Pendent Personal Jurisdiction in the Federal Courts

William D. Ferguson
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By William D. Ferguson†

I.

INTRODUCTION

IN THE PAST few years a number of cases have presented a technical but fascinating problem regarding personal jurisdiction. This problem has been presented in actions under various federal acts regulating securities. ¹ For example, plaintiff claims damages under section 12(1) and (2) of the Securities Act of 1933,² because defendant sold securities, purchased by the plaintiff, and failed to comply with the registration statement or prospectus which contained misrepresentations of material facts or facts which were misleading under the circumstances. Because of a question of whether the statute of limitations may bar the action under the federal act, the attorney for the plaintiff decides to add counts based upon common law claims of fraud and misrepresentation. The defendant lives in Illinois and was an active participant in drafting the prospectus and selling stock in the corporation. Plaintiff is from Florida and wants to bring the suit in the federal court in Florida. There is no problem as to the claim under the Securities Act because section 22₃ provides for both jurisdiction and venue. Since plaintiff claims that the sale took place in Jacksonville, Florida, venue may properly be laid in the Northern District of Florida and process may be served in any district in which the defendant is an inhabitant or may be found.

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(a) The district courts of the United States, . . . shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

(56)
Thus, the defendant may be served in Illinois and such service will subject him to the jurisdiction of the federal court in Florida, at least as to the claim under the federal act. The defendant moves to dismiss the common law claims against him on the ground that the court has jurisdiction over him only as to the federal claim and not as to the nonfederal claims. The question presented is whether the District Court for the Northern District of Florida can obtain jurisdiction over the defendant on the nonfederal claim by service of process on defendant in Illinois in the absence of express statutory authority.

This problem has grown out of the increased awareness of the doctrine of pendent jurisdiction as it applies to the subject matter jurisdiction of the federal courts. We shall first examine that doctrine as it has developed as a background to the problem set forth. It is not necessary to delve into the problem in detail, but we should, at least, have the basic factors in mind.

II.

Pendent Jurisdiction — An Extension of Subject Matter Jurisdiction

Although a detailed study of pendent jurisdiction should probably start with Osborn v. Bank of United States and Siler v. Louisville & N.R. Co., for our purposes Hurn v. Oursler would appear to suffice. Briefly, plaintiffs sued defendants setting forth three counts: (1) infringement of plaintiffs’ copyright; (2) unfair competition in respect to plaintiffs’ copyrighted play; and (3) unfair competition in respect of an uncopyrighted version of plaintiffs’ play. The lower court found no infringement and gave judgment for defendant on the merits as to count one, but dismissed counts two and three on the ground it lacked jurisdiction of the subject matter. The Supreme Court ruled the District Court had jurisdiction to dispose of the unfair competition claim in count two on the merits and should have dismissed that claim on the grounds there was no unfair competition.

4. It is perhaps ambitious to attempt to define briefly what is meant by “pendent jurisdiction” since most of the next few pages are devoted to it, but it might be defined generally as a nonfederal claim which is so allied and the facts so interwoven with a federal claim that the court will accept jurisdiction over the subject matter even though it could not hear the claim if presented as a separate action. Throughout we shall use the expression “pendent jurisdiction” as referring to subject matter jurisdiction and when referring to the extension of this doctrine to personal jurisdiction shall refer to “pendent personal jurisdiction.”
5. 22 U.S. (9 Wheat.) 738 (1824).
7. 289 U.S. 238 (1933).
since there was no infringement. The rationale of the Court was that the claim based on the federal question (count one) was "not plainly wanting in substance," and since it and count two were "two distinct grounds" in support of a "single cause of action," the federal court had jurisdiction to decide both counts. There being no federal rights involved in the third count, since it related to an uncopyrighted version of the play, the jurisdictional dismissal of it was upheld. Thus the existence or nonexistence of jurisdiction over a nonfederal claim joined with a federal claim depends upon whether the federal claim is substantial and whether there is but one cause of action, not two. Naturally, litigants should not be permitted to smuggle nonfederal claims into federal court by tying them to frivolous federal claims.

In Levering & Garriques Co. v. Morrin, the Court said a claim would be plainly unsubstantial either because obviously without merit or because prior decisions foreclosed the matter. This test is to be compared with the one to which Chief Judge Magruder lent his support in a concurring opinion in Strachman v. Palmer and which has largely supplanted the foregoing and is probably more satisfactory. This test is known as the introduction of evidence test, that is, if the federal claim is dismissed without the necessity of the introduction of evidence, then it is not sufficiently substantial to provide a basis for exercising jurisdiction over the nonfederal claim. This test eliminates some of the problems resulting from a dismissal of the federal claim before trial in instances where the claim would meet the test expressed in Levering & Garriques Co. v. Morrin.

After deciding that the federal claim is "not plainly wanting in substance," the question of jurisdiction over the nonfederal claim is only half decided. The Hurn opinion does not clearly point the way for those who follow. It stated that the two involved claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."

Later in the same paragraph, the Court adopts language from a prior case:

8. Id. at 246.
9. 289 U.S. 103 (1933). This case was decided one week before Hurn, involved the anti-trust laws and was unrelated to pendent jurisdiction. However, the Court stated, page 105:
   'And the federal question averred may be plainly unsubstantial either because obviously without merit, or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'
10. 177 F.2d 427 (1st Cir. 1949).
11. Thus preventing the tail from wagging the dog. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 808 (1953).
12. 289 U.S. at 246.
A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination is the violation of but one right by a single legal wrong.

The single right–single wrong theory is excellent for those exercising hindsight, but well nigh impossible for those exercising foresight because the breadth of the cause of action depends upon how broadly the court eventually defines the right violated or the wrong committed.13 Tacitly recognizing this, some of the courts adopted the language of *Hurn* relating to identical facts and accepted jurisdiction of the nonfederal claim when it was based upon substantially identical facts as the federal claim.14 Others considered that test too restrictive and expanded jurisdiction to include nonfederal claims where there was a substantial overlapping of proof in the two claims.15 The latter approach gives the courts a greater degree of latitude, which is probably desirable in this area, while still restricting them within reasonable bounds.10

In summary, if plaintiff states a federal claim (that is, a claim based upon the Constitution, laws or treaties of the United States) which is not plainly wanting in substance (will not be dismissed prior to the introduction of evidence) and also states a claim based upon the common law or a state statute and there will be a substantial overlapping of proof actually necessary to both the federal and nonfederal claims, the federal courts have exercised jurisdiction over both claims. The policy of the courts to avoid piece-meal litigation, promote judicial economy and expedite litigation is thereby served. Such policy is commendable and should be fostered so long as federal

13. For example, in *Hurn* the Court said the single right allegedly violated was the right to protection of the copyrighted play. It could have decided, perhaps, that it was the right to protection of one’s literary works, thus encompassing all three claims. 14. *E.g.*, Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938); French Renovating Co. v. Ray Renovating Co., 170 F.2d 945 (6th Cir. 1948). 15. *E.g.*, Treasure Imports v. Henry Amdur & Sons, 127 F.2d 3 (2d Cir. 1942). 16. Congress recognized the pendent jurisdiction problem in patent, copyright and trademark cases by enacting 28 U.S.C. § 1338(b): The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws. Note that the statute does not refer to the single cause of action rule of *Hurn* but only requires a "related" claim. It was probably desirable to have greater flexibility, especially as to patent and copyright cases in view of the exclusive jurisdiction of the federal courts as to those matters (28 U.S.C. § 1338(a)). We need not pursue the interpretation of the statute and cases thereunder since our particular problem does not arise in these fields in view of the venue and process provisions (28 U.S.C. §§ 1400, 1694).
jurisdiction is contained within reasonable limits and not permitted to pre-empt areas traditionally left to state courts.\textsuperscript{17}

III.

RECENT ATTEMPTS TO TRANSPLANT THE DOCTRINE INTO THE PERSONAL JURISDICTION ARENA

In each of the cases about to be considered, the foregoing tests have been complied with and the federal court does have jurisdiction over the subject matter of the nonfederal claim by virtue of the pendent jurisdiction doctrine. We now advance one step further to ask whether that doctrine will support not only the exercise of otherwise non-existent subject matter jurisdiction, but also jurisdiction of the person of the defendant where service can be supported only by virtue of a special statutory provision applicable only to the federal claim.

The first case in which this question was clearly presented and decided was \textit{Schwartz v. Bowman}.\textsuperscript{18} Plaintiff sued Alleghany Corporation, the Chesapeake & Ohio Railway Co. and the directors of Alleghany in a one count complaint for damages resulting from defendant's dealings in stock of the Chesapeake & Ohio Railway Co. and the New York Central Railroad at a time when Alleghany was subject to the Investment Company Act\textsuperscript{19} and had failed to comply with its provisions. Three individual defendants were residents and citizens of Cleveland, Ohio, where they were served. On their motion to quash service, the court held a claim was stated under the Investment Company Act and service on that claim had been properly perfected.\textsuperscript{20}

\textsuperscript{17} For a more comprehensive consideration of the pendent jurisdiction doctrine, see \textit{The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts}, 62 \textit{Colum. L. Rev.} 1018 (1962).
\textsuperscript{18} 156 F. Supp. 361 (S.D. N.Y. 1957). Stella v. Kaiser, 82 F. Supp. 301 (S.D. N.Y. 1948), contains no discussion of this nor does it indicate any question of jurisdiction was raised. The court treated it as one single claim for fraud and did not separate it into federal and nonfederal claims. In Errion v. Connell, 236 F.2d 447 (9th Cir. 1956), the question was whether the claim was under the Securities Act of 1933 and Securities Exchange Act of 1934 since those acts relate to securities and the case involved an exchange of land, securities and notes for land. The court found a single indivisible scheme and held the Act applied. Since the court granted damages under the federal claim, there was no discussion of the applicability of pendent concepts to personal jurisdiction problems.
\textsuperscript{19} 54 Stat. 789 (1940); 15 U.S.C. § 80a-1-a–52.
\textsuperscript{20} 54 Stat. 844 (1940); 15 U.S.C. § 80a-43.

The district courts of the United States . . . shall have jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this subchapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. . . . Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts
However, Judge Dimock granted a motion to strike the pendent nonfederal claims for lack of jurisdiction of the persons of the Ohio defendants. In refusing to extend *Hurn v. Oursler*, he said:

Doubtless there is sound policy in favor of permitting a plaintiff to assert in one court all his claims based on the same facts. Nevertheless that policy is not so strong as to compel the conclusion that whenever the court has personal extra-territorial jurisdiction over a defendant to enforce one claim it must have personal extra-territorial jurisdiction over him to enforce every other claim pendent thereon. The advantage to the plaintiff is outweighed by the hardship upon the defendant.

On appeal to the Court of Appeals, all three judges agreed that the appeal should be dismissed because there was no appealable order. However, Clark, Chief Judge, with Gibson, D.J., concurring, emphasized the procedural aspects of Judge Dimock's order:

From every angle the district court's action in attempting to dismiss a part of plaintiff's legal theories appears a nullity. The striking of a portion of the prayer for relief was surely a futile and meaningless gesture. [Citations omitted.] And the trial judge at the close of the case will still be obligated to grant the parties the relief to which they prove themselves entitled. F.R. 54(c). Judge Dimock's observation on the propriety of the plaintiff's legal theories resulted in no definitive action which would bind the court; and as the court has jurisdiction of the entire case, not merely certain issues of law, [citation omitted], it lacks no power to do so.

Judge Moore, while concurring in the dismissal of the appeal, brushed aside the niceties of pleading and squarely faced the issue of personal jurisdiction, stating:

There can be no question that had a derivative stockholder's action against the individual defendants for fraud and malfeasance been filed, personal jurisdiction would have to be obtained in the manner provided by law, i.e., personal service. In my opinion these legal requirements cannot be by-passed or evaded merely by adding a long factual narrative and a prayer for relief . . . under the Investment Companies Act. The extent to which any or all of the facts alleged may be relevant to the claims made

business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

21. Since the complaint was a one count complaint and the facts alleged therein went to the federal claim as well as the nonfederal, the order striking the nonfederal claim went to portions of the prayer for relief.
24. *Id.* at 197.
under the Act will be for the trial judge to determine. . . . Whether personal service should be limited is not open for judicial debate. The rules are clear and defendants as well as plaintiffs are entitled to equal protection under the law.26

From a purely procedural standpoint, it is difficult to argue that striking a portion of the prayer for relief was a futile gesture since the prayer for relief is not necessary to the statement of the claim. But it is another thing to say that a trial judge must give relief to plaintiff if the court does not have jurisdiction to give that relief. It would seem to be elementary procedure that a judgment rendered by a court lacking jurisdiction of the defendant is a nullity.26 Assuming the defendants preserve their objection to jurisdiction over their persons, the trial judge would have to dismiss the action if plaintiff failed to prove a case under the Act (there would be no jurisdiction of defendants as to the other claim) or, if there was sufficient evidence for the case to go to the jury, the instructions would have to limit the jury to a consideration of the claim under the Act (for the same reason). This would seem to be an adequate response to the procedural niceties argument. One cannot help but wonder whether Judge Clark would have decided the same way if the plaintiff had set up the common law claims in separate counts so that Judge Dimock could have dismissed designated counts. We venture to suggest that since the reasons given by him would not have been available then, he would have been forced to face the real issue and might have allied himself with Judge Moore.

It is indeed unfortunate for those who wish to find their way through the tangle that the only appellate court decision discussing this point is dictum and the majority go off on a matter of technicalities of pleading rather than facing the issue squarely.

Three years later, in International Ladies Garment Workers Union v. Shields & Co.,27 the plaintiff made it easier for Judge Dimock when it set forth two claims, one based on alleged violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the other claim based upon common law fraud. The court found it had jurisdiction of the subject matter of the fraud claim under the pendent jurisdiction doctrine but denied jurisdiction over the defendants as to the nonfederal claim:

To extend the rule of pendent jurisdiction to jurisdiction over the person calls into play different considerations. The

25. Id. at 198.
doctrine of Hurn v. Oursler flows of necessity from the conception that there is but a single claim where a single right has been violated. Where the subject matter is a single claim and the court has jurisdiction of the claim it has jurisdiction of the whole subject matter. As we see here, however, there may be plural rights of action to enforce a single claim. As far as the court's jurisdiction of the subject matter is concerned, it has jurisdiction to enforce all those rights of action. The court's jurisdiction over the person, though, is usually limited by Rule 4(f) to jurisdiction over those who can be served within the state. While Congress has made an exception to that in the case of the federal right of action asserted here so far as the common law right of action is concerned, the limitation to those who can be served within the state still stands. There is no such compulsion of logic here as exists in the case of jurisdiction over the subject matter; a claim for the violation of a single right is indivisible but the rights to enforce it are divided at their creation into different rights of action.

Apparently fearing that his order might be considered a procedural nullity, as had happened in the Schwartz case, Judge Dimock held that if so characterized the order in this case was to be treated as a pre-trial conference order limiting the trial to the Securities Acts case.

During the interim between the two decisions by Judge Dimock there were four other negative votes and one relatively weak affirmative vote on this proposition. In Lasch v. Antkies, plaintiff sued to rescind the sale of stock by two defendants (New York citizens and residents) to the plaintiff (Pennsylvania citizen) asserting jurisdiction and venue under the Securities Act of 1933. The defendants were served in New York and they appeared by attorney in the action in Pennsylvania. The plaintiff then filed and served upon defendants' attorneys in Pennsylvania an amended complaint setting forth three claims: one under the Securities Act; the second debatably under the Act; and the third, clearly based upon the common law. The court treated defendants' motion to dismiss as a motion to set aside and vacate the service of the amended complaint and granted the same. In so doing, it was stated:

Congress has seen fit . . . to provide for special service in cases brought under the Securities Act, which was apparently based upon public policy considerations. The provision cannot be carried beyond what Congress intended. Service of Count 3 of

28. Id. at 148.
the amended complaint is not authorized by [the Act] and, therefore, the service requirements of the Federal Rules of Civil Procedure must control. . . . Counsel has cited no authority to permit 'ancillary service' which was attempted to be made in the present case. Furthermore, it is a reasonable inference that Congress, by enacting a special venue provision in a statute, did not intend to permit a party to do indirectly (through service of an amended complaint) what cannot be done directly (through service of the original complaint).\(^{81}\)

In *Jaypen Holdings v. Bellanca Corp.,*\(^ {82}\) the individual defendant moved to quash service of process upon him in connection with counts 2, 3 and 4. Count 2 was based on common law fraud; count 3, Securities Act of 1933; and count 4, Securities Act of 1934. The court denied the motion to quash service of process, but dismissed the second count:

I conclude that jurisdiction over the person of the defendant Albert has been effectively acquired through valid service of process pursuant to the provisions of the Federal statutes upon which the third and fourth causes of action are based. Venue for the second cause of action against Albert may not be laid in this district (28 U.S.C. § 1391). That cause of action should be dismissed as to him. The motion to quash service of process upon the defendant Albert will be denied.\(^ {83}\)

In addition to the venue requirement, the court also relied upon improper service:

Jurisdiction of the person of Albert has not been obtained under the second cause of action for failure of service within New Jersey (Rule 4(f)). This cause of action may not be brought against Albert in this district (28 U.S.C. § 1391).\(^ {84}\)

In *Kappus v. Western Hills Oil, Inc.,*\(^ {85}\) plaintiff started with a claim for breach of contract; defendant moved to quash service; plaintiff amended to add violation of the Wisconsin securities acts and served again; another motion to quash was made; complaint was amended again to add Federal Securities Act violations and served again; and defendants again moved to quash. The court approved service upon the corporate defendant outside the state under the Wisconsin long arm statute but denied jurisdiction of the individual defendants:

\[^{31}\text{161 F. Supp. 851, 852.}\]
\[^{32}\text{22 F.R.D. 190 (D. N.J. 1958).}\]
\[^{33}\text{Id. at 193.}\]
\[^{34}\text{Id. at 192.}\]
\[^{35}\text{24 F.R.D. 123 (E.D. Wis. 1959).}\]
Plaintiff has joined in one count with alleged Federal Securities Act violations additional claims which cannot be brought in this district against the individual defendants here involved.

If plaintiff’s complaint alleged only the breach of contract and Wisconsin statutory claims, the attempted service on the individual defendants would have been insufficient as beyond the area of authorized service. Rule 4(f), F.R. Civ. P.

Congress has authorized special service in cases brought under the Federal Securities Acts. Although the court has jurisdiction over certain of the Securities Acts claims, the court has no authority to allow a party to join additional claims which could not be brought in this district originally. See Lasch v. Antkies, D.C.E.D., Pa. 1958, 161 F. Supp. 851.

Thus, the non Federal Securities Acts claim against the individual defendants, Gilmartin, Bennett, Treat and Dohn cannot stand and must be stricken from plaintiff’s one count complaint.36

The court did not face the procedural problem raised by Judge Clark in Schwartz because it decided that the 18 page one count complaint failed to comply with Rule 8(b) and so dismissed the entire complaint with leave to replead.

Phillips v. Murchison,38 involved an amended complaint which added nonfederal claims to Securities Acts claims. One of the added claims was clearly not within the pendent jurisdiction of the court since it was a claim based on an alleged libel. The court dismissed the amended complaint on the basis of improper service and, in dictum, stated:

Although the court has jurisdiction over certain of the Securities Act claims, it has no authority to permit a party to join, by way of amendment, claims which could not originally have been brought in this court.39

Judge Dawson relies on both Lasch and Kappus but does not mention the dictum of his own Court of Appeals in Schwartz v. Eaton. In view of the failure of the court to refer to that decision, it is questionable whether the dictum of this case is entitled to much consideration.

In Ackert v. Ausman,40 a motion was made to transfer the action to the district court in Minnesota for the convenience of the parties. Plaintiff was a Missouri citizen, the two corporate defendants were

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36. Id. at 127.
37. Fed. R. Civ. P. 8(a) :
A pleading which sets forth a claim for relief... shall contain... (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

The judge did not consider 18 pages to be a short and plain statement.
39. Id. at 622.
from Minnesota and the individual defendants were from various states, including New York. Finding that Minnesota was clearly the more convenient forum, the court had to decide whether Minnesota was a district where the claim "might have been brought." It decided there was at least an attempt to state a claim under the Investment Company Act of 1940, but did not decide whether plaintiff had in fact stated a cause of action under that Act since there was no motion to dismiss for failure to state a claim. Without discussing the issue of jurisdiction over the individual defendants and without citing any authority, the court held the action could be transferred, saying:

Here the derivative and representative action which the plaintiff brought in this district sounds under the Investment Company Act of 1940 and also includes a diversity claim based on common law. An action under the Investment Company Act against these defendants 'might have been brought' in the District of Minnesota as that phrase is used in 1404(a). The diversity claim would be pendent to the claim asserted under the Investment Company Act in the District of Minnesota as it is here.

41. 28 U.S.C. 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district where it might have been brought." This means that the transferee district must be one in which the plaintiff could have sued the case and would have been able to serve the defendants without their consent and would have been a proper district under the venue provisions. See Van Dusen v. Barrack, 376 U.S. 612 (1964); Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960); and Hoffman v. Blaski, 363 U.S. 335 (1960).

42. Plaintiff was opposed to the transfer even though Minnesota would be more convenient because the Court of Appeals had held the Investment Company Act of 1940, 15 U.S.C. § 80a, did not give a private right of action against the directors of a corporation. Brouk v. Managed Funds, Inc., 286 F.2d 901 (8th Cir. 1961), cert. granted, 366 U.S. 958, joint motion to vacate and remand on ground of mootness granted and judgment of Court of Appeals vacated and case remanded to District Court with directions to dismiss the cause of action as to respondents, 369 U.S. 424 (1962). If that case were to be followed, then plaintiff's action would fail in Minnesota but in New York it would be controlled by the decision in Brown v. Bullock, 194 F. Supp. 207 (S.D. N.Y. 1961), affirmed, 294 F.2d 415 (2d Cir. 1961), in which the court held that a private right of action existed by implication.

43. This decision of the court not to pass on the legal sufficiency of the federal claim would clearly be proper if there were no question of pendent jurisdiction involved. However, when it reached that question it may have missed the complexities of the case. If the Minnesota District Court would have to dismiss the federal claim because "plainly wanting in substance" since Brouk v. Managed Funds, Inc., supra note 42, foreclosed the matter (Levering & Garriques Co. v. Morin, supra note 9), then the nonfederal claim could not have been brought in Minnesota because of lack of jurisdiction of the subject matter. However, in New York, the federal claim was "not plainly wanting in substance" and thus the court would have subject matter jurisdiction. In view of the pendent jurisdiction doctrine. Hence, a determination of the sufficiency of the federal claim was necessary to decide the transferability because of its relationship to the pendent claim. This is entirely without regard to any question of personal jurisdiction.

44. The court did cite the Schwartz case, supra, earlier in the opinion on a different point.
Unfortunately, on appeal from this decision, the Court of Appeals
in the Second Circuit again failed to face the issue with which we
are here concerned.\textsuperscript{46}

Since the second Judge Dimock decision, in 1961, there have
been five cases decided in the district courts, three approving pendent
personal jurisdiction and two disapproving. In \textit{Townsend Corpora-
tion of America v. Davidson},\textsuperscript{47} the corporation sued its former directors
in a complaint setting forth eleven counts, some of which were based
upon alleged violations of the Investment Company Act of 1940.
The court found that the federal claims were not frivolous, it had
jurisdiction of the federal claim and the nonfederal claim was within
its pendent jurisdiction.\textsuperscript{48} As to the issue of personal jurisdiction via
extra-territorial service of process, it stated:

The Court of Appeals in \textit{Schwartz v. Eaton} stated, however,
in very definite language that the pendent jurisdiction doctrine
did extend the service of process provision of section 44 of the
Act to a state claim arising under the same facts that formed
the basis of the federal claim. This certainly would seem to be

\textsuperscript{46} Plaintiff sought a writ of mandamus to forestall the transfer of the case to
Minnesota because of the position taken by the Eighth Circuit in \textit{Brouk v. Managed
Funds, Inc.}, supra note 42. The individual defendants did not oppose the transfer
nor had they appeared in the action at that stage of the proceedings. Judges Clark
and Kaufman were of the opinion that the \textit{Brouk} case should not be a bar to transfer
even if the Minnesota District Court would have to dismiss; since the case might have
been brought in that court, it would have had jurisdiction to determine whether a
claim was stated and it was clearly a more convenient forum. Judge Friendly dis-
sented, suggesting that if the transferee court would be bound to dismiss for lack of
jurisdiction of the subject matter (because no federal question involved, failing to
realize that the court could hear it as a common law claim because there was
diversity) under the prevailing decision in its circuit, then it was not a district
"where it might have been brought" and hence transfer was unavailable. There is no
discussion of the nonfederal claim, although the dissent notes that if the transferee
court dismissed the federal claim then the nonfederal diversity claim would have to
be dismissed because of lack of jurisdiction, whereas in the Southern District of New
York, the court would have jurisdiction over the New York resident. Can one
properly infer that Judge Friendly means the court does have personal jurisdiction by
virtue of nationwide service of process as to the nonfederal claim if it is a pendent
claim? Presumably one could so argue from the foregoing, but it seems weak, especially
since it does not appear that the problem was subjected to the scrutiny which it
warrants.


\textsuperscript{48} Venue in the New Jersey District was based upon a single act but the court
determined one act was sufficient, even though all defendants did not participate, if
the one act was of "material importance to the consummation of the scheme." \textit{Id.} at 3.
the better view as a matter of judicial economy and convenience of the parties where, as here, the same acts are alleged to be both a violation of the Act and also actionable under state law. This Court adopts that view.\footnote{Id. at 4.}

Unfortunately, Judge Augelli did not point out the "very definite language" of the \textit{Schwartz} case on which he relies (possibly because it is non-existent). The opinion of the majority in \textit{Schwartz} contains no language concerning pendent jurisdiction, does not even contain the word pendent and does not discuss the problem of personal jurisdiction. The only cases cited by the majority in \textit{Schwartz} which have anything to do with the topic of pendent jurisdiction were \textit{Osborn v. Bank of United States}\footnote{22 U.S. (9 Wheat.) 738 (1834).} and \textit{Jung v. K. & D. Mining Co.}\footnote{260 F.2d 607 (7th Cir. 1958), in which the Court of Appeals held the federal claim under the Securities Exchange Act was not wanting in substance and therefore the court had pendent jurisdiction of the common law claim with no question raised as to the propriety of the service of process.} The only definite language in that case relating to pendent jurisdiction is in the concurring opinion of Judge Moore to the effect that such does not exist, a position exactly contrary to that taken by Judge Augelli.

In \textit{Cooper v. North Jersey Trust Co.},\footnote{226 F. Supp. 972 (S.D. N.Y. 1964).} plaintiff sued a New Jersey corporation for damages claimed to have resulted from defendant's violation of the Securities Exchange Act of 1934. Venue was laid in the Southern District of New York on the ground that the stock involved was sold on the national exchange in New York, but all acts by the defendant were in New Jersey. In addition to the federal claims, the plaintiff alleged common law claims based upon conversion, breach of fiduciary duty and negligence.\footnote{There were a number of cases growing out of the situation before the court and suits were pending in state and federal courts in New York and New Jersey. \textit{Id.} at 975, n.2.} Judge Feinberg upheld jurisdiction stating:

Reasons of judicial economy — which justify the judicially created doctrine of pendent jurisdiction — suggest sustaining the service of process as to the pendent non-federal claims. [Citations omitted.] The same basic facts will have to be presented on both federal and non-federal theories. Service on the federal claims is proper and defense of these claims must, in any event, be made in this District.\footnote{Id. at 980-81.}

Is the court correct when it says the "defense of these claims must, in any event, be made in this District?" Doesn't the court overlook
Ackert v. Ausman and Ackert v. Pelt Bryan, wherein transfer was allowed. This is a case in which the court could hardly refuse to transfer to New Jersey upon proper motion since practically all the business transactions occurred there, all the witnesses are there and it would not be inconvenient for the plaintiff. Besides, if judicial economy is the ultimate goal, then the result of this case is contrary to the goal sought since the New Jersey District is far less congested than the Southern District of New York.

In a stockholder's derivative action, Kane v. Central American Mining & Oil, Inc., the original complaint contained a single count and jurisdiction was based upon diversity of citizenship. Service was made upon one of the individual defendants at his residence in the Eastern District of New York and the other two individual defendants, allegedly citizens of New York, were served in Texas where they were “found.” Service on the corporate defendant, a Panama corporation, was by service upon the secretary at his residence in the Eastern District of New York. Thereafter, plaintiffs amended the complaint to add Count II based on the Securities Exchange Act and Count III based upon the allegations of the first two counts and allegedly resting upon the doctrine of pendent jurisdiction. The defendants' motion to dismiss was denied. Judge

55. See also H. L. Green Co., Inc. v. MacMahon, 312 F.2d 650 (2d Cir. 1962), cited and quoted in Van Dusen v. Barrack, 376 U.S. 612 (1964). In addition to the issue of what statute of limitations would apply (the court said it should be the New York statute since the Alabama District Court, after transfer, should apply New York law), there was a question concerning amending the complaint to add a non-federal claim. It was noted that the Alabama District Court would have to decide if plaintiff could have amended in New York in light of the personal jurisdiction problem. If he could have, then New York law would be applied; if he could not have, then Alabama law would be applied if it allowed amendment (there would be no jurisdiction problem since defendants were residents of Alabama).

The problem that will confront the Alabama court will, however, be complicated by the fact that none of the defendants was personally served within the Southern District of New York, all having been served extraterritorially under the special provisions applicable to suits under the Securities Exchange Act. Accordingly, it will be necessary for the Alabama court to determine whether the common law claim could have been joined in New York with the statutory claim — despite the lack of such personal service as would have permitted the common law claim to be the subject of an independent action in New York — under a theory of "pendent" personal jurisdiction. The Alabama district court will, of course, decide this question by its own lights, and we express no opinion on it. [312 F.2d 650 at 653.] (Citations omitted.)

56. The following concerning the case load in the Southern District of New York appears in Ackert v. Ausman, supra note 40, at 541:

In contrast to the Minnesota District where the calendar is current, the Southern District of New York is the busiest in the entire country. It has more than 20 percent of the civil case load in the nation and the highest civil case load per judge in the country. It also has by far the largest number of long and complicated cases. Its trial calendars are congested with cases waiting to be tried and there is necessarily a substantial delay in bringing cases to trial.

In light of this can it truly be said that the interest of judicial economy will be served by allowing the case to be brought in a district of such congested calendar by extraterritorial service of process?

Weinfeld held that Count II was a sufficient statement of a claim under the Securities Exchange Act of 1934. He then held (apparently unnecessarily since the facts indicate service was within the scope of the New York statute)\(^58\) that the amendment related back to make service valid, a holding of doubtful validity to say the least.\(^59\) Thus, he treated the case as though service had been made under the amended complaint and decided that pendent personal jurisdiction based upon considerations of judicial economy and convenience of parties was the better view. There is absolutely no discussion of the reasons why he believed such to be the better view and he dismissed the contrary decisions without discussion. As further support for his position, the procedural incantations of Judge Clark in *Schwartz v. Eaton* are called upon without analysis. Since the dictum contains no discussion or analysis of the reasons for the adopted rule, it adds nothing to the picture except the name of one more judge and one more case.

The first dissenting vote in the post 1962 cases is *Wilensky v. Standard Beryllium Corporation*,\(^60\) in which the plaintiff joined claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 with common law based claims. The court granted a motion to quash as to process served under the Massachusetts long arm statute. However, it upheld the service under the Securities Acts as to the federal claims but dismissed the nonfederal claims because there was no valid service as to them, stating:

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58. It appears that the action was brought in 1964 which was after the effective date of the New York Civil Practice Law and Rules (§ 10005, September 1, 1963) and thus the provisions of N.Y. CPLR § 302 applied. The plaintiff apparently alleged tortious acts within the state and facts sufficient to show that the corporation was transacting business within the state; thus all defendants were amenable to service under N.Y. CPLR § 302 and service seemed properly made under §§ 311 and 313. Judge Weinfeld's reference to Tausa v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917), seems misleading and out of place.

59. Unfortunately, the authorities cited by Judge Weinfeld for support do not support his statement. In MacGowan v. Barber, 127 F.2d 458 (2d Cir. 1942), the only case cited involving personal jurisdiction, the process and service were proper since the original complaint included property within the state and the only effect of the amendment was to remove from the scope of the action property without the state, thus clarifying the in rem jurisdiction. On a question of jurisdiction of subject matter, the court in International Garment Workers Union v. Donnelly Garment Co., 121 F.2d 561 (8th Cir. 1941), refused to decide the effect of an amendment. In Baldwin v. Pickens, 288 F. Supp. 889 (W.D. S.C. 1962), the court permitted an amendment to cure a defective allegation of diversity of citizenship to reflect the facts as they existed when suit was brought, a subject matter jurisdiction issue. The statute cited, 28 U.S.C. § 1653, permits amendment of defective allegations of jurisdiction, not applicable here and is limited to subject matter jurisdiction. The citation to 3 Moore, *Federal Practice* § 15.15, at 855-56 (2d ed. 1964), is not only misleading but also out of date since the discussion in that section relating to the issue stated in this case is a statement of the case of MacGowan v. Barber, supra, without comment by the writer and is found at pages 1064-65. Surely, even Judge Weinfeld cannot believe, after due reflection, that a court which lacks jurisdiction of the defendant can gain jurisdiction of him by unilateral acts, such as amending a complaint.

However, the question involved in Hurn was whether the Federal judicial power 'extends to the decision of the whole case . . . [or] merely to those parts of cases only which present the particular question involving the construction of the constitution or the law.' Strachman v. Palmer, 177 F. 2d 427, 431, 12 A.L.R. 2d 687 (1 Cir. 1949), Magruder, C.J. concurring. Thus, perhaps in part prompted by 'considerations of convenience and economy of judicial administration,' the statutory grant of judicial power to the federal district courts over the 'action,' 28 U.S.C. § 1331, was interpreted as power over all the ingredients of the 'action.' Unlike the instant situation there was no provision of law expressly forbidding a result admittedly based on judicial economy.61

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As this court acquired jurisdiction over the defendant for the limited purpose of adjudicating the federal claims, cf. Moreno v. United States, 120 F. 2d 128, 130 (1 Cir. 1941), the pendent claims must be and hereby are stricken from plaintiffs' complaints.62

Perhaps an influencing factor was that plaintiffs had sued these defendants in New York where all were amenable to service of process for the common law as well as the federal claims and this court stayed the proceedings before it pending the outcome of the New York cases, with the usual protective provisions.

Further support for the position that the courts cannot obtain pendent personal jurisdiction of the defendant is found in Trussell v. United Underwriters, Ltd.63 The complaint contained four counts based on the Securities Exchange Act and one based on the statutes of Kansas. The court struck two of the federal claims for failure to state a claim, leaving two federal claims and the state claim, as to which all parties agreed the court had pendent subject matter jurisdiction. Judge Doyle then examined the question of personal jurisdiction, recognizing that the issues underlying it were different from those involved in pendent subject matter jurisdiction, and decided that the rules regulating service of process should not be extended by implication and since no statute or rule permitted extra-territorial service as to nonfederal claims, such service could not give the court jurisdiction of the defendant. Not only is there a good discussion of the refusal to extend the rules, but the opinion points out "that there are no compelling extraneous reasons for an implied approval

61. Id. at 705. The provision of law referred to was Fed. R. Civ. P. 4(f) relating to territorial limitations upon service of process, infra, page 73.
62. Id. at 706.
does not only does Judge Doyle reject extra-territorial service as contrary to the rules, he also finds judicial economy and party convenience do not support a contrary result in this case.

In summary, few of the decisions have really analyzed the issue and the arguments on both sides and come to a reasoned conclusion. The cases which deny pendent personal jurisdiction rely mainly upon the theory that the provisions for extra-territorial service apply only to suits based upon the acts and any other claims would be governed by Rule 4(f) of the Federal Rules of Civil Procedure. They reason that pendent jurisdiction could not extend to embrace personal jurisdiction because the rule limits service to the territorial limits of the state except as Congress had specifically provided for extra-territorial service. No similar rule had stood in the way of expansion of subject matter jurisdiction and, therefore, the courts were free to expand subject matter jurisdiction without running afoul of statutes and rules.

In addition, three of the cases seem to rely upon the provisions of the venue statutes. The position is that the usual rules of venue shall apply except where Congress has made special provision. Special provision has been made as to suits for wrongs covered by the acts, but there is no provision anywhere that the venue of any non-act cases may be laid anywhere other than as provided in the general statutes regarding venue. None of the judges who resorted to the venue argument reveal what rule of venue they would apply. Although there is limited discussion of the supporting arguments in these cases, there is a failure to treat the position upholding the expansion of jurisdiction and the cases so holding.

The courts that do not slide off on procedural niceties content themselves with a simple statement that pendent personal jurisdiction is in the interest of judicial economy and convenience of the parties. The opinions in these cases do not explain how judicial economy or the convenience of the parties will be served, possibly because if the situation were to be analyzed it would result in a determination that neither of these interests would be served by upholding the service. Nor do these cases contain an examination of the jurisdictional problem, the rights of defendants and plaintiffs and the limitations on process or venue. Finally, the cases denying pendent personal jurisdiction are not explained.

64. Id. at 804.

65. It is true that Judge Dimock had to and did face the Schwartz case but since the reasoning there went to the pleading niceties and not in support of an extension of personal jurisdiction, there was no supporting argument to refute.
IV.

Present Exclusion of Pendent Personal Jurisdiction

In order to make a sound choice between upholding pendent personal jurisdiction or denying it, it is necessary to examine carefully the relevant rules and statutes to determine whether they do or do not provide for service of process in these cases.

The general procedural provisions relating to service of process are found in Rule 4 of the Federal Rules of Civil Procedure. The rule pertinent to the present inquiry is Rule 4(f) which provides:

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. [Emphasis added.]

Since the process involved in the pendent jurisdiction cases is a summons, the provision governing subpoenas is not applicable and none of the Federal Rules provide for service of an initial summons beyond the territorial limits of the state. The only other justification for extra-territorial service, therefore, would be a statute of the United States which authorizes service beyond the limits of a state. The only statutes that arguably might be applicable here would be the sections of the various securities acts which provide for extra-territorial service.

In this respect, all of the securities acts generally follow the same pattern and provide for jurisdiction, substantially as follows:

... of all suits in equity or actions at law brought to enforce any liability or duty created by this subchapter. Any such suit may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. [Emphasis added.]66

Is a suit for common law fraud or for the violation of a state blue sky law an action “to enforce any liability or duty created by” the

Securities Act or any of the other federal acts? It has been suggested that a nonfederal claim which complies with the requirements for pendent jurisdiction falls within the category of an action brought to enforce a liability created by the securities acts.67 Even though the facts that must be proved are substantially the same (or the claims will involve a substantial overlapping of proof), this does not mean the nonfederal claims are to enforce federal rights. The state law will have to control the nonfederal claims, and thus they cannot be brought to enforce liability created by the federal acts.68 By no stretch of the imagination can we truly say the nonfederal claim is a federal claim brought to enforce the liability created by the Act when it is to enforce a liability created by common law or state statute. Therefore, we must conclude the statute does not authorize extra-territorial service as to claims not dependent upon rights conferred by the federal acts, that is, the nonfederal claim, and Rule 4(f) is applicable to restrict service of process in such cases to the territorial limits of the state where the court is sitting.

Since the statute does not provide for the extension of service of process to the nonfederal claims, the courts should not misconstrue it to cover those claims. In each of these cases we are dealing with claims that could not be pursued in the state courts of the jurisdiction where the federal court is sitting, because the defendant is not amenable to service of process there.69 In connection with the nonfederal claim, the defendant has a constitutional right to have the judgment entered against him only by a court having jurisdiction over his person. Pennoyer v. Neff,70 though buried many times, has been disinterred whenever a state sought to extend its process beyond its territorial limits in violation of the constitutional rights of litigants. Recently the Supreme Court has reaffirmed territorial limitations on service


68. Presumably the writer of the comment, note 67, would be aghast at a suggestion that the federal act defenses would apply to the nonfederal claim, including the special statute of limitations contained in the acts. But if these nonfederal claims arise under the acts then the defendant is entitled to the protection and defenses of the acts. This would, in many cases, defeat the purpose of adding the nonfederal claims (to escape the federal act defenses). Also, an inconsistency is noted because the writer would apply state law, but if the suit is to enforce a liability created by the federal act, the application of state law cannot be justified.

69. If the defendant were amenable to service of process in the state court by virtue of state status, e.g., long arm statute, § 302 N.Y. CPLR (a so-called one act statute), we would have no problem since Rule 4(e), FED. R. CIV. P., permits service under such statutes. In only one of the cases arising thus far has the question of such a statute arisen and in that instance, Cooper v. North Jersey Trust Co., 226 F. Supp. 972 (S.D. N.Y. 1964), the court did not pass upon it because it upheld pendent personal jurisdiction.

70. 95 U.S. 714 (1877).
of process. Thus, the state court could not deprive defendant of his constitutional right as to the nonfederal claim. The federal court a block or two down the street should not be able to do what the state court cannot do in relation to the nonfederal claim. It should not, therefore, extend the statutes relating to securities to permit such a result. If the law is to be changed, it should be left to Congress to enact legislation to that end; the courts have enough to handle without taking on the work of the legislature.

The other basis of decision relied upon by the courts denying jurisdiction was that the nonfederal claim could not be maintained because venue was improperly laid. Venue of the federal claim was proper and unquestioned since the securities acts have special provisions relating to action to enforce liabilities created by the acts. What is the proper venue of the nonfederal claim, over which the district court has jurisdiction by virtue of federal question jurisdiction over the allied claim to which such nonfederal claim is attached? Since the case is not one resting solely on diversity of citizenship, the general venue statute is not applicable. However, under another subsection, if jurisdiction is not founded solely on diversity, then the action may be brought only in the judicial district where all the defendants reside, except as otherwise provided by law. The nonfederal claim is within this section since jurisdiction is based upon pendent jurisdiction, not diversity. The exception is not applicable because the special statutory provisions apply only to actions to enforce liabilities or duties created by the acts and do not cover the common law claims. Therefore, venue of the common law action would be where the defendant resides. One should not be permitted to circumvent the venue statute by combining claims having special venue provisions with ones coming under section 1391(b). Defendant has a right to have venue of the federal claim laid in the district where he resides.

71. Hanson v. Denckla, 357 U.S. 235 (1958). Commenting upon the trend of expanding personal jurisdiction over nonresidents, the Court stated, at page 251:

But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

72. Indeed, there may be some question of the constitutionality of provisions for extraterritorial service of process as to nonfederal claims, see Abraham, Constitutional Limitations upon the Territorial Reach of Federal Process, 8 Vill. L. Rev. 520 (1963).

73. 28 U.S.C. § 1391.

74. (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

75. The discussion of the jurisdictional effect of the statutes, supra, pages 63-72, supports the statement as to venue as well as jurisdiction.
Thus, arguments opposing pendent personal jurisdiction are forceful and authoritative. The next step requires an examination of the reasons advanced to justify denying the defendant his right to a trial in the proper venue and for validating service of process otherwise contrary to the relevant rules. The arguments on behalf of pendent personal jurisdiction have been expressed as convenience of the parties, judicial economy and an interest in avoiding piece-meal litigation. One might wonder whether these factors have any vitality after being used to support pendent jurisdiction of the subject matter, but let us assume they do.

Convenience of the parties does not support the extension of personal jurisdiction. It is extremely doubtful whether this factor, the principal factor in deciding questions of forum non conveniens and transfers under statutes providing for change of venue (where personal jurisdiction is a prerequisite), should be imported into the jurisdictional field. Moreover, it is directly repugnant to commonly accepted notions about jurisdiction to say that a defendant's right to be subjected to suit only where he can be served properly with process and only in a court having venue may be defeated simply because it inconveniences someone.

Aside from this, half of the decided cases have arisen in the United States District Court for the Southern District of New York, whose connection with the case generally comes from the presence of the stock exchanges in that district. The Southern District of New York may be a district foreign to the defendant and certainly inconvenient to him. When both the federal and nonfederal claims are identical, the defendant's inconvenience will be minimal since he must try the federal claim in that district. As the nature and quantum of proof varies, and as defendant has defenses in addition to those under the acts, the inconvenience increases. Thus, the balance of convenience and inconvenience will vary with every case and with the claims and defenses put forth. This is not a serious handicap where the question is merely one of whether to change the venue of the case, which is an ad hoc determination, but it would be an unreliable guide in determining a matter as important as jurisdiction and, therefore, should be left to its proper function in the change of venue cases.

Judicial economy is another pillar claimed by the expansionists to support their position. Presumably, what is meant is that we should strive for the most economical and efficient use of the judicial resources of this country. The epitome of judicial economy would

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76. Unless it is transferred to another district, as in Ackert v. Ausman, supra note 40.
be an equal number of cases of comparable degrees of complexity on the docket of each judge and equally current calendars in all courts. That such is desirable, all can no doubt agree; that such a utopia is not at hand likewise cannot be doubted.

This argument, moreover, while persuasive when talking about subject matter jurisdiction (where the concern is the power of the court to decide, not the rights of the defendant to proper service of process) is not relevant here. There it was a proposition of trying two cases in the same state and district in two separate courts against one action on both claims in either the state or the federal court. Here the separate nonfederal claim could not be brought in that state nor could it be joined in the state court with the federal claim. Presumably there is a correlation between the state and federal case loads in the same geographical area, so that it is desirable to have only one claim pending in the one area. However, in the present situation we are drawing one claim from a different geographical area in order to have it decided in a federal court in a congested district. We take the claim away from the current, relatively uncongested court and add it to the harried, delayed, congested calendar and that court’s overworked judges. Judicial economy is not being served when cases are retained on a calendar already containing 20% of the civil cases in federal courts and which also add to the highest case load per judge in the nation.\(^7\) This, then, is a false sense of judicial economy.

The interest in avoiding piece-meal litigation is not really a separate factor. From the public standpoint, and that of the courts, it is part of the judicial economy argument. Perhaps, contrary to the interest in avoiding piece-meal litigation, judicial economy might be served by permitting the nonfederal claim to be placed upon a current calendar in a court where the defendant can be served and disposed of, since this could result in eliminating the case from the congested calendar. From the viewpoint of the parties, this is really one of the elements that come under the heading of inconvenience, which has already been discussed or overdiscussed.

V.

A Possible Solution Preserving the Rights of All

In most cases, the ends of justice, judicial economy and convenience may be served while at the same time preserving defendant’s rights. The solution depends, to some extent, upon requiring plaintiff to choose between a relatively inconvenient (to defendant) forum for

\(^7\) Supra note 56.
trial of his federal claim alone and a more convenient forum for the trial of both claims together. In fact, if plaintiff is willing, and wants to try both claims together without an element of harassment, he could sue in defendant's district initially and forestall all problems. It is only because of his insistence upon a different forum that any need to make a choice arises.

Judge Clark, in *Schwartz v. Eaton*, suggested that a denial of jurisdiction would mean:

At most defendants can only hope to wage two defensive battles in two places in place of a single decisive engagement; but even that dubious gain may not be at hand. Since there appears to be diversity of citizenship between plaintiff and these defendants, suit in the federal courts on all claims is proper; and transfer under 28 U.S.C. § 1404(a) and consolidation under F.R. 42(a) may still make a single trial possible. . . .

The starting point seems to be that two actions will be brought. This pervades the discussion relating to convenience, judicial economy and piece-meal litigation. That basic assumption may be erroneous. The nonfederal claim may not merit a separate suit; it is not unheard of for plaintiff to lose a lawsuit. The nonfederal claim may be most valuable, or may have value only as a part of the federally based action because of the increased settlement value from the additional risks and the inconvenience, especially where the defendant has a reasonable chance of a successful statutory defense to the federal claim. One must always keep in mind that the expansion of jurisdiction may give plaintiff a club to hold over the defendant's head to help induce settlements.

If a second suit were brought, this does not necessarily mean two separate trials, as Judge Clark aptly pointed out in view of transfer and consolidation procedures. The diversity aspect is helpful, but not essential in light of the pendent jurisdiction over the subject matter of the nonfederal claim. The important factor is the section 1404(a) transfer as suggested by Judge Clark, though he apparently did not follow through with his reasoning. Had he done so, he would have recognized that defendant would have gained more than separate battles, he would have had both claims being tried in his district. The nonfederal claim could not be transferred to the district where the federal claim was pending because section 1404(a) permits transfer only to a district where it might have been brought, and we have

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78. 264 F.2d 195, 198, n.6 (2d Cir. 1959).
79. For text of that section, see note 41, supra.
already determined that it could not be brought in that district because of lack of jurisdiction over the defendant. Hence, only the federal claim could be transferred and it would be transferred to defendant’s district.\(^80\)

This appears to lead us to the best solution to these cases. The court can transfer the federal claim pursuant to section 1404(a) to the district where the defendant could be sued. At the same time, the nonfederal claim could be transferred under another section\(^81\) and the lack of jurisdiction over the defendant would not be an obstacle and could be cleared up in the transferee district where he would be amenable to service of process.\(^82\)

This, of course, does not solve the cases of multiple defendants where all are not amenable to service in one state. In those cases, plaintiff can exercise his full rights as to the federal claims and, to the extent desirable, join nonfederal claims against selected defendants in the district where service can be obtained. Plaintiff will not be deprived of the benefits conferred upon him by the federal legislation, nor will he reap a bonanza by an enlargement of those rights at the expense of the defendants.\(^83\)

VI.

Conclusion

On the one hand the statutes and rules do not provide for extraterritorial service of process as to the nonfederal claim; the statutes should not be construed to invade an area of defendant’s constitutional rights; the venue provisions militate against permitting the suit to

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\(^{80}\) In effect, this is what did occur in H. L. Green Co., Inc. v. MacMahon, 312 F.2d 650 (2d Cir. 1962), \textit{supra} note 55.

\(^{81}\) 28 U.S.C. § 1406. Cure or waiver of defects.

\(^{82}\) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

\(^{83}\) Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), settled a conflict of authority and held that the provision for transfer was broad enough to authorize transfer regardless of presence or lack of personal jurisdiction in the transferor court.

\(^{84}\) The solution to this problem, which has plagued us throughout our legal history when we have joint tortfeasors scattered about the globe, is properly a concern of the legislature, not the courts. The proposals to alter federal diversity jurisdiction and establish a jurisdiction based upon multiple defendants in numerous states with nationwide service of process (Chapter 158, American Law Institute, Study of the Division of Jurisdiction between States and Federal Courts, Tent. Draft No. 1, 1963), would not reach these cases since as now proposed, it would exclude non-necessary parties and places joint tortfeasors in that group (Id. § 2341(b) and commentary, pp. 84–87). If the plaintiff is being mistreated by our present laws, then his recourse should be sought in the legislature and spokesmen perhaps should seek a revision of the proposed revisions to that end, but the courts should not rape their procedures to satisfy plaintiff’s desires.
be brought in a distant forum; and if jurisdiction is to be extended it should be done through the legislature, not the courts. On the other hand, in some cases the inconvenience to defendant would be slight (though not in all or perhaps even most); judicial economy might be served in some cases; and piece-meal litigation might be avoided. Under such circumstances the courts should refuse to permit nonfederal claims, over which they have pendent subject matter jurisdiction, to be brought in a district court where jurisdiction can be obtained only by virtue of the special provisions of the securities acts. In all cases in which it is possible, the courts should transfer the case to an appropriate district under the general procedural statutes.