

## Sec. 2—Judicial Power and Jurisdiction

## Cl. 1—Cases and Controversies

was instituted to decide the “dispute.” Declaring that “the whole proceeding was in contempt of the court, and highly reprehensible,” the Court observed: “The contract set out in the pleadings was made for the purpose of instituting this suit. . . . The plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit. . . . And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed upon between themselves . . . and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision. . . .”<sup>365</sup> “Whenever,” said the Court in another case, “in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”<sup>366</sup> Yet several widely known constitutional decisions have been rendered in cases in which friendly parties contrived to have the actions brought and in which the suits were supervised and financed by one side.<sup>367</sup> There are also instances in which there may not be in fact an adverse party at certain stages; that is, instances when the parties do not actually disagree, but where the Supreme Court and the lower courts are empowered to adjudicate.<sup>368</sup>

<sup>365</sup> 49 U.S. at 254–55.

<sup>366</sup> *Chicago & G.T. Ry. v. Wellman*, 143 U.S. 339, 345 (1892).

<sup>367</sup> *E.g.*, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *cf.* 1 C. Warren, *supra* at 147, 392–95; 2 *id.* at 279–82. In *Powell v. Texas*, 392 U.S. 514 (1968), the Court adjudicated on the merits a challenge to the constitutionality of criminal treatment of chronic alcoholics although the findings of the trial court, agreed to by the parties, appeared rather to be “the premises of a syllogism transparently designed to bring this case” within the confines of an earlier enunciated constitutional principle. But adversity arguably still existed.

<sup>368</sup> Examples are naturalization cases, *Tutun v. United States*, 270 U.S. 568 (1926), entry of judgment by default or on a plea of guilty, *In re Metropolitan Ry. Receivership*, 208 U.S. 90 (1908), and consideration by the Court of cases in which the Solicitor General confesses error below. *Cf.* *Young v. United States*, 315 U.S. 257, 258–259 (1942); *Casey v. United States*, 343 U.S. 808 (1952); *Rosengart v. Laird*, 404 U.S. 908 (1972) (Justice White dissenting). *See also* *Sibron v. New York*, 392 U.S. 40, 58–59 (1968).