IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF OREGON.

BROOKINGS STATE BANK, an
Oregon Banking Corporation,

Plaintiff,

-vs- NO. L. 9041

FEDERAL RESERVE BANK OF SAN
FRANCISCO, a Federal Reserve
Banking Corporation,

Defendant.

MEMORANDUM OF AUTHORITIES

ON MOTION TO DISMISS.

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The position of the defendant in relation to this motion may be briefly summarized as follows:

1. The complaint in this action, from the allogations of which the theory upon which the jurisdiction of the United States District Court is predicated must be ascertained, invokes jurisdiction upon the sole ground of the Federal incorporation of the defendant.

2. The Act of the Congress of February 13, 1925, (c.229, 43 Stat. Sec. 12), effective May 13, 1925, deprives this Court of jurisdiction founded upon the Federal incorporation of the defendant.

3. This Act affects cases pending when it takes effect, as well as cases thereafter arising and deprives this Court of power to proceed with the trial of this case in any particular.

4. This action is not one "arising under the laws of the United States" except in so far as it is such by reason of the Federal incorporation of the defendant.

5. This action is not one "between citizens of different states" nor "between citizens of a state and foreign states, citizens or subjects."

6. There being only one ground upon which the jurisdiction of this Court could be predicated, the Federal incorporation of the defendant, and that ground having been removed by the recently enacted statute, this Court should forthwith dismiss the action.

These contentions will be considered more fully in the order stated.

I.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOUNDED UPON A FEDERAL QUESTION NOR UPON DIVERSITY OF CITIZENSHIP. THE SOLE GROUND OF JURISDICTION STATED IS THE FEDERAL CHARACTER OF DEFENDANT.

The only allegations in the complaint which in any way refer to the character of the defendant or the laws under which it exists are those contained in paragraph II, which is as follows:

> "That the defendant, Federal Reserve Bank of San Francisco, is a corporation organized, created and existing under and by virtue of the laws of the United States, and being the Federal reserve system of the United States, the principal office of which is in the city of San Francisco, California; that said bank is doing business within the State of Oregon and has duly organized a branch bank in pursuance of the Federal Reserve Act, which said branch bank is located in Portland, Multnomah County, Oregon, and that said defendant is carrying on the business of a reserve bank and is doing business within the State of Oregon."

The statement that the defendant is organized under the laws of the United States and that it has a branch at Portland, Oregon, established in pursuance of the Federal Reserve Act, does nothing more than identify the defendant as a Federal corporation. Neither in this paragraph nor elsewhere in the complaint does the plaintiff claim any right founded upon the Reserve Act nor does it attack the constitutionality of said act nor allege

any infringement or violation of the provisions thereof by defendant. The entire action sounds in common law tort and, in so far as the allegations of the complaint are concerned, every issue involved could be decided independently of the defendant's character as a Federal corporation and without reference to any law of the United States. Defendant is charged with wilful and malicious interference with plaintiff's business and with certain alleged libels, the commission of which might, with equal force, be charged against any corporation, however organized.

If, then, as we will hereafter show, the mere Federal character of defendant no longer serves to vest this Court with jurisdiction, upon what possible theory can jurisdiction be longer retained?

Existence of Federal question must be plainly stated in the complaint.

If there is any rule firmly established in the Federal decisions, it is that in order to predicate jurisdiction upon the ground that the action is one arising under the laws of the United States, the action must be one actually and not potentially involving a Federal question and that such is the fact must be plainly and unequivocally shown by the initial pleading, unaided by subsequent pleadings or proof. On this point the case of

Roman Catholic Church v. Pa. Ry. Co., 237 U.S.575;
35 Sup. Ct. 729

is pertinent. This was a suit for injunctive relief and an award of damages against the railway company for an alleged nuisance occasioned by the operation of trains along a certain highway. The court, passing upon the matter of whether a Federal question is involved, say:

> "The only passage in the bill which in any degree whatever gives basis for the assumption that jurisdiction was invoked because of a reliance on rights claimed under the Constitution and laws of

the United States, is par. XI, which is as follows:

'That the said acts of the defendant have taken from your orator property consisting of casements of light and air to which your orator is legally entitled, and deprives it of the same without due process of law and without just compensation, ... and that such acts of the defendant have been and now are a violation of the provisions of the Constitution of the United States.' As from any point of view it is impossible, because of the vagueness of these averments, to escape, to say the least, doubt as to whether the bill asserted rights under the Constitution and laws of the United States which would be adequate to sustain the jurisdiction of the Circuit Court..... it follows that they are insufficient to sustain the claim of jurisdiction, since the rule is that averments to accomplish that result must be explicit and clearly made. ... But even if this impossible assumption were yielded to, there will yet be no ground upon which to rest jurisdiction, since the bill contains allegations which would exclude the possibility of implying from the facts alleged that there was an intention to base jurisdiction on rights asserted under the laws of the United States. We say this because paragraph XII of the bill unmistakably charges that the acts complained of were the result of the negligence of the carrier in operating its trains, thus excluding the possibility of affixing to them the character of state action so as to bring them within the 14th Amendment."

Again the rule is clearly stated in

Hull v. Burr, 234 U. S., 272; 34 Sup. Ct. 892,

wherein it is said:

"The general rule is firmly established that a suit does not so arise under the laws of the United States unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that suit arises under some federal law."

Where the jurisdiction of the District Court is originally invoked, or the case is brought there by removal, on the ground that the case is one arising under the Constitution, laws or treaties of the United States, that it does so arise must appear from plaintiff's own statement of his claim, that is, "a statement of facts in legal and logical form such as is required in good pleading," showing the plaintiff's cause of action without regard to

what may be the contentions or claims of the defendants.

Carson v. Dunham, 121 U. S. 421; 7 Sup. Ct. 1030,
Metcalf v. Watertown, 128 U. S. 586; 9 Sup. Ct. 173,
Colorado Mining Co. v. Turck, 150 U. S. 138; 14 Sup. Ct. 35,
Tennessee v. Union Bank, 152 U. S. 454; 14 Sup. Ct. 654,
Boston Copper Co. v. Montana Ore Co., 188 U. S. 632; 23 Sup. Ct. 434.

"Whether or not a case arises under the laws of the United States is a question which must be decided, not because of questions which might arise in the subsequent progress of the cause, but upon the grounds of jurisdiction asserted in the plaintiff's pleading."

Lovell v. Newman, 227 U. S. 412; 33 Sup. Ct. 375.

"When the complaint shows a case which arises out of a contract or a common-law right of property, and only indirectly and remotely depends on federal law, such a case not only does not, but cannot properly turn upon a construction of such law. But when the complaint asserts a right created by federal law, it presents a suit which may properly turn upon a construction of that law."

McGoon v. Northern Pacific Ry. Co., 204 Fed. 998.

"The averments of the complaint cannot be helped out by resort to the other pleading or to judicial knowledge."

Mountain View Mining Co. v. McFadden, 180 U. S. 533;
21 Sup. Ct. 488.

"It has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose."

Taylor v. Anderson, 234 U.S. 74; 34 Sup. Ct. 724,
See, also, Joy v. St. Louis, 122 Fed. 524,
affirmed in - 201 U. S. 332; 26 Sup. Ct. 478,
Third Street Ry. Co. v. Lewis, 173 U. S. 457;
19 Sup. Ct. 451,
Peabody v. Gold Hill Mining Co. (C.C.A. 9th Cir.)
111 Fed. 817.

"The suggestion in a complaint in an action at law that the defendant may or will set up a defense based on a statute repugnant to the Constitution, does not make the suit one arising under the Constitution."

Fergus Falls v. Fergus Falls Water Co., (C.C.A.8th Cir.) 72 Fed. 873.

"Where, however, the original jurisdiction of a circuit (now district) court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases, that the suit was one of which the circuit (now district) court at the time its jurisdiction is invoked, could properly take cognizance of. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleadings, must dismiss the suit; just as it would remand to the state court a suit which the record at the time of removal, failed to show was within the jurisdiction of the circuit court.

"It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right to recover will finally depend; and if so retained, the want of jurisdiction is not cured by an answer or plea which may suggest a question of that kind."

Metcalf v. Watertown, 128 U. S. 586; 9 Sup. Ct. 173.

"In other words, as was said, in substance, in Osborn v. U. S. Bank, 9 Wheat. 739; the right of the plaintiff to sue does not depend upon the defense which the defendant may choose to set up, because the right to sue exists, if at all, before any defense is made, and must be judged exclusively as of the date of the filing of the complaint, on the state of facts therein disclosed."

St. Paul Ry. Co. v. St. Paul, etc. 68 Fed. 2.
Decree affirmed 18 Sup. Ct. 946.

In San Francisco v. United Railroads, (C.C.A. 9th Cir.) 190 Fed. 507, the plaintiff alleged that section 499 of the California Civil Code entered into and became a part of its contract with the defendant city and that ordinances adopted by the city with a view to the construction of a municipal railroad and its acts in carrying out those ordinances would result in an impairment of plaintiff's contract as expressed in its franchise. Holding that no federal question was presented, the Court said;

"If, as alleged in the bill, the impairment of the appellee's contract consists in the fact that the city is proceeding to disregard its covenant, and to construct a road in violation of the provisions of Sec. 499, which was made a part of the contract, we are confronted with the fact that the city is proceeding to violate a law

of the state. If its action is illegal and unwarranted, it is primarily so because it violates that law. If its action had the effect to impair the obligation of the contract, it also has the effect to violate the express and paramount law of the state, and it is therefore void, and is not state legislation. .... In Barney v. New York, 193 U. S. 430; 24 Sup. Ct. 502, jurisdiction was invoked on the ground of the deprivation of property without due process of law in violation of the fourteenth amendment. It appeared on the face of the plaintiff's bill that the acts of the city officers therein complained of were not only unauthorized, but were forbidden by state legislation. It was held that no federal question was involved. The Court said: 'In the present case defendants were proceeding, not only in violation of the provisions of the law, but in opposition to plain prohibition.'"

In Parson v. Chicago, 138 Fed. 184, the Court said:

"Turning, now, to the question as to whether the suit is one arising under the Constitution, two elements must concur to give the court jurisdiction; The suit must be one actually and not potentially arising under the Constitution, as said by Mr. Chief Justice Fuller, speaking for the court in New Orleans v. Benjamin, 153 U. S. 411, 424, and it must appear at the outset that the alleged deprivation was by the act of the State. Barney v. N. Y., 193 U. S. 430. ... The court must look to the substance of the bill to determine whether there is in fact a federal question presented, or whether the said federal question, if there be one, is but incidental to the controversy. ... The federal courts should be slow to assume jurisdiction, unless it appears that a federal question is necessarily involved in the case."

The following cases are to the same effect:

Oregon Short Line v. Skottowe, 162 U. S. 490;
16 Sup. Ct. 869.
Brown v. Keene, 8 Pet. 112; 8 U. S. (L. Ed.) 885,
Sheldon v. Sill, 8 How. 441; 12 U. S. (L. Ed.) 1147,
Robertson v. Cease, 97 U. S. 646,
Hanford v. Davies, 163 U. S. 273; 16 Sup. Ct. 1051,
State of Tennessee v. Union Bank, 152 U. S. 454;
14 Sup. Ct. 654,
Defiance Water Co. v. City of Defiance, 191 U. S.
143; 24 Sup. Ct. 53,
Little York Co. v. Keyes, 96 U. S.199; 24 L. Ed. 656,
Blackburn v. Portland Mng. Co. 175 U. S. 571;
20 Sup. Ct. 222,
Shreveport v. Cole, 129 U. S. 36; 9 Sup. Ct. 210,
New Orleans v. Benjamin, 153 U, S. 411; 14 Sup. Ct.
905, 909,
Arbuckle v. Blackburn, 191 U. S. 405; 24 Sup. Ct. 148,

Spencer v. Duplan Silk Co. 191 U. S. 526;
24 Sup. Ct. 174.
Peabody Gold Mng. Co. v. Gold Hill Co. (C.C.A. 9th Cir.)
111 Fed. 817.

That the court, separately from the trial on the merits, should hear and determine questions relating to its jurisdiction in any action before it, whether those questions be raised by objections to the complaint, or by a plea in abatement, or whether taken advantage of pending the trial, is unquestioned.

American Sheet Co. v. Wenzler, 227 Fed. 321.

This uniform rule is so well stated in Shulthis v. McDougal, 225 U. S. 561, 32 Sup. Ct. 704 that further authority seems unnecessary.

In this case, involving the question of the title to certain oil lands, the jurisdiction of the Supreme Court was challenged on a motion to dismiss the appeal. In opposing the motion, the appellants contended that the case was one arising under certain laws of the United States and was not one, therefore, dependent upon diversity of citizenship. In considering this contention, the Court said:

> "The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:
> "1. Whether the jurisdiction depended upon diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action, as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of subsequent pleadings. ...
> "2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. ...
> "3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.

> This is especially so of a suit involving rights to lands acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws....
>
> "To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes... But the bill makes no mention of those statutes or of any controversy respecting their validity, construction or effect. Neither does it by necessary implication point to such a controversy."

Emerson v. Baker 3 Fed. (2d) 831, (Jan. 30, 1925)

Judged by the matter alleged in the complaint, which, as has been seen, is the only source from which a foundation for jurisdiction can be derived, it certainly cannot be said that the cause of action therein stated, substantially or at all "involves a dispute or controversy respecting the validity, construction or effect of any Federal law, upon the determination of which the result depends." The action can be decided solely by reference to the common law liability for tort. No portion of the Reserve Act is pleaded; no interpretation of the Reserve Act is asked; no claim is made that any right accorded by the Act has been infringed or that any constitutional right is, by the Act, denied. Federal jurisdiction was invoked and is now maintained solely upon the ground that the defendant exists and conducts its operations under Federal law. This being so, may this Court retain jurisdiction to complete the trial of this case?

II

THE ACT OF CONGRESS OF FEBRUARY 13, 1925, EFFECTIVE MAY 13, 1925, (c. 229; 43 Stat. Sec. 12) DEPRIVES THIS COURT OF JURISDICTION FOUNDED UPON THE FEDERAL INCORPORATION OF THE DEFENDANT.

The sixty-eighth Congress passed an act (Public-No. 415 H.R. 8206) entitled, "An Act to amend the Judicial Code, and to further define the jurisdiction of the Circuit Courts of Appeal and of the Supreme Court, and

for other purposes." (c.229, 43 Stat.) Section 12 of this Act reads as follows:

> "That no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress; Provided, that this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock."

Section 13 of the Act repeals certain sections of the Judicial Code and certain existing Acts of Congress, among them section 5 of "An Act to amend an Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' approved March 3, 1911," approved January 28, 1915, to which repeal reference is hereinafter made.

Section 14 provides:

> "That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect. (Underscoring ours.)

The Act was approved February 13, 1925, and goes into effect May 13, 1925.

Congress could not have used more positive language than that used in section 12. Where jurisdiction is based upon the Federal origin of one of the parties, as in this case, the jurisdiction of the United States District Court ends on May 13, 1925. This intent is made additionally plain by reason of the fact that section 12 of the new Act takes the place of section 5 of the Act of January 28, 1915, (38 Stat. L. 803, ch. 22, sec. 5) repealed.

> "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

By the recently enacted law this provision is repealed and the same rule is applied to all corporations incorporated by or under an Act of Congress. The defendant is such a corporation.

III.

THE ACT OF FEBRUARY 13, 1925, AFFECTS CASES PENDING WHEN THE ACT TAKES EFFECT, AS WELL AS CASES THEREAFTER ARISING. IT DEPRIVES THIS COURT OF POWER TO PROCEED AT ALL WITH THE TRIAL OF THIS CASE.

The above conclusion would seem to be inevitable from the very wording of the Act. Section 14 thereof declares that the Act shall take effect three months after its approval, May 13, 1925; but that it shall not affect cases then pending in the Supreme Court. The omission of any exception as to cases then pending in the District Courts which, by the provisions of section 12 are divested of jurisdiction in certain cases, clearly evinces an intention not to except cases pending in such District Courts. Further, section 14 expressly provides that the Act shall not affect the right to a review or the mode or time for exercising the same, as respects any judgment or decree entered "prior to the date when it takes effect." Thus, the Act does operate in respect to all judgments and decrees not entered prior to the date when it takes effect.

But we are not confined to a construction of the wording of the Act to support the contention that the Act in question divests this court of power to proceed in all cases pending upon its effective date, when jurisdiction is predicated upon the Federal origin of one of the parties. The rule that jurisdiction over pending cases is ousted by the repeal or amendment of the statute upon which jurisdiction depends, was early laid down and has been uniformly followed by the Supreme Court of the United

States. The only exception to this rule is represented by those cases where the repealing or amending act contains a clause saving pending cases from its operation.

Norris v. Crocker, 13 How. 429; 14 L. Ed. 210

In this case an Act of Congress imposing a penalty for aiding in the escape of fugitive slaves was repealed while an action brought for the purpose of collecting the penalty fixed by the Act was in progress; the Supreme Court holding that since the action for the recovery of the penalty was pending at the time of the repeal of the Act, such repeal was a bar to the action, the Court saying:

> "The suit was pending below when the Act of September 18, 1850 was passed, and was for the penalty of $500 secured by the fourth section of the Act. As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law. We therefore answer, to the second question certified, that the repeal of the fourth section of the Act of 1793 does bar this action, although pending at the time of the repeal."

In the case of

McNulty v. Batty, 10 Howard, 646; 13 L. Ed. 333, the Court said:

> "In the case of U. S. v. Boisdere's Heirs, 8th How. 121, it is said, that as this court can exercise no appellate power over cases unless conferred on it by Congress. If the act conferring the jurisdiction has expired, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the Act. The cases on this point are referred to in the brief in that case and afford full authority for the principle, if any were needed. The writ of error, therefore, fell with the abrogation of the statute upon which it was founded."

Ex parte McCardle, 7 Wall. 506; 19 L. Ed. 264.

This case came before the Supreme Court on appeal from the Circuit Court for the Southern District of Missouri. The matter arose on a petition for a writ of habeas corpus. A motion to dismiss the appeal

was made, argued and denied. Subsequently the Supreme Court permitted reargument and while the matter was pending awaiting reargument, an Act of Congress was passed affecting the jurisdiction of the Supreme Court in such cases. The attention of the court was called to the Act of Congress restricting its jurisdiction and, holding that even while the matter was pending before it, its jurisdiction could be and had been foreclosed, the Court said:

> "On the other hand, the general rule, supported by the best elementary writers, is that when an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it had never existed. And the effect of repealing Acts upon suits under Acts repealed has been determined by the adjudications of this court. The subject was fully considered in Norris v. Crocker, 13 How. 429, and more recently in Insurance Co. v. Ritchie, 5 Wall. 541; 18 L. Ed. 540. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the Act under which it was brought and prosecuted.
>
> "It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is no less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer. ... The appeal of the petitioner in this case must be dismissed for want of jurisdiction."

Baltimore and Potomac Ry. Co. v. Grant, 8th Otto 398;
25 L. Ed. 231;

In this case an appeal from the Supreme Court of the District of Columbia to the Supreme Court of the United States involving less than $2500 was pending at the time that an Act of Congress was passed limiting appeals in such cases to those in which the amount in dispute, exclusive, of the costs, exceeded the sum of $2500. The question presented was whether, the jurisdictional amount having been changed while the case was in process of appeal, the jurisdiction of the Supreme Court had been taken away. The Court say:

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. ... It is claimed, however, that taking the Act together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the Act which, in express terms, indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared. ... Indeed, so common it is, when a limited repeal only is intended, to insert some clause to that express effect in the repealing act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose. ... There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun .... If it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so; we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed.

"Without more we conclude that our jurisdiction in the class of cases of which this is one has been taken away, and the writ is accordingly dismissed."

In the case of

Gates v. Osborne, 9 Wall. 567; 19 L. Ed. 748,

a jurisdictional question was raised and Mr. Justice Clifford, speaking for the Court, said:

"Jurisdiction was conferred by an act of Congress, and when that act of Congress was repealed, the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell."

To the same effect see:

Yeaton v. U. S., 5 Cfanch 281; 3 L. Ed. 101,
Hamilton Bank v. Dudley, 2 Pet. 492; 7 L. Ed. 496,
B. & O. Railway Co. v. Grant, 98 U.S., 398;
25 L. Ed. 231
Hendrix v. U.S. 219 U. S. 79; 31 Sup. Ct. 193,
Hallowell v. Commons, 239 U. S. 506; 36 Sup. Ct. 202.

This rule is not confined to the Supreme Court of the United States but has been uniformly followed by the other Federal courts, as well as the state courts. 15 Corpus Juris, 825. Thus, in the case of Hoyle v. New Orleans Railway, 23 La. Ann. 502, it was decided that even though

judgment had been rendered, a divestiture of jurisdiction before the judgment is signed deprives the court of authority to sign it.

U. S. v. Kelley, (C.C.A. 9th Cir.) 97 Fed. 460; followed in Parr. v. Colfax - C.C.A. 9th Cir., 197 Fed. 302)

A former judgment of the lower court was reversed on the writ of error from the Circuit Court of Appeals and the cause was remanded for new trial. After the mandate had issued, it was discovered that before the Circuit Court of Appeals had rendered its decision, Congress had passed an act abridging the jurisdiction of the Circuit Court and District courts in cases such as the one then under consideration. A motion was made by defendant in error for an order recalling the mandate, upon the ground that the court had been deprived of jurisdiction.

The Circuit Court of Appeals, deciding that the lower court had been deprived of jurisdiction while the case was pending, and its mandate should therefore be recalled, since the lower court had no jurisdiction to further try the case, said:

> "The question arises whether the act deprives the courts of the United States of jurisdiction of causes which were pending at the time of its enactment. The plaintiff in error invokes the well-settled rule that a prospective operation of a statute is presumed to be intended unless the legislative intent to the contrary is declared, or necessarily implied, either from the contents of the statute or from the circumstances which attended its enactment. In the Circuit Court of Appeals for the Fifth Circuit, in U. S. v. McCrory, 91 Fed. 295, it was held that the effect of the statute was to deprive the courts of the United States of jurisdiction to entertain pending cases. The same view of the statute was taken by Kirkpatrick, District Judge, in Fairchild v. U. S. (91 Fed. 297) .... The Supreme Court in a series of decisions has recognized the doctrine that, when jurisdiction of a cause depends upon a statute, the repeal of the statute, without a reservation as to pending cases deprives the court of all jurisdiction which the act conferred. ...
>
> "We are unable to discover how a law which amends the act whereby jurisdiction was conferred differs from a repealing act such as the acts considered in the decisions above referred to. Such an

amendment is, in effect, a repeal. It repeals pro tanto the grant of jurisdiction. It revokes a portion of the jurisdiction which was conferred. There is nothing in the language of the act in question to indicate a purpose to except from its operations cases which were then pending. In the absence of such a reservation, the intention of Congress is clear. ... As amended, the statute expresses the measure of the court's power over pending cases. ... This court has no power to review the judgment of the circuit court in a matter of which the latter had been divested of its jurisdiction. This court can act upon the circuit court only through its mandate. It will not issue its mandate to a court which has no power to enforce it. ...

"The argument that the construction which we place upon the act will in some cases lead to harsh results is one that would have persuasive force if the language of the act left its meaning doubtful. In view of the settled construction which has been placed upon similar legislation, it must be presumed that, in omitting a saving clause as to pending suits, Congress intended all the results of its act, and that it had in view the possible exercise of its own power to grant relief in cases in which the dismissal of pending causes and the intervention of the Statute of limitations might result in hardship. The motion for an order recalling the mandate will be allowed, the judgment of this court set aside, and the writ of error dismissed."

It is interesting to note that Judge Gilbert, who wrote the opinion in this case, was urged to his conclusion by Jos. N. Teal, Esq., there counsel for defendant in error, and here one of counsel for the defendant, Federal Reserve Bank.

The language of the court is particularly apt, for section 14 of the Act of Congress of February 13, 1925, not only does not evince any intention to save pending cases from the operation of the statute, but does plainly evince an intention to allow the statute to operate on pending cases. The Act says:

"This Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

Patently, the act is intended to affect cases pending in the District courts on the date when it takes effect, as well as the right to a review and the

mode and time for exercising same, as respects all judgments and decrees not entered prior to the date when it takes effect. The conclusion is inescapable that the act serves to divest the District courts of all jurisdiction in cases pending on the effective date of the Act, May 13, 1925.

Bond v. United States, 181 Fed. 813 (Circuit Court District of Oregon, 1910).

This was a suit brought by an Indian to declare heirship in certain allotted lands. The Government defended the suit on the merits. The report of the case does not show in what manner the question of jurisdiction was raised and, so far as the decision shows, that question was investigated by the court upon its own motion.

After issue had been joined but before the trial of the case, Congress passed an act (June 25, 1910; 36 Stat. 855), declaring that in matters such as the one involved in this suit, the Secretary of the Interior should decide the question of heirship and "his decision thereon shall be final and conclusive." There was no statute expressly repealing an existing act which conferred upon the United States District Court jurisdiction to entertain cases of the kind in question.

Judge Bean, in passing upon the question of jurisdiction, said:

> "If the jurisdiction thus conferred upon the Secretary of the Interior is exclusive, the court should proceed no further in this suit but should dismiss it... Unless the court has jurisdiction to ascertain and determine disputes arising over the question of heirship of deceased allottees by virtue of some act of Congress, and especially if Congress has conferred exclusive jurisdiction over that question upon another department of the Government, the court is without authority to proceed in the matter."

After quoting the statute upon which jurisdiction had depended prior to the enactment of the latter statute giving the Secretary of the Interior jurisdiction, the Court continued:

"If Congress intended by the act of 1901 to confer upon the courts jurisdiction to determine questions of heirship and descent as it may affect allotted lands during the trust period, it was a jurisdiction, which it could take away at any time. This, it did by making the Secretary of the Interior a special tribunal to determine such questions and declaring that his decision shall be final and conclusive, thus making the jurisdiction conferred upon him exclusive and to that extent operated as a repeal, by implication, of the act of 1901, conferring jurisdiction upon the courts. ... and as there is no saving clause, the authority of the court immediately ceased over pending cases. In my judgment, therefore, the court has no jurisdiction of this suit, but the question sought to be litigated must be determined by the Secretary of the Interior." (Underscoring ours.)

This case was followed by Pel-Ata-Yakot v. United States, decided by the District Court for the District of Idaho, and reported in 188 Fed. 387.

In this case, Judge Dietrich, quoting the Act of Congress conferring upon the Secretary of the Interior power to render final decisions in Indian allotment cases, said:

"The provision is comprehensive, and clearly evinces the intention of Congress to confer exclusive jurisdiction to decide such controversies upon the Secretary of the Interior. This being true, it must be held that by implication the existing act conferring jurisdiction upon the courts, was repealed. ... The repeal thus effected being without any reservation as to pending cases, the present case, although commenced prior to the passage of the repealing act, must fall with the act upon which it rested." (Underscoring ours.)

Neither of these cases were taken to the Circuit Court of Appeals but in the case of Parr v. Colfax, 197 Fed. 302, the Circuit Court of Appeals for the Ninth Circuit decided the same question in identically the same way, saying:

"What is the effect of that statute upon the appeal in this case? The contention is made that it has no application to a case which was begun before the date of the statute, but we do not think so. There is in the statute no clause reserving jurisdiction as to pending cases, and the meaning of the statute is clear that exclusive jurisdiction is given to the Secretary of the Interior of all cases where an Indian, to whom allotment of land had been made or might thereafter be made, dies or had

died, intestate before the expiration of the trust period and before the issuance of the fee simple patent. That construction being given, the statute deprived the Circuit Court of jurisdiction to entertain an action such as is here under consideration and thereby, as a necessary incident, it took away the jurisdiction of this court to entertain an appeal from the decree of the Circuit Court sued out after the statute went into effect, and this for the reason that the act deprives this court of the power to enforce any judgment it may render on appeal. The appeal is dismissed."

It will be noted that in these cases the court held that the jurisdictional statute previously existing was repealed by implication, by virtue of the fact that final authority was vested in another department of the Government. In the present case there is no repeal of the statute conferring general jurisdiction upon the District Courts but there has been enacted a special statute eliminating from that jurisdiction suits brought against corporations organized under acts of Congress where jurisdiction rests upon that ground. That the District Courts have been divested of jurisdiction in cases such as the one at bar does not, therefore, rest for its support upon inference or implication, but upon a positive Congressional enactment.

IV.

THIS ACTION IS NOT ONE "ARISING UNDER THE LAWS OF THE UNITED STATES" EXCEPT AS THE DEFENDANT IS A FEDERAL CORPORATION.

We have seen that the plaintiff in its complaint does not attempt to state a Federal question except by alleging that the defendant is a Federal corporation and operates under Federal law. We have also seen that by the recent Act of Congress, jurisdiction predicated upon this ground has been taken away.

But, it may be said, every act of the defendant is governed by Federal law and grows out of such law; therefore any action against such a corporation must necessarily be one arising under a law of the United

States, irrespective of the allegations of the complaint. Any such contention is, of course, at once confronted with the uniform rule discussed in Subdivision I ante, that jurisdiction cannot be presumed or left to conjecture but must be predicated solely upon what the plaintiff sets up in its complaint as a ground for jurisdiction. Moreover, the gradual restriction by Congress of the jurisdiction of the United States Courts and the decisions interpreting the Congressional enactments so restricting jurisdiction show plainly that no such contention is tenable.

Since the case of Osborn v. Bank, 9 Wheat. 738; 6 U. S. (L.Ed) 204, it has been uniformly held by the Supreme Court that a mere averment that the plaintiff or defendant is a corporation organized under an act of Congress makes the case one "arising under the laws of the United States."

> Bankers Trust Co. v. T. & P.Ry. 241 U. S. 295,
> Pacific Removal Cases, 115 U. S. 1; 5 Sup. Ct. 1113,
> American Bank v. Fed. Reserve Bank, 256 U. S. 350;
> 41 Sup. Ct. 499.

In the case last cited, the Supreme Court, referring to a Federal Reserve Bank say:

> "The principal defendant was incorporated under the laws of the United States and that has been established as a ground of jurisdiction since Osborn v. Bank."

The only theory upon which jurisdiction was sustained in the Osborn case, the Pacific Removal cases and the ones which follow them, was the Federal character of one of the parties. And now, Congress has said that "no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress." The intent to destroy the basis upon which jurisdiction was predicated in these early cases could not be made plainer.

This curtailing of jurisdiction in action by and against Federal

corporations has been a matter of gradual growth.

Up to 1882 the right of national banks to sue and be sued in Federal courts was based upon their Federal origin. The passage of the Act of July 12, 1862 (Comp. Stats. 9665; 22 Stat. L. 172) left the jurisdiction as to these banks, with certain specified exceptions, dependent on diversity of citizenship, or the existence of a federal question.

Up to 1915 railroad companies incorporated under acts of Congress were subject to suit and could sue in the Federal courts by reason of their Federal incorporation.

T. and P. Ry. Co. v. Cody, 166 U. S. 608; 41 L. Ed. 1134.

Congress, by the Act of January 28, 1915, (ch. 22, sec. 5, 35 Stat. at L. 803), provided that no Federal jurisdiction should attach in the case of suits by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress. The Congress has now seen fit to still further restrict the jurisdiction of the Federal court by saying that no district court shall have jurisdiction of suits or actions by or against any corporation upon the ground that it was incorporated under an Act of Congress, at the same time repealing the special statute in regard to jurisdiction against Federal railroad companies. Thus the gradual restriction of Federal jurisdiction is plainly seen, applying first to national banks, next to federally incorporated railroads, and, by the recently enacted statute, to all Federal corporations.

That Congress has this power cannot be questioned, for the Constitution left to Congress the sole power to declare the extent and distribute the jurisdiction among the Federal courts. These courts possess no powers except such as the Constitution and the laws of Congress concur in

conferring and the presumption is always against jurisdiction unless it affirmatively appears.

Nashville v. Cooper, 6 Wall. 252; 18 L. Ed. 852,
U. S. v. S. P. Ry. Co. 49 Fed. 297,
Hanford v. Davies, 163 U. S. 273; 41 L. Ed. 157.

As has been already shown, a case presents a federal question only where, by the allegations of the complaint, it is apparent that it will become necessary to construe the Constitution, laws or treaties of the United States in order to reach a correct decision of the material issues or to decide as to the existence of some right asserted under the Federal Constitution or laws. The Constitution or laws of the United States must be directly involved and the existence of such question must be set forth in the complaint. The issue must be one of law, and not of fact.

Simpkins Fed. Practice, Rev. Ed. 395, 396, 409.

A mere reference to the Federal statute or even a claim that it will become necessary to construe a Federal statute, does not set up a Federal question. It must appear from the complaint that the recovery sought is based upon the construction given and that it is the substantial issue.

Simpkins, Fed. Practice, Rev. Ed. 416, 418.

Where, as in this case, the answer raises no Federal question, the case should be dismissed at once.

Robinson v. Anderson, 121 U. S. 522, 524; 30 L. Ed. 1021,
Hooker v. Los Angeles, 188 U. S. 318; 47 L. Ed. 491,
Devine v. Los Angeles, 202 U. S. 338; 50 L. Ed. 1055,
Boston Min. Co. v. Montana Ore Co., 188 U. S. 634;
47 L. Ed. 633.

The case of

Bankers Trust Co. v. T. & P. Ry. Co. 241 U. S. 295; 36 Sup. Ct. 569.

is directly in point on this phase of our contention. This was a suit to foreclose a mortgage given by the railway company. It was brought in the United States District Court for the Northern District of Texas and was dismissed for want of jurisdiction. A direct appeal was taken to the Supreme Court on the jurisdictional question.

The bill alleged that the defendant corporation was one created and existing under the laws of the United States with its principal place of business and its general offices in the Northern District of Texas. The Act of Congress under which the railway company was created provided, in part, that such company "shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States." By motion to dismiss the railway company challenged the jurisdiction of the District Court upon the ground of the special statute passed by Congress, heretofore referred to, which read as follows:

> "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress." (Act of Jan. 28, 1915, ch. 22, sec. 5; 38 Stat. at L. 803.)

The plaintiff insisted that, in refusing to entertain the suit, the District Court erred because the bill showed that the suit was one arising under the laws of the United States in that it arose under an Act of Congress and upon the further ground that the bill showed the suit to be one between citizens of different states. Deciding both of these contentions in the negative, the Supreme Court said:

> "Upon reading Sec. 1 of the Act of 1871, it is plain that the words 'shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States' were not intended in themselves to confer jurisdiction upon any court. As the context shows, Congress was not then concerned with the jurisdiction of courts, but with

the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court of law or equity - federal, state or territorial - whose jurisdiction as otherwise competently defined was adequate to the occasion. Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy, and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words. ...

"As long ago as Osborn v. Bank of United States, it was settled that a suit by or against a corporation chartered by an Act of Congress is one arising under the laws of the United States. ... After the Act of March 3, 1875 extended the jurisdiction of the circuit courts to cases arising under the laws of the United States, the ruling just quoted was uniformly followed and applied in suits by and against federal corporations..... save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enactment, like that of July 12, 1882 (22 Stat. at L. 162) placing most of the suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States...

"It results that if the general jurisdictional provision now embodied in Sec. 24 of the Judicial Code, respecting suits arising under the laws of the United States, were alone to be considered, it would have to be held that the District Court had jurisdiction of the present suit as one falling within that class by reason of the incorporation of the Texas and Pacific Railway Company under a law of the United States. But Sec. 5 of the Act of Jan. 28, 1915 must also be considered. It is a later enactment, is shown by the title to be amendatory of the Judicial Code, and, as has been seen, declares that 'no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress.' These are direct and comprehensive words, and when read in the light of the settled course of decision just mentioned, must be taken as requiring that a suit by or against a railroad company incorporated under an Act of Congress, be not regarded, for jurisdictional purposes, as arising under the laws of the United States, unless there be some adequate ground for so regarding it other than that the company was thus incorporated. Primarily, there was a purpose to effect a real change in the jurisdiction of such suits.... And so, when due regard is had for the terms of the amendatory section of 1915 and for the real basis of the jurisdiction affected, the conclusion is unavoidable that what is intended is to make the fact that a railroad company is incorporated under an Act of Congress - that is to say, derives its existence, faculties, and powers from such an act - an entirely negligible factor in determining whether a suit by or against the company is one arising under the laws of the United States.

"Upon examining the bill in the present suit, it is certain that it does not arise under those laws apart from the incorporation of the Texas and Pacific Company under Acts of Congress ... Portions thereof are copied into the bill as showing that the mortgage sought to be enforced was given under a power conferred by Congress, but this does not help the jurisdiction. As under the amendatory section,

> the fact that the company derives its existence and all of its faculties and powers from a Federal charter, cannot avail to give jurisdiction, it is obvious that to dwell upon the fact that any particular power comes from the common source must be equally unavailable."

The language of the Supreme Court in this case, applied to paragraph two of the complaint in the Brookings case, will convince at once that there are no allegations in that paragraph sufficient to sustain jurisdiction on any ground other than the federal incorporation of the defendant. The fact that the defendant was organized, created, and exists under the laws of the United States is immaterial. The jurisdiction is not aided by the additional allegations that the defendant has duly organized a branch bank in pursuance of the Federal Reserve Act, because as Mr. Justice Van Deventer says, in the Bankers Trust Company case, under the recent statute the fact that the defendant derives its existence, its franchise and its powers from a Federal charter cannot avail to give jurisdiction. Therefore, to dwell upon the fact that any particular power comes from Federal source or that any act has been done under Federal authority, must be equally unavailing to confer jurisdiction.

Western Union Telegraph Company v. Ann Arbor Railroad, 178 U. S. 239; 20 Sup. Ct. 867.

This was a bill filed in the state court of Michigan against the railroad company to restrain the defendant from interfering with the right of the telegraph company in certain telegraph lines along the defendant's railroad. The bill stated that the telegraph company was doing business in many parts of the United States and that it had filed with the Post Master General its acceptance of the provisions of a certain Act of Congress relating to telegraph companies. It further alleged that the telegraph company had the right to maintain its telegraph line under the provisions of

the statutes of the United States. The action was removed by the defendant to the Circuit Court of the United States, upon a petition alleging that the action was one arising under the laws of the United States, citing the specific Acts of Congress to which the bill of complaint referred. The defendant filed an answer and cross-bill and the cause was submitted to the Circuit Court. That court dismissed the bill and from the decree of dismissal an appeal was taken to the Circuit Court of Appeals which affirmed the decree.

Mr. Chief Justice Fuller, speaking for the Supreme Court, said:

> "Defendant's application to remove was based on the averment that the suit arose under the Constitution and laws of the United States. Whether it did so arise depended on complainant's statement of its own case. The sixth and seventh paragraphs of the bill contained all the defendant could have relied on as bringing the case within that category. Those paragraphs were to the effect that complainant had accepted the provisions of the Act of Congress and that, independent of the contract, it had a right to maintain its telegraph line under the provisions of the Statutes of the United States. ....
>
> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. ... We are unable to perceive that paragraphs 6th and 7th met this requirement and it does not appear to us that they were intended to do so by the pleader. ... It is entirely clear that there were no averments in the bill in respect to this contention, which would bring the case within the category of cases arising under the Constitution or laws of the United States so that jurisdiction could be held to have rested on that ground."

The rule announced in the foregoing cases might be multiplied by the citation of an endless number of other decisions of the Supreme Court. A few, however, will suffice to show the uniformity of the principle involved.

Cohens v. Virginia, 6 Wheat. 264; 5 L. Ed. 257,
Leather Mfg. Co. v. Cooper, 120 U. S. 778;
7 Sup. Ct. 777,
Whittemore v. Amoskeag National Bank, 134 U. S. 527;
10 Sup. Ct. 592,
Continental Bank v. Buford, 191 U. S. 119;
24 Sup. Ct. 54,
Spencer v. Duplan Silk Co., 191 U. S. 526;
24 Sup. Ct. 174,

In the case of Leather Mfg. Co. v. Cooper, cited above, referring to the statute localizing national banks, the court said:

"This was evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States. ... The removal of this class of cases from a state court to a circuit court was first provided for by the Act of March 3, 1875, in that clause of Sec. 2 which relates to suits arising under the Constitution or laws of the United States as construed in the Pacific Railroad Removal cases. Then the Federal and state courts had concurrent jurisdiction for suits brought by or against national banks and a suit of that character begun in a state court could be removed... because, as a national bank is a Federal corporation, a suit by or against it is necessarily a suit arising under the laws of the United States. But the Act of 1882 provided in clear and unmistakable terms, that the courts of the United States should not have jurisdiction of such suits thereafter brought. ... Consequently, so long as the Act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States."

V.

THIS ACTION IS NOT ONE "BETWEEN CITIZENS OF DIFFERENT STATES" NOR "BETWEEN CITIZENS OF A STATE AND FOREIGN STATES, CITIZENS OR SUBJECTS.

Section 24 of the Judicial Code, defining the jurisdiction of district courts, provides, so far as applicable to this case, as follows:

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity...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 between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects ...."

It may be contended that, granting this is not an action arising under the laws of the United States and conceding that the Federal character of the defendant does not serve to confer jurisdiction, this is an action between a citizen of the State of Oregon and a citizen of another state and that, therefore, jurisdiction attaches by reason of diversity of citizenship. Any such contention is entirely untenable.

This same question, in another phase, was at issue in the case of Bacon v. Federal Reserve Bank of San Francisco, 289 Fed. 513. That case involved the question of whether or not the Federal Reserve Bank of San Francisco was an inhabitant of the State of Washington by virtue of the fact that it maintained an office in that state, and therefore subject to suit against its objection, in the United States District Court for the Eastern District of Washington. Judge Neterer decided this question in the negative, holding that the Reserve Bank was an inhabitant of the Northern District of the State of California within the meaning of section 51 of the Judicial Code but that it was not a citizen of either the State of Washington or the State of California. In this case, if it had been determined that the Reserve Bank had any state citizenship, the United States District Court would have had jurisdiction, either upon the ground of diversity of citizenship or upon the ground that the defendant was a citizen of the State of Washington and therefore amenable to process served in that state. In the Bacon case the court said, in part:

> "The defendant, Federal Reserve Bank, is not a citizen of California, it being incorporated under an Act of Congress; its activities are not confined to a single state or locality, but are carried on in different states. ... The defendant Federal

Reserve Bank bears the same relation to the United States, or at least to the Federal Reserve District, as a corporation does to the state of its creation. It is a creature of the Congress. It is a citizen, if it may be so termed, of the United States. It is transacting business under and by virtue of national authority."

In Fletcher's Enc. of Corporations, Vol. 1, p. 866, it is said:

"A national corporation - that is, a corporation created by Congress in the exercise of its powers as the Legislature of the United States - is not regarded as a foreign corporation, but as a domestic corporation, in any state or territory in which it may do business, or in which it may have an office. ... A railroad company, incorporated under Acts of Congress, whose activities and operations were not intended to be, and are not in fact, confined to a single state, but are carried on in different states, is not a citizen of any state for the purpose of Federal jurisdiction on the ground of diversity of citizenship."

This same question was decided by the Supreme Court in the case of

Bankers Trust Co. v. T. & P. Ry. Co., 241 U.S. 295; 36 Sup. Ct. 569

heretofore cited on another point. In that case the Court said:

"Whether this is a suit between citizens of different states turns upon whether the Texas and Pacific Company is a citizen of Texas. It is doubtful that the pleader intended to state a case of diverse citizenship, but, be this as it may, we are of the opinion that the company is not a citizen of any state. It was incorporated under acts of Congress, not under state laws; and its activities and operations were not to be confined to a single state, but to be carried on, as in fact they were, in different states. Of course, it is a citizen of the UnitedStates in the sense that a corporation organized under the laws of one of the states is a citizen of that state, but it is not within the clause of the Fourteenth Amendment which declares that native born and naturalized citizens of the United States shall be citizens of the state wherein they reside. Nor has Congress said that it shall be regarded as possessing state citizenship for jurisdictional purposes, as isdone in respect of national banks by Sec. 24, par. 16, of the Judicial Code. In short, there is no ground upon which the company can be deemed a citizen of Texas, and this being so, the suit is not one between citizens of different states."

State of Texas v. Interstate Commerce Commission, 258 U. S. 158; 42 Sup. Ct. 261.

In this case the Supreme Court decided that the Interstate

Commerce Commission and the Railroad Labor Board, when sued by a state as corporate entities created by the United States for governmental purposes, are not citizens of any state within the provisions fixing the jurisdiction of the Federal courts.

A bill was brought in equity in the Supreme Court by the State of Texas against the Interstate Commerce Commission and the Railroad Labor Board. The state sought a declaration that the transportation act was unconstitutional; that all action taken thereunder should be declared void; and that the defendants should be restrained from proceeding under the Act. The defendants were referred to as citizens of states other than Texas, for the purpose of vesting jurisdiction. The Court said:

> "Both defendants are sued as corporate entities created by the United States for governmental purposes; and, if this be their status, they are not citizens of any state, but have the same relation to one state as to another. So, to entertain the suit, we should have to find some ground of jurisdiction other than the one suggested. ... It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exercise of the judicial power. ...What has been said suffices to show that we are not at liberty to entertain the bill in the exercise of our limited original jurisdiction."

Petri v. Commercial National Bank, 142 U.S. 644; 12 Sup. Ct.325.

This case involved the question of whether the fourth section of the Act of Congress of March 3, 1887 (24 Stat. 552), declaring national banks, for the purposes of actions by or against them to be citizens of the states in which they are located, prevented national banks from bringing actions in the Federal courts on the ground of diversity of citizenship.

Mr. Chief Justice Fuller, resolving this question in the negative, reviewed the legislation in relation to national banks and concluded by

quoting the provisions of the fourth section of the Act of July 12, 1882, which is as follows:

> "Jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations. ... shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations might be doing business when suits may be begun."

Commenting upon this statute, the Court say:

> "Hence the jurisdiction of the circuit courts over suits by or against national banks could no longer be asserted on the ground of their Federal origin, as they were placed in the same category with banks not organized under the laws of the United States... So far as the mere source of its incorporation rendered suits to which a national bank might be a party cognizable by the circuit courts, that was taken away, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different states or under the Constitution or laws of the United States, except in that respect, remained unchanged."

So, in the case at bar, it must be apparent that the enactment by Congress of the recent statute creates a situation where jurisdiction by the District Courts over suits by or against Federal reserve banks can no longer be asserted on the ground of their Federal origin. This statute places the Reserve banks in the same category with banks not organized under the laws of the United States, in so far as jurisdiction of the Federal courts is concerned. Of course it is true that jurisdiction of the Federal courts remains in so far as diversity of citizenship is concerned and in so far as actions arising under the laws of the United States are concerned, but, as has been seen, the case at bar involves neither of these questions.

VI.

CONCLUSION

Summarizing, we submit the following:

First. The jurisdiction of this court is predicated in the complaint upon

the sole ground that the defendant is a creature of the Federal law and therefore subject to suit in this court.

Second. The complaint is the only source from which the basis of jurisdiction can be ascertained. If not adequately pleaded there, jurisdiction cannot be aided by judicial knowledge, the allegations of the subsequent pleadings nor the testimony developed at trial.

Third. Congress has, by the Act of February 13, 1925, divested this court of jurisdiction upon the only ground stated in the complaint.

Fourth. Jurisdiction cannot be predicated upon the ground of diversity of citizenship because this is not the theory of the complaint, because there is no diversity of citizenship, the defendant not being a citizen of any state, and because this Court is now without power to grant leave to amend the complaint in an attempt to state even a specious diversity of citizenship.

Fifth. The terms of the Act of February 13, 1925, and the construction placed upon analogous statutes by the Federal courts lead inevitably to the conclusion that this Court is divested of jurisdiction over this action for all purposes upon and after the effective date of the Act of May 13, 1925.

Mayor v. Cooper, 6 Well. 247; 18 L. Ed. 851

Sixth. We respectfully submit that this Honorable Court should eo instanti strike this case from its files and dismiss the same without an award of costs or other relief to either party.

Respectfully submitted,

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_____

_____

Attorneys for Defendant

Portland, Oregon,
May 13, 1925