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Ernest W. Machen Jr.

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under the statute after the expiration of three years from the birth of the child. In 1939 the statute of limitations was amended to its present form.²³ The effect of the 1939 amendment on the former statute of limitations was first considered in *State v. Killian*, where the court said: "This section (the former statute of limitations) however was definitely changed by Section 3 of Chapter 217 Public Laws 1939 (the present statute of limitations) which limited the application thereof to proceedings to establish the paternity of such child."²⁴ Considering this statement, it is difficult to understand why the court has held that "the only material change wrought by the particular amendatory proviso was to extend the time within which prosecutions may be brought when the reputed father has acknowledged his child by payments. . . ."²⁵ Therefore, today the law in North Carolina requires that prosecutions be commenced within three years of birth or they are barred by the statute of limitations, unless the proviso is made operative because of payments in acknowledgment, in which case the maximum limit for commencing the action would be six years from birth.

A father's initial gift to an illegitimate child is universal condemnation. This irreparable disservice should not be further perpetuated by allowing the father to escape the financial responsibility of his wrongful act because of ambiguity in our law. Nor could the legislature have intended such a result. The legislature has expressly distinguished proceedings and prosecutions, but, if there be any uncertainty, society and common decency dictate that it should be construed in favor of the unfortunate child.

THOMAS A. WADDEN, JR.

Federal Jurisdiction—Joinder of Non-Federal Claim with Federal Question

Plaintiff brought an action against FBI agents to recover damages allegedly resulting from an unlawful search and seizure of the plaintiff's property and from a deprivation of his liberty and property without due process of law in violation of his immunities guaranteed by the Fourth and Fifth Amendments of the United States Constitution. The district court dismissed for lack of jurisdiction on the ground that the complaint failed to state a federal claim for which relief could be granted, and the Circuit Court of Appeals affirmed.¹ The Supreme Court reversed² on the grounds that the plaintiff had clearly and in

²³ N. C. GEN. STAT. (1943) §49-4.

²⁴ *State v. Killian*, 217 N. C. 339, 341, 7 S. E. 2d 702, 703 (1940).

²⁵ 224 N. C. 57, 29 S. E. 2d 462 (1944); *see* *State v. Killian*, 217 N. C. 339, 341, 7 S. E. 2d 702, 703 (1940).

¹ *Bell v. Hood*, 150 F. 2d 96 (C. C. A. 9th 1945).

² *Bell v. Hood*, 327 U. S. 678 (1946). Mr. Chief Justice Stone and Mr. Justice Burton dissented on the ground that "The district court is without jurisdiction as

good faith founded his claim on provisions of the Constitution, and that the claim was substantial and not frivolous so that the district court should have taken jurisdiction before determining whether or not relief could be granted. The district court then took jurisdiction and *held*: 1., that no provision of the Constitution or laws of the United States gave a right of action in any person against a federal officer who violates that person's immunities under the Fourth and Fifth Amendments, and 2., that the federal court was without jurisdiction to consider any non-federal cause of action for trespass and false imprisonment arising out of the facts alleged, since a federal cause of action was entirely wanting.³ The present note is concerned only with the second part of the district court's holding.

The problem might be stated: to what extent and under what circumstances may issues, which are non-federal in character, be joined in a suit before a federal court in cases where jurisdiction depends not on the nature and relation of the parties⁴ but on the subject of the action. Prior to 1933 a variety of approaches to the subject had been taken by the courts resulting in the inevitable conflict in the cases.⁵ Beginning with Marshall's statement in *Osborn v. Bank of the United States*⁶ the general rule was developed that all issues actually raised in a case were within the judicial power of the district court once jurisdiction had been acquired over the case by virtue of the substantial federal question involved, even if the federal question was decided adversely to the party presenting it, or even if it was not decided at all.⁷ This rule, however, had found expression most frequently in proceedings to enjoin state action on the ground that it would be a violation both of the Federal Constitution and of the State Constitution or laws,⁸ and in the

a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States," at p. 685, and since neither the federal law nor the Constitution affords a remedy in this case, no cause of action is stated. The Justices further observed that the only effect of the majority holding is to require the district court to pass upon the local question of trespass, citing *Hurn v. Oursler*, 289 U. S. 238 (1933).

³ *Bell v. Hood*, 71 F. Supp. 813 (S. D. Cal. 1947).

⁴ The new Federal Rules of Civil Procedure, 28 U. S. C. A. following §723(c), Rule 18(a) provides that a party "... may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party," if joinder of parties and other rules are satisfied, so that where there is diversity of citizenship almost unlimited joinder of claims is permitted. See 2 MOORE'S FEDERAL PRACTICE 2118-2123 (1938).

⁵ Note, 40 HARV. L. REV. 298 (1926).

⁶ 9 Wheat. 738, 823 (U. S. 1824) "... when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

⁷ *Sterling v. Constantin*, 287 U. S. 378, 393 (1923); *Lincoln Gas & Electric Light Co. v. City of Lincoln*, 250 U. S. 256, 264 (1919); *Siler v. Louisville & Nashville R. R.*, 213 U. S. 175, 191 (1909).

⁸ *Chicago G. W. Ry. v. Kendall*, 266 U. S. 94 (1924); *Davis v. Wallace*, 257

main had been disregarded in the great mass of cases where a claim for unfair competition was sought to be joined in a suit for patent, trademark or copyright infringement.⁹ In 1933 the United States Supreme Court, in the case of *Hurn v. Oursler*,¹⁰ endeavored to resolve the conflict, holding that a common law claim for unfair competition should have been passed on by the district court on its merits when joined with a claim for copyright infringement over which the court had assumed jurisdiction, even though it found there had been no infringement. But in "attempting to formulate some rule on the subject"¹¹ the court is said to have prescribed two conditions, *vis.*, that the claims must rest on "substantially identical" facts,¹² and that the non-federal claim must not be actually a separate and distinct cause of action simply joined in the complaint with a federal cause.¹³ Courts not in sympathy with this decision have availed themselves of these limitations (that they find in it) to dismiss non-federal claims which would appear to fall well within the intent or purpose, and some even within the explicit wording, of the rule allowing jurisdiction. Thus, the simplest device for avoiding the *Hurn* case has been to find that some additional, even if closely related, fact must be presented to make out the non-federal claim.¹⁴

U. S. 478 (1922); *Greene v. Louisville & Interurban R. R.*, 244 U. S. 499 (1917); *Louisville & Nashville R. R. v. Greene*, 244 U. S. 522 (1917); *Ohio Tax Cases*, 232 U. S. 576 (1914); and cases cited note 7 *supra*.

⁹ The cases seem to have relied principally on language in *Stark Bros. Co. v. Stark*, 255 U. S. 50 (1921); *Leschen & Sons Rope Co. v. Broderick*, 201 U. S. 166 (1906) and *Elgin Nat'l Watch Case Co. v. Illinois Watch Case Co.*, 179 U. S. 665 (1901). See *Geneva Furniture Co. v. Karpen & Bros.*, 238 U. S. 254 (1915); *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446 (1911). For citations to lower court holdings see *Schulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure*, 45 *YALE L. J.* 393, 406 (1936) and Note, 52 *YALE L. J.* 922, 923 (1943); indicating the various approaches, Note, 1 *U. OF CHI. L. REV.* 480, 482 (1934).

¹⁰ 289 U. S. 238 (1933). Three claims were joined in the complaint, (1) for infringement of the copyrighted play, (2) for unfair competition with regard to the copyrighted play, and (3) for unfair competition with regard to an uncopyrighted version of the same play. The third was dismissed for lack of jurisdiction.

¹¹ *Id.* at 241.

¹² *Id.* at 246 "Indeed, the claims of infringement and unfair competition so precisely rest on identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." Read in its context, this statement appears rather to emphasize the fact that in the case only one right was alleged because the two claims rested upon identical facts.

¹³ *Id.* at 245-6 "But the rule [of the cases cited *supra* note 7 allowing jurisdiction] does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action." Accordingly, the court dismissed a third claim for lack of jurisdiction. See note 10 *supra*.

¹⁴ *Derman v. Stor-Aid, Inc.*, 141 F. 2d 580 (C. C. A. 2d 1944); *Zalkind v. Scheinman*, 139 F. 2d 895 (C. C. A. 2d 1943) *cert. denied*, 322 U. S. 738 (1944); *Musher Foundation, Inc. v. Alba Trading Co., Inc.*, 127 F. 2d 9 (C. C. A. 2d 1942) *cert. denied* 317 U. S. 641 (1942); *Foster D. Snell, Inc. v. Potters*, 88 F. 2d 611 (C. C. A. 2d 1937). In the last cited case the court not only relies on the contention that the facts are different, but the non-federal claim "relates to a different period of time . . . *Stark Bros. Co. v. Stark*, 225 U. S. 50, 41 S. Ct. 221, 65 L. ed. 496, is a flat authority that an action for damages resulting from unfair

But not less common is the more technical and complex method, that of finding that the facts alleged in reality present two causes of action.¹⁵

In *Bell v. Hood*,¹⁶ the court seems not to have pursued either of these courses in a clear-cut manner. It does state that the *Hurn* case is not applicable when the facts relied on to establish the federal claim are not substantially identical with those setting forth the non-federal claim¹⁷ citing four second circuit cases¹⁸ and one district court decision,¹⁹ but does not discuss whether or not that defect appears in the case before it. Indeed, it is difficult to see how it could.²⁰ Rather the

competition prior to registration of the plaintiff's trade-mark is not within the federal jurisdiction. We do not read the opinion in *Hurn v. Oursler* as overruling that decision and we think it controls the case at bar." The same court had previously supposed that the *Hurn* case had overruled the *Stark* case, "at least in [its] *ratio decidendi*." *L. E. Waterman Co. v. Gordon*, 72 F. 2d 272, 274 (C. C. A. 2d 1934). See Judge Clark's statement in *Treasure Imports, Inc. v. Henry Amdur & Sons, Inc.*, 127 F. 2d 3, 5 (C. C. A. 2d 1942), and *Zalkind v. Scheinman*, *supra*, at 901 n. 14. Whether or not the *Stark* case was overruled, some courts continue to exclude from consideration of unfair competition claim, any act done prior to the alleged patent, copyright or trade-mark. *Treasure Imports, Inc. v. Henry Amdur & Sons, Inc.* *supra* opinion of Hand and Swan, JJ. at page 6; *Hydraulic Press Mfg. Co. v. Columbus Malleable Iron Co.*, 35 F. Supp. 603 (S. D. Ohio 1940); *Slaymaker Lock Co. v. Reese*, 24 F. Supp. 69 (E. D. Pa. 1938); *Mitchell & Webber, Inc. v. Williams-Bridge Mills, Inc.*, 14 F. Supp. 954 (S. D. N. Y. 1936). For a criticism of this rule see Note, 52 *YALE L. J.* 922 (1943).

¹⁵ *Crabb v. Welden Bros.*, 164 F. 2d 797 (C. C. A. 8th 1947); *Newport Industries, Inc. v. Crosby Naval Stores, Inc.*, 139 F. 2d 611 (C. C. A. 5th 1944); *American Broadcasting Co. v. Wahl Co.*, 121 F. 2d 412 (C. C. A. 2d 1941); *Lewis v. Vendome Bags, Inc.*, 108 F. 2d 16 (C. C. A. 2d 1939); *Foster D. Snell, Inc. v. Potters*, 88 F. 2d 611 (C. C. A. 2d 1937); *Fred Benioff Co. v. Benioff*, 55 F. Supp. 393 (N. D. Cal. 1944). *Danials v. Barfield*, 71 F. Supp. 884 (E. D. Pa. 1947) action brought (1) to gain reemployment under provision of Selective Service Act and (2) to recover back pay on claim that employment had been at less than union wage scale. The objection that the causes are separate seems better applied here, and also in *California Water Service Co. v. City of Redding*, 304 U. S. 252 (1938) and *General Motors Corp. v. Rubsam Corp.*, 65 F. 2d 217 (C. C. A. 6th 1933) *cert. denied* 290 U. S. 688 (1933).

¹⁶ 71 F. Supp. 813, 820 (S. D. Cal. 1947).

¹⁷ *Id.* at 820.

¹⁸ *Dermon v. Stor-Aid, Inc.*, 141 F. 2d 580 (C. C. A. 2d 1944); *Zalkind v. Scheinman*, 139 F. 2d 895 (C. C. A. 2d 1943); *Musher Foundation, Inc. v. Alba Trading Co.*, 127 F. 2d 9 (C. C. A. 2d 1942); *American Broadcasting Co. v. Wahl Co.*, 121 F. 2d 412 (C. C. A. 2d 1941). Professor Moore observes that the "second circuit rule," to which express reference was made in *Hurn v. Oursler*, *fn.* at p. 241, was in that case "repudiated by the Supreme Court. Naturally, the second circuit cannot verbally cling to its former rule; but as a practical matter it does in many cases just about what it did before, although it now achieves the result by refusing jurisdiction over the claim of unfair competition by calling it a separate and distinct cause of action." *I MOORE'S FEDERAL PRACTICE* (1947 Cum. Supp.) §2.04, p. 94.

¹⁹ *Fred Benioff Co. v. Benioff*, 55 F. Supp. 393, 397 (D. C. Cal. 1944). In what respect the facts differed does not clearly appear, rather, the court seems to have looked to the merits.

²⁰ CALIF. CONST. Art. I, §19 is identical to the Fourth Amendment of the Federal Constitution. If anything, more facts would be required to make out a violation of the latter, among them, evidence that the defendants were federal officers acting by color of their office. The complaint, set out in the margin of *Bell v. Hood*, 327 U. S. 678, 679 (1946), would seem to allege facts more than sufficient to state a cause of action for trespass and false imprisonment.

judge states that if the two causes of action²¹ rest on substantially identical facts jurisdiction should be taken of the entire case, but that "in any event, the federal court cannot acquire jurisdiction over the non-federal cause of action unless the complaint also alleges a federal cause of action."²²

First, it is at least doubtful whether the complaint here alleges two causes of action, or only one, based on two theories of recovery or predicated on two provisions guaranteeing a single right.²³ This, of course, depends upon the meaning given to a "cause of action." True the Court in *Hurn v. Oursler*, while recognizing that "cause of action" may mean one thing for one purpose and something else for another, indicated²⁴ that for the purpose of determining the bounds between state and federal jurisdiction courts should stay within the meaning given in *Baltimore S. S. Co. v. Phillips*, "the number and variety of the facts alleged do not establish more than one cause of action so long as their result. . . . is the violation of but one right by a single legal wrong."²⁵ Even so, can it be said that a person has one right to the protection of a copyrighted play and two rights to the protection of his person and papers so that an encroachment upon the former gives him but one cause of action while a violation of the latter gives two?

However this may be, the requirement that a federal *cause of action* must be alleged before the federal court may take jurisdiction over a non-federal issue arising from the same set of facts seems to be without authority in the cases.²⁶ The only time failure of the federal claim is

²¹ "Cause of action," or "ground"? In the rule laid out in the *Hurn* case, at 246, which runs to the crux of this problem, great care was taken to distinguish between cases where two *grounds* support a single cause of action and those where two separate *causes of action* are alleged. (Words italicized by the court). It would seem for the sake of clarity, in reiterating the rule, the same care should be taken in the use of these terms.

²² *Bell v. Hood*, 71 F. Supp. 813, 820 (S. D. Cal. 1947).

²³ See Clark concurring in *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C. C. A. 2d 1939); *R.C.A. Manufacturing Co. v. Columbia Recording Corp.*, 36 F. Supp. 247 (S. D. N. Y. 1940); Clark, *The Code Cause of Action*, 33 *YALE L. J.* 817 (1924).

²⁴ 289 U. S. 238, 246 (1933).

²⁵ 274 U. S. 316, 321 (1927). 1 MOORE'S FEDERAL PRACTICE §2.04 n. 46 (1938)

"... it is true that the *Hurn* case uses language reminiscent of Pomeroy's definition of a cause of action as one primary right plus a delict or breach thereof, but its decision must be based on a more pragmatic notion, for the jurisdiction which was sustained embraced two rights—a statutory and a common law right, and alleged violations of both."

²⁶ *L. E. Waterman Co. v. Gordon*, 72 F. 2d 272, 274 (C. C. A. 2d 1934) "... it is only necessary that we should hold that the cause of suit upon the [federal ground] was substantial enough to support the jurisdiction of the district court." *Southern Pacific Co. v. Van Hoosear*, 72 F. 2d 903, 912 (C. C. A. 9th 1934) "And as the federal question here presented was a substantial one (and unlike cases of diversity of citizenship, this suffices) [*sic*] there was no jurisdictional obstacle on this score to a judgment for the intrastate rate." *Hurn v. Oursler*, 289 U. S. 238, 246 (1933) "... where the federal question averred it not plainly wanting in substance, the federal court . . ." may dispose of the case on the non-federal ground. *Field Packing Co. v. Glenn*, 5 F. Supp. 4, 5 (W. D. Ky. 1933), *modified as to another matter and aff'd* 290 U. S. 177 (1933).

fatal to jurisdiction of the non-federal matter is where the former is plainly "unsubstantial," made fraudulently for the purpose of gaining access to federal courts, or made colorable.²⁷ But, in this case the Supreme Court had already declared that the contention that the constitutional provisions give no cause of action when violated "does not show that [plaintiff's] cause is unsubstantial or frivolous, and the complaint does in fact raise serious questions both of law and fact . . ." and "That question [whether violations of the Amendments give rise to a cause] has never been specifically decided by this court."²⁸

It would seem then that the request to have the issues of trespass and false imprisonment determined should not have been denied for the reasons given by the district judge. Had he found that the two issues were not based on substantially identical facts, or that they were two separate and distinct causes of action, without much question the result would be within the rule of the *Hurn* decision, though in this writer's opinion, either would have been a finding not warranted by the facts of the case.²⁹

The decision may be explained by the fact that the situation is an unusual one, and to this we get a clue in the judge's statement that "the [*Hurn*] decision seems to have been prompted by those considerations which find expression in the familiar maxim—'Equity delights to do justice and not by halves' . . . [and] a review of the decisions discloses that in practice, almost without exception, the rule of *Hurn v. Oursler* has been applied only to equity cases."³⁰ While it is true that suits to enjoin infringement of protected articles have been the primary cause for invoking the doctrine, neither the Supreme Court nor the lower courts have intimated that the rule is in any way confined to such cases, and no reason has been advanced indicating that it should be.³¹

However, the judge in the instant case is not without support from others of the bench³² in his apparent desire to limit the practice of liberal joinder in this respect, and the topic of whether the doctrine of the *Hurn* case is wise from the standpoints of constitutional theory, of political expediency, and of trial convenience, is a lively one among

²⁷ See *Bell v. Hood*, 327 U. S. 678, 682 (1946); *Siler v. Louisville & Nashville R. R.*, 213 U. S. 175, 191 (1909). *Rudolf Lesch Fine Arts, Inc. v. Metal*, 51 F. Supp. 69 (S. D. N. Y. 1943). It may be unsubstantial because a recent decision has made it wholly without merit. *California Water Service Co. v. City of Redding*, 304 U. S. 252 (1938).

²⁸ *Bell v. Hood*, 327 U. S. 678, 685 (1946).

²⁹ See notes 20 and 23 *supra*.

³⁰ *Bell v. Hood*, 71 F. Supp. 813, 820 (S. D. Cal. 1947).

³¹ An example of a sound application of the rule in a law action can be found in *Southern Pacific Co. v. Van Hoosear*, 72 F. 2d 903 (C. C. A. 9th 1934).

³² See courts cited notes 14 and 15 *supra*. But see 60 HARV. L. REV. 424, 430 (1947) indicating Congressional proposal, H. R. 7124 §1338(b), to adopt *Hurn* rule in Federal Judicial Code with regard to actions on patents, copyrights and trade-marks.

writers and judges particularly interested in federal jurisdiction and procedure.³³ The argument is made on the one hand that jurisdiction, where it might conflict with state or local interests should be carefully confined to limitations clearly established by the Constitution and the Congress, since our federal system at best is one of peculiar political sensitivity.³⁴ On the other hand it would seem a waste of time and expense both for the judiciary and the litigants serving no real purpose to require that substantially the same facts presented in an action before a federal court should be retried in a state court when one action should suffice.³⁵ It has been suggested that *Hurn v. Oursler* was carefully calculated to strike a compromise between these two opposing considerations,³⁶ and indeed, in the very limitations noted above, this seems apparent. The joinder rule of the *Siler* case is adopted as one of general application, but only where judicial economy will thereby be served ("substantially identical" facts) and only if the local matter is in reality a part of the transaction giving rise to the federal claim. The necessity for showing the federal claim to be substantial has always been a requisite to federal jurisdiction, absent diversity. As has been pointed out elsewhere,³⁷ the district court is protected by these limitations from frivolous suits, purely local litigation, and the states from intrusion by the federal judiciary. "We may concede that problems of allotment of jurisdiction between state and national courts are fundamentally problems of government, calling for wise and shrewd statesmanship by any arbiter of the relations of states to nations in a federal system. . . ."

³³ *E.g.*, dissenting opinions of Judge Clark in *Zalkind v. Scheinman*, 139 F. 2d 895, 905 (C. C. A. 2d 1943), *Musher Foundation, Inc. v. Alba Trading Co.*, 127 F. 2d 9, 11 (C. C. A. 2d 1942), and in *Lewis v. Vendome Bags, Inc.* 108 F. 2d 16, 18 (C. C. A. 2d 1939). 1 MOORE'S FEDERAL PRACTICE (1947 Cum. Supp.) 91 *et seq.*; 2 *id.* 25 *et seq.* Note, 52 YALE L. J. 922 (1943).

³⁴ See *Mutual Life Ins. Co. v. Johnson*, 293 U. S. 335, 339 (1934). For cases illustrating the reluctance of the courts to decide local issues before determination by the state courts, see I MOORE'S FEDERAL PRACTICE (1947 Cum. Supp.) 180-184. See generally, Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499 (1928).

³⁵ To this end the *Hurn* rule has been applied by the second circuit in at least six instances (cited in *Zalkind v. Scheinman*, 139 F. 2d 895, 901 n. 7 (C. C. A. 2d 1943)) and in several other circuits, *General Shoe Corp. v. Rosen*, 111 F. 2d 95 (C. C. A. 4th 1940); *E. Edelman & Co. v. Triple-A Specialty Co.*, 88 F. 2d 852 (C. C. A. 7th 1937); *Illinois Watch Case Co. v. Hingeco Mfg. Co.*, 81 F. 2d 41 (C. C. A. 1st 1936); *Hemmeter Cigar Co. v. Congress Cigar Co.* 118 F. 2d 64 (C. C. A. 6th 1941). It might be said that no time is saved in considering evidence on a non-federal cause where as in the case under comment the federal cause is dismissed at the outset. But, non-federal claims have been retained after patent or copyright held invalid; *United Lens Corp. v. Duray Lamp Co.* 93 F. 2d 969 (C. C. A. 7th 1937); *Bulova Watch Co. v. Stolzberg*, 69 F. Supp. 543 (D. Mass. 1947); and even where the federal claim was not considered, *Glenn v. Field Packing Co.*, 290 U. S. 177 (1933); *Best & Co. v. Miller*, 67 F. Supp. 809 (S. D. N. Y. 1946).

³⁶ *Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L. J. 393, 400 (1936).

³⁷ Note, 52 YALE L. J. 922 (1943).

Even so, there will be no loss to statecraft if in the daily activities of courts the needs of practical judicial administration may have some sway to persuade against compelling two lawsuits where one will more completely serve the interests of the litigants."⁸⁸

ERNEST W. MACHEN, JR.

Mortgages—Foreclosures—Partial Sale of Land

A executed a deed of trust on four tracts of land to *T* to secure the payment of a series of notes payable to *C* and maturing in 1925. In 1926, *T* advertised under the power of sale of the deed and sold one of the tracts of land included therein. In 1928, *T* advertised and sold two additional tracts of land. The latter tracts were bought in by *C*, who went into possession, but no deed was given him for the land until 1943, some 18 years after the maturity of the debt. Under the law then existing, unless a mortgagee was in possession, the foreclosure sale and the execution and delivery of the deed pursuant thereto, in order to be valid, must have been completed within 10 years from the date the debt matured. In a suit by the heirs of *A* against the heirs of *C* to quiet title to the land, the issue became one of whether or not *C* was a mortgagee in possession of the two tracts to which he had no deed. *Held*: For the heirs of *A*. It is a general rule that there can be only one foreclosure of a mortgage or deed of trust. When a mortgagee or a trustee under a deed of trust elects to sell only a portion of the pledged property to satisfy the debt, the remainder of the security is released, and he cannot thereafter assert any right to it. Therefore, *C* was not and could not have been a mortgagee in possession after the execution and delivery of the deed made pursuant to the foreclosure sale held in 1926.¹

The rule against successive foreclosures of the mortgage security has been widely applied where a decree is sought in a court of equity,² on the theory that a mortgage represents but a single security and therefore but a single cause of action, which cannot be split. Therefore, the foreclosure cannot be piecemeal. The basic idea of not splitting the mortgagee's cause of action has, in several states, been enacted into statutes which set out that "there shall be but one single action for the enforce-

⁸⁸ Judge Clark, dissenting in *Lewis v. Vendome Bags, Inc.*, 108 F. 2d 16, 20 (C. C. A. 2d 1939).

¹ *Layden v. Layden*, 228 N. C. 5, 44 S. E. 2d 340 (1947).

² *Dumont v. Taylor*, 67 Kan. 727, 74 Pac. 234 (1903) (mortgagee got one decree and order of sale, but withdrew it; second foreclosure refused); *Hanson v. Dunton* 35 Minn. 189, 28 N. W. 221 (1886) (mortgagee had foreclosed once for part of the debt, sought a second foreclosure for the remainder); *Long v. W. P. Devereux Co.*, 87 Mont. 209, 286 Pac. 406 (1930) (no second foreclosure on wheat grown on mortgaged land, where mortgagee had failed to assert his right to the wheat in the first foreclosure by having a receiver appointed); *Nebraska Loan and Trust Co. v. Damon*, 4 Neb. (unof.) 334, 93 N. W. 1022 (1903) (foreclosure of mortgage for interest only, where whole debt is due, exhausts lien); *Dooly v. Eastman*, 28 Wash. 564, 68 Pac. 1039 (1902).