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EXPANDING JURISDICTION OVER FEDERAL BANKS

Since *McCulloch v. Maryland*[1] was decided in 1819, the constitutional power of the federal government to create and regulate a federal system of banks has been undisputed. The power to assert federal jurisdiction over questions arising from the operations of these federal financial institutions is an issue that has been answered with less certainty.

The scope of federal judicial power as defined in article III of the Constitution extends to, "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties" of the United States.[2] To fulfill jurisdictional grants to the federal government in the Constitution, the Congress enacted the Judiciary Act of 1875[3] investing federal trial courts with jurisdiction to decide such cases. Although the "arising under" terminology was incorporated into the statute, courts generally do not expand their powers to the outer limits of the original constitutional grant and tend to construe the term "arising under" against the finding of jurisdiction.[4]

In contrast to the general exercise of restraint in delineating the scope of federal jurisdiction, a broad interpretation was given to the "arising under" provision in *Osborn v. Bank of the United States*.[5] *Osborn* is the Court's initial decision regarding the

1. 17 U.S. (4 Wheat.) 315 (1819). Wherein Justice Marshall explained that although the words "bank" or "incorporation" were not expressly written into the constitutional grants of power, the power to create such an institution was incident to the express grants of power to lay and collect taxes; borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies. *Id.* at 406, 422.

National banks are those banks which are incorporated under an Act of Congress. The National Bank Act, 12 U.S.C. §§ 21 *et seq.*, enumerates the procedure for creation and regulation of such banks.

2. U.S. CONST. art. III, § 2.

3. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. Since this enactment the federal trial courts have had jurisdiction to hear and decide such cases or controversies which arise under the Constitution, laws, or treaties of the United States, both in cases of original jurisdiction and those involving removal from state courts.

4. *See, e.g.*, Zalkind v. Scheinman, 139 F.2d 895 (2d Cir. 1943), *cert. denied*, 322 U.S. 738 (1944) (where the court, after extensive discussion of previous cases, stating that it should follow new doctrinal trends in the Supreme Court, declared that it could not ignore recent decisions manifesting a marked disposition *not* to enlarge, but to reduce, federal jurisdiction, even where considerable inconvenience to one of the parties might result); St. Louis I. M. & S. Ry. Co. v. Davis, 132 F. 629 (C.C.E.D. Ark. 1904) (holding that the Act of 1887, as corrected by the Act of 1888, was intended to contract the jurisdiction of the federal courts, and that all doubts as to jurisdiction had to be resolved against it).

5. 22 U.S. (9 Wheat.) 251 (1824). In *Osborn* the tax levied by Ohio applied only to those banks not organized under the laws of the State of Ohio. Besides determining that the federal courts were the proper forum for litigating suits involving federally incorporated institutions it

scope of federal question jurisdiction over federal banks. A national bank sued to enjoin the state auditor of Ohio from levying a tax on the bank. One argument against jurisdiction in the federal court was that the Act of Congress creating the Second National Bank had not given authority to sue or be sued in federal court.[6] The Court looked to the exact wording of the statute under which the bank was incorporated which stated that the bank shall be " 'made able and capable in law . . . to sue and be sued . . . in all state courts having competent jurisdiction, and in any circuit court in the United States.' "[7] Noting that the reference to any circuit court in the United States had been absent in the act incorporating the First Bank of the United States,[8] the Court construed the statute to mean that Congress had intended to open the federal courts to the federal banks.

It was also argued that the Constitution did not impart the congressional power to create the jurisdiction.[9] In a two-part reply the Court first declared that article III gave Congress the power to expand the original jurisdiction of the inferior court to any cause which the appellate court may entertain including those cases "arising under . . . the Laws of the United States." Next, it was determined that a contract action initially involves the question of the parties' capacity to contract. Because one party was a national bank, the Court must look to the law of the United States upon which the bank's charter was founded to determine the question of capacity. Since resort to federal law for purposes of determining capacity was an ingredient in the case, the cause of action arose under federal law.[10] Although the Court talks in terms of "arising under," for the bank was asserting a claim under the federal Constitution, the later analysis demonstrates that jurisdiction would be present even in a case where no federal question was asserted because of the bank's federal incorporation. Therefore, the federal courts' jurisdiction extended to each case to which the national bank or other federally incorporated institution was a party, merely because the entity was incorporated under an Act of Congress.

In 1863 Congress enacted the first comprehensive statute regulating federal banks.[11] This statute expressly conferred jurisdiction over national banks formed pursuant to the Act in any circuit, district or territorial court of the United States

held that a case involving such institution was one "arising under" the laws of the United States. *Id.* at 258.

6. 22 U.S. (9 Wheat.) at 254.
7. *Id.* at 255.
8. Act of Feb. 24, 1791, ch. 10, 1 Stat. 191.
9. 22 U.S. (9 Wheat.) at 255.
10. *Id.* at 258-59.
11. Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 668.

within the district in which the bank was established, without regard to the question in controversy, amount in controversy or the citizenship of the parties. The Act was a codification of the *Osborn* decision. When re-enacted in 1864,[12] an express grant of concurrent state and federal jurisdiction was added to the Act. This statute dispelled any notion that the federal courts were to have exclusive jurisdiction over suits involving federal banking institutions.[13]

This blanket grant of jurisdiction to federal banks in the federal courts was sustained until the Act of July 12, 1882.[14] Prompted by a plethora of cases involving federal corporations which were being filed in federal courts under the *Osborn* doctrine,[15] the Act of 1882 placed a major jurisdictional limitation on national banks, as well as other federal corporations, nullifying the effect of *Osborn*. The Act provided that jurisdiction for suits involving federal banking institutions "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."[16] National banks were to be treated exactly like local state banks in terms of their right to sue in the federal courts. The effect was that national banks no longer had the right to sue in federal court or to remove an action from state to federal court solely as a function of their incorporation by Congress.[17]

The 1882 Act was renewed in 1887[18] and amended by the Act of August 13, 1888.[19] Section 4 of the 1888 statute embodied substantially the same provision as its predecessor. National banks were to "be deemed citizens of the states in which they are respectively located" and federal courts were to sustain juris-

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12. Act of June 3, 1864, ch. 106, § 57, 13 Stat. 99.

13. The National Bank Act, now 12 U.S.C. §§ 21-215(b) (1970), was first established by the Act of 1864 as amended by the Act of 1874. (Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123).

Until 1882, legislative oversights resulted in exclusive federal jurisdiction over the banks, only to be quickly remedied by a provision in a subsequent act reinstating concurrent jurisdiction. These fluctuations appear to be a matter of inadvertence rather than of intent.

14. Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162.

15. As a result of the Pacific Railroad Removal Cases, 115 U.S. 1 (1884), (wherein it was determined that ordinary tort claims against railroads, as federally incorporated entities, were entitled to federal jurisdiction under the 1875 statute), and the *Osborn* decision, every federally incorporated institution had been granted federal question jurisdiction in federal court.

16. Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163.

17. *See* Leather Mfrs. Bank v. Cooper, 120 U.S. 778 (1887). Under this Act a national bank cannot institute or maintain a suit against residents of its own state and judicial district in the United States Courts. *See* National Bank v. Fore, 25 F. 209 (C.C.E.D. Tex. 1890).

18. Act of March 3, 1887, ch. 373, § 4, 24 Stat. 552, *amending* Act of March 3, 1875, ch. 137, 18 Stat. 470.

19. Act of August 13, 1888, ch. 866, § 4, 25 Stat. 433, 436, *amending* Act of March 3, 1887, ch. 373, § 4, 24 Stat. 552, 554.

diction only "as they would have in cases between individual citizens of the same state."[20]

The counterpart of the 1887-1888 Act is now found in section 1348 of Title 28.[21] Since 1882 the jurisdictional basis for access to federal courts by national banks has been substantially the same as for any state banking institution. The statutory prohibition now found in section 1348 is a clear directive to federal courts that national banks must meet the requirements of federal question[22] or diversity[23] jurisdiction, in order to gain access to the federal courts. Federal question jurisdiction can not be based on the federal character of the bank.

Cases decided after 1882 followed the jurisdictional directive of what is now section 1348. *Leather Manufacturer's Bank v.*

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20. *Id.* It further states:
The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such Bank.

21. 28 U.S.C. § 1348 (1970):
The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
All national banking associations shall, *for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.* (emphasis added)

22. 28 U.S.C. § 1331 (1970):
(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

23. 28 U.S.C. § 1332 (1970):
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
(1) citizens of different States;
(2) citizens of a State, and foreign states or citizens or subjects thereof; and
(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Cooper,[24] the first case to interpret section 4 (now section 1348) of the 1882 Act was an action to recover the balance due on an account from the defendant national bank, organized under the National Bank Act of 1865. The Court remanded the case after the defendant attempted removal based on the 1875 statute which had granted federal courts removal jurisdiction over any suit involving a national bank. The holding reestablished that section 4, which limited the jurisdiction of the federal courts in regard to banks, had repealed the Act of 1875.[25] A bank could no longer acquire jurisdiction because of the source of its incorporation.[26]

The effectiveness of the statutory prohibition as embodied in section 1348 remained unimpaired until 1967. At that time a new basis on which to sustain jurisdiction over federal banking institutions was introduced in the Second Circuit.[27] Whether or not this expansion of federal jurisdiction is warranted and constitutional must be examined in light of the traditional limitations on federal question jurisdiction.

SECTION 1337

Beginning in 1967, a series of cases have followed which circumvent the statutory restrictions on jurisdiction found in sections 1348[28] and 1349[29] of Title 28, by employing the jurisdictional standards of section 1337 of Title 28. Section 1337 provides that:

> The district courts shall have original jurisdiction of any action or proceeding *arising under* any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.[30]

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24. 120 U.S. 778 (1887).

25. *Id.* at 780-81. *See also* Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71.

26. In Whittemore v. Amoskeag National Bank, 134 U.S. 527 (1890), the Court again refused jurisdiction over a bank absent allegations of diversity. The plaintiff claimed that the defendant had mismanaged bank funds, asserting violations of two sections of the revised statutes, including a section under which a federal bank would be forced to relinquish its charter. Despite the allegation of statutory violations as a basis for jurisdiction the Court held that the statutory prohibitions of section 4 acted as a bar.

The 1903 case of Continental National Bank of Memphis v. Buford, 191 U.S. 119 (1903), reinforced the hands-off attitude of the federal courts. The plaintiff, a national bank, sought to collect on a promissory note but the cause was dismissed for lack of jurisdiction. The Court found that the action was barred by section 4.

27. *See* text accompanying note 30 *infra*.

28. 28 U.S.C. § 1348 (1970).

29. 28 U.S.C. § 1349 (1970):

> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

30. 28 U.S.C. § 1337 (1970) (emphasis added). To give rise to federal

As a special jurisdictional statute, section 1337 requires no allegation of jurisdictional amount.[31] Thus, a plaintiff is only required to show that his cause is based on a substantial question arising under federal laws regulating commerce. It is not the federal character of the bank or institution in and of itself that confers jurisdiction, but a separate ground must create a case "arising under" the laws of the United States if no diversity jurisdiction exists. That statutory ground must be a substantial basis for the law suit.

Although acts regulating the banking industry have existed since 1863,[32] the Second Circuit, in 1967, was the first court to adopt section 1337 as a basis for jurisdiction in bank related cases. In *Murphy v. Colonial Federal Savings and Loan Association*[33] the court held that section 1464(a) of Title 12,[34] which authorized the Federal Home Loan Bank Board to provide for the organization and operation of federal savings and loan associations, was an act regulating commerce within the meaning of section 1337. Although the defendant in *Murphy* was a nationally incorporated savings and loan association which does not fall within the express jurisdictional prohibition of section 1348 relating to banks, it does fall within section 1349,[35] a more general statute which applies to all corporations incorporated under an Act of Congress.

In *Murphy*, the plaintiff sought a declaratory judgment and other appropriate relief based on the refusal of the bank's management to provide a dissident group of shareholders with a list of persons eligible to vote for the directorship positions in the federal savings and loan association. Section 1464(a) of Title 12 authorizes the Federal Home Loan Bank Board to provide for the organization and operation of federal savings and loan associations under such regulations as it may prescribe. The court felt that an interpretation of the Board's regulations dealing with proxies was necessary to any decision involving the propriety of access to membership lists.[36] Although the court recog-

jurisdiction under this section pertaining to commerce, the basis of the action must concern the validity, construction or enforcement of a statute regulating commerce. Adams v. Internat'l Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, 262 F.2d 835 (10th Cir. 1959).

31. *See, e.g.*, Bloomfield S.S. Co. v. Sabine Pilots Ass'n, 262 F.2d 345 (5th Cir. 1959); Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co., 193 F.2d 441 (10th Cir. 1951); Robertson v. Argus Hosiery Mills, 121 F.2d 285 (6th Cir. 1941).

32. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

33. 388 F.2d 609 (2d Cir. 1967).

34. 12 U.S.C. § 1464(a). Section 1464 provides for such things as incorporation, funding, regulation and taxation of federal savings and loan associations.

35. 28 U.S.C. § 1349 (1970).

36. 388 F.2d at 611.

nized the concurrent jurisdiction of state and federal courts, and that state courts would be required to apply federal law in interpreting such regulations, it rejected the idea that section 1349 was intended to relegate this sort of action to the state courts when diversity of citizenship did not exist. No congressional intent to allow the rights of members of federal savings and loan associations to differ under the laws of various states was found.

After determining that section 1349 was not a bar to all actions involving federal corporations, the court resolved the problem of jurisdictional amount. Apparently no allegation of jurisdictional amount was made, as required by section 1331,[37] and the circuit court admitted that the action would fail without another jurisdictional basis.[38] As an alternative source of jurisdiction the court referred to section 1337[39] of Title 28 which does not require a monetary minimum. Interpreting the scope of section 1337, the court recognized that the phrase "regulating commerce" had acquired a meaning as broad as the scope of the commerce clause.[40] Although the federal regulation of finance is not grounded in the commerce power alone, the fact that it is a significant basis for authority is sufficient to bring a regulatory "Act of Congress" within the purview of section 1337.[41]

The *Murphy* court took the first step towards expanding the jurisdiction of federal courts over banking institutions. Due to the prohibition of section 1348, jurisdiction could not be based on the fact that the bank was incorporated under an Act of Congress, but it could be based on the fact that the bank was regulated by an Act of Congress.

In 1971, the Second Circuit once again applied the *Murphy* reasoning in *Cupo v. Community National Bank & Trust Company of New York.*[42] This was an action to invalidate the election of directors at a national bank following an alleged denial of cumulative voting rights as guaranteed by the National Bank Act. The complaint was dismissed by the district court, which found the allegation of jurisdiction based on section 1331 of Title 28 to be insufficient. On appeal the plaintiff realleged section 1331 jurisdiction, but alternately alleged section 1337 jurisdiction

37. Under 28 U.S.C. § 1331 (1970), the jurisdictional amount must be in excess of $10,000 not including interest and costs.

38. 388 F.2d at 614.

39. *See* text of statute accompanying note 30 *supra.*

40. *Id. See* Imm v. Union R.R., 289 F.2d 858 (3d Cir. 1961), which held that the Federal Employer's Liability Act is an act regulating commerce.

41. 388 F.2d at 615.

42. 438 F.2d 108 (2d Cir. 1971). The plaintiff claimed that he was wrongfully denied election to a one-year term as director of defendant bank, in violation of 12 U.S.C. § 61, which guarantees the right of cumulative voting by shareholders of national banks.

upon which the court eventually heard the case. Relying almost exclusively on *Murphy* for support, the court explained that the congressional policy behind section 1348 was to prohibit the hearing of common law actions involving national banks in federal court. However, 1348 was not intended to negate federal jurisdiction under other jurisdictional grants such as section 1337.[43] In *Cupo* the Second Circuit circumvented the express jurisdictional bar of section 1348 by extending the theory with which it had by passed the more general jurisdictional bar of section 1349 in *Murphy*.

The Fifth Circuit has also accepted this reasoning in a 1972 class action suit. *Partain v. First National Bank of Montgomery*[44] was brought under the National Bank Act[45] by holders of Bank Americards. They alleged that the Bank charged plaintiffs and their class usurious interest through the use of credit cards.[46] The original allegation of jurisdiction was based on section 1355[47] which grants the district courts exclusive jurisdiction in any action to recover or enforce a forfeiture incurred under an Act of Congress. Alternately, the plaintiffs asserted jurisdiction based on section 1337. The court found jurisdiction under section 1337 and thereby avoided a determination of whether section 1355 could provide still another loophole in the bar against jurisdiction over federal banks. The *Partain* court relied primarily on the language of *Murphy* and *Cupo* in joining the Second Circuit expansion of jurisdiction under section 1337.

The Eastern District of Michigan adopted the *Murphy* theory in two cases[48] involving savings and loan associations. Both

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43. 438 F.2d at 110.

44. 467 F.2d 167 (5th Cir. 1972).

45. 12 U.S.C. §§ 21-215(b) (1970). The plaintiffs alleged particularly 12 U.S.C. § 86 as a section on which the cause of action was grounded. Section 86 provides a forfeiture of the entire interest on the transaction when usurious interest, as determined by the Act, is charged.

46. In *Partain* the district court granted summary judgment for the defendants without dealing with the jurisdictional question.

47. 28 U.S.C. § 1355 (1970):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

Several banks filed *Amici Curiae* briefs vigorously attacking the claim of jurisdiction under section 1355.

See Williams v. American Fletcher Nat'l Bank & Trust Co., 348 F. Supp. 963 (S.D. Ind. 1970).

48. Gibson v. First Fed. Sav. & Loan Ass'n, 347 F. Supp. 560 (E.D. Mich. 1972); and Miller v. Standard Fed. Sav. & Loan Ass'n, 347 F. Supp. 185 (E.D. Mich. 1972).

In *Gibson* the court rejected the plaintiff's argument that jurisdiction could be found in section 1343 of Title 28, which gives jurisdiction to redress any deprivation of civil rights under color of state law. Plaintiffs asserted that since the state process was used to foreclose mortgages, state action was involved. In dismissing this allegation the court stated,

cases involved alleged overcharges in escrow accounts for purposes of paying taxes and insurance in violation of federal regulations. Jurisdiction was founded on section 1337 with no minimum jurisdictional amount required.

In the Eighth Circuit the *Murphy* theory was not so readily accepted. The companion cases of *Burns v. American National Bank & Trust Company* and *Fisher v. First National Bank of Chicago*[49] were dismissed at the district court level for lack of subject matter jurisdiction. The court refused to find jurisdiction based on section 1337, holding that the action was clearly barred under a literal reading of section 1348.[50]

On appeal, however, the *Murphy* position was adopted.[51] The majority held that the clear prohibitory language of section 1348, does not bar an action brought against a national bank under the usury provisions of the National Bank Act[52] when jurisdiction is predicated upon section 1337 of Title 28.

The plaintiffs in *Burns* had borrowed money from the defendant bank. They sought to recover usury penalties for defendant's violation of the National Bank Act. In *Fisher*, the plaintiff was a holder of a Bank Americard who alleged that defendant bank which issued the card had charged interest rates in violation of the usury laws of the National Bank Act.

The *Burns* majority, after discussing the historical setting of the jurisdictional problems, reasoned that it was ludicrous to allow national banks access to federal courts when they met the jurisdictional requirements of federal question or diversity juris-

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"[t]o hold that the taking is under color of law would subject every contract or mortgage to constitutional scrutiny." 347 F. Supp. at 562.

The *Gibson* court also found section 1331 of Title 28, general federal question jurisdiction, inapplicable. Besides doubting that the plaintiffs could meet the jurisdictional amount requirement of in excess of $10,000, they asserted that a federal savings and loan was not such a federal instrumentality that it could be identified as government activity even though completely regulated by Congress. The court did find jurisdiction based on section 1337. *Id.* at 563, 564.

Miller also dealt with the question of jurisdictional amount under section 1331. The court stated that the jurisdictional amount was in excess of $10,000 because if the savings and loan was required to cease the alleged overcharges, many times the $10,000 would be affected. This seems to be a unique approach to the determination of jurisdictional amount.

The court eventually found jurisdiction based on section 1331 (as well as section 1337). In support of section 1331 jurisdiction the court stated:

> This case is therefore not a case based on contract under state law, but one bottomed squarely on a federal statute or regulation, and therefore the kind of case that ought to be heard in this Court if a jurisdictional amount can be found.

347 F. Supp. at 187.

49. 479 F.2d 26 (8th Cir. 1973).
50. *Id.* at 27.
51. *Id.* at 30 (Bright & Mehaffy, JJ. dissenting).
52. 12 U.S.C. §§ 85-86 (1970).

diction while denying access if a more specific federal question arising from the commerce clause was involved.[53] Following *Murphy*, the Eighth Circuit became the third circuit to join in expanding federal jurisdiction in national banking cases under section 1337.

Discussion of the *Burns* case would be incomplete without an analysis of the dissent's arguments. The dissenters agreed with the majority premise that section 1348 was not meant to be the exclusive jurisdictional statute for national banks. They agreed that federal jurisdiction would lie in suits to which national banks are parties where a state bank would be entitled to access to the federal court under the same circumstances. They did not, however, condone an expansion of federal jurisdiction that would differentiate between state and federal banks. Limitation of the allowable interest rate which a bank may charge represents a regulation common to both state and federal banking laws, so access to federal courts would be denied if a similar action had been brought against state banks under state law.[54] The dissenters noted the Supreme Court had consistently denied access to federal courts since 1882 where no allegations of general jurisdictional requirements were made. Finally, they were reluctant to expand jurisdiction to controversies involving national banks, "which appear to have been generally and satisfactorily handled by state courts for over 90 years."[55]

Both the majority and dissent in *Burns* summarized the arguments for and against extending the use of section 1337 as a jurisdictional basis for national banking and financial institutions. As the *Burns* dissent points out, section 1348, although not intended to prohibit banks from the federal forum, was intended to put federally incorporated institutions on the same footing as state institutions. Obviously, a state bank which is not regulated by the National Bank Act could not have found similar jurisdictional authority. The trend, however, is to find jurisdiction under section 1337 when a federally regulated institution is involved.[56]

Once finding the statutory basis for jurisdiction, courts considering this issue from *Murphy* to the present, seem to have

53. 479 F.2d at 29.
54. *Id.* at 33.
55. *Id.*
56. It should be noted that since the *Burns* decision, several other opinions have favorably discussed or applied the *Murphy* theory. *See* Goldman v. First Fed. Sav. & Loan Ass'n, 377 F. Supp. 883 (N.D. Ill. 1974); Milberg v. Lawrence Cedarhurst Fed. Sav. & Loan Ass'n, 496 F.2d 523 (2d Cir. 1974); Acker v. Provident Nat'l Bank, 373 F. Supp. 56 (E.D. Pa. 1974); Haas v. Pittsburgh Nat'l Bank, 60 F.R.D. 604 (W.D. Pa. 1973). Section 1337 was mentioned, but not relied on, in Hancock Financial Corp. v. Fed. Sav. & Loan, 492 F.2d 1325 (9th Cir. 1974). *Contra*, Mamber v. Second Fed. Sav. & Loan Ass'n, 275 F. Supp. 170 (D.C. Mass. 1967).

ignored a discussion of the basic rules for determining when a case does "arise under" a federal statute. Yet these tests continue to be applied strictly to the state counterparts of national banks as well as to all other hopeful applicants to the federal courts. In effect, the courts have begun to emphasize that such banks are *regulated* by the federal government rather than concern themselves with the violation of a particular regulation for which the action was brought.

"ARISING UNDER" DOCTRINE

Finding a statutory basis on which to assert jurisdiction, is only one step in the court's jurisdictional determination. Before a court can maintain jurisdiction under a federal question statute it must make the determination that the cause is one "arising under" federal law.

The term "arising under" is first found in article III of the United States Constitution which extends the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ."[57] The same language was incorporated into the Judiciary Act of 1875 and is used in section 1331 of Title 28, the general federal question statute. Section 1337 provides for special jurisdiction if the cause is one "arising under any Act of Congress regulating commerce."

The federal courts are all courts of limited jurisdiction, and the term "arising under" is meant as a limitation on jurisdiction in all types of federal question cases.[58] The most expansive reading of the term may be found in *Osborn v. Bank of United States*[59] where the court found a cause arising under the laws of the United States because the bank was incorporated under an Act of Congress. The bank's incorporation was a mere ingredient of the cause of action which turned on a state's power to tax a federal entity. *Osborn* is now regarded as a misguided opinion[60] and has been overruled by Congress.[61] Later courts have taken a more restrictive view of the scope of the term and have fashioned rules, principles and tests to aid in applying the amorphous standard.

Determination of whether a cause of action over a federal question arises under the laws of the United States is made by

57. U.S. CONST. art. III, § 2.
58. *See* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936).
59. 22 U.S. (9 Wheat.) 251 (1824).
60. Romero v. Internat'l Terminal Operating Co., 358 U.S. 354, 379 n. 50 (1959) referred to the federal incorporation cases as "unfortunate decision[s]."
61. 28 U.S.C. §§ 1348-49 (1970).

the manner in which the plaintiff frames his complaint. Since jurisdictional determinations are made solely on the basis of the complaint, the fact that federal law is not the turning point of the case is irrelevant.[62] The right, title or immunity the plaintiff seeks to protect by his cause of action must be supported if the federal laws are given one construction and defeated if they receive another. It is imperative that the federal laws be construed to protect the right asserted.[63] If the cause of action only incidentally concerns the involvement or construction of the federal laws it is insufficient to raise a federal question, such as where it becomes necessary in construing a private contract or local law, to consult some federal statute with a view towards ascertaining the meaning of the contract or the scope of the local law. The federal question must be substantially involved in the suit. Consequently, not every question of federal law which emerges in a law suit creates a suit "arising under" federal law.[64]

In *Gully v. The First National Bank in Meridian*,[65] a pre-*Murphy* decision, federal removal jurisdiction was based on a federal statute[66] dealing with the power to tax the shares of a national bank. The bank was sold pursuant to a contract under which the vendee promised to pay the debts and liabilities of the insolvent bank. The new bank failed to pay the taxes of the old bank and this action for breach of contract ensued. The case was remanded to the state court. After summarizing all the major "arising under" tests, the court concluded that the suit is primarily based on contract which is governed by the law of the state. A simple contract action is enforceable without reference to a federal law. The court noted that the state law would have to be considered first to determine whether a valid contract even existed, and whether such an interpretation of the contract would moot a contention that federal law had been infringed. Although *Gully* was decided before section 1337 was "discovered" as a basis for jurisdiction in cases alleging violation or involvement of the National Bank Act, it seems likely that even a skillfully designed complaint based on section 1337 would not have

62. *See, e.g.*, Bell v. Hood, 327 U.S. 678 (1946); Southern P.R. Co. v. California, 118 U.S. 109 (1886).

63. *See, e.g.*, Smith v. Kansas City Title and T. Co., 255 U.S. 180 (1921); New Orleans v. Benjamin, 153 U.S. 411 (1894); McGoon v. North P.R. Co., 204 F. 998 (D.C.N.D. 1913).

64. A plaintiff seeking access to federal courts on this ground must set out a federal claim which is "well pleaded" and the claim must be real and substantial and may not be without color or merit, Bell v. Hood, 327 U.S. 678 (1946). Plaintiffs may not anticipate that defendants will raise a federal question in answer to the claim, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

65. 299 U.S. 109 (1936).

66. 12 U.S.C. § 548.

brought the *Gully* cause of action within the "arising under" criteria.[67]

The more important application of the "arising under" test is to be found in those few cases decided after *Murphy* which have refused jurisdiction because the claim presented did not "arise under" an alternative jurisdictional ground. In 1972 a district court[68] refused to sustain jurisdiction over an action for a breach of a mortgage contract because the federal National Housing Act[69] was not an essential element of the cause of action. The plaintiff had alleged that jurisdiction should be based on section 1337 since the National Housing Act was an act regulating commerce.[70]

In a later case,[71] a district court rejected jurisdiction based on alleged violations of the Truth in Lending Act and regulations promulgated by the federal reserve system. The court concluded that the gravamen of the complaint was the alleged violation of a contract to procure insurance, which would give rise to an action determinable by state law, not one arising under federal law.[72]

In comparison with the pre-*Murphy* decisions the case of *Goldman v. First Federal Savings and Loan Association of Wilmette*,[73] a post-*Murphy* case, involved an action by mortgagors to recover from the mortagee savings and loan a refund of prepaid interest. The homeowners, after paying the monthly installment on their mortgage, sold their home and paid off the mortgage in the middle of the month. They sought to recover the prepaid interest element in their monthly charge. Jurisdiction was based on the Home Owner's Loan Act of 1933[74] as an act regulating commerce under section 1337. The court rejected the defendant's contention that the Home Owner's Loan Act was not an act regulating commerce, and that the cause turned on state law. The defendants had asserted that the case was contingent upon an interpretation of the promissory note to determine whether there had been a breach and such an interpretation of the contract must be grounded in state law. Although the contractual agreement might have provided for payment of the pre-

67. *See also* Austin v. Altman, 332 F.2d 273 (2d Cir. 1964); and Bachman v. First Mechanics Nat'l Bank, 69 F. Supp. 739 (D.C.N.J. 1947) (alleged violations of provisions of the banking act).

68. Baker v. Northland Mortgage Co., 344 F. Supp. 1385 (N.D. Ill. 1972).

69. 12 U.S.C. §§ 1701 *et seq.*

70. 344 F. Supp. at 1386.

71. Burgess v. Charlottesville Sav. & Loan Ass'n, 477 F.2d 40 (4th Cir. 1973).

72. *Id.* at 44.

73. Goldman v. First Federal Sav. & Loan Ass'n, 377 F. Supp. 883 (N.D. Ill. 1974).

74. 12 U.S.C. §§ 1461 *et seq.*

paid interest, the question of the validity of such a payment under federal statutes was sufficient to raise a federal question.[75] After adopting the *Murphy* theory as a basis for jurisdiction, the court accepted jurisdiction without finding a substantial involvement of federal law. The "arising under" test was not applied as rigorously as it had been to cases where no section 1337 jurisdiction was found.

The trend towards applying the standard jurisdictional tests liberally can be seen in the cases previously discussed under section 1337 where the action is one based primarily on contract.[76] Not only has a new basis for jurisdiction been established by the courts under section 1337, but the situations in which this new basis of jurisdiction will confer federal question jurisdiction has seemingly been expanded beyond the scope of ordinary "arising under" tests. It seems that the "arising under" tests should be applied with no less rigor in banking cases than in other federal question cases.

CONCLUSION

From the early case of *Osborn v. Bank of the United States*[77] to the case of *Goldman v. First Federal Savings and Loan Association of Wilmette*[78] the courts have gone full circle in setting standards under which a case involving federally incorporated financial institutions may gain access to the federal courts.[79] *Osborn* can be interpreted to define the constitutional scope of the "arising under" terminology as granting federal jurisdiction wherever some element of federal law is a mere ingredient of the cause of action. If Congress had intended to give such an expansive meaning to federal jurisdiction, the *Osborn* case shows that it had power to do so. However, the mere ingredient standard of *Osborn* has generally been rejected in construing the meaning of the "arising under" section.[80] The recent decisions under section 1337 suggest a trend towards applying the mere ingredient standard to the arising under provision of that

75. 377 F. Supp. at 885.

76. *Compare* Gibson v. First Fed. Sav. & Loan Ass'n, 347 F. Supp. 560 (E.D. Mich. 1972); Miller v. Standard Fed. Sav. & Loan Ass'n, 347 F. Supp. 185 (E.D. Mich. 1972) *with* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936). *But see* Cooper v. Baldwin-Bellmore Fed. Sav. & Loan Ass'n, 390 F. Supp. 874 (E.D.N.Y. 1975).

77. 22 U.S. (9 Wheat.) 251 (1824).

78. 377 F. Supp. 883 (N.D. Ill. 1974).

79. It should be noted that certain common law actions which could find no regulatory authority in the National Bank Act, Home Loan Mortgage Act, etc., such as a libel action, will probably not be affected by an expansion of federal jurisdiction.

80. *See* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936) for a summary of the "arising under" test which has been accepted by the courts.

statute.[81] It seems that any cause, which has one of the pervasive regulatory statutes applicable to federal banks as an element, will be granted a federal forum. The fact that an express prohibition against jurisdiction has been in effect since 1882 has not deterred the assertion of jurisdiction. It has merely made the assertion a more roundabout process.

The arguments against expanding the meaning of the "arising under" test to its full constitutional scope evolve out of a desire by the federal court system to leave to the states those actions which are primarily a matter of state law. Although the federal court should properly hear those cases which require expertise in the construction of federal law involved in the case, sophistication in the application of intricate federal statutes, or a sympathetic forum for the trial of a claimed federal right, the federal court should not be compelled to accept jurisdiction over suits which involve neither actual contested issues of federal law nor require the protective jurisdiction of a sympathetic federal forum.[82] The ability of the federal court to maintain the advantage of that forum is already impeded by a burgeoning case load. In determining whether new inroads should be made into the federal courts, the disadvantages to an already overcrowded federal system must be weighed. For example, the federal court system should be reluctant to expand its jurisdiction over contractual obligations, a primary area in banking litigation. There is a real possibility that the contract could be construed under state law which would render the issue of federal law irrelevant or inconclusive.

Aside from the practical aspects involved in a consideration of expanding jurisdiction, the authority for the expansion must be examined. A suit brought by or against a federal banking institution must overcome two obstacles to reach the federal forum: the express jurisdictional bar of section 1348 and the "arising under" provisions of sections 1337 and 1331. Both obstacles exist as intended congressional restrictions on federal jurisdiction. By circumventing section 1348 under section 1337 without religiously applying the restrictive "arising under" tests, the courts have made a mockery of express congressional intent. An expansion of jurisdiction in this manner appears to be an unwarranted exercise of judicial legislation.

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81. Goldman v. First Fed. Sav. & Loan Ass'n, 377 F. Supp. 883 (N.D. Ill. 1974).

82. Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 906 (1967).