit must be obtained on special motion to the court. *State of Georgia v. Grant,* 6 Wall. 241, 18 L. Ed. 848. Every step in the case proceeds upon special motion and special leave first obtained. The clerk keeps a separate docket of such cases, called the original docket, and all proceedings in cases on that docket are on special motion. No original case is heard unless the court makes a special order to have it heard and sets it down for a particular day; and every step in such a case is by leave under special order

first obtained on motion to the court. See *Washington v. Northern Securities Co., supra.* In a suit against a state process in the Supreme Court is served on the Governor and Attorney General of such state. Supreme Court rule 5 (32 Sup. Ct. v).

## Appellate Jurisdiction

Appellate jurisdiction is the power to review and revise the judgments of other courts. That of the Supreme Court is divided into two branches, the power to review judgments of state courts, and the power to review judgments of inferior federal courts.

### (a) *Over State Courts*

The Constitution of the United States nowhere in express terms gives the Supreme Court the power to review judgments of state courts. At an early day all such power was denied by some of the state courts, especially by the Supreme Court of Virginia. But the Supreme Court of the United States in *Martin v. Hunter,* 1 Wheat. 304, 4 L. Ed.

97, and in *Cohens v. State of Virginia,* 6 Wheat. 264, 5 L. Ed. 257, held the power to exist. This result was finally acquiesced in by the whole country and is one of the many instances proving the commanding influence of Chief Justice Marshall and his associates. The power is an implied one, resting on the second clause of the sixth article of the Constitution, providing that the Constitution of the United States and the laws of Congress made under its authority shall be the supreme law of the land.

Congress in the twenty-fifth section of the Judiciary Act, passed in 1789 (chapter 20, 1 Stat. 85), provided for the exercise of appellate jurisdiction over the judgments of state courts. This section read:

"A final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treat-

ies or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." Rev. Stat. § 709 (U. S. Comp. St. 1901, p. 575).

The section quoted from the Judiciary Act of 1789 was re-enacted in substance in section 237 of the Judicial Code (U. S. Comp. St. Supp. 1911, p. 227). It requires that the judgment of the state court must have been *against* some right set up under the Constitution of the United States, or a treaty, or an act of Congress. If the decision of the state court erroneously sustained that right, there was no review in the Supreme Court of the United States. *Murdock v. Memphis,* 20 Wall. 590, 626, 22 L. Ed. 429.

But this section was amended December 23, 1914 (Comp. St. § 1214), by adding a

provision making it competent for the Supreme Court to require, by certiorari or otherwise, a case to be certified to the Supreme Court with the same authority as in case of writ of error, although the decision of the state court may have been *in favor* of the validity of the treaty, or statute, or authority exercised under the United States, or against the validity of the state statute or authority claimed to be repugnant to the Constitution, treaty, or law of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States. The result of this amendment is that the Supreme Court of the United States has a discretion to review by certiorari the judgment of a state court which sustains the federal right asserted.

The same section was more extensively amended by the act of September 6, 1916, 39 Stat. 726 (Comp. St. § 1214), which struck out the third clause reading:

"Or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission."

This amendment is a very important one. It involves a fundamental change, the extent of which it is difficult to define, in a jurisdiction which had existed from the foundation of the court up to 1916, and which was quite well defined by precedents.

The result of the amendment is that where is drawn in question in a state court the *validity* of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity or where is drawn in question the *validity* of a statute of, or an authority exercised under, any state as being repugnant to the Constitution, treaty, or law of the United States, and the decision is in favor of their validity, the final judgment of the highest court of the state may be reviewed on writ of error. But where the judgment of the state court only passes on some title, right, privilege, or

exemption claimed under the Constitution, treaty, or statute of the United States without involving the *validity* of a treaty, or statute, or *authority,* there is no writ of error. *Ireland v. Woods,* 246 U. S. 323, 38 Sup. Ct. 319, 62 L. Ed. 745. The line between cases reviewable by writ of error and those not so reviewable is difficult to lay down exactly, and apparently will have to be marked out by decisions of the court. It is clear that cases not really involving the *validity* of some law or authority, but involving the contention only that some action taken under the supposed authority of law has the effect to take property without due process, are not reviewable by writ of error. *Philadelphia & Reading Coal & Iron Co. v. Gilbert,* 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. 221; *Ireland v. Woods,* 246 U. S. 323, 38 Sup. Ct. 319, 62 L. Ed. 745; *Stadelman v. Miner,* 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed. 875; *Northern Pacific Ry. Co. v. Solum,* 247 U. S. 477, 481, 38 Sup. Ct. 550, 62 L. Ed. 1221; *Dana v. Dana,* 250 U. S. 220, 39 Sup. Ct. 449, 63 L. Ed. 947.

The act of September 6, 1916, while di-

minishing the Supreme Court's jurisdiction by writ of error, enlarges importantly its jurisdiction by certiorari. It makes it competent for the court to review by certiorari final judgments of state courts (a) in favor of the validity of a treaty, or statute of, or authority exercised under, the United States; (b) against the validity of a statute of, or an authority exercised under, a state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; (c) or where a title, right, privilege, or immunity is claimed under the Constitution, or treaty, or statute of, or commission held or authority exercised under, the United States and the decision is either in favor of or against the title, right, privilege, or immunity so claimed.

Not all judgments of state courts can be carried to the United States Supreme Court. The Supreme Court may revise only those judgments described in the act of Congress, because its appellate jurisdiction is such as Congress may confer. The act of Congress requires, first, that the judgment of the state court shall be "a final judgment" of the

highest court of the state. This excludes orders and interlocutory judgments, which therefore cannot be reviewed except upon writ of error from final judgment. The language also requires the judgment to be of the highest court of the state to which the case can be carried. *Houston v. Moore,* 3 Wheat. 433, 4 L. Ed. 428; *Miller v. Joseph,* 17 Wall. 655, 21 L. Ed. 741; *Gelston v. Hoyt,* 3 Wheat. 246, 4 L. Ed. 381; *Kanouse v. Martin,* 15 How. 198, 14 L. Ed. 660.

It will be noticed that the right is given to review judgments of state courts in criminal as well as civil cases, both irrespective of the amount in controversy (*Twitchell v. Pennsylvania,* 7 Wall. 321, 19 L. Ed. 223); also that cases from the state courts cannot go up to the Supreme Court of the United States because of the citizenship of the parties, but only by reason of their being in the case a question of one of the kinds falling within the language of the act.

It should be made to appear *in the record of the case* that one of the questions described by the act was actually involved

and was decided by the state court. The *record* means, in law cases, the pleadings, judgment and bill of exceptions, if any; in equity cases, the pleadings, decree, orders and all the evidence. The record does not include the briefs or arguments of counsel, or evidence in law cases not preserved in a bill of exceptions. And unless the record shows a question involved and decided such as is defined by the section, which questions for brevity are called "federal questions," the writ of error will be dismissed. *Harding v. Illinois,* 196 U. S. 78, 25 Sup. Ct. 176, 49 L. Ed. 394. See *Atlantic Coast Line v. Mims,* 242 U. S. 532, 535, 37 Sup. Ct. 188, 61 L. Ed. 476; *Gasquet v. Lapeyre,* 242 U. S. 367, 371, 37 Sup. Ct. 165, 61 L. Ed. 367; *Hartford Life Ins. Co. v. Johnson,* 249 U. S. 490, 39 Sup. Ct. 336, 63 L. Ed. 722.

How should the record be made to show such a federal question? To clarify the answer let us illustrate. The Constitution says no state shall pass any law impairing the obligation of a contract. Suppose suit is brought in a state court on a contract, and

the defendant relies on some state law which in effect does away with the contract or injuriously modifies it. If the action is at law there would be a trial by jury in the state court. Plaintiff should request the judge to charge the jury to disregard the state statute, because it impairs the contract and is void under the Constitution of the United States. Should the judge differ, he will refuse so to instruct and will hold the state statute good. To this ruling an exception should be taken and incorporated in a bill of exceptions signed by the judge. This makes the point a part of the record, and if plaintiff is finally defeated in the state court of last resort, he may then take this federal question to the United States Supreme Court on writ of error. In an equity suit, on the other hand, if the complainant has such a question, he should present it by proper averments in his bill. If the defendant intends to raise such a question, he should do it in his answer.

However, it is not absolutely necessary to have the federal question thus explicitly stat-

ed in the record, provided the court can see by reading the record that the question was necessarily involved and must have been decided. *Furman v. Nichol,* 8 Wall. 44, 19 L. Ed. 370; *Citizens' Bank v. Board of Liquidation,* 98 U. S. 140, 25 L. Ed. 114; *Roby v. Colehour,* 146 U. S. 153, 13 Sup. Ct. 47, 36 L. Ed. 922. But careful practice dictates that the federal question be stated in some way expressly in the record. *Harding v. Illinois,* 196 U. S. 78, 25 Sup. Ct. 176, 49 L. Ed. 394.

Cases frequently occur involving several questions, each one of them disposing of the case, one a federal question, the others questions purely of state law. Suppose the state court decides the federal question wrong, but also decides a question of state law in such a way as to end the case, no matter how the federal question is decided. In such cases obviously the United States Supreme Court will not take jurisdiction, because the decision of the federal question is immaterial. *Neilson v. Lagow,* 12 How. 98, 13 L.

Ed. 909; *Magwire v. Tyler,* 8 Wall. 652, 19 L. Ed. 320; *Klinger v. Missouri,* 13 Wall. 257, 20 L. Ed. 635; *Johnson v. Risk,* 137 U. S. 300, 307, 11 Sup. Ct. 111, 34 L. Ed. 683; *Hale v. Akers,* 132 U. S. 554, 565, 10 Sup. Ct. 171, 33 L. Ed. 442; *Municipal Securities Corp. v. Kansas City,* 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579.

It is now settled that the Supreme Court upon such writs of error will consider *only* the federal question. So that the present rule may be thus stated; if the case contains a non-federal question sufficiently broad to sustain the judgment below, *however the federal question is decided,* the Supreme Court will affirm without considering the federal question; but if it be found that the federal question controls the whole case, or that the state court has not decided any other matter sufficient of itself to sustain the judgment, then, if the federal question was decided rightly, the Supreme Court affirms; if wrongly, the Supreme Court reverses. *Anderson v. Carkins,* 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272; *Hammond v. John-*

*ston,* 142 U. S. 73, 12 Sup. Ct. 141, 35 L. Ed. 941; *Henderson Bridge Co. v. Henderson City,* 141 U. S. 679, 12 Sup. Ct. 114, 35 L. Ed. 900; *Enterprise Irrigation Dist. v. Farmers' Mut. Canal Co.,* 243 U. S. 157, 37 Sup. Ct. 318, 61 L. Ed. 644.

Observe that all cases from the state courts, even equity cases, go up by writ of error; there are no appeals.

The requirements of practice in writs of error from the state courts to the Supreme Court of the United States are simple and brief. The writ of error must be allowed, either by the presiding judge of the state court which made the decision to be taken up, or by some justice of the Supreme Court of the United States. *Gleason v. Florida,* 9 Wall. 779, 19 L. Ed. 730. The writ of error, after being allowed, is issued, either by the clerk of the Supreme Court at Washington, or by a clerk of the District Court of the United States in the district where the decision of the state court was made. For example, a writ of error to the Supreme Court of Minnesota can be issued by the clerk of the Supreme Court of the United States, or by

the clerk of the District Court of the United States for the District of Minnesota. The original writ of error is lodged with the clerk of the state court in which the judgment is rendered, and he returns that original writ, with a certified copy of the judgment and record in the state court, to the Supreme Court at Washington. The statutes of the United States provide what bonds shall be given and what notice shall be given to the opposing party. If a supersedeas—that is, a stay of execution—is desired pending the writ of error, adequate security must be given for performance of the judgment, if affirmed. But no supersedeas can be allowed unless the writ of error is sued out within sixty days. The statute requires that the defendant in error have thirty days' notice, that is, thirty days after service of the citation, before any hearing can be had in the Supreme Court. Rules 8 and 9 of the Supreme Court (32 Sup. Ct. vi, vii) make the writ of error returnable in thirty days, except when directed to certain of the far Western states, in which cases it is made returnable in sixty days. Rev. Stat. § 997 (U.

S. Comp. St. § 1653), requires that an assignment of errors shall be returned with the writ, and by rule of court No. 21 (32 Sup. Ct. x) errors not assigned will not be considered, except at the option of the court.

Certiorari is a writ issued by the Supreme Court, directed to the inferior court, and is obtained by special motion based on the record.

Section 6 of the act of September 6, 1916 (Comp. St. § 1228a), limits, to three months after entry of the judgment or decree complained of, the time within which writ of error, appeal, or certiorari shall be allowed to bring any case for review to the Supreme Court. This is a general provision applicable to writs of error and certiorari, whether to state courts or inferior federal courts. *Rust Land & Lumber Co. v. Jackson,* 250 U. S. 71, 76, 39 Sup. Ct. 424, 63 L. Ed. 850.

### (b) *Over Inferior Federal Courts*

Next as to the appellate jurisdiction of the Supreme Court in cases determined in the inferior courts of the United States. This jurisdiction has been extensively modified by the act of March 3, 1891, creating the Cir-

cuit Court of Appeals, and further modified by the Judicial Code (Act March 3, 1911, effective January 1, 1912). I think it therefore inadvisable to enter upon any explanation of such jurisdiction as it stood from 1789 down to January 1, 1912, and shall try to state the present jurisdiction of the court.

Appeals and writs of error may be taken from the District Court *direct* to the Supreme Court in the following cases: First, in any case in which the jurisdiction of the lower court is in issue; in such cases the question of jurisdiction alone is taken to the Supreme Court. Under this it will be seen at once that the whole case does not go up. The question of jurisdiction alone is certified to the Supreme Court, and its decision is then certified back to the District Court for further proceedings in conformity with the opinion. Second, from final sentences and decrees in prize causes. Third, in any case which involves the construction or application of the Constitution of the United States. Fourth, in any case in which the constitutionality of any law of the United States or

the validity or construction of any treaty made under its authority is drawn in question. Fifth, in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Section 238, Judicial Code (U. S. Comp. St. § 1215). The third, fourth and fifth subdivisions exclude cases involving merely the effect of an act of Congress, which consequently do not go *direct* to the Supreme Court.

Direct appeals from the District Court to the Supreme Court are authorized by three other acts of Congress: (a) By the act of Congress of February 11, 1903 (32 Stat. 823, c. 544 [U. S. Comp. St. §§ 8824, 8825]), called the "Expedition Act," an appeal from final decree in cases coming under that act lies to the Supreme Court only and must be taken within 60 days. (b) By section 266, Judicial Code,[1] interlocutory orders either granting or denying an injunction suspending or restraining the enforcement, operation or execution of any statute of a state on the ground of the unconstitu-

[1] U. S. Comp. St. § 1243.

tionality of such statute, are appealable direct to the Supreme Court. *Pullman Company v. Croom, Comptroller,* 231 U. S. 571, 34 Sup. Ct. 182, 58 L. Ed. 375. Doubtless appeals from final judgments in such cases fall under section 238, Judicial Code. (c) By the act of October 22, 1913 (38 Stat. 219), which contains a provision abolishing the Commerce Court, a direct appeal to the Supreme Court is provided, if taken within 30 days, from an order granting or denying an interlocutory injunction in suits brought to restrain the enforcement, operation or execution of, or to set aside in whole or in part, any order of the Interstate Commerce Commission. The same act provides an appeal from final decree in such suits from the District Court direct to the Supreme Court, which appeal must be taken within 60 days.

All judgments of the District Courts, except those appealable direct to the Supreme Court, are appealable to the Circuit Court of Appeals; this without regard to the amount in controversy. Section 128, Judicial Code (U. S. Comp. St. Supp. 1911, p. 193).

The act, it will be noted, provides for *appeals* as well as writs of error, whereas the judgments of state courts are reviewed by writ of error only. The difference is important. A writ of error takes up only law questions, while an appeal carries up the whole case, evidence and all. In equity and admiralty cases therefore (for these go up by appeal) the facts as well as the law are reviewed by the Supreme Court. *Dower v. Richards,* 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305.

Under subdivision 1 of section 238 of the Judicial Code (U. S. Comp. St. § 1215) the question of jurisdiction referred to is the jurisdiction of the court as a *federal* court, not the jurisdiction of the District Court as a court of equity. *Smith v. McKay,* 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; *Louisville Trust Co. v. Knott,* 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159.

Two appeals or writs of error, one to the Supreme Court under subdivision 1, the other to take the whole case to the Circuit Court

of Appeals, cannot be prosecuted at the same time. See *United States v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861; *Boise Artesian Water Co. v. Boise City* (June 16, 1913), 230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. 1400.

Under the fourth, fifth and sixth subdivisions of section 238 the constitutional question to justify direct appeal must be a real and controlling one, necessarily involved in the case. It is not enough that the case *may* perhaps involve a constitutional question, and the question cannot be one merely colorably suggested to give the court jurisdiction of the appeal or writ of error. *Sawyer v. Piper*, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757; *Ansbro v. United States*, 159 U. S. 695, 697, 16 Sup. Ct. 187, 40 L. Ed. 310; *Lampasas v. Bell*, 180 U. S. 276, 282, 21 Sup. Ct. 368, 45 L. Ed. 527; *Sugarman v. United States*, 249 U. S. 182, and cases cited on page 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

Section 128 as amended by Act Jan. 28, 1915 (U. S. Comp. St. § 1120), provides that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction of the District Court is dependent entirely on opposite parties being aliens or citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, under the criminal laws and in admiralty cases. But in all cases it is provided that the Circuit Court of Appeals may certify any question or proposition of law, concerning which it desires instruction, to the Supreme Court for its decision; and also that the Supreme Court on special application may order any case in which the judgment of the Circuit Court of Appeals is final certified to it from the Circuit Court of Appeals (sections 239, 240, Judicial Code).[1] In all cases in which the judgment of the Circuit Court of Appeals is not made final, as above stated, sec-

[1] U. S. Comp. St. §§ 1216, 1217.

tion 210 of the Judicial Code [2] gives an appeal or writ of error from the Circuit Court of Appeals to the Supreme Court of the United States where the matter in controversy exceeds one thousand dollars besides costs.

The cases which are appealable from the Circuit Court of Appeals to the Supreme Court are those where the jurisdiction of the District Court rests wholly or *partly* on subject-matter. *Southern Pac. R. Co. v. Stewart,* 245 U. S. 359, 363, 38 Sup. Ct. 130, 62 L. Ed. 345. The point here is not what kind of a question is really involved, but what was the ground of jurisdiction of the District Court. If that rested on subject-matter, *i. e.,* a federal question (it need not be a constitutional question), there is a right to take the case ultimately to the Supreme Court, *i. e.,* the judgment of the Circuit Court of Appeals is not final. *Northern Pacific Ry. Co. v. Soderberg,* 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; *Christianson v.*

[2] U. S. Comp. St. § 999.

*King County*, 239 U. S. 356, 36 Sup. Ct. 114, 60 L. Ed. 327. Generally speaking, cases in which the jurisdiction of the District Court rested wholly or partly on the meaning or effect of an act of Congress, or on the meaning or effect of the federal Constitution or of a treaty, may be taken from the Circuit Court of Appeals to the Supreme Court; but from such cases the act excepts those arising under the patent laws, trade-mark laws, copyright laws, revenue laws, criminal laws and admiralty cases, which therefore terminate in the Circuit Court of Appeals unless certified.

Appealability from the Circuit Court of Appeals to the Supreme Court depends wholly on the ground of jurisdiction of the District Court and in no respect depends on the question or questions involved in the case or necessary to pass on in order to dispose of it. *Southern Pacific Co. v. Stewart*, 245 U. S. 359, 363, 38 Sup. Ct. 130, 62 L. Ed. 345. On the other hand, it is equally clear that under section 238, governing di-

rect appeals to the Supreme Court, the ground of jurisdiction of the District Court is immaterial, the sole test being the nature of the question involved; hence the well-settled rule of *Sawyer v. Piper,* 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757, and other cases cited (p. 34) that the case must really involve a constitutional question in order to be appealable to the Supreme Court direct. Notwithstanding the language in memorandum opinion by the Chief Justice in *Raton Water Works Co. v. City of Raton,* 249 U. S. 552, 39 Sup. Ct. 384, 63 L. Ed. 768, it could hardly have been the intention of the court to say that the test of its jurisdiction of direct appeals is the ground of jurisdiction of the District Court. No doubt the language used in that opinion is explainable by the fact that a constitutional question was really involved, and the only question involved, in a decision of that case.

As to cases certified note that the Circuit Court of Appeals cannot certify the whole case. It must certify specific questions of law, which can be answered without exami-

nation of the whole case. *Columbus Watch Co. v. Robbins,* 148 U. S. 266, 13 Sup. Ct. 594, 37 L. Ed. 445; *McHenry v. Alford,* 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614; *Stratton's Independence, Limited, v. Howbert,* 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285. But the Supreme Court orders the *whole* case certified where it acts. The Supreme Court orders certified very few cases, the practice being to order up only cases of very considerable and very general importance.

The practice in regard to suing out the writ of error or taking the appeal from the inferior federal courts is similar to the practice in taking a writ of error from the state courts, and this I have already explained. But the ordinary supersedeas bond does not suspend the operation of an injunction or continue in force pending appeal an injunction dissolved or denied. *Slaughter House Cases,* 10 Wall. 273, 19 L. Ed. 915; *Leonard v. Ozark Land Co.,* 115 U. S. 466, 6 Sup. Ct. 127, 29 L. Ed. 445; *Hovey v. McDonald,* 109 U. S. 161, 3 Sup. Ct. 136, 27

L. Ed. 888; *In re Haberman Mfg. Co.,* 147 U. S. 525, 13 Sup. Ct. 527, 36 L. Ed. 266. This is the rule of the English Chancery. *Waldo v. Caley,* 16 Ves. 206; *Flower v. Lloyd,* Weekly Notes, 1877, p. 81. The court granting an appeal, either from a final decree, or an interlocutory order granting, continuing, refusing or dissolving an injunction or appointing a receiver, may make such order as to stay pending appeal and may require such terms or bonds as may be proper for securing the rights of the opposite party. Section 129, Judicial Code (U. S. Comp. St. § 1121); New Equity Rule 74 (33 Sup. Ct. xxxix).

One noticeable change in the jurisdiction of the Supreme Court results from the act creating the Circuit Court of Appeals. For many years after 1789, when the Judiciary Act was passed, civil actions could not be taken from the Circuit Court of the United States to the Supreme Court of the United States unless the amount directly in controversy in the Circuit Court exceeded two thousand dollars; and later this limitation

was raised to five thousand dollars. So that in a very large proportion of cases the judgment of the Circuit Court of the United States was final. But the act creating the Circuit Court of Appeals gives jurisdiction to the Supreme Court to review five classes of cases, expressly enumerated, by direct appeal or writ of error from the District Courts, irrespective of the amount in controversy. In other words, the jurisdiction of the Supreme Court of appeals and writs of error direct from the trial court now depends on the subject-matter of the controversy, not on the character of the parties or on the amount involved. Also there is no requirement of amount involved to appeal from the District Court to the Circuit Court of Appeals. With respect to appeals and writs of error from the Circuit Court of Appeals to the Supreme Court, the amount involved must exceed one thousand dollars besides costs, and also the case must be one in which the act does not make the judgment of the Circuit Court of Appeals final.

By the act creating the Circuit Court of Appeals the time limited for taking an appeal or writ of error to that court is six months. By section 6 of the act of September 6, 1916 (Comp. St. § 1228a), no writ of error, appeal, or certiorari to bring up any case for review by the Supreme Court shall be allowed or entertained unless applied for within three months after entry of the judgment or decree complained of. This seems to be a universal limitation applicable to every sort of proceeding for review in the Supreme Court. Except for the few cases where acts of Congress specially permit appeals from interlocutory orders (for example, orders granting or dissolving injunctions or appointing a receiver—see p. 45), all appeals and writs of error to review judgments of federal courts are confined to review of *final* judgments.

## CHAPTER III

### THE CIRCUIT COURT OF APPEALS

I have already said in stating the appellate jurisdiction of the Supreme Court all that seems necessary with respect to the jurisdiction of the Circuit Court of Appeals. The Circuit Court of Appeals has no original jurisdiction, except to enforce orders of the Federal Trade Commission (see 38 Stat. 735 [U. S. Comp. St. § 8835j]). As an appellate court it has jurisdiction to review those judgments of the District Courts specified in the act creating the court. Before this act was passed there was in each circuit of the United States a circuit judge, with the exception of the New York circuit, in which there were two circuit judges. An Associate Justice of the Supreme Court was allotted by that court to each circuit, and customarily each Justice of the Supreme Court, after adjournment of that court in April or May, attended the circuits and held

or assisted in holding the Circuit Court. The Circuit Court of Appeals Act provided for an additional circuit judge in each circuit. The Circuit Court of Appeals consists of three judges. The justice of the Supreme Court assigned to each circuit, the two circuit judges and the district judges are made competent to sit as judges in the Circuit Court of Appeals. Since the Circuit Court of Appeals Act, another act of Congress has been passed for the appointment in the Eighth Circuit of a third circuit judge, and recently by another act a fourth circuit judge has been added.[1] In this circuit the Circuit Court of Appeals, therefore, may be held by the Justice of the Supreme Court allotted to the circuit and any two circuit judges, or by three circuit judges, or by the Supreme Court Justice and two district judges, or by either of the circuit judges and two district judges, or by the Justice, a circuit and district judge, or by two circuit judges and a district judge.

[1] U. S. Comp. St. § 1109.

By section 129 of the Judicial Code (U. S. Comp. St. § 1121) an interlocutory appeal may be taken from the District Court to the Circuit Court of Appeals from an order granting, continuing, refusing or dissolving an interlocutory injunction, or from an interlocutory order or decree appointing a receiver. This appeal must be taken within thirty days and takes precedence in the appellate court. By section 128, Judicial Code, final judgments of the District Court (except those which go to the Supreme Court direct) may be taken to the Circuit Court of Appeals without limitation as to amount involved. Appeals to this court from final judgments must be taken within six months.

# CHAPTER IV

## THE DISTRICT COURTS



The Judiciary Act of 1789 divided the country into thirteen districts and in each established a District Court. It put these thirteen districts into three circuits and in each established a Circuit Court. In each district there was to be appointed one district judge, who should reside in the district for which he was appointed. No circuit judges were provided for, and the Circuit Court, which was to be held annually in each district, might be held by the Supreme Court Justice and the district judge. As the country grew,

subsequent legislation created additional districts with a district judge in each. April 10, 1869 (chapter 22, 16 Stat. 44), an act was passed, providing for the appointment in each circuit of a circuit judge having the same power and jurisdiction as the Justice of the Supreme Court allotted to the circuit. From 1789 to January 1, 1912, there were Circuit Courts, which, after the act of April 10, 1869, could be held by one judge, either by the Justice of the Supreme Court allotted to the circuit, or by the circuit judge, or by a district judge, or by any two or by three of these judges sitting together. The act of April 10, 1869, made it the duty of the Chief Justice and of each Justice of the Supreme Court to attend, during every period of two years, at least one term of the Circuit Court in each district of the circuit to which he was allotted.

Prior to January 1, 1912, the District Courts were criminal, admiralty and bankruptcy courts. They had also jurisdiction, as provided by acts of Congress, to en-

tertain various actions by the government of the United States. . And the mass of civil litigation between individuals and corporations (other than the United States) brought in the federal courts, either because of subject-matter, or because of the citizenship of the parties, could be brought only in the Circuit Courts.

The Circuit Courts have been abolished by the Judicial Code, which became effective January 1, 1912, and by this act the jurisdiction of the Circuit Courts and the cases pending therein were transferred to the District Courts, thus making the District Court the only federal court of general original jurisdiction (except the Supreme Court to the extent limited by the Constitution). By the Judicial Code all the jurisdiction possessed when it took effect by the Circuit Courts was transferred to the District Courts.

## Criminal Jurisdiction of the District Courts

The Circuit Courts had general jurisdiction over all crimes and offenses against the

United States. And the criminal process of the United States issued by any Circuit Court ran into and might be executed in any portion of the United States. So might subpœnas for witnesses in criminal cases. The criminal jurisdiction of the Circuit Court was mainly concurrent with that of the District Court, which also had general jurisdiction of crimes against the United States; but the Circuit Court had exclusive jurisdiction of certain crimes.

The Sixth Amendment to the Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

So far as territorial jurisdiction is concerned, the accused is to be tried by a jury of the "district wherein the crime shall have

been committed, which district shall have been previously ascertained by law." This has no reference to crimes committed outside the limits of a state. *United States v. Dawson,* 15 How. 467, 14 L. Ed. 775. See article 3, § 2, Constitution. Therefore the trial of crimes committed outside the limits of a state, either on the high seas, or in the Indian country, or in Alaska, or other territory subject to the control of the United States, may be at such place as Congress shall prescribe.

By an act of Congress of March 3, 1825, the trial of crimes committed on the high seas is in the district where the prisoner is apprehended, or into which he may first be brought.

## Original Civil Jurisdiction of the District Courts

The civil jurisdiction of the Circuit Courts was established by the Judiciary Act of 1789, and was substantially and materially changed, particularly by an act of 1867,

an act of 1875 and the act of 1887, re-enacted and corrected August 13, 1888. The new Judicial Code, besides abolishing the Circuit Court and turning its jurisdiction over to the District Court, has changed this jurisdiction in some important particulars. Necessity of brevity prevents me from explaining the jurisdiction of the Circuit Courts under the older acts. I must limit the inquiry to the jurisdiction of the District Court as defined in the act of March 3, 1911 (chapter 231, 36 Stat. 1087 [U. S. Comp. St. § 968 et seq.]), the new Judicial Code.

Section 24 of this act (U. S. Comp. St. § 991) defines the original civil jurisdiction of the District Court, providing:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is be-

tween citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

Section 51 of the same act (U. S. Comp. St. § 1033) should be read in this connection and provides:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a District Court, and except as provided in the six succeeding sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Non-residents may be sued in the courts of the states and their property within the jurisdiction attached as a means of compelling appearance by the defendants in the suit, or if appearance is not put in, as a means of exercising jurisdiction over the attached property and proceeding to a sale of it in order to satisfy the claim asserted. It has never been so in the courts of the United States. The defendant must be found and served personally in the district where the suit is brought. If not found in the district, his property cannot be attached and he served by publication. The case of *Toland v. Sprague,* 12 Pet. 300, 9 L. Ed. 1093, is the leading case on this subject. See, also, *Big Vein Coal Co. v. Read* (May 26, 1913), 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *United States v. Hvoslef,* 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Thames & Morsey Marine Ins. Co. v. United States,* 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.

A few exceptions to this rule are stated in sections 52–57, Judicial Code (U. S. Comp. St. §§ 1034–1039). They are: (a) Where a state contains more than one district and there are two or more defendants residing in different districts, suit will lie in either; (b) suits of a local nature, where the defendant resides in a district in the same state different from that in which suit is brought; (c) suits of a local nature, where land or other subject-matter of a fixed character lies partly in one district and partly in another within the same state, may be brought in either district; (d) suits to enforce any legal or equitable lien upon, or claim to, or to remove an incumbrance or lien or cloud upon title to real or personal property within the district where suit is brought and one or more of the defendants is not an inhabitant of or found within the district, in which suits personal service outside the district is permitted, and, where this is not practicable, publication is provided.

The act requires that the suit be brought

in the district of which defendant is an inhabitant, except that in actions resting upon diverse citizenship it may be brought in the district where *either* plaintiff or defendant resides. But if an action is brought against a defendant in an improper district, his exemption from suit in that district is a personal privilege which he may waive. If he appears voluntarily in the court and does not make the objection, the court may proceed against him as if the action were brought in the district where he resides. *St. Louis & S. F. R. Co. v. McBride,* 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. But see *Ex parte Wisner* (Dec. 10, 1906), 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. Overruling *Ex parte Wisner,* as far as it conflicts with text, see *In re Moore,* 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.,* 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

As to corporations it is now settled that within this act they are *inhabitants only* of

the district where they are incorporated, notwithstanding they own property and do business in other districts. In such other districts they cannot be sued *against their objection* in the United States District Court, except that suits based on diverse citizenship may be brought against corporations in the district where the plaintiff resides. *Southern Pacific Co. v. Denton,* 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *Re Keasbey & M. Co.,* 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *United States v. Northern Pac. R. Co.,* 134 Fed. 715, 67 C. C. A. 269; *Male v. Atchison, T. & S. F. R. Co.,* 240 U. S. 97, 36 Sup. Ct. 351, 60 L. Ed. 544.

The civil jurisdiction given to the District Court is divisible into two kinds: First, that which arises from the character of the parties; and, second, that which depends on the subject-matter involved in the suit.

### (a) *Jurisdiction Dependent on the Character of the Parties*

The court is given jurisdiction first of all actions brought by the United States, or by

any officer thereof authorized by law to sue; next of all suits between citizens of the same state claiming lands under grants from different states. Note that as to both these classes of suits there is no requirement that over three thousand dollars be involved, and therefore they may be brought in the District Court, regardless of the amount in controversy. The section enumerates next certain suits which may be brought in the District Court only when involving exclusive of interest and costs the sum or value of over three thousand dollars. Such suits are (a) suits which arise under the Constitution or laws of the United States, or treaties made or which shall be made under their authority; (b) suits between citizens of different states; and (c) suits between citizens of a state and foreign states, citizens or subjects.

We shall take up first suits in which there is a controversy between citizens of different states. Under this clause a citizen of New York may sue a citizen of Minnesota in the District Court of the United States. But

each plaintiff in the case must be a citizen of a different state from any of the defendants. For example, a citizen of New York cannot sue in the District Court of the United States a citizen of Minnesota and also another citizen of New York. *Coal Co. v. Blatchford,* 11 Wall. 172, 20 L. Ed. 179; *Sewing Machine Co. Case,* 18 Wall. 553, 21 L. Ed. 914.

By section 50, Judicial Code (U. S. Comp. St. § 1032), it is provided that where there are several defendants, and one or more of them are neither inhabitants of nor found within the district in which suit is brought and do not voluntarily appear, the court may entertain jurisdiction and proceed to trial of the suit as between the parties properly before it; but the judgment or decree shall not conclude or prejudice other parties not served or voluntarily appearing. The substance of this provision is that nonjoinder of parties not inhabitants of nor found within the district shall not constitute matter of abate-

ment. This section applies in the federal courts a liberal rule in favor of the jurisdiction to render judgment as between parties properly within the jurisdiction of the court without the presence of others who would be simply *proper* parties. The objection, in other words, for want of parties in the District Court in cases where those parties are beyond the jurisdiction, will be sustained only when the absent parties are absolutely indispensable to the rendition of any judgment. *Clearwater v. Meredith,* 21 How. 489, 16 L. Ed. 201; *Barney v. Baltimore City,* 6 Wall. 280, 18 L. Ed. 825; *Camp v. Gress,* 250 U. S. 308, 316, 39 Sup. Ct. 478, 63 L. Ed. 997. And in cases in the District Court founded solely on diversity of citizenship not brought in the District where plaintiff resides, the words in section 50, "nor found within the district in which the suit is brought," do not warrant joinder of defendants not resident within the district but found and served therein. This is held prohibited by the requirement in section 51

(U. S. Comp. St. § 1033) that a defendant must be sued only in the district of his residence or that of the plaintiff. *Camp v. Gress,* 250 U. S. 308, 39 Sup. Ct. 478, 63 L. Ed. 997, and cases cited.

The next inquiry is: Who is a citizen? Who is a citizen of New York or of any other state? It is well settled that this language means a citizen of the United States, either native-born or naturalized, domiciled in a particular state. It is not sufficient to give the court jurisdiction that the plaintiff is, for example, domiciled in the District of Columbia or in one of the territories. Neither the District nor the territories are states. *New Orleans v. Winter,* 1 Wheat. 91, 4 L. Ed. 44. Neither do the federal courts have jurisdiction on the ground of citizenship where both plaintiff and defendant are aliens. *Montalet v. Murray,* 4 Cranch, 46, 2 L. Ed. 545.

It occurs frequently that suits are brought by persons who act in a representative capacity, as executors, administrators, guardians or trustees. The citizenship which the

act requires has been held to refer to that of the executor, administrator, guardian or trustee. It is immaterial to inquire of what country or state his beneficiaries are citizens. If he has the proper citizenship he can sue, and if he has not he cannot sue even though his beneficiaries have. *Coal Co. v. Blatchford,* 11 Wall. 172, 20 L. Ed. 179.

When the jurisdiction of the court has once attached by reason of the proper citizenship, it will not be defeated by a change of domicile of the parties. For instance, a citizen of New York sues a citizen of Minnesota in the United States District Court for Minnesota. Afterward the plaintiff removes to Minnesota. The court having acquired jurisdiction of the action does not lose it by this change of citizenship. The same rule applies to changes resulting from the death of a party and the appointment of an executor or administrator who has a different citizenship. *Morgan v. Morgan,* 2 Wheat. 290, 4 L. Ed. 242; *Clarke v. Mathewson,* 12 Pet. 164, 9 L. Ed. 1041.

On a similar principle all ancillary suits and proceedings to execute, enforce, qualify, modify or set aside a judgment or decree of the District Court may be brought in that court, regardless of the citizenship of parties to the ancillary suit; the court retaining jurisdiction of all the ancillary proceedings because of its jurisdiction of the original suit. *Freeman v. Howe,* 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde,* 110 U. S. 280, 4 Sup. Ct. 27, 28 L. Ed. 145; *Minnesota Co. v. St. Paul Co.,* 2 Wall. 609, 17 L. Ed. 886.

Controversies between citizens of a state and foreign states, citizens or subjects involving the proper amount are also within the jurisdiction of the District Court.

Practically one of the most important things to remember in this connection is that the requisite citizenship to give the court jurisdiction must be averred in the record, and that a failure to make this averment is fatal to the case at any stage, because the presumption is against the jurisdiction of the District Court. Upon this the leading case

is *Montalet v. Murray,* 4 Cranch, 46, 2 L. Ed. 545. *Brown v. Keene,* 8 Pet. 112, 115, 8 L. Ed. 885; *Thomas v. Ohio State University,* 195 U. S. 207, 218, 25 Sup. Ct. 24, 49 L. Ed. 160. The usual method of averment in a pleading is to say that A. B., a citizen of the state of New York, complains of C. D., a citizen of the state of Minnesota. But no particular form of averment is required. If the diverse citizenship requisite to give the court jurisdiction appears in any way on the face of the record sufficiently and satisfactorily, the case is properly in the District Court. *Jones v. Andrews,* 10 Wall. 327, 19 L. Ed. 935.

The Constitution and the act of Congress speak of actions between *citizens,* and corporations are nowhere mentioned and perhaps were not thought of when the Constitution was adopted. It is clear that a corporation is not a citizen, for a citizen is a native or naturalized person. But at this date a large proportion of the cases in the District Court is brought by or against corporations. How

does the court obtain jurisdiction of such cases? When this question first came before the Supreme Court of the United States, the court held that a corporation was not a citizen, and likened it to a partnership, saying that if all the stockholders of a corporation, like all the members of a partnership, were citizens of different states from the opposite parties to the suit, that fact might be averred and so jurisdiction obtained. But this jurisdiction rested on the personal citizenship of the stockholders, because the corporation could have no citizenship. *Bank of United States v. Deveaux,* 5 Cranch, 61, 3 L. Ed. 38. Few corporations at the present day could bring actions or be sued in the District Court of the United States under this rule, for most of the larger corporations have stockholders in many states of the Union. In the next case on the subject a decided advance was taken. *Ohio & Mississippi Railroad Co. v. Wheeler,* 1 Black, 286, 17 L. Ed. 130. In that case it was laid down as a *legal presumption* that all the members or

stockholders of a corporation were citizens of the state where the corporation was organized; that a suit by or against a corporation in its corporate name *may be presumed* to be a suit by or against citizens of the state which created the corporation; and that *no averment or denial to the contrary is permissible for the purpose of withdrawing the suit from the jurisdiction of the United States Courts.* This remains still the ground of jurisdiction over corporations. The jurisdiction does not rest on the corporation being a citizen, for it is not, and to allege that it is is not good (*Lafayette Ins. Co. v. French,* 18 How. 404, 15 L. Ed. 451), but on the legal presumption, which is a pure fiction, and which cannot be disputed or traversed, that all its members are citizens of the particular state where the corporation was organized. So that for the purpose of jurisdiction a corporation is treated as if it were a citizen of the state where it is incorporated. See *Thomas v. Ohio State University,* 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160.

## (b) *Jurisdiction Dependent on Subject-Matter*

The section authorizes certain suits to be brought in the District Court because of the subject-matter involved and regardless of citizenship of the parties.

First, suits arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, may be brought in the District Court, without regard to the citizenship of either plaintiffs or defendants. Therefore such a suit may be brought by a citizen of a state against another citizen of the same state. What is meant by a case *arising* under the Constitution or laws of the United States, or treaties? This question may be answered by quoting from Chief Justice Marshall in *Osborn v. Bank of United States,* 9 Wheat. 738, 822 (6 L. Ed. 204):

"A cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States; others

on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Under this construction, the judicial power of the United States extends effectively and beneficially to that most important class of cases which depend on the character of the cause."

And, as stated by the same judge in *Cohens v. Virginia,* 6 Wheat. 264, 379 (5 L. Ed. 257):

"A case in law or equity consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either." Swafford v. Templeton, 185 U. S. 487, 494, 22 Sup. Ct. 783, 46 L. Ed. 1005; Patton v. Brady, 184 U. S. 608, 611, 22 Sup. Ct. 493, 46 L. Ed. 713.

See *Defiance Water Co. v. Defiance,* 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140.

An example of a suit which may be

brought originally in the District Court is one to recover possession of or enjoin trespass upon land alleged to be granted to plaintiff by an act of Congress, where the controversy in the case involves the interpretation or effect of the act. Other examples are suits in which the plaintiff's right to recover depends upon his establishing that the obligation of a contract has been violated or that his property is taken by a state law without compensation or without due process, contrary to the Constitution of the United States. Patent and copyright cases, cases arising under the laws for the collection of duties on imports and other government taxes, and cases arising under other acts of Congress, are also examples of cases that go into the District Court because of the subject-matter involved.

It is now settled that to give the District Court jurisdiction the federal question must appear in the plaintiff's declaration or bill; that is, by the plaintiff's statement of his

own case. It is not sufficient that the federal question is set up by the defendant in his answer or otherwise. *Tennessee v. Union Bank,* 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Louisville & Nashville Ry. Co. v. Mottley,* 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126; *Hopkins v. Walker,* 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

The District Court, having acquired jurisdiction through a bill presenting a substantial federal question, has power to decide every question in the case, and may even dispose of the case on principles of state law without passing upon its federal aspect. *Lincoln Gas & Electric Light Co. v. City of Lincoln,* 250 U. S. 256, 39 Sup. Ct. 454, 63 L. Ed. 968; *Greene v. Louisville & Interurban R. R. Co.,* 244 U. S. 499, 508, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88. This principle of decision, applicable to the original jurisdiction of courts of the United States, is the reverse of that applicable to the appellate jurisdiction of the Supreme Court over state courts, where the

Supreme Court considers federal questions only. *Murdock v. Memphis,* 20 Wall. 590, 22 L. Ed. 429.

It has been decided that all actions by or against corporations created by an act of Congress, as the Union Pacific Railway Company and the Northern Pacific Railroad Company (not the corporations of similar names chartered by state laws), are actions which arise under the laws of the United States, and are therefore within the jurisdiction of the District Court because of their subject-matter; this regardless of whether the case actually will involve the construction or effect of any act of Congress. *Osborn v. Bank of United States,* 9 Wheat. 738, 6 L. Ed. 204; *Pacific Railroad Removal Cases,* 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319.

As to national banks the sixteenth subdivision of section 24 of the Judicial Code [1] says that for purposes of jurisdiction they shall be deemed citizens of the states in which they are respectively located. Each bank can sue and be sued in the federal

[1] U. S. Comp. St. § 991(16).

## NOTE TO PAGE 70

Section 5, Act of Congress of January 28, 1915 (38 Stat. 803), provides that no court of the United States shall have jurisdiction of any action or suit by or against a railroad company upon the ground that the company was incorporated under an act of Congress. *Bankers' Trust Co. v. Texas & Pacific Ry.*, 241 U. S. 295, decides that this act forbids any court of the United States to take jurisdiction of actions by or against such railway company upon the ground of its federal incorporation; in other words that as to such companies the doctrine of *Osborn v. Bank of United States* and *Pacific Railroad Removal Cases* is no longer applicable. As *Osborn v. Bank of United States* and *Pacific Railroad Removal Cases* rest the jurisdiction on subject-matter and not on citizenship, the act of January 28, 1915, deprived the federal courts of a jurisdiction based on subject-matter; that is upon the ground that the railroad was incorporated under act of Congress. *Bankers' Trust Company v. Texas & Pacific Ry.* also decides that the federal courts have no jurisdiction over such corporations because of their citizenship; that is that a corporation created by act of Congress cannot be regarded for jurisdictional purposes as a citizen of any state, differing in this respect from national banks which the 24th section of the Judicial Code makes, for purposes of jurisdiction, citizens of the states in which they are respectively located.

courts as if incorporated under the laws of the state where it is located; but the act prevents it from being considered, for purposes of jurisdiction, a federal corporation. *Continental Bank v. Buford,* 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119.

Another class of cases which may be brought in the District Court because of subject-matter is cases involving claim of lands under grants from different states.

Another important feature of the Judicial Code should be noted. The proviso in section 24 (see page 52, *supra*) has the effect to give to the District Court jurisdiction of several kinds of cases, without regard to the amount or value in controversy. These cases are enumerated in subdivisions of the section numbered "second" to "twenty-fifth" inclusive. I shall not quote these subdivisions or attempt to enumerate all these cases. The more important are (a) all crimes and offenses cognizable under the authority of the United States; (b) maritime and admiral-

ty cases; (c) cases arising under internal revenue and customs laws; (d) cases arising under the postal laws; (e) cases arising under the patent, copyright and trade-mark laws; (f) cases arising under any law of the United States regulating commerce; (g) matters and proceedings in bankruptcy; (h) cases arising under the acts against trusts and monopolies.

Before the Judicial Code of March 3, 1911, cases arising under the acts to regulate commerce, like cases arising under most other laws of Congress or under the Constitution, could be brought in the courts of the United States only when they involved the amount or value required; but under the new act the most trivial case of this character may be brought in the District Court. Cases arising under the act to regulate commerce include at least all cases against carriers for violation of the act, every action against them to recover a charge collected in excess of lawful interstate tariffs, or to recover for loss of or damage to shipments of freight be-

tween states (see *Adams Express Co. v. Croninger* [Jan. 6, 1913] 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314), as well as all actions by carriers to recover tariff charges on interstate shipments. *Louisville & N. R. Co. v. Rice,* 247 U. S. 201, 38 Sup. Ct. 429, 62 L. Ed. 1071.

By act of January 20, 1914, amending the Judicial Code (U. S. Comp. St. § 1010), it is provided that no suit brought in a state court against a railroad company or other common carrier to recover damages for delay, loss of or injury to property received for transportation under the act of Congress regulating commerce, shall be removed to any court of the United States unless the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. The result of this amendment is that the original jurisdiction of the District Court of suits arising under the acts regulating commerce remains as stated in the last paragraph. The act of January 20 affects removals only and affects only suits brought *against* a carrier to recover damages

for *delay, loss of or injury to property* received for transportation.

## Choses in Action

A clause of section 24 reads:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

This clause of the statute is clumsily drawn. But its purpose is to prevent the owner of a *chose in action,* who cannot sue on it in the United States Courts because there is no diverse citizenship, from assigning it, colorably perhaps, to the citizen of another state, so that the assignee may sue upon it in the federal court. From this prohibition are excepted foreign bills of exchange and obligations of corporations payable to bearer. The section applies only to

actions to recover "upon" the note or chose in action. Therefore it does not include replevin to recover the note itself. *Sheldon v. Sill,* 8 How. 441, 12 L. Ed. 1147. And the restriction does not prevent an action by the holder of paper against his immediate indorser, because such an action is not "upon" the promissory note but upon the new contract of indorsement. *Superior City v. Ripley,* 138 U. S. 95, 11 Sup. Ct. 288, 34 L. Ed. 914.

As to all the paper within this restriction it is incumbent on the plaintiff to allege, and to prove at the trial, not only that he, the plaintiff, has the proper citizenship as regards the defendant, but that the original payee also had. *Bradley v. Rhines' Adm'rs,* 8 Wall. 393, 19 L. Ed. 467; *Parker v. Ormsby,* 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654. The restriction applies only to actions brought upon promissory notes or other choses in action, and does not prevent, for instance, the vendee of tangible property from suing with respect to that property if he has the proper citizenship, although his

vendor or assignor did not have: *Brainerd, Shaler & Hall Quarry Co. v. Brice,* 250 U. S. 229, 39 Sup. Ct. 458, 63 L. Ed. 951; *Brown v. Fletcher,* 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374.

## Amount Involved

The Code confers on the District Court jurisdiction in four classes of cases: (a) Where the United States are plaintiffs or petitioners; (b) where citizens of the same state claim lands under grants from different states; (c) cases arising under the Constitution, a treaty or some act of Congress; (d) cases where jurisdiction depends upon diverse citizenship. It is plain from a reading of the section that the three thousand dollar limit does not apply to cases where the United States are plaintiffs (*United States v. Shaw* [C. C.] 39 Fed. 433, 3 L. R. A. 232), or to suits between citizens of the same state claiming lands under grants of different states. Except in these two classes of cases and in those enumerated in the proviso to section 24 the District Court

cannot take jurisdiction unless the sum or value involved is more than three thousand dollars, exclusive of interest and costs. This limitation applies as well to suits involving a federal question as to those coming into the District Court because of citizenship. It is not necessary that more than three thousand dollars should be recovered. The jurisdiction depends on the amount demanded in the declaration or bill. If, however, it is plain from the plaintiff's own statement that he cannot recover in any view over three thousand dollars, the court will not take jurisdiction. *Vance v. W. A. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111.

The jurisdiction thus granted to the District Courts (with a few exceptions, such as bankruptcy proceedings, where the federal jurisdiction is expressly made exclusive *) is concurrent with the jurisdiction of the state courts. The state courts are as open as the federal courts to entertain actions between

* Section 256, Judicial Code (U. S. Comp. St. § 1233), enumerates the cases of which the federal courts are given jurisdiction exclusive of the state courts.

citizens of different states and between aliens and citizens, as well as actions involving most federal questions. *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The final judgments of the state courts involving federal questions are reviewable in the Supreme Court of the United States on writ either of error or certiorari as before shown.

## Removal of Suits to the District Courts

This subject is regulated by the twenty-eighth section of the Judicial Code.[1] Without quoting this section, it is sufficient to state its provisions in substance. It mentions as removable any suit of a civil nature at law or in equity arising under the Constitution, laws or treaties of the United States "of which the District Courts of the United States are given original jurisdiction" by section 24. This language limits the suits which may be removed to those which might have been brought originally in the District Court. Therefore, if a suit could not have

[1] U. S. Comp. St. § 1010.

been brought originally in the District Court, it cannot be removed, having been brought first in a state court (*Ex parte Wisner,* 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264); and hence the importance of thorough mastery of the section defining original jurisdiction, which describes what suits may be brought originally in the District Courts. That section once thoroughly understood, there are few difficulties connected with the matter of removal.

Suits are removable under this section, either because they involve a federal question, or because of the citizenship of the parties. The first sentence of the section provides for removing suits involving a federal question, and only the defendant can remove; the act saying, "may be removed by the defendant or defendants therein to the District Court of the United States for the proper district." If the plaintiff chooses to bring an action in a state court which involves the construction of the Constitution or some treaty or law of Congress, he cannot remove his suit

into the District Court, but must abide by his election. The state courts have concurrent jurisdiction with the federal courts of actions involving the Constitution, laws and treaties of the United States. The jurisdiction of the federal courts is not exclusive except of a few specified cases. Where the section defining original jurisdiction requires over three thousand dollars to be involved that the suit may be brought originally in the District Court, section 28 requires the same amount to be involved that the suit may be removed; removable suits being those and only those which might have been brought originally in the District Court. On the other hand, where the section defining original jurisdiction permits a suit in the District Court regardless of the amount in controversy, there is a similar absence of requirement as to amount involved in determining removability.

The second clause of section 28 provides for removal of suits on the ground of citizenship of the parties. It says that any suit

of a civil nature, of which the District Court of the United States is given jurisdiction by section 24, if brought in a state court, may be removed into the District Court of the United States by the defendant or defendants therein, being non-residents of that state; that is, the state in which the action is commenced. Under this clause also the action to be removable must involve over three thousand dollars and be one of which the District Court would have jurisdiction if the suit had been brought in that court. Here the privilege of removal is limited to the defendants in the suit *being non-residents of that state.* The effect of the qualification, "being non-residents of that state," is this: If a citizen of New York sue a citizen of Minnesota in one of the state courts of Minnesota, the defendant cannot remove the suit; but if a citizen of New York sue a citizen of Minnesota in the state courts of New York, the defendant, being a non-resident of the state where the action is brought, can remove it into the federal court. It was

held in *Ex parte Wisner,* 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, that, if a citizen of New York sue a citizen of Minnesota in one of the state courts of a third state, the defendant could not remove the suit. But afterwards this ruling was explained and qualified, and it was held that, if on removal of such a case the parties appear in the federal court and plead to the merits, or otherwise waive objection, the District Court will have jurisdiction. *In re Moore,* 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.,* 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

The third clause provides for removal of a limited class of cases which involve several separate controversies. The subdivision has little application, if indeed any, to actions at common law. But in suits in equity several controversies are frequently involved in one suit, and one of those controversies may be capable of being completely tried and determined without the presence of some of the

defendants. The other defendants may be joined solely because of some other controversy in the suit. This clause relates to suits in which there are two or more separate controversies. Its requirements are that in such suits brought in the state court there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them; in that event *either one or more of the defendants actually interested in such controversy* may remove the suit into the District Court. Observe that the whole suit—*i. e.*, all the controversies—is removed.

The fourth clause provides for a removal in cases where there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state; *any* defendant, being a citizen of such other state, is given the right to remove the suit into the District Court, by making it affirmatively appear to the District Court that from prejudice or local influence he will not be able to obtain justice in the state court.

Observe that under the first and second clauses the law says the *defendant* or *defendants* may remove the suit. This language requires, where there are several defendants, that they should all have the requisite citizenship *and all join in the petition for removal. Fletcher v. Hamlet,* 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679; *Stone v. South Carolina,* 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Chicago, Rock Island & Pacific Ry. Co. v. Martin,* 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. While under the third and fourth subdivisions, which provide for cases involving several distinct controversies and for removals on the ground of local prejudice, less than all the defendants may petition for the removal.

With a view to the requirement that all the defendants must join to remove, and that all must have the requisite citizenship, a plaintiff sometimes adds unnecessary defendants who have not the requisite citizenship for the very purpose of preventing removal. It has been held that the right to remove cannot be

defeated by fraudulent joinder as co-defendant of one who cannot be held liable to the plaintiff in any view of the case. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Am. Dec. 757. But, on the other hand, if all the defendants may in some possible view be held jointly liable to the plaintiff, the motive of the plaintiff in joining them cannot be inquired into. *Chicago, R. I. & P. Ry. Co. v. Schwyhart*, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. 473; *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544.

Two observations should be made upon removals because of a federal question. The first is, as said by Mr. Chief Justice Waite in *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. Ed. 656, that a cause cannot be removed simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must arise out of a controversy between the parties in regard to

the operation and effect of the federal Constitution or federal laws upon the facts involved. Before, therefore, the case can be removed, it must in some form appear upon the record, by a statement in legal and logical form as required by good pleading, that the suit is one which really and substantially involves a dispute or controversy depending upon the construction or effect of the Constitution or treaty or act of Congress. *Western Union Tel. Co. v. Ann Arbor Railroad Co.,* 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Defiance Water Co. v. Defiance,* 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140. Secondly, a petition for removal on account of a federal question must rely upon the showing of facts made in the plaintiff's pleading. Just as section 24 requires, in order to give the District Court original jurisdiction, that the federal nature of the question must appear in the plaintiff's declaration or complaint, so similarly section 28 requires, in order to give jurisdiction by removal, that the same sort of a question ap-

pear in the same way. It is not sufficient that the question is set up by the defendant. *Tennessee v. Union & Planters' Bank,* 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Galveston, Harrisburgh & San Antonio Ry. Co. v. Texas,* 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017. This is because section 28 requires to make a suit removable, that it be one which might have been brought originally in the District Court.

The practice on removals—the method of removing a case—is rather minutely provided by section 29 of the same act.[1] Observe that removals for local prejudice under the fourth clause of section 28 may occur at any time before the trial in the state court. But all other removals—that is, removals under the first three subdivisions of section 28, either on the ground of the subject-matter or citizenship of the parties—must be applied for at an early stage of the case. The party desiring such removal must make and file in the state court a petition, duly verified, at the time or before the time when the defendant

[1] U. S. Comp. St. § 1011.

is required by the laws or practice of the state to answer or plead in the action, for a removal of such suit into the District Court; he must make and file with such petition a bond with good and sufficient surety conditioned to enter in the District Court within thirty days a copy of the record in the suit and to pay all cost if the District Court shall hold the suit improperly removed. The act then makes it the duty of the state court to accept the petition and bond and proceed no further in the suit.

The requirements to be observed in removing a suit are: That the record in the case show the nature of the controversy and that over three thousand dollars is involved, or that the case is one of those not required to involve over three thousand dollars; that the suit involves a federal question *as shown in the plaintiff's complaint,* if removal is applied for on that ground; that the citizenship of the parties is such as to give the District Court jurisdiction where removal is asked for diverse citizenship; and that the

petition is filed within the time required by law.

Commonly the pleadings in the state court will not show the citizenship of the parties, and where they do not it is necessary to allège and show that citizenship in the petition for removal. And generally any of the facts necessary to show the case removable and to give the District Court of the United States jurisdiction must be made to appear in the record, either in the pleadings or in the petition for removal. If the record does not show all the jurisdictional facts the case will be remanded by the District Court. In this connection a very common error is an allegation of residence instead of citizenship. One may reside in Minnesota without being a citizen, and it is well settled that an allegation of residence is not equivalent to an allegation of citizenship. It is the citizenship of the parties which gives jurisdiction, and this should be distinctly and positively alleged. This caution applies as well to the bringing of cases originally in the District Court as to the removal of them from state courts.

The former acts of Congress did not require the petition for removal to be verified, but by the Judicial Code verification is required. The act also requires the record to be entered in the District Court within thirty days instead of by the next session, and that written notice of the petition and bond for removal be given the adverse party prior to filing, which before was not required. Thirty days after the record is filed in the District Court is given to plead. The petition may doubtless be signed and verified by an agent or attorney of the petitioner. *Canal & C. Sts. R. Co. v. Hart,* 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226.

It has been decided necessary to state the citizenship of the parties, both at the time when the suit is brought in the state court and at the time when removal is petitioned for. *Gibson v. Bruce,* 108 U. S. 561, 2 Sup. Ct. 873, 27 L. Ed. 825. The petition may be amended. *Kinney v. Columbia Sav. & L. Ass'n,* 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103.

When a proper petition and bond are filed and on the face of the record it is made to appear that the case is a removable case, the act makes it the duty of the state court to accept the petition and bond and proceed no further in the suit. The practice is to obtain an order from the state court accepting the petition and bond. All rightful jurisdiction of the state courts ceases instanter on filing the petition, except the jurisdiction to accept the petition and bond. If the state court proceeds and renders a judgment in the case, that judgment (provided the case should have been removed) is reviewable in the Supreme Court of the United States. *Stone v. South Carolina,* 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962. But under the act of September 6, 1916 (U. S. Comp. St. § 1214), writ of error apparently will not lie and the remedy is by certiorari.

When a proper petition and bond are filed in the state court and on the face of the record it is made to appear that the action is properly removable, the proper practice is

this: A copy of the record is sent to and filed with the District Court of the United States; any issues of fact with respect to the removability of the case, for example, whether the proper diverse citizenship of parties does in fact exist, should be tried and determined in the District Court on an issue framed in such manner as that court directs; if on trial of this issue the District Court determines that the case was improperly removed, it will be remanded. *Chesapeake & Ohio Ry. Co. v. Cockrell,* 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544. It was held in *Missouri Pacific Ry. v. Fitzgerald,* 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536, that an order of the federal court remanding the case is final and not reviewable by the Supreme Court in any manner or at any stage of the case; this seems firmly settled. *Yankaus v. Feltenstein,* 244 U. S. 127, 133, 37 Sup. Ct. 567, 61 L. Ed. 1036.

Section 28 introduces a new feature, which is that no case arising under the Employers' Liability Act of Congress (U. S.

Comp. St. §§ 8657–8665), brought in a state court of competent jurisdiction, shall be removed. The Employers' Liability Act referred to is the act regulating the liability of railroads to their employés injured while engaged in interstate commerce, which was held valid in *Northern Pacific v. Bessie Babcock* and *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. A difference of view developed in the District Courts as to the interpretation of this prohibition. Some judges held that it is absolute and that no case brought under the act can be removed (*Ullrich v. New York, N. H. & H. R. R. Co.* [U. S. D. C., N. Y.] 193 Fed. 768), while other judges held the prohibition to forbid only removals on the special ground that the case arises under an act of Congress, leaving the right to remove for proper diversity of citizenship (*Van Brimmer v. Texas & P. Ry. Co.* [U. S. C. C., Texas] 190 Fed. 394).

This question has been settled by the Su-

preme Court and the rule is now established that such cases are not removable on either ground. *Kansas City Southern Ry. Co. v. Leslie,* 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478; *Southern Ry. Co. v. Lloyd,* 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402; *Great Northern Ry. Co. v. Alexander,* 246 U. S. 276, 38 Sup. Ct. 237, 62 L. Ed. 713.

## Other Features of the Jurisdiction of the District Courts

The District Courts, in addition to possessing all the civil and criminal jurisdiction hereinbefore described formerly belonging to the Circuit Courts, are also courts of admiralty, courts of bankruptcy and courts in which are triable all crimes against the United States; also they entertain suits brought by the United States or its officers for collection of the revenue or for other relief.

The jurisdiction of the District Courts in admiralty is substantially the jurisdiction of admiralty courts throughout the civilized

world. A discussion of admiralty jurisdiction is not within my purpose.

In addition to the District Court, other federal courts of original jurisdiction are the Court of Claims, with jurisdiction defined by sections 136 to 187 of the Judicial Code,[1] and the Court of Customs Appeals, with jurisdiction defined by sections 188 to 199.[2] An explanation of the jurisdiction of the Court of Claims and of the Court of Customs Appeals will not be undertaken.

An act of March 3, 1911,[3] created a new court called the Commerce Court, to consist of five judges to be designated from time to time and assigned to the court by the Chief Justice of the United States from among the United States Circuit Judges, the assignment to hold for a period of five years. The act provided for five new Circuit Judges, who at first were to constitute the Commerce Court, but who from time to time could be assigned by the Chief Justice of the United

[1] U. S. Comp. St. §§ 1127-1178.
[2] U. S. Comp. St. §§ 1179-1190.
[3] 36 Stat. 539.

States for service in the District Court of any district, or in the Circuit Court of Appeals of any circuit. In every sense these judges were Circuit Judges.

Congress passed an act (October 22, 1913) abolishing the Commerce Court January 1, 1914, and the jurisdiction of that court is important only because the same jurisdiction will now be exercised by the District Courts.

The act creating the Commerce Court probably vested in that court no new jurisdiction, but only that then possessed by the Circuit Courts of the United States and the judges thereof. The act enumerated this jurisdiction as (1) all cases for the enforcement of any order of the Interstate Commerce Commission other than for the payment of money; (2) cases brought to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission; (3) suits brought by the Interstate Commerce Commission against a common carrier to compel obedience to the commerce act, as provided

in section 3 of the act of Congress of February 19, 1903 (32 Stat. 848, c. 708 [U. S. Comp. St. § 8599]); (4) mandamus proceedings to enforce obedience to the commerce act as provided in sections 20 and 23 of that act.

The jurisdiction thus enumerated doubtless belonged to the Circuit Courts when the Commerce Court was created, and it belongs to the District Courts now that the Commerce Court has been abolished.

Cases brought to enforce orders of the Interstate Commerce Commission and cases brought to enjoin, set aside, annul or suspend such orders, are large both in number and importance and are likely to grow in both respects. The most important principle applicable to such suits as yet determined by the Supreme Court of the United States is: That findings of mere fact made by the Interstate Commerce Commission are practically conclusive on the courts and will not be there reviewed; that the courts are open only to remedy errors of law of the Commission,

that is, to give relief only where an order of the Commission deprives the plaintiff of some property or right guaranteed by law, or where it exceeds the power conferred on the Commission by the act of Congress. *Interstate Commerce Commission v. Illinois Cent. R. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *Baltimore & O. R. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308.

By the Judicial Code the District Courts for the most part will be held by the district judges, but section 18 [1] provides how, in certain cases, a District Court may be held by the circuit judge. By section 21 [2] an affidavit of prejudice, which is a new feature in federal practice, may be made against any judge, and will result, if made, in requiring the designation of another judge to hear the case. Only one such change is permitted.

[1] U. S. Comp. St. § 985.

[2] U. S. Comp. St. § 988.

In three classes of cases acts of Congress require the District Court to be held by at least three judges, some or all of them to be circuit judges: (a) The act of Congress of February 11, 1903 (32 Stat. 823, c. 544 [U. S. Comp. St. §§ 8824, 8825]), called the "Expedition Act," authorizes the Attorney General, in any suit in equity in which the United States is complainant, brought under the Anti Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. §§ 8820–8823, 8827–8830]), or the Interstate Commerce Act of February 4, 1887 (24 Stat. 379, c. 104 [U. S. Comp. St. § 8563 et seq.]), or any other act having a like purpose, to file with the clerk of the court a certificate that in his opinion the case is one of general public importance. Thereupon the case is given precedence and must be heard before not less than three of the circuit judges, if there be three or more circuit judges in that circuit; and if not it must be heard before two circuit judges and such district judge as they may select. (b) Section 266, Judicial Code,[1]

[1] U. S. Comp. St. § 1243.

amended, act March 4, 1913 (U. S. Comp. St. §§ 1243, 1243a, 1243b), forbids any interlocutory injunction in the federal District Court suspending or restraining the enforcement, operation or execution of any statute of a state unless the application is heard and determined by three judges, of whom at least one must be a Justice of the Supreme Court or a circuit judge and the other two either circuit or district judges. (c) By the act of October 22, 1913,[1] which contains provisions abolishing the Commerce Court, it is provided that no interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part any order of the Interstate Commerce Commission, shall be granted by any District Court of the United States or by any judge thereof, unless the application is heard and determined by three judges, of whom at least one shall be a circuit judge.

[1] U. S. Comp. St. § 992.

# CHAPTER V

## SOME FEATURES OF JURISDICTION AND RULES OF DECISION PECULIAR TO THE FEDERAL COURTS

As Courts of Equity.
Injunctions.
Some Rules of Decision Peculiar to Federal Courts.

### As Courts of Equity

An important feature of the jurisdiction of federal courts is their equity jurisdiction. The sixteenth section of the Judiciary Act of 1789, substantially re-enacted in section 267 of the new Judicial Code (U. S. Comp. St. § 1244) provided:

"Suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

This language has been repeatedly held to refer to the common law of England and this country when the Constitution of the United States was adopted. It has no reference whatever to the common law or statute law

of the different states as modified since that time. So that, when bringing an action in any court of the United States, it is necessary to determine whether the action is essentially at law or in equity. Before the new equity rules a bill in equity was demurrable, and would be dismissed even by the court on its own motion, though the objection was not taken by the defendant, and dismissed at any stage of the case, wherever there was a plain, adequate and complete remedy at law. *Boyce v. Grundy,* 3 Pet. 210, 7 L. Ed. 655; *Robinson v. Campbell,* 3 Wheat. 212, 4 L. Ed. 372. But under new equity rule 22 (33 Sup. Ct. xxiv) the case will be transferred from the equity to the law docket instead of being dismissed. In the federal courts the distinction between law and equity must be preserved because the Seventh Amendment to the Constitution of the United States provides that in suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved. One cannot be deprived in the federal courts of his

right to trial by jury by being sued in equity instead of at law.

The remedy spoken of here being the common law of England as it existed when the Constitution was adopted, it is not an objection to a bill in equity that the state where the suit was brought has since amplified the common law remedies so that in the courts of the state there would be now a plain, adequate and complete remedy at law.

## Injunctions

Section 720 of the Revised Statutes (U. S. Comp. St. § 1242) provides:

> "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 in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This statute cannot perhaps be made any clearer by comment. Its purpose was to prevent unseemly interference between the courts of the United States and the courts of the states. It withholds from the United

States courts any power to interfere with the proceedings of the state courts except by the means heretofore pointed out—as, for example, a writ of error from the Supreme Court of the United States to the court of a state. While nothing is said in the Constitution or acts of Congress upon the subject, it has been decided in several cases that the courts of the states cannot enjoin proceedings in the courts of the United States. *McKim v. Voorhies,* 7 Cranch, 279, 3 L. Ed. 342; *Peck v. Jenness,* 7 How. 625, 12 L. Ed. 841.

This statute permits the federal court to grant injunctions against proceedings in a state court, where such injunctions may be authorized by any law relating to bankruptcy. In bankruptcy the federal court takes possession of the bankrupt's estate, and obviously it becomes at times necessary to protect that possession and to preserve the property or fund in court, so that the court will be able to execute its decree when rendered. In such cases injunction is issued against the parties, if they attempt any proceeding in

another court which will interfere with the property or fund, or prevent the execution of any decree the federal court may make. Another exception to the statute, equally necessary, has been established by the decisions; that is, where the federal court first obtains jurisdiction of a controversy, the parties will be enjoined from taking proceedings in any other court, which would operate to defeat or interfere with that jurisdiction. *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, was decided on this principle. In that case it appeared that the suit brought in the federal court resulted in an injunction against the defendants. Afterwards proceedings were commenced in a state court, by one of the parties to the suit in the federal court, to obtain an injunction against the same defendants, commanding them to violate the decree of the federal court. This is a case where it was found fundamentally necessary for the court issuing the first injunction to restrain the parties before it

from proceeding in any other court to obtain a decree commanding the violation of that injunction.

The practice in the federal courts is against the issuance of writs of injunction without notice to the adverse party. Rev. St. §§ 716 to 719, inclusive (U. S. Comp. St. §§ 1238, 1239, 1241, 1243a). The practice is universal to make only an order to show cause why injunction should not issue, and section 718 authorizes the court or judge, if there appears to be danger of irreparable injury from delay, to grant a restraining order.

New equity rule 73 (33 Sup. Ct. xxxix) provides:

"No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no

event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

## Some Rules of Decision Peculiar to Federal Courts

After having determined that a court of the United States has jurisdiction over a particular cause, the next inquiry is: By what rules of decision will that court act in determining the cause? I call attention again to the fact that the Constitution and laws of the United States have separated jurisdiction of civil causes into three groups: Common law, equity and admiralty. And in inquiring what rules of law the federal courts

will follow it is necessary to keep this distinction in view.

With reference to common-law jurisdiction an act of Congress provides:

"That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in courts of the United States in cases where they apply." Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92 (U. S. Comp. St. § 1538).

So in accordance with this act in any trial at common law in the federal court the inquiry is usually: What is the law of the state? That law is administered in the courts of the United States. This statute has reference to civil cases only and has no application to criminal trials, because there are no criminal trials in the federal courts except for offenses against the laws of Congress or the laws of nations. In determining what is the law of the state the federal courts will be governed, where there are decisions in the state courts, by the decisions of the court of last resort of the state. And

if those decisions have fluctuated or varied the federal court is usually controlled by the latest authoritative decision. *Webster v. Cooper,* 14 How. 488, 14 L. Ed. 510.

It will be found by examining the opinion last cited that where the federal courts follow the state courts they do so with reference both to construction of the state Constitution and statutes and to determination of the common or customary law of the state.

Generally speaking, the federal courts follow the state courts. This may be taken as the general principle. And perhaps its most universal application will be found in determination of the law of real property and in the interpretation of state statutes, for example, the statute of frauds or statutes of limitation.

But to this general principle several exceptions are established, the first of which is that where a case turns upon questions of commercial law or general jurisprudence, and not on the statutes or local laws of the states, the federal courts apply to the case

their own views of the law. *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865. The principle of this decision and of the cases following it in the federal courts is applied most strikingly to questions of negotiable paper and the rights of *bona fide* purchasers of such paper. On questions concerning the law merchant, or general commercial law, the federal courts have frequently held a rule directly in conflict with rules held in the state where the controversy arose.

The federal courts regard questions of negligence as questions of general law, upon which they follow their own rules and not the decisions of the state courts. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.,* 129 U. S. 397, 442, 9 Sup. Ct. 469, 32 L. Ed. 788; *Lake Shore & M. S. Ry. Co. v. Prentice,* 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.,* 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; *Baltimore & O. R. Co. v. Baugh,* 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. So that upon a large class of questions,

for example, those touching liability of a master for his servant, those depending on the co-servant doctrine, and those involving liability for negligent fires, the federal courts may hold a very different rule from that applied in the state courts of the state in which the controversy arose.

It seems obvious that in its exercise of revisory power over the judgments of state courts the Supreme Court of the United States cannot hold itself bound to follow the state court on questions of law, or bound by the state court's findings of fact. In a case, for example, where the question is whether a state law violates the obligation of a contract, or in a case where a state law is alleged to take property without due process, the Supreme Court of the United States, in order to make its revisory power effectual, must of necessity decide for itself both the facts and the law. *Mobile & O. R. R. Co. v. Tennessee,* 153 U. S. 486, 492, 14 Sup. Ct. 968, 38 L. Ed. 793; *Stearns v. Minnesota,* 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162; *Hunting-*

*ton v. Attrill,* 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *State of Washington v. Fairchild,* 224 U. S. 510, 528, 32 Sup. Ct. 535, 56 L. Ed. 863; *Creswill v. Grand Lodge Knights of Pythias of Georgia,* 225 U. S. 246, 261, 32 Sup. Ct. 822, 56 L. Ed. 1074; *Detroit United Ry. v. Michigan,* 242 U. S. 238, 249, 37 Sup. Ct. 87, 61 L. Ed. 268; *Northern Pac. R. Co. v. Concannon,* 239 U. S. 382, 388, 36 Sup. Ct. 156, 60 L. Ed. 342; *Union Pac. R. Co. v. Public Service Commission,* 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. 131.

In a recent case there was a federal right to be exempt from taxation, and the state court had refused to enforce this right on the ground that the plaintiffs had paid their taxes voluntarily (a proposition of state law). The Supreme Court inquired whether on the facts voluntary payments had been made and reversed the highest court of the state on this question of fact, saying:

"It therefore is within our province to inquire, not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal

grounds of decision that were without any fair or substantial support. * * * Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward v. Board of County Commissioners* (April 26, 1920) 253 U. S. 17, 40 Sup. Ct. 419, 64 L. Ed. ——.

In another large and important class of cases the effect of recent legislation is that the federal courts follow their own rules, and, moreover, that the state courts are bound to follow the federal rules. The cases now referred to are all those which arise out of the Interstate Commerce Act and involve the liability of carriers concerning shipments of merchandise in interstate commerce. What facts make a carrier liable, what facts exempt it from liability, and the proper measure of that liability in cases of interstate shipment, are now cases to be determined exclusively by the statutes of the United States and by the decisions of its courts. Neither the statutory law nor the unwritten law of any state has any bearing upon such questions. This was decided by the Supreme

Court of the United States January 6, 1913, in *Adams Express Co. v. Croninger,* 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314. The same is true of all questions arising out of the Employers' Liability Act of Congress, which regulates, exclusively of state laws, the liability of railways to their employés killed or injured while engaged in interstate commerce.

Another case where the courts of the United States do not follow absolutely the state law is where the decisions of the state courts have changed and rights have accrued in reliance on the earlier decisions. *Ohio Life Ins. & Trust Co. v. Debolt,* 16 How. 432, 14 L. Ed. 997. For example, where state laws authorizing municipalities to issue bonds are held constitutional by the state courts and on the faith of those decisions bonds are issued and sold on the market, a change of ruling in the state courts, holding the laws of the state under which the bonds were issued unconstitutional and void and the bonds consequently illegal, will not be followed in the federal

courts. The federal courts in such cases, instead of following the latest decision of the state courts, will follow the earlier decision and hold the bonds valid and enforce their collection. *Gelpcke v. Dubuque,* 1 Wall. 175, 17 L. Ed. 520.

In actions at common law the federal courts by statute and by rules of court have adopted also the practice of the state where the court sits as the practice of the federal court in that state, except where the state practice conflicts with some law of Congress or some rule of the federal court. The result of this is that to a large extent the practice in actions at law in the courts of the United States is different in each state, conforming in each district substantially to the practice in the state courts of that state.

On the other hand, the federal courts in equity found their practice upon that of England. That law and practice as it existed in England when the Constitution was adopted, as modified by the equity rules of the federal courts, is followed and enforced in the fed-

eral courts. Consequently equity practice is uniform throughout the country and does not change or vary with state laws, or rules of decision, or rules of practice. *Neves v. Scott,* 13 How. 272, 14 L. Ed. 140. The same observation is applicable to the admiralty law and admiralty practice in the federal courts.

The Supreme Court of the United States has made rules regarding the practice in equity, and the practice is conducted in conformity with those rules and according to the general principles of chancery practice in England before 1789. The former nineteenth equity rule provided that the courts will follow as nearly as may be the practice in the High Court of Chancery in England. New equity rules, effective February 1, 1913, were adopted by the Supreme Court.[1] These rules, the decisions of the federal courts, the writers on equity practice, and the decisions of the English courts are the sources of the rules determining questions of equity pleading and equity practice.

[1] 33 Sup. Ct. xix.

One notable difference between common-law practice in the state courts and common-law practice in the courts of the United States should be borne in mind: In the state practice of many states an appeal is allowed to the Supreme Court from an order granting or refusing a new trial. On the other hand, in the federal courts, although the inferior court has power to grant or refuse a new trial, its ruling upon such a motion is neither the subject of a writ of error, nor will its ruling be considered, nor can it be assigned as error, in the appellate courts. In the federal courts a writ of error or appeal can be taken only from final judgment.

# CHAPTER VI

## EVIDENCE

On this subject I shall enter into no extended discussion. The main point to be observed is that Congress has made complete provision in the statutes of the United States for taking testimony in the federal courts. In equity cases all the testimony was formerly taken in writing; that is, not by the production of witnesses before the judge, but in depositions or orally before an examiner upon notice. The testimony was reduced to writing and returned into court. Upon the trial it was read or referred to from the depositions. By rule 46 of the new equity rules (33 Sup. Ct. xxxi) testimony in equity cases will be taken usually in open court, and only in exceptional cases and instances will be taken in writing. See rules 46 to 54. In common-law cases testimony is given orally before the jury, or may be taken under the acts of Congress either by commission or by

deposition before a notary or other officer upon verbal interrogatories. The testimony may thus be taken of witnesses who reside more than one hundred miles from the place of trial, or are old and infirm, or about to leave the country to a distance of more than one hundred miles. Where witnesses reside within one hundred miles they may be subpœnaed and examined on the trial.

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