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how is that cost to be measured? Without a guiding principle consistently applied, no final answer can be expected. At any given time, the balance will be struck wherever the nine Justices of the Supreme Court think it should be struck.

YERACHMIEL E. WEINSTEIN

FEDERAL JURISDICTION—Ancillary Jurisdiction—Independent Grounds of Jurisdiction Required for Plaintiff's Claim against Third Party Defendant. Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 2396 (1978). Within the last fifty years, and especially since the adoption of the Federal Rules of Civil Procedure, the doctrine of ancillary jurisdiction has been greatly expanded by the inferior federal courts. Importantly, this evolution has occurred in the absence of specific direction from the United States Supreme Court. Indeed, prior to the recent decision of Owen Equipment & Erection Co. v. Kroger, the Court had last directly addressed a question regarding the permissible scope of ancillary jurisdiction in 1926 in Moore v. New York Cotton Exchange. Owen's primary significance is that it (1) directs that jurisdictional statutes be interpreted narrowly and (2) delineates a rather ambiguous three part test in cases involving questions of ancillary jurisdiction. While a possible interpretation of Owen is that two of the factors involved in this latter test—logical dependence of the federal and nonfederal claims and the loss of a party's legal rights—are to be required only of plaintiffs, in the author's judgment the better view is that either factor should be required of any party to a lawsuit asserting a claim requiring ancillary or pendent jurisdiction. Although the full

2. This statement follows the distinction between ancillary, pendent and pendent party jurisdiction which has been developed by the inferior federal courts. Owen, however, makes fairly clear that there are no "principled" differences between the three doctrines. Thus, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (pendent jurisdiction), and Aldinger v. Howard, 427 U.S. 1 (1976) (pendent party jurisdiction), may properly be viewed as addressing the question of ancillary jurisdiction. Nevertheless, Owen is the most comprehensive pronouncement on the matter to date.
3. 270 U.S. 593 (1926).
5. A nonfederal claim is one as to which there are no independent grounds of jurisdiction. A federal claim has such grounds.
import of Owen must await judicial construction, the decision provides the basis for a new and restrictive approach to this area of jurisdictional law.

I. PRIOR LAW

Before addressing the decision itself, it may be helpful to briefly review the general doctrine of ancillary jurisdiction as it existed before Owen. Ancillary jurisdiction was first recognized in the case of Freeman v. Howe which held that federal courts have jurisdiction to resolve disputes relating to the ownership of property drawn into their control by a principal claim falling within the court's jurisdiction. As late as 1925 the general rule was that "no controversy can be regarded as . . . ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."8

In 1926, in Moore v. New York Cotton Exchange,9 the doctrine of ancillary jurisdiction was expanded to include compulsory counterclaims, but the Court gave little explanation of the reasons for such expansion. Use of ancillary jurisdiction was further extended after the adoption of the Federal Rules of Civil Procedure. While the Rules did not expand subject matter jurisdiction,10 their liberal provisions for claim and party joinder, at the very least, broadened the opportunities available for the exercise of ancillary jurisdiction.11

Following Moore and the adoption of the Federal Rules of Civil Procedure, the federal courts generally held that a district court acquires jurisdiction of a case in its entirety and, as an incident to the disposition of a matter properly before it, can decide other matters raised by the case over which there are no independent grounds of jurisdiction.12 This position followed

from the premise that a claim, under the Federal Rules, denotes "the aggregate of operative facts which give rise to a right enforceable in the courts." Thus, once a court had acquired jurisdiction over a core of facts, it could dispose of any claims arising out of that core.\footnote{13}

In 1966 the Supreme Court decided \textit{United Mine Workers v. Gibbs}\footnote{15} which involved a question of pendent jurisdiction. Pendent jurisdiction concerns the resolution of a plaintiff's federal and state law claims against a single defendant in one action.\footnote{16} In \textit{Gibbs}, it was held that a federal court has power to adjudicate pendent claims if "the relationship between that [federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"\footnote{17} Under \textit{Gibbs}, it is necessary that both the federal and nonfederal claims derive from a "common nucleus of operative fact."\footnote{18} Thus, it is readily apparent that the \textit{Gibbs} test is quite similar to the principles of ancillary jurisdiction which had been developed by the inferior federal courts.

II. \textbf{The Owen Decision}

\textit{Owen}, a wrongful death action, arose when James Kroger was electrocuted in an accident involving a crane coming into contact with power lines. Mrs. Kroger, an Iowa citizen, brought a diversity action against the Omaha Public Power District (OPPD), a Nebraska corporation. After Owen Equipment and Erection Company (Owen) was impleaded by OPPD, Mrs. Kroger amended her complaint to assert a direct claim against Owen. Owen, in its answer, admitted that it was a Nebraska corporation. After OPPD was dropped from the suit, the action

\begin{itemize}
\item \footnote{13. Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189 (2d Cir. 1943).}
\item \footnote{14. Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970); LASA Per L'Industria Del Marmo Soc. Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).}
\item \footnote{15. 383 U.S. 715 (1966). Prior to \textit{Gibbs}, the exercise of pendent jurisdiction depended on whether the state and federal law claims were "two distinct grounds in support of a single cause of action," rather than "two separate and distinct causes of action." Hurn v. Oursler, 289 U.S. 238, 246 (1933). This test was rejected by \textit{Gibbs}, 383 U.S. at 725, as "unnecessarily grudging" under the Federal Rules of Civil Procedure.}
\item \footnote{16. 98 S. Ct. at 2401.}
\item \footnote{17. 383 U.S. at 725 (footnote omitted).}
\item \footnote{18. \textit{Id.} Under \textit{Gibbs}, if this requirement is met, the court then has "power" to hear the whole case; but the exercise of this power depends upon "considerations of judicial economy, convenience and fairness to litigants." \textit{Id.} at 728.}
\end{itemize}
proceeded between Mrs. Kroger and Owen, jurisdiction resting on diversity of citizenship. On the third day of trial, some two years after Mrs. Kroger had amended her complaint to assert a claim against Owen, the company challenged the court's jurisdiction, contending that diversity of citizenship was lacking inasmuch as it was an Iowa corporation. Importantly, Owen did not raise the jurisdictional defect until the Iowa statute of limitations had run. The district court held that the claim was within its ancillary jurisdiction. The court of appeals, relying on Gibbs, affirmed. In reversing, the Supreme Court held that independent grounds of jurisdiction are necessary before a plaintiff may assert a claim against a third party defendant. In reaching this conclusion, the Court seems to propound the three part test discussed below.

A. Gibbs: Constitutional Limitations

Owen first addressed the issue of whether the Gibbs doctrine is applicable in cases involving ancillary jurisdiction. Although a factual distinction between pendent and ancillary claims is noted, the Court indicated that the distinction bears no determinative weight. While this position would appear to be in accord with the reasoning of the court of appeals, the majority indicated that the appellate court had not understood the scope of the Gibbs doctrine. Properly read, "Gibbs delineated the constitutional limits of federal judicial power." In effect, the Court is stating that the Gibbs doctrine is applicable in cases involving questions of ancillary jurisdiction, but that Gibbs is only the first step in determining whether ancillary jurisdiction is available.

B. Step Two: Statutory Limitations

Relying on two recent decisions, the Court noted that Gibbs "does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal

19. For a more complete statement of facts, see the opinion of the court of appeals, 558 F.2d 417 (8th Cir. 1977).
21. 558 F.2d 417 (8th Cir. 1977).
23. Id. at 2401.
24. Id.
ones,"\textsuperscript{26} since "the jurisdiction of the federal courts is limited not only by . . . the Constitution, but [also] by Acts of Congress."\textsuperscript{27}

Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.\textsuperscript{28}

Since Strawbridge v. Curtis,\textsuperscript{29} the diversity jurisdiction statute, now codified as 28 U.S.C. § 1332\textsuperscript{30} has consistently been interpreted as requiring complete diversity of citizenship.\textsuperscript{31} Relying on this judicial construction and on the legislative history subsequent to its initial enactment, the Court re-emphasized that "diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant."\textsuperscript{32} The majority expressly disapproved of the tactic by which a plaintiff uses ancillary jurisdiction to "defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."\textsuperscript{33}

C. The Ambiguous Third Step: Logical Dependence, Loss of Legal Rights and/or Claimant’s Posture?

The final, and perhaps most important, part of the Court’s opinion involves the context in, or posture from which the nonfederal claim is asserted. The Court recognized three grounds which can justify ancillary jurisdiction despite some restrictive statutory language: (1) if there is a logical dependence between the federal and nonfederal claims, (2) if "a defending party [is] haled into court against his will" or (3) if the situation

\textsuperscript{26} 98 S. Ct. at 2402.
\textsuperscript{27} Id.
\textsuperscript{28} Id. (quoting Aldinger v. Howard, 427 U.S. at 18).
\textsuperscript{29} 7 U.S. (3 Cranch) 267 (1806).
\textsuperscript{30} (1976).
\textsuperscript{31} See note 131 infra.
\textsuperscript{32} 98 S. Ct. at 2403. The Court noted that Congress has re-enacted the statute a number of times without altering the diversity requirement.
\textsuperscript{33} Id.
involves the potential irretrievable loss of legal rights.34

The second factor, the claimant's position in the lawsuit, is perhaps dispositive. In the Court's view, a plaintiff who sues a third party defendant has the option of suing in either a state or federal court, whereas "ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."35 While the complete import of this statement is not certain, it is clear that the Court is of the opinion that, at least in a case such as this, there can be no room for complaint since "'[T]he efficiency plaintiff seeks so avidly is available without question in the state courts.'"36

The Court also distinguished a plaintiff's ancillary claim from a third party claim in that "A third-party complaint depends at least in part upon the resolution of the primary lawsuit. . . . Its relation to the original complaint is thus not mere factual similarity but logical dependence."37 Since respondent's claim did not depend upon the resolution of the principal claim, it was "'[f]ar from being an ancillary and dependent claim," but was rather "a new and independent one."38

Thus, the Court raised the logical dependence factor in the third part of its test, but problematically, this factor was only raised as an adjunct to the discussion distinguishing a plaintiff's claim from a third party claim. Nevertheless, in this author's view, this requirement of logical dependence marks the introduction of a new and restrictive element in the doctrine of ancillary jurisdiction. Federal courts had previously exercised jurisdiction if the nonfederal claim was logically related to the principal claim or if the claims arose from the same core of facts. The majority's requirement of logical dependence is distinguishable, seemingly referring to the nonfederal claim's relationship to the resolution of the principal claim rather than to its relationship to the transaction before the court.

Clearly, the Owen Court does not construe the diversity statute as an absolute prohibition. A third factor, the need to

34. Id. at 2404.
35. Id. (footnote omitted).
37. 98 S. Ct. at 2404. While this is the case in impleader, it is not, in fact, the situation in all third party complaints.
38. Id.
protect legal rights, is also raised as a possible basis of ancillary jurisdiction if the first two parts of the Owen test are met:

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. 39

This latter part of the opinion leaves a number of questions unresolved. Does the Court mean to say that all nonfederal claims asserted by defendants which have met the Gibbs test are within the ancillary jurisdiction of a federal court, regardless of the logical dependence or legal necessity requirements? In other words, are the first and third factors listed above, which both present very rigid and strict tests, to be employed only in cases where the nonfederal claim is asserted by plaintiff, or should they be applicable to both plaintiff's and defendant's claims, with, perhaps, a relaxed logical dependence requirement in the latter situation? Finally, what is the relation of the third step of the Owen test to the second; are there some cases where these latter factors are not to be considered and the statutory negation of jurisdiction will be dispositive? 40

In the author's view, any distinction between plaintiff's and defendant's claims is largely artificial. Revere Copper & Brass Inc. v. Aetna Casualty & Surety Co., 41 attempted to distinguish a third party defendant's claim from that of a plaintiff's:

Suffice it to say that the two situations are the converse of each other only superficially and that there are differences which militate against identical treatment. First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can . . . . Since a plaintiff could not initially join a non-diverse defendant, it is arguable he should not be allowed to do so indirectly . . . . Moreover, there is the possibility . . . of collusion between the plaintiff and an overly cooperative defendant . . . . 42

These distinctions are not convincing. First, plaintiff has no

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39. Id.
40. See text accompanying note 124 infra.
41. 426 F.2d 709 (5th Cir. 1970).
42. Id. at 716.
choice or control over the impleader; he has only an initial choice of forum. Once the third party defendant is impleaded, plaintiff is, in effect, involuntarily made a party to a new type of action—one which he may not have contemplated. Moreover, even if the impleader is foreseeable, foreseeability alone should not "be a sufficient reason to declare that a district court does not have the power to exercise ancillary jurisdiction." Indeed, it has previously been held that the actions or consent of a party do not affect jurisdiction; there is no reason why foreseeability should stand on a different footing.

On the other hand, a defendant's ability to defend "himself as best he can" is not enhanced by exercising jurisdiction over his nonfederal claim for personal injuries. Except for impleader, a defendant's claims are offensive in nature and are not related to his ability to defend himself. Similarly, it is not clear why the plaintiff, who is after all, the allegedly aggrieved party, should be penalized either for choosing a federal forum or for responding to a change in the nature of the action resulting from the defendant's impleader of an additional party. Also, indirection should be irrelevant since plaintiff has not caused it and indirection results in all cases where ancillary jurisdiction is invoked. Finally, as the dissent in Owen argued, collusion can adequately be handled under 28 U.S.C. § 1359. Thus, it would seem that any distinctions between plaintiff's and defendant's posture in a lawsuit are insufficient to warrant affording them different rights.

Indeed, if ancillary jurisdiction is to be restricted, the requirements of logical dependence or loss of legal rights are more logical means of restriction. Traditionally, the doctrine of ancillary jurisdiction was invoked in cases such as Freeman v. Howe, where legal rights would otherwise be lost. In Moore v. New York Cotton Exchange the doctrine was expanded to include compulsory counterclaims, but, as the particular claim in Moore probably satisfied the logical dependence test, the

43. 38 S. Ct. at 2408 (White, J., dissenting) (emphasis in original).
44. E.g., American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951) (cited by the Owen majority).
45. The most convincing justification for a preferential jurisdictional rule would seem to be that such a rule is necessary to safeguard the interests of a defending party. However, the availability of impleader would seem to afford a defendant adequate protection, thus eliminating the need for any special jurisdictional treatment.
47. 65 U.S. (24 How.) 450 (1860).
48. 270 U.S. 593 (1926).
decision should not be read as a blanket approval of all claims by defendants which arise from the same transaction. Indeed, Moore is cited by Owen in support of the logical dependence proposition. While the inferior federal courts gave Moore a broad and liberal interpretation and developed a test virtually identical to the Gibbs doctrine, Supreme Court precedents reflect a view of ancillary jurisdiction which is considerably more narrow. The better argument, then, supports the uniform application of the logical dependence or protection of legal rights requirements regardless of the claimant's status.

III. INTERPRETATION AND SCOPE OF Owen IN DIVERSITY CASES

Depending on the interpretation given the third part of the Owen test, the decision could have a major impact on modern notions of ancillary, pendent and pendent party jurisdiction. While the decision is in accord with the majority federal court view in a Rule 14 context, its rationale diverges sharply from

49. 98 S. Ct. at 2404.
50. Recent decisions of the Supreme Court have successively adopted a narrower view of ancillary jurisdiction. In Zahn v. International Paper Co., 414 U.S. 291, 300-01 (1973), the Court refused to extend ancillary jurisdiction to plaintiffs in a Fed. R. Civ. P. 23(b)(3) class action who failed to meet the jurisdictional amount requirement. The decision was reached in spite of the fact that the Supreme Court had previously held that intervention by a member of a class was within the ancillary jurisdiction of a federal court. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Stewart v. Dunham, 115 U.S. 61 (1885).

Three years after Zahn, the Court decided Aldinger v. Howard, 427 U.S. 1 (1976). In that case, the doctrine of pendent party jurisdiction was severely restricted, if not wholly abrogated. In so doing, the Court diverged from the majority federal court view (see, e.g., Schulman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971)) and established an entirely new test in pendent party cases.

Owen has now extended the Aldinger test to cases of ancillary jurisdiction, and, like its predecessors, has adopted a policy of strict statutory compliance. Unmistakably, the trend has been to restrict the availability of ancillary jurisdiction and to limit the conclusiveness of Gibbs.

51. The argument can also be made that the Court did not intend to alter the traditional majority position that nonfederal claims asserted by defendants (which have first met the Gibbs test) are within a court's ancillary jurisdiction. First, there is language in Owen which appears to approve this view. 98 S. Ct. at 2404. Secondly, the majority notes that ancillary jurisdiction "has been said to include cases that involve multiparty practice." Id. at n.18. It was the opinion of the dissent in Owen that this language was recognition of ancillary jurisdiction in the impleader, cross-claim and counterclaim contexts. Id. at 2406 (White, J., dissenting). Finally, it can be argued that if the Supreme Court had meant to overturn the law as developed by the inferior federal courts it would have done so in an unequivocal manner. It may be, then, that Owen has not propounded a new rule in cases where the nonfederal claim is asserted by a defendant.

these decisions. Certainly, a significant change is the strict, almost unyielding construction given the diversity statute itself.

Although it has been held that 28 U.S.C. § 1332(a)(1) requires complete diversity and must be strictly construed, the Court here seems to require stricter adherence to the letter of the statute than had previously been thought necessary. The requirement of complete diversity is interpreted so strictly in this case that it is not circumvented (1) by indirection, (2) by the fact that the claims derive from a common nucleus of fact, (3) by the fact that Owen’s negligence will be before the court in either case, (4) by the fact that plaintiff will be inconvenienced and the burden on the judiciary as a whole increased or (5) by the fact that such a strict construction could lead to a harsh and inequitable result.

Diversity and ancillary jurisdiction are in fact opposite sides of the same coin; to expand the complete diversity requirement is to necessarily limit the doctrine of ancillary jurisdiction. The next section of this note will examine the impact of Owen on ancillary claims against nondiverse parties given this relation. In this examination, it will be assumed that the federal and nonfederal claims derive from a “common nucleus of operative fact.” Since Owen has now very strictly construed the diversity statute, the second part of the test need not be addressed. The key question, then, is how the third step of the Owen test will be employed in a variety of situations.

A. Plaintiff v. Third Party Defendant

Prior to Owen, the majority of federal courts refused to exercise ancillary jurisdiction when faced with a plaintiff’s claim against a third party defendant. Generally, they distin-

55. 98 S. Ct. at 2403.
56. Id.
57. Id. at 2407 (White, J., dissenting).
58. In this instance, the Iowa statute of limitations had run, perhaps leaving plaintiff with no alternate forum. Id. at 2404 n.20.
59. See id. at 2406.
guished Gibbs and held that it is not enough that the federal and nonfederal claims arise from a "common nucleus of operative fact" in the instance of a plaintiff's claim because a plaintiff should not be allowed to do indirectly that which he cannot do directly—obtain jurisdiction over a party who would not otherwise be within the court's reach.

The minority view followed the reasoning of Professor Moore and allowed ancillary jurisdiction for plaintiff's claims. Moore had argued that Gibbs "re-emphasizes the fundamental principle that a federal court has jurisdictional power to adjudicate the whole case." He severely criticized a restricted view because: (1) it is irrelevant that plaintiff could not have sued the third party defendant directly since he has no control over the impleader, (2) collusion can effectively be handled under 28 U.S.C. § 1359 and (3) a fear of collusion does not justify an absolute prohibition.

Owen apparently resolves the question of whether independent grounds of jurisdiction are necessary to support a plaintiff's claim against a third party defendant where the federal claim is based on diversity of citizenship. However, even under the decision's restrictive test, the result in this instance can be questioned.

It will be recalled that Owen concealed its true citizenship until after the Iowa statute of limitations had expired. Respondent, who had no reason to disbelieve petitioner's false admissions, was deceived into proceeding in a federal court to her possible detriment. In effect, a federal court and its procedural system may have been used as an instrument in the destruction of an innocent plaintiff's legal rights. Iowa does have a saving clause in its statute of limitations, however, and

64. 3 Moore's Federal Practice ¶ 14.27[1], at 14-569 (2d ed. 1978) (emphasis in original).
65. (1976). This section prohibits district court jurisdiction over parties collusively joined to invoke jurisdiction.
67. This provision reads: "If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is
the language of both the majority and the dissent suggest that the justices believed that, despite a dismissal in federal court, Mrs. Kroger would be able to pursue her claim against Owen in the Iowa courts. Thus, Owen leaves unanswered the question whether ancillary jurisdiction can be exercised in a case where a plaintiff's rights would definitely be lost through no negligence on his or her part.

B. Third Party Defendant v. Plaintiff

The federal courts have split on the issue whether independent jurisdictional grounds are necessary for a claim by a third party defendant against a plaintiff. The modern trend has allowed ancillary jurisdiction, reasoning that there is little chance of collusion and the posture in which a third party defendant's claim is asserted is sufficiently different from that in which a plaintiff's claim is made to require different treatment.

Clearly, if legal rights would be lost or the nonfederal claim is logically dependent upon the principal claim, ancillary jurisdiction may be exercised. The difficulty lies with the Court's statement that "ancillary jurisdiction typically involves claims by a defending party haled into court against his will..."72 While it can be argued that ancillary jurisdiction should not be predicated upon whether the claimant is plaintiff or defendant, or that such a test is illogical and inconsistent with that of logical dependence, the Court does, nevertheless, include this language in its discussion of the third step. This may be deemed as sufficient approval for the inferior courts to perpetuate the majority view.

Although Owen may not cause any change in the Rule 14 context herein discussed, the illogicality of basing ancillary jurisdiction on a claimant's status is best demonstrated under

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68. 98 S. Ct. at 2404 n.20.
69. Id. at 2407 (White, J., dissenting).
72. 98 S. Ct. at 2404.
Assume, for example, that \( A, B \) and \( C \)—citizens of states \( X, Y \) and \( X \) respectively—are involved in a three car collision. \( A \) sues \( B \) in diversity and \( B \) impleads \( C \) for contribution. \( C \), who has also been injured, claims against \( A \) pursuant to Rule 14; \( A \) raises the affirmative defense of contributory negligence and also asserts a claim against \( C \) for his own injuries. All of the claims here satisfy the Gibbs test, but \( A \) and \( C \) are nondiverse parties. If the test of "context" be whether the claimant "has been haled into court against his will," then \( C \)'s claim against \( A \) will be ancillary, but \( A \)'s claim against \( C \) will not, since \( A \) "has chosen the federal rather than the state forum and must thus accept its limitations."\(^{73}\)

Under the logical dependence test, however, \( C \)'s claim against \( A \) for his own injuries would be new and independent and in no way necessary to protect his legal rights which are amply safeguarded by the availability of impleader. If the former of the two tests is adopted, it is manifest that jurisdiction over \( C \)'s claim will not be founded on his need to defend himself, since his claim is for his own injuries. In effect, then, the ancillarity of \( C \)'s claim will be based on considerations of convenience and economy. This is nothing more than the Gibbs doctrine, which Owen found not to be peremptory. The argument would seem to be quite strong, then, that at least in such a context, different rules should not apply merely because the nonfederal claim is asserted by a defendant rather than by a plaintiff who has a choice of forum.

C. Impleader

Since the 1948 amendment to Rule 14, there has been little doubt that a defendant's claim against a third party defendant falls within the ancillary jurisdiction of a federal court.\(^{74}\) Owen expressly approved of this practice.

A number of federal courts have also held that Federal Rule 18(a)\(^{75}\) should be read in conjunction with Rule 14(a) to permit

\(^{73}\) Id. The absurdity of this result is further illustrated by the fact that \( C \)'s negligence will be determined in either instance and \( A \) may assert the defense of contributory negligence, but will not be permitted to recover any damages from \( C \). It can certainly be argued that questions of jurisdiction should not be resolved by an arbitrary test which leads to such an illogical result.

\(^{74}\) See, e.g., H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

\(^{75}\) Fed. R. Civ. P. 18(a). This rule provides that a party may join as many claims as he has with his third party claim against an opposing party.
the defendant to join a personal claim with his impleader claim. Such claims, when procedurally permissible, have sometimes been held to be ancillary if they are logically related to the core of facts from which the principal claim derives. The propriety of exercising ancillary jurisdiction in such cases is questionable after Owen. A Rule 18(a) claim, since it is generally asserted for personal injuries, apparently is "[f]ar from being an ancillary and dependent claim" but is rather a "new and independent one."

D. Counterclaims

The applicability of the doctrine of ancillary jurisdiction to compulsory counterclaims has not been questioned since Moore v. New York Cotton Exchange. Owen will probably have no effect on this practice. Owen does, however, suggest that the traditional rationale for asserting ancillary jurisdiction in such cases is somewhat inaccurate. The federal courts have generally held that "the issue of the existence of ancillary jurisdiction and the issue as to whether a counterclaim is compulsory are to be answered by the same test."


78. 98 S. Ct. at 2404. It should also be noted, in reference to the Court's statement that ancillary jurisdiction typically extends to claims made by a defending party, that in such a case the personal claim is being asserted by a defendant against a new defendant who has also been "haled into court against his will." It is not a claim which is made against the plaintiff.

79. In the context of counterclaims the doctrine of ancillary jurisdiction is of primary importance where the principal claim is based on a federal question. E.g., Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961). It is also applicable in diversity actions where the counterclaim fails to meet the amount in controversy requirement. E.g., Kirby v. American Soda Fountain Co., 194 U.S. 141 (1904). No problems, of course, are presented in diversity actions where the amount in controversy requirement is met.


81. 270 U.S. 593 (1926).

82. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961), where it was held that a "counterclaim is compulsory if it bears a 'logical relationship' to an opposing party's claim." Id. at 634. It should be noted that "transaction or occurrence," "core of operative fact" and "common nucleus of opera-
the transactional test for determining whether a counterclaim was compulsory indicating that "‘[t]ransaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." However, the federal courts also adopted this test as the test for determining whether a claim is ancillary, despite the fact that the only statement in Moore going to jurisdiction clearly requires more than a mere logical transactional relationship. In fact, Moore was cited by the Owen Court in support of the logical dependence requirement. Thus, the earlier federal court interpretation appears to have been too liberal.

While it is conceivable that some compulsory counterclaims may not satisfy the logical dependence requirement, it seems unlikely that any change in the traditional practice will follow. Permissive counterclaims will continue to require independent grounds of jurisdiction under the Owen test. This is so since a permissive counterclaim, by definition, does not arise from the "common nucleus of operative fact" and is thus outside the limits of constitutional power.

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83. 270 U.S. at 610.
85. So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction. 270 U.S. at 610.
86. See H.L. Petersen Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967).
87. 98 S. Ct. at 2404.
88. It could be argued that compulsory counterclaims are ancillary since they are forfeited if not asserted. See American Mills Co. v. American Sur. Co., 260 U.S. 360 (1922). But this rationale is weak. Assuming that compulsory counterclaims are not within a court's ancillary jurisdiction, a forfeiture would be a denial of "due process." This, then, cannot be the basis for exercising ancillary jurisdiction.
89. Fed. R. Civ. P. 13(b) reads: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."
90. Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970). A permissive counterclaim in the nature of a setoff has been held to be an exception to the general rule. Kaiser Aluminum & Chem. Sales v. Ralston Steel Corp., 25 F.R.D. 23, 26 (N.D. Ill. 1959). Owen may also have an effect on this practice.
E. Crossclaims

Crossclaims have consistently been held to be within the ancillary jurisdiction of the federal courts. The test for determining whether a crossclaim exists has been held to be the same as the test for determining whether a crossclaim is ancillary. Owen may call for a review of this practice since it is now clear that a finding that the claims derive from a “common nucleus of operative fact” does not end the inquiry into whether ancillary jurisdiction exists.

Certainly, where the court has gained control over property or a fund, a crossclaim as to ownership will be regarded as ancillary. But it apparently will not be enough that the crossclaim merely relates to property in the court’s control. The crossclaim may now have to affect, or be necessary to a complete determination of, the principal claim. This would mark a return to the narrow view of ancillary jurisdiction recognized in Rickey Land & Cattle Co. v. Miller & Lux.

Crossclaims for indemnity, contribution or subrogation will continue to be ancillary under the new rule. Other types of crossclaims, which merely bear a transactional relationship to the principal claim, may not be ancillary under the principles propounded in Owen. The fact that such a claim is asserted by a defendant should not be sufficient to circumvent the Court’s strict construction of the diversity statute since the claim is being asserted against a codefendant who has also been "haled

92. See, e.g., LASA Per L’Industria Del Marmo Soc. Per Azioni v. Alexander, 414 F.2d 143, 146-47 (6th Cir. 1969); Glens Falls Indem. Co. v. United States, 229 F.2d 370, 373 (9th Cir. 1956). But see Fed. R. Civ. P. Form 20 (suggesting that independent grounds may be required).
93. Scott v. Fancher, 369 F.2d 842, 844 (5th Cir. 1966); Collier v. Harvey, 179 F.2d 664, 668-69 (10th Cir. 1949).
96. Cases like Coastal Air Lines v. Dockery, 180 F.2d 874, 877 (8th Cir. 1950), where an action was brought to determine rights to insurance funds and a crossclaim for rent due was held to be ancillary because it arose out of the same transaction as the principal claim, will be questionable under the Owen test.
97. See Pettyjohn v. Pettyjohn, 192 F.2d 322, 326 (8th Cir. 1951).
98. 218 U.S. 258 (1910). Rickey involved a dispute as to prior right to river water amongst riparian owners. The crossclaim there was held within the court’s ancillary jurisdiction since “a decree as between themselves and other defendants would be necessary in order to prevent a decree for . . . [plaintiff] from working injustice.” Id. at 263.
99. See, e.g., Childress v. Cook, 245 F.2d 798, 805 (5th Cir. 1957).
into court against his will” and not against a plaintiff. In such a case a crossclaimant is, in effect, a plaintiff who is asserting a new and independent claim. The federal courts, however, may be hesitant to modify a rule which has been so firmly established.

F. Additional Parties Under Rule 13(h)

Federal Rule 13(h) provides for the joinder of additional parties to counterclaims or crossclaims in accordance with Rules 19 and 20. The federal courts have generally applied the same rules of ancillary jurisdiction as have been applied in the counterclaim and crossclaim contexts. Thus, Rule 13(h) crossclaims and compulsory counterclaims have been held to be ancillary, whereas permissive counterclaims have not.

Even if the third step of the Owen test is whether or not the claimant has been “haled into court against his will,” there seem to be considerations which militate against pendent party jurisdiction under Rule 13(h).

First, an additional party under Rule 13(h) is one who would not otherwise be in court. Second, a 13(h) claim’s only relation to the federal claim is that it arises out of a common nucleus of operative fact; it is not defensive but is rather asserted by a defendant to recover for his own injuries. Last, such a claim is not made against a plaintiff who has a choice of forum, but against a new party who is joined unwillingly. Thus, it can be argued that a Rule 13(h) claim should also meet the requirement of logical dependence in order to be ancillary.

G. Intervention

As with counterclaims, the applicability of ancillary jurisdiction to intervention has depended on whether it is classified as permissive or of right. Permissive intervention has tradi-

101. Fed. R. Civ. P. 19, 20. Whether an additional party is classified as a Rule 19 or Rule 20 party seems irrelevant, since the new party will be permissive, one who should be joined or indispensable with regard to the crossclaim or counterclaim—not to the principal (federal) claim. See Value Line Fund Inc. v. Marcus, 161 F. Supp. 533 (S.D.N.Y. 1958).  
103. See, e.g., H.L. Petersen Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967).  
104. See, e.g., Chance v. County Bd. of School Trustees, 332 F.2d 971, 973-74 (7th Cir. 1964).  
tionally been held to require independent grounds of jurisdiction. The Court's decision certainly affirms this practice.

However, class actions may be one exception to the rule that independent grounds of jurisdiction are required for permissive intervention. Since 1885, it has been held that intervention by a member of a class is within a federal court's ancillary jurisdiction since such an absentee is bound by the judgment and thus it is "merely a matter of form whether the new parties should come in as co-complainants." This practice has been followed in subsequent cases and Owen should not have any effect.

Generally an independent basis of jurisdiction has not been required if intervention is of right. The doctrine is properly invoked in such cases since the intervenor "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may . . . impair or impede his ability to protect that interest." Indeed, it would be inequitable to exclude the intervenor merely because he is of the wrong citizenship and the original action was brought in a federal court. The traditional rule prevents such inequity and Owen certainly does nothing to interfere with this practice.

106. See generally Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970); Hunt Tool Co. v. Moore Inc., 212 F.2d 685 (5th Cir. 1954).
111. The general rule that intervention as of right is ancillary has been qualified by the exception that a person who is regarded as "indispensable" under Fed. R. Civ. P. 19(b) may not intervene (unless independent grounds of jurisdiction are present). Chance v. County Bd. of School Trustees, 332 F.2d 971 (7th Cir. 1964). This is somewhat of an anomaly since a Fed. R. Civ. P. 19(a) party who is not indispensable may intervene even though independent grounds of jurisdiction are lacking. Wichita R.R. & Light v. Public Utils. Comm'n, 260 U.S. 48, 54 (1922). A possible explanation for this is that if a Rule 19(a) party is found to be indispensable, the action will be dismissed, but if he is not found to be indispensable, the action will proceed in his absence and his legal rights may be prejudiced. Thus, in the latter case, ancillary jurisdiction is necessary to protect legal rights.

Finally, it should be noted that ancillary jurisdiction of an intervenor's claim as of right is almost wholly a problem of diversity cases. Generally, if a federal question is involved in the principal claim, the intervenor's claim will also be within federal question jurisdiction. 7A C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1917, at 605-07 (1972) [hereinafter cited as Wright & Miller].
H. Interpleader

Interpleader, which is governed by Federal Rule 22(1)112 and 28 U.S.C. § 1335,113 generally does not present problems of ancillary jurisdiction and should not, therefore, be affected by Owen.114

IV. INTERPRETATION AND SCOPE OF Owen IN FEDERAL QUESTION CASES

The doctrine of ancillary jurisdiction is important not only in diversity cases such as Owen, but also in cases where the principal claim is based on a federal question. It can be inferred that once the Gibbs test is met, following the letter of Owen, courts will next have to examine each relevant jurisdictional statute to determine whether Congress has "expressly or by implication negated" the exercise of jurisdiction over the non-federal claim. This could plunge courts into a laborious, time consuming and generally futile115 examination of legislative intent and statutory history. As a practical matter, this requirement could seriously impair judicial economy.

Owen fails to address additional problems in the federal question area. Those to be discussed in this section include: (1) What approach should be used in the interpretation of a particular jurisdictional statute? (2) What should the result be where the relevant statute is silent on the question of jurisdiction? (3) What is the relationship between the second and third steps in the Owen test in federal question cases? and (4) What are the implications of Owen in pendent and pendent party cases.

A. Interpretive Aids

Several "rules" of statutory interpretation follow from

114. For example, if S of state A sues C1 of state B and C2 of state A, Rule 22(1) interpleader will not be available since complete diversity is lacking, but, under 28 U.S.C. § 1335 statutory interpleader is proper since it only requires diversity between the claimants. See generally 7 Wright & Miller, supra note 111, § 1710, at 397.
Owen. Since most jurisdictional statutes do not address non-federal claims, congressional intent will have to be determined by examining whether Congress has, by implication, negated the exercise of jurisdiction. In this vein, “the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress.” By way of example, in Aldinger it was held that the scope of the cause of action excluded “counties.” Since the relevant jurisdictional statute referred only to “persons,” it was concluded that Congress had by implication negated the exercise of pendent party jurisdiction over counties. It is manifest that this approach will be difficult to apply.

The second interpretive “rule” has reference to the policy of strict construction. Zahn, Aldinger and Owen make it clear that jurisdictional statutes should be strictly and literally construed. A restrictive, and not expansive, interpretation should apparently be preferred in close cases.

B. Statutory Silence

It should further be noted that Owen poses difficult questions where the relevant statute is completely silent on the matter of ancillary jurisdiction. At least two possibilities come to mind. One view rests on language in Aldinger which suggests that a court can exercise jurisdiction if Congress has not expressly, or by implication, negated its exercise: “In . . . Gibbs Congress was silent on the extent to which the defendant . . . might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under . . . Art. III.”

Another possible interpretation is that Congress by its silence has negated the exercise of jurisdiction over the nonfederal claim. The dissent in Aldinger noted that such a conclusion was the logical result of the majority’s reasoning: “At one
level of analysis, this test is of course meaningless, being capa-
ble of application to all cases, because all instances of asserted
pendent-party jurisdiction will by definition involve a party as
to whom Congress has impliedly "addressed itself" by not ex-
pressly conferring subject-matter jurisdiction on the federal
courts.\textsuperscript{121} This view was followed in \textit{Long Prarie Packing Co. v. Midwest Emery Freight System Inc.}\textsuperscript{122}

While the \textit{Long Prarie Packing} position seems to be in line
with the axiom that federal courts only have such jurisdiction
as is expressly conferred by statute,\textsuperscript{123} it ignores the fact that,
by definition, issues of ancillary jurisdiction only arise when
jurisdiction has not been expressly conferred by Congress. The
former view is also supported by a logical reading of the
\textit{Aldinger-Owen} language. More specifically, why should a court
delve into the morass of congressional intent merely to find
that which can be inferred, if the second view is followed, from
silence alone? If all instances of statutory silence were con-
strued as a negation of jurisdiction, then the \textit{Aldinger} and
\textit{Owen} requirement of statutory examination would be super-
fluous.

C. The Relation of Owen's Second and Third Steps

\textit{Owen} does not address the question of whether the context
or posture in which the nonfederal question is asserted is al-
ways a consideration. \textit{Aldinger} would seem to indicate that
there may be some cases where a statutory negation of jurisdic-
tion will be conclusive.\textsuperscript{124} Although the Court in that case
touched upon the pendent party context, the implied statutory
negation was ultimately dispositive. Thus, it may be that con-
text will be irrelevant under some jurisdictional statutes.

\begin{itemize}
\item 121. 427 U.S. at 23 (Brennan, J., dissenting) (emphasis in original).
\item 123. It has long been the established rule that federal courts have only such juris-
diction as Congress has expressly conferred by statute. In the leading case of \textit{Kline v. Burke Constr. Co.}, 260 U.S. 226 (1922), the rule was stated as follows:

The right of a litigant to maintain an action in a federal court . . . is not
one derived from the Constitution . . . unless in a very indirect sense. Certainly,
it is not a right \textit{granted} by the Constitution. . . . The effect of these provisions
[Art. III \S\S 1, 2] is not to vest jurisdiction in the inferior courts over the
designated cases and controversies but to delimit those in respect of which
Congress may confer jurisdiction upon such courts as it creates. . . . The Con-
stitution simply gives to the inferior courts the capacity to take jurisdiction in
the enumerated cases, but it requires an act of Congress to confer it.
\textit{Id.} at 233-34.
\item 124. 427 U.S. at 16-19.
\end{itemize}
D. Pendent and Pendent Parties

Although Owen concerned a question of ancillary jurisdiction, the Court’s statements are too clear to be limited only to such cases; both Owen and Aldinger strongly suggest that there is no “principled” difference between the rules governing ancillary and pendent jurisdiction. Accordingly, the three part Owen test should be applicable in cases involving pendent jurisdiction.

Following Gibbs, a majority of federal courts expanded the doctrine of pendent jurisdiction to include pendent parties. In 1976, in Aldinger v. Howard, the Supreme Court addressed the issue, holding that:

If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. I permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.

The Court refused, however, “to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction” and noted that “[o]ther statutory grants and other alignments of parties and claims might call for a different result.”

125. 98 S. Ct. at 2401; 427 U.S. at 13.
126. See, e.g., Schulman v. Huck Finn Inc., 472 F.2d 864 (8th Cir. 1973); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971); Leather’s Best Inc. v. S.S. Mormacynx, 451 F.2d 800 (2d Cir. 1971); Astor-Hono Inc. v. Grosset & Dunlap Inc., 441 F.2d 627 (2d Cir. 1971). Under this doctrine, a plaintiff who sues a defendant on a federal question is permitted to assert a state-law claim (arising out of the same core of facts) against an entirely new defendant as to whom there is no independent basis of jurisdiction.
127. 427 U.S. at 18.
128. Id.
129. Id. Since Aldinger, several decisions have refused to allow “pendent party” jurisdiction. Ayala v. United States, 550 F.2d 1196, 1200 (9th Cir. 1977), cert. granted, 98 S. Ct. 50 (1977), cert. dismissed, 98 S. Ct. 1635 (1978) (the court refused to exercise “pendent party” jurisdiction even though it had exclusive jurisdiction of the principal claim); Long Prarie Packing Co. v. Midwest Emery Freight Sys. Inc., 429 F. Supp. 201, 204 (D. Mass. 1977). “Pendent party” jurisdiction was allowed in Transok Pipeline Co. v. Darks, 564 F.2d 1150, 1155 (10th Cir. 1977) (where the federal claim was within the exclusive jurisdiction of the federal courts). The court relied on dictum in Aldinger v. Howard, 427 U.S. at 18, which suggests that “pendent party” jurisdiction may be proper in cases of exclusive jurisdiction over the principal claim.
Pendent party jurisdiction may have been further limited by the Court's holding in Owen. It appears that the third step of the Owen test will rarely, if ever, be sufficient to offset an express or implied negation of pendent party jurisdiction. Certainly, if the Court is unwilling to extend jurisdiction over a plaintiff's claim against a third party defendant who is already a party to the action and whose negligence will be decided in either event, it would seem that even stronger reasons militate against the exercise of jurisdiction over a claim against a defendant who is neither a party to the action nor whose liability is already before the court.130

V. CONCLUSION

The ultimate impact of Owen Equipment & Erection Co. v. Kroger will depend, in large part, on the context in which its progeny will be litigated. Important, of course, is the question of whether diversity jurisdiction itself is abolished, as was proposed in the last session of Congress.131 Certainly much of the

130. Aldinger v. Howard, 427 U.S. at 14. See Moor v. County of Alameda, 411 U.S. 693, 713-16 (1973). Pendent party jurisdiction has been invoked to adjudicate the rights of parties who assert claims for less than $10,000 (but otherwise meet jurisdictional requirements) when they are joined with parties whose claims meet the jurisdictional amount requirement. Thus, where P1 sues D for $11,000 and P2 asserts a claim against D for only $8,000, a number of courts have allowed "pendent party" jurisdiction. See, e.g., Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 817 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968). But see Clark v. Paul Gray Inc., 306 U.S. 583 (1939); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969). This practice is now highly questionable in view of the Court's holding in Zahn v. International Paper Co., 414 U.S. 291 (1973). This should not be confused with the aggregation of insufficient claims. Tray Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911); Texas & Pac. Ry. v. Gentry, 163 U.S. 353 (1896). See generally 7 WRIGHT & MILLER, supra note 111, § 1659, at 305-09.


In the report from the Committee on the Judiciary, a number of reasons were propounded in favor of the adoption of H.R. 9622. First, a major purpose of the bill is to achieve a balance between the federal and state court systems. The report states "that Federal law questions are to be adjudicated in the Federal courts, . . . and diversity cases, which involve questions of state law are to be resolved in the state courts." H.R. REP. No. 893, 95th Cong., 2d Sess. 1 (1978). Second, H.R. 9622 was designed to reduce the federal case load by eliminating some 30,000 diversity cases annually (25% of the cases filed in 1977) and thus permit the federal courts to concentrate on the adjudication of disputes in traditional federal subject matter areas. Id. at 2-5. Finally, the report recognizes that "Federal courts are a scarce resource" which should not be depleted by giving litigants the luxury of a choice of forum nor allocated
language of *Owen* is ambiguous and will require further clarification, but as a general proposition the decision presents a three part analysis. First, it must be determined whether the federal and nonfederal claims comprise a single constitutional case. If the nonfederal claim does not arise from the "common nucleus of operative fact," then the inquiry will be at an end, since the claim is outside the constitutional limits of jurisdiction. Second, if the constitutional test is met, the relevant statute must be examined to determine whether Congress has negated the exercise of jurisdiction. Last, if a statutory negation is found, then the context in which the nonfederal claim is asserted must be examined to determine whether it should permit a circumvention of the negation. Exactly what type of context will be sufficient to permit circumvention is uncertain. Also, there may be some cases where context will be irrelevant. While leaving a number of unresolved questions as to scope and interpretation, in requiring this three part test, *Owen* may burden the courts with time consuming examinations of congressional intent and limit, to some extent, the efficiency, economy and fairness intended to be fostered by the Federal Rules of Civil Procedure.

Igor Potym

**JUDGES — Immunities — Judicial Act and Jurisdiction Broadly Defined.** *Stump v. Sparkman*, 98 S. Ct. 1099 (1978). Since 1871, the Supreme Court has made available a very broad privilege of immunity to judges of courts of general jurisdiction in civil actions when such actions arise out of judicial acts not done in the complete absence of jurisdiction.1 In the recent case of *Stump v. Sparkman*,2 the United States Supreme Court again considered the defense of judicial immunity and, for the first time, offered some definition of what constitutes a judicial act. In this author’s view, in putting forward a broad definition of judicial act, and in reaffirming the use of a broad construction of jurisdiction in immunity cases, the Court

"to the arduous and ultimately wasteful task of guessing what state law is on issues upon which only the state court can authoritatively act." *Id.* at 4-5. The bill has been reintroduced in the 96th Congress. H.R. 2202, 96th Cong., 1st Sess. (1979).