

1942

## Recent Cases

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# Recent Cases

## EQUITY—INJUNCTION—POWER OF FEDERAL COURT TO RESTRAIN STATE PROCEEDINGS

### *Toucey v. New York Life Ins. Co.*<sup>1</sup>

Toucey, alleging fraud by the defendant company, brought suit in a Missouri state court to set aside a reduction in the amount of a life insurance policy, to reinstate the policy as originally written, and to recover disability benefits thereunder. The suit was removed to the federal District Court for the Western District of Missouri. This court dismissed the bill, finding that there was no fraud on defendant's part and that plaintiff was not disabled within the meaning of the policy; no appeal was taken, and the decree became final. A short time later Toucey's assignee sought to relitigate the same issues in a Missouri state court. Upon defendant's filing of a "supplemental bill," the federal court which had entered the original decree enjoined the "retrial, reconsideration, or readjudication" of the settled issues and the prosecution of the state action. After the granting of this injunction was affirmed<sup>2</sup> by the Circuit Court of Appeals for the Eighth Circuit, the United States Supreme Court granted *certiorari*<sup>3</sup> and subsequently a rehearing. The Supreme Court's decision to reverse the decrees also applied to another case which was then there for consideration, because "the controlling question in both is the same."

In this companion case—a mortgage foreclosure suit brought in a federal court by bondholders, the court adopted, as modified, the master's conclusions, and the decree invalidated the mortgage and bonds issued in consideration of the claimed indebtedness, this decree becoming final.<sup>4</sup> Parties to these proceedings thereafter instituted five separate suits in the Delaware state courts,<sup>5</sup> seeking

1. 62 S. Ct. 139 (1941). "The distribution of judicial authority between state and Federal courts is one phase, and perhaps the most delicate, of the ever-recurring problem of the distribution of power between the states and the nation. Wisdom in the distribution of this judicial power is thus important for the happy relations of the states to the nation," Frankfurter, *The Federal Courts* (1929) 58. NEW REPUBLIC 273; Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 344, 346.

2. 102 F. (2d) 16 (C. C. A. 8th, 1939), *cert. denied*, 307 U. S. 638 (1939). The injunction was made permanent, Toucey appealed, and the circuit court of appeals again affirmed, 112 Fed. (2d) 927 (C. C. A. 8th, 1940).

3. 311 U. S. 643 (1940). The decision below was affirmed by an equally divided Court, 313 U. S. 538 (1941), *rehearing granted*, 313 U. S. 596 (1941).

4. 98 F. (2d) 416 (C. C. A. 8th, 1938), *cert. denied*, 305 U. S. 650 (1938).

5. In one of these suits the state court held that no valid defense had been shown under the plea of *res adjudicata*, 1 Terry 500, 14 A. (2d) 386, 390 (Del. Super. Ct. 1940); this state court said there had been a misjoinder of parties in the federal court, that therefore the only parties before the federal court were connected with the collateral and not the antecedent debt, and that therefore "the

recovery on various notes and contracts claimed to have constituted the consideration for the bonds. Defendant filed a "supplemental bill" in the federal court which had issued the original decree; the court, on a finding that the causes declared upon in Delaware had been settled by the federal litigation, enjoined plaintiff from further prosecuting the state suits. The Circuit Court of Appeals for the Eighth Circuit affirmed,<sup>6</sup> and then *certiorari* was granted by the Supreme Court.

In delivering the opinion of the Court, Mr. Justice Frankfurter propounded the following as being the controlling question in both cases: "Does a federal court have power to stay a proceeding in a state court simply because the claim has previously been adjudicated in the federal court?"<sup>7</sup> Any answer to this question involves primarily the interpretations of portions of three federal statutes, of which the last two named appear literally to be in partial conflict.<sup>8</sup> One is to the effect that the pleading of a federal decree as *res adjudicata*<sup>9</sup> in a state suit raises a federal question reviewable in the Supreme Court. The second is that the courts of the United States ". . . shall have power to issue all writs . . . which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."<sup>10</sup> The third one, now judicially referred to as Section 265, of the Judicial Code (REV. STAT. § 720), provides that, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."<sup>11</sup>

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invalidity of the collateral does not necessarily destroy the validity of the underlying debt." Note the statement of Mr. Justice Reed in his dissent in the principal case: "It (the federal decree) is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication."

6. *Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co.*, 115 F. (2d) 1 (C. C. A. 8th, 1940), *cert. denied*, 312 U. S. 670 (1941). Concerning the view held by the Delaware state court, preceding note, the circuit court of appeals said, p. 10: "There can be no merit in such a contention. The entire transaction was decreed to be fraudulent and without consideration. A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

7. Compare the phraseology of Mr. Justice Reed, with whom the Chief Justice and Mr. Justice Roberts concurred, dissenting, "The controlling issue is the power of a federal court to protect those who have obtained its decrees against an effort to force relitigation of the same causes of action in the state courts."

8. *Terre Haute & I. R. R. v. Peoria & P. Union R. R.*, 82 Fed. 943, 946 (N. D. Ill. 1897), the court saying, "In their literal scope, the Constitution and statutes conferring jurisdiction, and this § 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down."

9. 43 STAT. 937 (1925), 28 U. S. C. § 344 (b) (1940); *Stoll v. Gottlieb*, 305 U. S. 165 (1938).

10. 36 STAT. 1162 (1911), 28 U. S. C. § 377 (1940).

11. 36 STAT. 1162 (1911), 28 U. S. C. § 379 (1940); *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 183 (1919) ("... it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation.") Professor Schofield in deploring the fact that the injunction had supplanted the stay-order procedure, (1911) 5 ILL. L. REV. 508, 510, said, "... (§ 265) and the stay order

The language of the Act of 1793 originally constituted an unqualified prohibition, and the only legislative exception which has been directly incorporated into Section 265 is the provision concerning the bankruptcy proceedings.<sup>12</sup> The other legislative exceptions are those pertaining to the removal of actions,<sup>13</sup> the limitation of shipowners' liability,<sup>14</sup> the Interpleader Act of 1926,<sup>15</sup> and the Frazier-Lemke Act;<sup>16</sup> and a recognized exception by judicial construction is that of the *res* cases.<sup>17</sup> The question presented by the principal cases is whether there has

procedure went upon the constitutional theory that when a state judge officially knows that a prior suit is pending in a federal court and is asked to stop a second suit for the same thing in his own court, the Constitution requires the state judge to stop the second suit; the Constitution is a standing perpetual injunction to the state judge as well as to the party; no injunction from the federal court is needed . . ." Durfee and Sloss concluded, *Federal Injunction Against Proceedings in State Courts; The Life History of a Statute* (1932) 30 MICH. L. REV. 1145, 1146, ". . . that Congress, without thinking the matter through to the end, meant precisely that no injunction should be granted to stay any proceedings in state courts." But nevertheless, ". . . it seems a safe assertion that the cases in which injunctions against state proceedings were sought to be prevented are the very ones in which the statute has been refused operation," Taylor and Willis, *Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169, 1194.

12. It has been held that "even when judicial powers are conferred upon state commissions, they are not courts within the meaning of the act so as to prevent the issue of injunctions against them by the federal courts," Warren, *supra* note 1, at 372. "But the preference for state review . . . cannot be regarded as an acute public problem. The Judicial Code makes it feasible for every state to require these cases to be first passed upon by the state courts," Lillenthal, *The Federal Courts and State Regulation of Public Utilities* (1930) 43 HARV. L. REV. 379, 421. Here also must be considered the effect of The Johnson Act, 48 STAT. 775 (1934), 28 U. S. C. § 41 (1) (1940).

13. 36 STAT. 1095 (1911), 28 U. S. C. § 72 (1940); *Dietzsch v. Huidekoper*, 103 U. S. 494 (1880). The justification stated for making this exception is that the federal court is "merely acting to protect its own jurisdiction." But the principles underlying *Kline v. Burke Const. Co.*, 260 U. S. 226 (1922), make this reason in itself insufficient; however, as this exception still exists, it would seem that the "relitigation" exception were proper; Taylor and Willis, *supra* note 11, at 1174 and 1176. See also Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 508; Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1924) 37 HARV. L. REV. 49, 131 (advocating the repeal of the removal laws); notes (1939) 122 A. L. R. 1425, 1431; (1923) 24 A. L. R. 1084, 1104.

14. REV. STAT. § 4285 (1878), 46 U. S. C. § 185 (1940); *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578 (1883).

15. 49 STAT. 1096 (1936), 28 U. S. C. § 41 (26) (1940); *Dugas v. American Surety Co.*, 300 U. S. 414 (1937) (note, however, that the authorities cited in this case are some of those which the dissent in the principal case regards as "relitigation" cases).

16. 47 STAT. 1470 (1933), 11 U. S. C. § 203 (1940); *Kalb v. Feuerstein*, 308 U. S. 433 (1938).

17. *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922) (saying, ". . . the rule was firmly established that the *pendency* (italics mine) in a federal court of an action *in personam* was neither ground for abating a subsequent action in a state court nor for the issuance of an injunction against its prosecution.") For distinguishing features of this statement, see note 23, *infra*. However, compare the language of Judge Donahue, *Limit of State and Federal Jurisdiction* (1923) 9 A. B. A. J. 479, 483: "The tribunal whose jurisdiction first attaches holds it to

arisen by judicial construction another exception, that of the so-called "relitigation" cases.<sup>18</sup> Mr. Justice Frankfurter disposed of this type of case either by classifying the decisions under one of the above exceptions, or by saying that ". . . the fact that one exception (by judicial construction, the *res* cases) has found its way into Section 265 is no justification for making another." On the other hand, Mr. Justice Reed in his dissenting opinion contended not only that this exception does exist, but also that it was embodied in and continued by the Judicial Code of 1911.<sup>19</sup> Disregarding the matter of implied Congressional adoption of this exception, it seems certain that the language<sup>20</sup> in many cases is broad enough to warrant the conclusion that this exception does exist by judicial construction, although there is also language to the contrary and to the effect that federal "interference" is prohibited if the action in the federal court is *in personam*.<sup>21</sup>

Two problems are thus presented; first, as to the cases themselves, and second, as to the policy underlying any exception arising by judicial construction. The cases must be distinguished not only on their facts but also on their pleadings and stage of proceedings; it must be ascertained whether the action is *in rem* or *in*

the exclusion of the other until the jurisdiction involved is exhausted. This rule, however, is limited to actions which deal either with the *rem* or potentially with specific property and does not apply to actions strictly in *personam*."

18. *Local Loan Co. v. Hunt*, 292 U. S. 234 (1934); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356 (1921); *Gunter v. Atlantic Coast Line R. R.*, 200 U. S. 273 (1906); *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 198 U. S. 188 (1904); *Julian v. Central Trust Company*, 193 U. S. 93 (1903). The writ of injunction is addressed to the party litigant and not to the court; *Marshall v. Holmes*, 141 U. S. 589, 600 (1891).

19. Mr. Justice Reed said, "Certainly when the Code of 1911 restated its terms, the Congress took into consideration what had by that time come to be its accepted interpretation. . . . (Although) no change in language was suggested, yet the Committee (on revision) as indicative of the then state of the law cited numerous cases which are relitigation cases. . . ." Opposing this, Mr. Justice Frankfurter was equally convinced that "there is no warrant for the assumption that, in the proposals for the Judicial Code of 1911, Congress had before it the "relitigation" exception as settled doctrine, and that by § 265 gave it legislative confirmation." *Durfee and Sloss*, *supra* note 11, at 1169, suggest that even if there were such Congressional adoption, still ". . . there is the alternative road of comity. The statute does not *demand* injunction in any case."

20. *Local Loan Co. v. Hunt*, 292 U. S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. . . . The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of section 265 of the Judicial Code.") See note 18, *supra*. And in an inferior federal court, in a suit to cancel a life and disability insurance policy for fraud—suit *in personam*, the court said, "In cases such as the one at bar, a recovery in the action in the state court will delay and obstruct the exercise of the jurisdiction of the federal court in equity and may lead to a conflict of authority, even though each court acts in accordance with the law," *Brown v. Pacific Mut. Life Ins. Co.*, 62 F. (2d) 711, 713 (C. C. A. 4th, 1933); note (1931) 73 A. L. R. 1531.

21. See note 17, *supra*.

*personam*,<sup>22</sup> and, if the action be *in personam*, whether the action has been adjudicated finally in either court or is pending.<sup>23</sup> As to these factors, even the Court could not agree as to the proper classification of the cases. However, in conjunction with the dissent in the principal cases, it is submitted that federal injunctions have been decreed in cases which can be properly regarded as involving *in personam* proceedings.<sup>24</sup>

Considering then the policies involved, it has been said that Section 265 ". . . expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process."<sup>25</sup> The recognized exception shown by the reciprocal doctrine of the *res* cases is said to be but an application of the reason underlying Section 265, in that that exception prevents actual physical conflict concerning the same physical property. Certainly the basis for that exception cannot be used as a reason for allowing "interference" in the *in personam* cases. Yet, when the policy underlying the removal<sup>26</sup> exception is noted, to allow

22. But even if the federal court has prior jurisdiction of specific property, if the state suit would not have the effect of "impairing or frustrating the jurisdiction of the federal court," then the state action may not be enjoined; *Chicago Title & T. Co. v. Fox Theatres Corp.*, 69 F. (2d) 60 (C. C. A. 2d, 1934). The federal court "may enjoin as well before the state court proceeding goes to judgment as afterward," *Sand Springs Home v. Title Guarantee & Trust Co.*, 16 F. (2d) 917, 918 (C. C. A. 8th, 1926); compare *Durfee and Sloss*, *supra* note 11, at 1158 and 1160. *Durfee and Sloss* also suggest, at 1156 and 1164, that the cases cannot be effectually distinguished on the basis of whether the federal injunction is ancillary or is original.

23. As stated in *Bethke v. Grayburg Oil Co.*, 89 F. (2d) 536, 538 (C. C. A. 5th, 1937), "In the *Kline* case (*supra* note 17) . . . it appeared both suits were only *in personam* and were pending and undecided when the injunction issued out of the federal court. . . . Here, the case in the federal court had terminated in final judgment. . . . The jurisdiction of federal courts to enjoin parties to suits in state courts has been successfully invoked in a number of cases where the jurisdiction of both courts was only *in personam*." Also, ". . . the authorities relied on in the *Kline* case were chiefly decisions which did not rest on the statute," *Durfee and Sloss*, *supra* note 11, at 1169 (footnote 74).

The Supreme Court said in *Penn General Casualty Co. v. Commonwealth*, 294 U. S. 189, 195 (1935), "Where the judgment sought is strictly *in personam* . . . both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, *at least until judgment is obtained* in one court which may be set up as *res adjudicata* in the other." (italics mine) It should be noted that in the *Hunt* and *Kline* cases, ". . . both opinions were by Mr. Justice Sutherland; and, in the *Hunt* case, no reference was made to the holding in *Kline v. Burke Const. Co.*, and the latter case therefore was not, and should not be regarded as effecting the rule announced in the *Hunt* case," *Hesselberg v. Aetna Life Ins. Co.*, 102 F. (2d) 23, 27 (C. C. A. 8th, 1939). In *Southern Ry. v. Painter*, 62 S. Ct. 154, 156 (1941), the Chief Justice, Mr. Justice Roberts and Mr. Justice Reed concurred, saying, "The reasons which led to dissent in *Toucey v. New York Life Ins. Co.* do not exist in this case. There is no federal decree and therefore no need of an injunction to protect the decree or prevent litigation."

24. *Looney v. Eastern Texas Ry.*, 247 U. S. 214 (1918); *Gunter v. Atlantic Coast Line R. R.*, 200 U. S. 273 (1906); *French v. Hay*, 22 Wall. 250 (U. S. 1875); *Durfee and Sloss*, *supra* note 11, at 1165. See notes 18 and 23, *supra*.

25. *Toucey v. New York Life Ins. Co.*, 62 S. Ct. 139, 145 (1941).

26. See note 13, *supra*.

the federal court "to protect its own jurisdiction," it would seem that this reason would be applicable to the *in personam* cases. Furthermore, it is submitted that the effect of the *res adjudicata* statute should be considered. Concededly it can be argued that as such statute exists then there is no need for federal "interference" in the *in personam* actions; however, it would seem that the better argument should be that the federal court has the power to protect its litigants from the doubt, time, and expense necessarily involved by proceeding under this statute.<sup>27</sup>

The opinions of both the majority and the dissent show rather extensive analyses of the cases, a consideration of legislative history, and a review of articles pertinent to the problems; but in view of the apparently conflicting past decisions, the result reached in the principal cases seems supported mainly by judicial classification and is seemingly based primarily on almost arbitrary and belated literal adherence to the provisions of Section 265.<sup>28</sup> The holding seems explainable, although perhaps justifiably, only by reference to one of Mr. Justice Frankfurter's citations<sup>29</sup> and to his statements: "Whatever justification there may be for turning past error into law when reasonable expectations would thereby (otherwise?) be defeated, no such justification can be urged on behalf of a procedural doctrine in the distribution of judicial power between federal and state courts. It denies reality to suggest that litigants have shaped their conduct upon some loose talk

27. Consider the reasoning of Judge Woodrough, 102 F. (2d) 16, 22 (C. C. A. 8th, 1939), who said, "If any necessity had been anticipated the federal court would doubtless have gone through the formality coincident with the decree of ordering Mr. Toucey to bring the policy into court for physical destruction by the marshall and would have admonished Mr. Toucey by appropriate writ of order to assert no claims under it. Such formality was pretermitted, as mere formalities tend to be in these days. . . . It is apparent therefore, that unless the court upon adjudging and decreeing that Mr. Toucey had no rights to re-instatement or recovery upon his policy, proceeds further and accords the insurance company some order against Mr. Toucey to effectuate the decree of the court, then the decree would amount to no more than a mere judicial declaration. See note 5, *supra*."

28. Compare Taylor and Willis, *supra* note 11, at 1196 and 1197, saying, "The very nature of the problem is such that to lay down a rigid rule governing the right of a federal court to decline to exercise jurisdiction in deference to a state court is neither practicable nor desirable. . . . Adjustment is still necessary to insure harmony. . . . These considerations, and the revived attitude of respect for the statute . . . strongly suggest the possibility and desirability of the revitalization of Section 265. Other decisions lend weight to a belief that in the future delicate problems of conflicting jurisdiction will be solved in the federal courts more often by a stay of their own proceedings than by the manufacture of ingenious devices for evading the statute."

29. Mr. Justice Frankfurter said, "Compare *Helvering v. Hallock*, 309 U. S. 106, 119, 120 . . ." (1940). This case does not involve the problem of the principal case, but at the pages cited it was stated: "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. . . . It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain non-action by Congress when Congress itself lends no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision."

in past decisions . . . (or) upon erroneous implications. . . . We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation.”

PAUL D. HESS, JR.

FEDERAL JURISDICTION—DIVERSITY OF CITIZENSHIP—ALIGNMENT OF PARTIES

*Chase National Bank of City of New York v. City of Indianapolis, Citizens Gas Co. of Indianapolis, Indianapolis Gas Co.*<sup>1</sup>

Chase, a New York corporation, was trustee under a mortgage deed to secure a bond issue executed by Indianapolis Gas, an Indiana corporation. The latter had leased its property for ninety-nine years to Citizens Gas, also an Indiana corporation, which agreed to pay as rental (a) the interest on the lessor's outstanding indebtedness, and (b) annual sums equal to six per cent return on the common stock of Indianapolis Gas. Citizens Gas was required by its franchise after twenty-five years to convey its property to the City subject to the Company's "outstanding legal obligations." Upon conveyance of the property, including the lease, the City refused to be bound by the lease.

Chase sued the three Indiana defendants, praying that the lease be declared binding on all defendants, that the City pay the interest directly to Chase, and that plaintiff be awarded costs and attorney's fees. The City and Citizens denied, while Indianapolis Gas admitted, that the lease was binding.

The district court found no collision of interests between Chase and Indianapolis Gas and realigned the latter as party plaintiff. Finding identity of citizenship between some plaintiffs and the defendants, the suit was dismissed for lack of jurisdiction. The circuit court of appeals reversed this ruling, and the Supreme Court denied *certiorari*. On remand to the district court the lease was held not binding on the City or Citizens Gas, and judgment was rendered against Indianapolis Gas for the amount of the unpaid interest. Chase and Indianapolis Gas appealed claiming the lease was valid, and the circuit court of appeals sustained their contention and found the defendants liable in the following order: City, Citizens Gas, and Indianapolis Gas.

Mr. Justice Frankfurter, speaking for the majority of the court, said that the only question involved was whether the lease was binding on the City and that the rest was "window-dressing" to satisfy diversity jurisdiction.<sup>2</sup> Chase and Indianapolis Gas were united on this issue, both contending for the validity of the lease and the City's obligation under it. What Chase wanted, Indianapolis Gas wanted, and the City did not want. Therefore, Indiana "citizens were on both sides of the litigation, and there was no jurisdiction. Whether the necessary "collision of interests"<sup>3</sup>

1. 62 Sup. Ct. 15 (1941).

2. Jud. Code § 24(1), 28 U. S. C. A. § 41(1), conferring upon the district courts jurisdiction "of all matters of a civil nature . . . where the matter in controversy exceeds . . . \$3000, and . . . is between citizens of different states . . ."

3. *Dawson v. Columbia Ave. Trust Co.*, 197 U. S. 178, 181 (1904).

exists must be determined from the "principal purpose of the suit"<sup>4</sup> and the "primary and controlling matter in dispute."<sup>5</sup>

Here was a case which had been before the federal courts several years, and which had twice run the gauntlet through the district court to the circuit court of appeals and finally to the Supreme Court. Three large corporations and a populous municipality anxiously awaited the determination of this controversy. Three years earlier the Supreme Court had refused to review the decision of the circuit court of appeals to the effect that federal jurisdiction existed. Now the same court has decided to further delay the outcome of this dispute.

This case presents the problem of the authority of a federal court properly to align the parties according to the nature of their actual interests in the dispute, and thereby determine whether the requisite total diversity of citizenship<sup>6</sup> exists to give jurisdiction. If the facts of the case show that the plaintiff's alignment of the parties does not conform to the real interests of the parties, and if the proper alignment shows that complete diversity does not exist, federal jurisdiction will be defeated.<sup>7</sup>

The power of the courts to ascertain the real matter in dispute and arrange the parties on one side or the other of that dispute has long been conceded.<sup>8</sup>

4. *East Tennessee, V. & G. R. R. v. Grayson*, 119 U. S. 240, 244 (1886).

5. *Merchants' Cotton-Press & Storage Co. v. Insurance Co.*, 151 U. S. 368, 385 (1893).

6. All the citizens on one side of the controversy must be citizens of different states from all parties on the other side. *Strawbridge v. Curtiss*, 3 Cranch 267 (U. S. 1806).

7. MOORE AND FRIEDMAN, *MOORE'S FEDERAL PRACTICE* (1938) 2136.

8. *Removal Cases*, 100 U. S. 457 (1879); *Pacific R. R. v. Ketchum*, 101 U. S. 289 (1879); *Harter v. Kernochan*, 103 U. S. 562 (1880), was a suit to contest the validity of municipal bonds, brought by a resident taxpayer against resident municipal officials and a non-resident bondholder. Removal was allowed on the ground that the interests of the taxpayer and the officials were identical. The sole matter in dispute was the liability of the township upon the bonds—on one side were the taxpayer and the township officers, on the other was the owner of the bonds. *Carson v. Hyatt*, 118 U. S. 279 (1886); *Evers v. Watson*, 156 U. S. 527 (1895); *Consolidated Water Co. v. Babcock*, 76 Fed. 243 (S. D. Cal. 1896); *Johnson v. Ford*, 109 Fed. 501 (D. Ore. 1901).

In *Blacklock v. Small*, 127 U. S. 96 (1888), one of the defendants joined in the prayer of the bill and therefore was aligned with the plaintiffs. Accord: *Lindauer v. Compania Palomas de Terrenos y Ganados, Sociedad Anonimo*, 247 Fed. 428 (C. C. A. 8th, 1918), if the corporation is made a defendant in a suit which is one in the right of the corporation, but joins in the prayer of the bill, it will be aligned as plaintiff.

In *Steele v. Culver*, 211 U. S. 26 (1908), no relief was asked against the defendant, so it was aligned with the plaintiff. Accord: *Brown v. Denver Omnibus & Cab Co.*, 254 Fed. 560 (C. C. A. 8th, 1918), holding that the omission of any prayer for judgment against the defendant trustee, who had refused to act, warranted the federal court in treating the trustee as plaintiff.

In *Merchants' Cotton-Press & Storage Co. v. Insurance Co.*, see note 5, *supra*, the primary controversy was between the complainants and the carrier, but the compress company was an indispensable party. Upon arranging the parties accord-

The majority opinion in the *Chase* case relied heavily upon *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co.*<sup>9</sup> That was a suit by a Pennsylvania mortgagee of a Georgia waterworks company against a Georgia municipality and the company to restrain the city from building a new waterworks and enforce the municipality's contract with the company. The court decided that the interests of the mortgagee and the company were not antagonistic, and that the company was made a defendant instead of a plaintiff for the purpose of reopening in the federal courts a controversy which had been decided against the company in the state court.<sup>10</sup> The court said that "it would look beyond the pleadings and arrange the parties according to their sides in the dispute."<sup>11</sup> The arrangement of the parties was held to be a mere contrivance between friends for the purpose of founding a jurisdiction which would not otherwise exist.

But before making such realignment of the parties, the courts make certain that the real interest is determined, rather than some apparent interest.<sup>12</sup> In *Hirsch v. Stone*,<sup>13</sup> where the defendant trustee was antagonistic to the plaintiff noteholders, the court ruled that he should not be realigned with the *cestuis*. The trustee who refused to bring suit was not realigned with the plaintiff bondholders in *Omaha Hotel Co. v. Wade*.<sup>14</sup>

Although it would have been to the financial interest of the corporation for the suit to succeed, the defendant corporation and the complaining stockholder were not placed on the same side of the controversy in *Venner v. Great Northern Ry.*,<sup>15</sup> because the corporation united with the other defendant in resisting the claim of fraud, and both were alleged to have engaged in the same illegal conduct by joint action. And in *Doctor v. Harrington*<sup>16</sup> the fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders did

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ing to their real relation to the primary controversy, there was no ground for diversity of citizenship.

In *Hamer v. New York Rys.*, 244 U. S. 266 (1917), the trustee was realigned as plaintiff because his interests were wholly with the plaintiff.

*Niles-Bement-Pond Co. v. Iron Moulders' Union*, 254 U. S. 77 (1920), was a suit by a corporation against its subsidiary and a local union to break a strike. There was no substantial "collision of interest" between the plaintiff and the subsidiary, so the latter was aligned with the plaintiff.

*Lee v. Lehigh Valley Coal Co.*, 267 U. S. 542 (1924), was a suit by the owner of one-half interest in a mine against the lessee and other one-half owner to cancel the lease. The defendant owner belonged on the same side of the controversy as the plaintiff owner.

*Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760 (C. C. A. 5th, 1903); *Kelly v. Dolan*, 218 Fed. 966 (E. D. Pa. 1914).

9. See note 3, *supra*.

10. *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696 (1889).

11. See note 3, *supra* at 180.

12. See note 7, *supra* at 2137.

13. 62 F. (2d) 120 (C. C. A. 5th, 1932), *cert. denied*, 289 U. S. 747 (1933).

14. 97 U. S. 13 (1878). But *cf.* *Allen-West Commission Co. v. Brashear*, 176 Fed. 119 (E. D. Ark. 1910), where trustee who refused to act was treated as plaintiff, and *Menefee v. Frost*, 123 Fed. 633 (S. D. N. Y. 1903).

15. 209 U. S. 24 (1908).

16. 196 U. S. 579 (1904). Accord: *Kelly v. Mississippi River Coaling Co.*, 175 Fed. 482 (W. D. Pa. 1909); *cf.* *Helm v. Zarecor*, 222 U. S. 32 (1911), where

not require that the corporation be grouped on the side of the plaintiffs, where the bill alleged that the corporation was under a control antagonistic to the plaintiffs.

Where the only issue concerned the amount of the debt, and the defendant mortgagor agreed with the plaintiff, but the issue was contested by another mortgagor who had assumed the entire mortgage debt, the mortgage and the debt was the subject matter of the controversy. In this situation the court in *Ayres v. Wiswall*<sup>17</sup> held that if the plaintiff's claim is sustained, the decree must run against all the defendants who owe the debt jointly.

It was held to be error in *Sutton v. English*<sup>18</sup> to align one of the defendants with the plaintiffs where her interest was adverse to the plaintiffs on one out of four issues, although with the plaintiffs as to three out of four.

The dissenting justices in the *Chase* case objected to the court's conclusion that a real controversy did not exist between Chase and Indianapolis Gas so that they could properly be on opposite sides of the litigation. The dissent contended that "the measure of jurisdiction should be taken from the pleadings unless the claims are frivolous" which was not the case here. There did not appear to be the slightest indication of such a connivance to confer jurisdiction as existed in the *Dawson* case.

Chase alleged a cause of action against the City on its undertaking to pay the indebtedness on the mortgage given by Indianapolis Gas. It also alleged a cause of action against Indianapolis Gas for the amount of the coupon interest. If the plaintiff had brought two separate actions, both would have been within federal jurisdiction. Jurisdiction should not be lost when these two causes of actions were united, merely because one defendant as surety sought to be exonerated by the other who was alleged to be the principal debtor. Although the City may be primarily liable for this indebtedness, the judgment must run against all the debtors. As long as there is a legal dispute between Chase and Indianapolis Gas, a real controversy would seem to exist.

If it is decided that the City is not liable for the mortgage debt, then Chase will need this judgment against the mortgagor in order to pursue the mortgaged

the controversy was over the control of a corporation. The court said that the corporation was properly made a defendant and should not be aligned as party plaintiff merely because its board and officers agreed with all the contentions of the plaintiffs.

17. 112 U. S. 187 (1884).

18. 246 U. S. 199 (1917). Plaintiffs, who included all the heirs of Mary Jane Hubbard except Cora, who was residuary legatee, sought to establish their right to certain property claimed to have belonged to Mary Jane, and sought to set aside testamentary dispositions and adjudge the property to the plaintiffs and partition it among them as heirs. Defendant Cora would share in the relief if obtained. Held, the prayer to have the will annulled with respect to the residuary clause is essential to any relief in the suit.

In *Knickerbocker Trust Co. v. City of Kalamazoo*, 182 Fed. 865 (W. D. Mich. 1910), the mortgagee of all the property of a street railway company sued to enjoin the city from depriving the company of its franchise and to compel the company to comply with all regulations of the city to preserve the franchise. Held, the mortgagee's interests, while in some respects the same as those of the company, were separate and distinct therefrom so that it could protest independently.

property into the hands of the City. Jurisdiction should not be refused just because the court may think that one cause of action is relatively less important than that asserted against another defendant.

"One of the tests by which the court may determine whether a defendant should be aligned with the plaintiff is the prayer for relief."<sup>19</sup> Chase asked that its lien be construed to cover the entire interest of Indianapolis Gas in the lease which required payments to stockholders over and above the interest payments for the bondholders, while Indianapolis Gas was opposed to this. Furthermore, Chase asked the court to set aside the escrow agreement by which Indianapolis Gas and the City assumed to exclude Chase from all dominion over the escrow funds. Chase requested that Indianapolis Gas be denied future control over such funds and that they be paid directly to itself, while Indianapolis Gas asserted they should be paid directly to it. Chase requested that its expenses be paid out of the money held in escrow by the bank. The greater the amount of recovery by Chase the less there will be for Indianapolis Gas. The trustee also claimed to be entitled to interest at six per cent after default on coupons which bore a five per cent interest rate. The plaintiff also sought to enjoin Indianapolis Gas from interfering with the lease and to have the lease declared binding on the company as well as the City.

The common attitude on the lease issue by Chase and Indianapolis Gas sprang from different legal origins. The mortgage was the only possibility that Chase could rely on to enforce the lease against the City. The rights of Indianapolis Gas were limited to the lease itself.

The majority of the court said that its basis was "not in legal learning but in the realities of the record," which meant that it disagreed with the lower court's view of the facts rather than its view of the law. Review of the facts is not the conventional function of the Supreme Court. After several years of litigation, jurisdiction should not be overturned on inconsequential grounds or on disagreements with the court below on matters of fact.

Realignment is required when there is no actual controversy between the plaintiff and the defendant, or no bona fide prayer of relief against it. From the facts and pleadings of the *Chase* case it seems that there was a sufficient collision of interests between Chase and Indianapolis Gas so that the two should properly be placed on opposite sides of the litigation.

JOHN C. MILLS, III.

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#### TORTS—HUMANITARIAN DOCTRINE

##### *Cochran v. Thompson*<sup>1</sup>

Action for damages for wrongful death. Plaintiff's husband was struck and killed by defendant's train, at a place on the track (located in open country),

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19. *Mahon v. Guaranty Trust & Safe Deposit Co.*, 239 Fed. 266 (C. C. A. 7th, 1917), citing *Dawson v. Columbia Ave. Trust Co.*, see note 3, *supra*; and *Steele v. Culver*, see note 8, *supra*.

1. 347 Mo. 649, 148 S. W. (2d) 532 (1941).

which was completely fenced and guarded. Occasionally, someone would climb over or through the fences and guards and use the track for travel parallel to the direction of the right of way. Deceased had been drinking, and had relaxed on the track to rest. He was noticed (*as an object only*) by those in charge of the engine, in time to have avoided hitting him. But when he was recognized as a human being, it was too late to avoid the accident. Deceased was "hunkered down" against the west rail with his head lying on the ties or ground; he wore khaki or light brown clothes, and didn't move when the whistle was sounded. These facts made him appear to the engineer, fireman, and brakeman, as a roll of brown paper, until it was too late. The court held that the mere discovery of an object on the track not discernible to be a human being does not require employees in charge to stop or slacken speed unless circumstances would lead a reasonably prudent man to believe that the object was probably a human being; and since there was no duty of lookout at the spot in question (which the court found after conflicting evidence as to the quantity of user), there were no such circumstances. Therefore, there was no negligence.

A number of cases hold that a railroad company will be liable if, after discovering an object on or near the tracks, the trainmen fail to exercise the requisite degree of care in discovering that it is a human being. But in these cases (other than those few taking the minority view),<sup>2</sup> the circumstances imposed a duty of lookout,<sup>3</sup> such as at crossings,<sup>4</sup> or within the limits of a city.<sup>5</sup>

It has been said that the duty of lookout is unimportant after the object is discovered on the track. However, the circumstances from which the duty of lookout arises play a very important role in determining whether the engineer should discern the object as a human being. The nature of the locality,<sup>6</sup> the probability that persons may be on the track at the point in question, the exact nature of the object as it appeared to the trainmen, the reasonableness of their belief that it was not a human being, and their watchfulness and attention in the interval between perceiving the object and discovering its true character—all bear on the question,

2. Note (1931) 70 A. L. R. 1124.

3. *Id.* at 1121. For cases where the question is left to the jury whether the railroad had permitted such user by the public as to raise a duty of lookout, see: *Yakubinis v. Missouri, K. & T. R. R.*, 339 Mo. 1124, 100 S. W. (2d) 461 (1936); *Wise v. Chicago, R. I. & P. Ry.*, 335 Mo. 1168, 76 S. W. (2d) 118 (1934); *Savage v. Chicago, R. I. & P. Ry.*, 328 Mo. 44, 40 S. W. (2d) 628 (1931).

4. *Womack v. Missouri Pac. Ry.*, 337 Mo. 1160, 88 S. W. (2d) 368 (1935); *Matz v. Missouri Pac. Ry.*, 217 Mo. 275, 117 S. W. 584 (1909) (no recovery because, although deceased was discovered, he did not enter the path of the train until too late to avoid the accident).

5. *Werner v. Citizens' Ry.*, 81 Mo. 368 (1884) (object was on track in heart of populous city of St. Louis).

6. *Degonia v. St. Louis, I. M. & S. Ry.*, 224 Mo. 564, 123 S. W. 807 (1909) (no public user pleaded or proven so no duty of lookout and no recovery); *Crossno v. Terminal R. Ass'n of St. Louis*, 328 Mo. 826, 41 S. W. (2d) 796 (1931); *Carpenter v. Kurn*, 345 Mo. 877, 136 S. W. (2d) 997 (1940) (path across tracks removed several years before accident so no invitation or license to use and no duty of lookout).

and cannot properly be disregarded in determining the liability of the company in a particular case.<sup>7</sup>

The mere discovery of an object on the track not discernible to be a human being does not impose on the employee in charge of the train the duty to stop or slacken the speed of the train, unless the circumstances are such as would lead a reasonably prudent man to believe that the object was probably a human being.<sup>8</sup> Hence, in the absence of such circumstances there is no negligence which will render the railroad company liable.<sup>9</sup> Since there were insufficient probabilities of the presence of people in the instant case to impose the duty of lookout, the same factors are influential in determining what interpretation the trainmen reasonably are held to make of the object they did see.

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7. Note (1931) 70 A. L. R. 1116.

8. *Isabel v. Hannibal & St. J. R. R.*, 60 Mo. 475 (1875) (defendant railroad liable for killing of child on the track, where, by the exercise of proper degree of care, the trainmen, after first observing the object on the track, could have discovered that it was a child in time to stop the train; also, fact that trainmen were aware that track ran between house where child lived and a well from which family got water—should increase the trainmen's vigilance); *Owen v. Delano*, 194 S. W. 756 (Mo. App. 1917) (a question for the jury whether an engineer in the circumstances should have discovered that an object seen by him was a human being, before it was too late to stop the train).

9. *Voorhees v. Chicago, R. I. & P. R. R.*, 325 Mo. 835, 30 S. W. (2d) 22 (1930).