

## PRELIMINARY ANALYSIS OF CONCURRENT JURISDICTION

*Plus credit nemo tota quam Cordus in urbe. "Cum sit tam pauper, quo modo?" Caecus amat.—Martial.*

HESSEL E. YNTEMA

GEORGE H. JAFFIN

### I

By Article III, Section 2, of the Constitution of the United States, it is provided that:

"The judicial power (of the United States) shall extend . . . to controversies between two or more States; between a State and citizens of another State, between citizens of different States, . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects."

The potential jurisdiction thus vested in the federal judiciary to adjudicate controversies concerning foreign citizens or between citizens of different States has been described as an integral part of the federal design. Thus, states Hamilton in *The Federalist*:

"The fourth point rests on this plain proposition, that the peace of the WHOLE, ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. . . .

"The power of determining causes between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union, than that which has been just examined. . . . Whatever practices may have a tendency to disturb the harmony

of the states, are proper objects of federal superintendence and control.

"It may be esteemed the basis of the union, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' And if it be a just principle, that every government *ought to possess the means of executing its own provisions, by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial, between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded."<sup>1</sup>

---

<sup>1</sup> THE FEDERALIST (John C. Hamilton's ed. 1775) 588-90, No. LXXX (1788).

Hamilton's conception, namely, that the federal diverse-citizenship jurisdiction is necessary to enforce the Privileges and Immunities Clause of the Constitution, is accepted by Henderson in his monograph, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918) 182, "And if we look at the scheme of the Constitution as a whole, there is little ground to doubt that the word 'citizen' was used in precisely the same sense in the jurisdictional provisions, as in the privileges and immunities clause. Both were designed to secure citizens against discrimination and hostile treatment on the ground of citizenship—the former against legislative inequalities, the latter against the more intangible and elusive influence of hostility in judicial procedure. Indeed, Hamilton looked upon the jurisdictional provisions primarily as the procedural machinery for effectively securing the substantial rights conferred by the privileges and immunities clause."

This view is, however, questioned by Warren, on the ground that an adequate remedy is provided for discriminatory decisions in the state courts by writ of error under the Privileges and Immunities Clause. See Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 82. Friendly regards Hamilton's interpretation as merely a specimen of syllogistic logic, and states that, "if a state denies to a citizen of another state a privilege which it grants to one of its own, we have a ground of federal jurisdiction quite independent of the citizenship of the parties." See Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483, 485, 492 n. Both criticisms seem to assume that the constitutional review of state judicial decision, like the recognized review of state legislation, is within the federal judicial power. This is very doubtful; the parallel decisions of the Supreme Court under the Fourteenth Amendment, which has largely displaced the Privileges and Immunities Clause, indicate that the Supreme Court will not undertake the appellate review of state judicial decisions, even if discriminatory; see *Patterson v. Colorado, ex rel. Attorney-General*, 205 U. S. 454, 27 Sup. Ct. 556 (1907); *Milwaukee Electric Railway and Light Co. v. State of Wisconsin ex rel. City of Milwaukee*, 252 U. S. 100, 106, 40

Thus conceived, the jurisdiction of the federal courts in cases involving diversity of citizenship is an application of the principle that within its sphere the federal government should be a government, not of corporate states, but of individuals.<sup>2</sup> Accordingly, in cases involving foreigners or between citizens of different states, original cognizance was given to the federal courts by the First Judiciary Act and, with variations of detail, not of principle, in the limitations originally established, has been exercised ever since.<sup>3</sup>

Sup. Ct. 306, 308 (1920); *American Railway Express Co. v. Commonwealth of Kentucky*, 273 U. S. 269, 273; 47 Sup. Ct. 353, 355 (1927). For a discussion of the relation between the Fourteenth Amendment and the Privileges and Immunities Clause, see HENDERSON, *op. cit. supra*, at 177 *et seq.*

Moreover, the remedy by writ of error in cases of violations of the Privileges and Immunities Clause does not cover perhaps the most important types of cases; it is not available to foreign corporations not engaged in interstate commerce, they not being regarded as "citizens" under the Privileges and Immunities Clause, even in cases involving discriminatory state legislation and, *a fortiori*, discriminatory judicial decision. *Paul v. Virginia*, 8 Wall. 168, 178 (U. S. 1869); *Ducat v. Chicago*, 10 Wall. 410, 415 (U. S. 1871); *Liverpool and London Life and Fire Insurance Co. v. Oliver*, 10 Wall. 566, 573 (U. S. 1871); *Blake v. McClung*, 172 U. S. 239, 259, 19 Sup. Ct. 165, 173 (1898).

<sup>2</sup> *E. g.*, THE FEDERALIST, *supra* note 1, Nos. XX, XXI (1787). Corwin states: "The essential defect of the Articles of Confederation, as has been so often pointed out, consisted in the fact that the government established by them operated not upon the individual citizens of the United States but upon the states in their corporate capacity—that, in brief, it was not a government at all, but rather the central agency of an alliance. As a consequence, on the one hand, even the powers theoretically belonging to the Congress of the Confederation were practically unenforceable; while, on the other hand, the theoretical scope of its authority was unduly narrow. Inasmuch as taxes are collectible from individuals, Congress could not levy them; inasmuch as commerce is an affair of individuals, Congress could not regulate it; and its treaties had not at first the force of laws, since to have given them that operation would again have been to impinge upon individuals directly and not through the mediation of the state legislatures. Furthermore, the powers withheld from Congress remained with the states—which is to say, *with their legislatures*. The evil thence resulting was thus a double one. Not only was a common policy impracticable in fields where it was most evidently necessary, but also the local legislatures had it in their power to embroil both the country as a whole with foreign nations and its constituent parts with each other. So the weakness of the Confederation played directly into the hands of the chief defect of government within the states themselves—an excessive concentration of power in the hands of the legislature department." *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention* (1925) 30 AM. HIST. REV. 511, 527-528. See also Madison's explanation in his letter to Jefferson of October 24, 1787. 5 HUNT, WRITINGS OF JAMES MADISON (1904) 17, 19 *et seq.*

The Articles of Confederation, it may be noted, assured to the free inhabitants of each state, "all privileges and immunities of free citizens in the several States", but was defective in that no machinery was provided for their enforcement. Article IV, 1 POORE, THE FEDERAL AND STATE CONSTITUTIONS (1877) 8.

<sup>3</sup> The provisions of the First Judiciary Act establishing the diverse-citizenship jurisdiction are as follows:

It is well known that this solution was reached not without controversy in the debates of the time,—in the Constitutional Convention,<sup>4</sup> in the state legislatures and conventions,<sup>5</sup> and in the First Congress.<sup>6</sup> The controversy, which has its roots in divergent views as to the proper function of the federal courts, would seem to be perennial. Recently there have been before

---

"Sec. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided."

Sec. 12 provides, "That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court", the defendant could file a petition for the removal of the case from the state court to the nearest circuit court.

"Sec. 34. *And be it further enacted*, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

1 STAT. 78, 79, 92 (1789). Cf. 28 U. S. C. A. §§ 41 (1, 2) 71 n., 725 (1927).

<sup>4</sup> See FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1911) *passim*; Friendly, *op. cit. supra* note 1, at 484 *et seq.*

<sup>5</sup> See ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (2d ed. 1836) *passim*; Friendly, *op. cit. supra* note 1, at 487 *et seq.* A vigorous pamphlet war was waged between federalists and anti-federalists during the period preceding the various state conventions. For references in this literature to the federal diversity jurisdiction, see *THE FEDERALIST*, *supra* note 1; *Pelotiah Webster's Defence of the New Constitution* (1787), reprinted in *The Real Authorship of the Constitution of the United States Explained*, SEN. DOC. NO. 787, v. 29, 62d Cong. 2d Sess., 79, 83, 84 (1912); FORD, *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* (1883) 53, 102, 149, 238, 307, 308, 329, 330; MCMASTER AND STONE, *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788*, (1888) 571, 582 *et seq.*

<sup>6</sup> Warren, *op. cit. supra* note 1, at 66-69, 77-78, 125-127. Friendly, *op. cit. supra* note 1, at 500 *et seq.*

Congress proposals which have looked to the substantial diminution or even the abolition of the jurisdiction of the federal courts in controversies between citizens of different States.<sup>7</sup> These proposals have been supported by arguments, historical, political and doctrinaire.

Thus far, the historical study of the "diversity" jurisdiction of the federal courts has been too limited in time and scope to

---

<sup>7</sup>In recent years bills of three main types have been introduced in Congress: (1) To abolish jurisdiction based upon diversity of citizenship. S. 3151 (Senator Norris) 70th Cong. 1st Sess. See SEN. REP. 626 of Committee on the Judiciary, March 27, 1928. S. 4357 (Senator Norris) 71st Cong. 2d Sess. See SEN. REP. 691 of Committee on the Judiciary, May 20, 1930. (2) To raise the jurisdictional amount from \$3000 to \$10,000. H. R. 6679 (Mr. Parks) 70th Cong. 1st Sess. (3) To abolish the rule of *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842) by providing that the decisions of the highest court of a state shall govern the courts of the United States in the ascertainment of the common law or general jurisprudence (Senator Walsh) S. 4333, 70th Cong. 1st Sess.; S. 96, 71st Cong. 1st Sess.

It may be noted that the recent bills in Congress to limit the scope of injunctions in labor disputes would affect the diversity of citizenship jurisdiction as well as the federal jurisdiction to grant labor injunctions under the Sherman Anti-Trust Act. S. 1482 (Senator Shipstead) 70th Cong. 1st Sess. 69 CONG. REC. 475, 10050 (1928). See *Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate*, 70th Cong. 1st Sess., on S. 1482, *A Bill to Amend the Judicial Code and to Define and Limit the Jurisdiction of Courts Sitting in Equity*, Parts 1-5 (1928), S. 2497 (Senator Shipstead) 71st Cong. 2d Sess. The latter bill was reported adversely: SEN. REP. 1060; 72 CONG. REC. 276, 10250, 11271, 11764 (1930). The diverse-citizenship jurisdiction in labor disputes has assumed great importance for the two reasons: (1) the leading "yellow-dog" contract decision was based upon that ground, *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (1917); (2) if interstate commerce is not affected and the Sherman Anti-Trust Act inapplicable, diversity of citizenship is one of the most important alternative bases of federal jurisdiction. For an interesting recent case, illustrating the point see *Washington Cleaning & Dyeing Co. v. Cleaners', Dyers' and Pressers' Union*, Local No. 17920, *et al.*, 34 F. (2d) 897 (C. C. A. 8th, 1929).

However, not all recent legislative proposals as to the federal jurisdiction in civil cases would involve reduction in the scope of the diversity jurisdiction. The bill providing for declaratory judgments in the federal courts in cases otherwise within their jurisdiction would automatically apply to diversity of citizenship cases. See H. R. 5623 (Mr. Montague) 70th Cong. 1st Sess.; *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, April 27 and May 18, 1928; H. R. 23 (Mr. Montague) 71st Cong. 1st Sess.; S. 2501 (Senator King) 71st Cong. 2d Sess.

Certain other proposals designed to affect the power and selection of federal judges might, if passed, have an indirect effect upon diverse-citizenship cases by reducing the advantages of litigation in the federal court under certain circumstances. S. 1094 (Senator Caraway) 70th Cong. 1st Sess., depriving federal judges of the power to comment on the evidence in jury cases. 69 CONG. REC. 1578, 4965, 4968, 5202 (1928); S. 374 (Senator Caraway) 71 CONG. REC. 255 (1929). A constitutional amendment for the election of federal judges has been recently proposed; S. J. Res. 126 (Mr. Dill) 71st Cong. 2d Sess., 72 CONG. REC. 1934 (1930).

reach a critical point. Two excellent studies have appeared, the one primarily of the discussion as to this branch of the federal jurisdiction in the Constitutional Convention,<sup>8</sup> and the other carefully analyzing the pre-natal history of the First Judiciary Act in committee and in Congress.<sup>9</sup> These studies amply demonstrate the existence of a definite split of opinion between the federalists and the anti-federalists as to the proper distribution of judicial power between the states and the federal union. However, institutions undergo transmutations of function as well as form; the evidence of institutional genesis by no means concludes the exodus. And in this instance, the employment of such evidence to question the present basis and policy of the federal diversity jurisdiction, as seems to be suggested in both studies,<sup>10</sup> would be particularly unsatisfactory. In the first place, the period specifically covered (1787-1789) is brief; the crucial experience of the Confederation and the experience subsequent to 1789 admittedly remain generally to be studied.<sup>11</sup> In the second place, the character of the evidence studied precludes extensive inference; it is, in sum, that of opinion

<sup>8</sup> Friendly, *op. cit. supra* note 1.

<sup>9</sup> Warren, *op. cit. supra* note 1.

<sup>10</sup> The suggestion is not made explicitly but by inference. Friendly, *op. cit. supra* note 1, at 510. Warren, *op. cit. supra* note 1, at 131. See also Frankfurter's summary: "Thanks to recent scholarship, we now know a good deal about the historic basis of this grant of jurisdiction and of its first exercise in 1789. Plainly enough, this phase of the 'judicial power of the United States' did not grow out of any serious defects of the Confederacy nor did it anticipate glaring evils. Even so strong a nationalist as Marshall gave it only tepid support. The available records disclose no particular grievance against state tribunals for discrimination against litigants from without. The real fear was of state legislatures, not of state courts. Such distrust as there was of local courts derived, not from any fear of their partiality to resident litigants, but of their general inadequacy for the interests of the business community." *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 520.

<sup>11</sup> Certain aspects have, of course, been treated. Thus, in particular, the development since 1789 of the doctrines as to "foreign corporations" has been portrayed by Henderson in an outstanding monograph, *op. cit. supra* note 1; see especially c. IV, at 50, in which the evolution of the rules as to the citizenship of foreign corporations for the purposes of the federal diverse-citizenship jurisdiction is discussed, and c. VIII, at 132, which is concerned with the doctrine of unconstitutional limitations provoked by the state anti-removal statutes. However, Henderson's treatment of this highly important aspect of the historical development stands more or less alone and is at best a brilliant but general outline of the evolution of the constitutional doctrine, which needs to be supplemented at various points. And, in any event, no systematic effort appears to have been made by Henderson or others, to relate the doctrinal development in question to economic and social factors.

evidence, (a) taken from a highly surcharged political atmosphere, and neither (b) directed to specific issues of fact nor (c) substantially in agreement. As Madison wrote at the time:

“The diversity of opinion on so interesting a subject (the federal Constitution) among men of equal integrity and discernment is at once a melancholy proof of the fallibility of the human judgment and of the imperfect progress yet made in the Science of government.”<sup>12</sup>

---

<sup>12</sup> Letter to Archibald Stuart, October 30, 1787, 5 HUNT, *op. cit. supra* note 2, at 47.

The evidence, subject to the qualification referred to in note 13 *infra*, consists of statements made in the course of the extended controversy between the federalists and the anti-federalists as to the adoption of the Constitution and its interpretation. As may be observed from the summary in Friendly, *op. cit. supra* note 1, at 487, the opinions are not only conflicting but betray varying apprehensions, in a degree unfounded, as to the scope of the diverse-citizenship jurisdiction provided for and its probable effects upon the state judicial establishments. The suggestion made by both Warren, *op. cit. supra* note 1, at 81, and Friendly, *loc. cit. supra*, that staunch federalists, such as Madison and Marshall, gave “tepid” support to the federal diverse-citizenship jurisdiction, probably should be taken *cum grano salis*; it is to be noted that the remarks of Madison, Marshall, Randolph and Pendleton, which are chiefly relied upon for this interpretation, were made in the course of the debates in the Virginia Convention, in which the opposition headed by Mason and Henry was very strong. The attitude of the federalists during the controversy succeeding the Constitutional Convention was necessarily conciliatory, as they desired primarily to assure the ratification of the Constitution.

More specifically, Madison's remark as to cognizance of disputes between citizens of different states that, “perhaps it might be left to the state courts”, ELLIOT, *op. cit. supra*, note 5, III, at 533, should be compared with his argument later in the same speech supporting the federal diversity jurisdiction, *ibid.*, 535, and with his explicit statement in the Constitutional Convention, advocating inferior federal tribunals to obviate local prejudice in the state courts, FARRAND, *op. cit. supra* note 4, I, at 124. See also Madison's summary of the “Vices of the Political System of the U. States,” referring to “occlusion of Courts” as an aggression on the rights of other States, 2 HUNT, *op. cit. supra* note 2 (1901), at 361, 362. Marshall's statement: “Were I to contend that this (federal diversity jurisdiction) was necessary in all cases, and that the government without it would be defective, I should not use my own judgment”, ELLIOT, *op. cit. supra* note 5, III, 551, at 556, is not to be taken out of context. It was, as the remainder of Marshall's examination of the matter shows, a response to Mason's arguments, *ibid.* 521, 526, and to Henry's assertion that he saw “arising out of that paper a tribunal that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen,” *ibid.* 542. Thus, no more is indicated than Marshall's view that the federal jurisdiction was not to be exclusive. Similarly, Randolph's suggestion that he did “not see any absolute necessity for vesting it (the federal court) with jurisdiction in these cases,” *ibid.* 572, needs to be glossed by the fact that the suggestion of this particular branch of the federal jurisdiction appears to have been first made in the Constitutional Convention by Randolph himself in the proposal of the so-called Virginia Plan, FARRAND, *op. cit. supra* note 4, I at 22. Pendleton's opinion that, “in general, those decisions might be left to the state tribunals,” seems to be based on the assumption that “citizens of one state are declared to be citizens of all”, and is coupled with the assertion of the

Even for the period covered, it is not demonstrated that the diversity clause was an anomaly or local prejudice inconsequential.<sup>13</sup> The inferences across a hundred and forty years are tenuous.

---

need of "jurisdiction in the federal judiciary, to stop (the) pernicious effects" of discriminatory state regulations, *ELLIOR, op. cit. supra* note 5, III, at p. 549. His view, which had been more fully explained earlier in the discussion, *ibid.* 517 *et seq.*, is, like Marshall's, that the federal jurisdiction in diverse-citizenship cases should not be exclusive but that "the necessity and propriety of a federal jurisdiction, in all such cases, must strike every gentleman", *ibid.* 518.

The clue to the conciliatory attitude of Madison and the other proponents of the Constitution during the Virginia Convention is furnished, not by the hypothesis of their indifference to a concurrent federal jurisdiction in diversity of citizenship cases, but by a passage which occurred between Mason and Madison early in the proceedings. Mason, whose opposition was most feared, on June 4, 1786, after stating that "when we come to the judiciary, we shall be more convinced that this (federal) government will terminate in the annihilation of the state governments," offered to put his hand to the Constitution, "if such amendments be introduced as shall exclude danger," *ibid.* 33. And, as Beveridge states, "Swift as any hawk, the Constitutionists pounced upon Mason's error, but they seized it gently as a dove. 'It would give me great pleasure', cooed Madison, 'to concur with my honorable colleague in any conciliatory plan'", I *LIFE OF JOHN MARSHALL* (1916) at 383. The nub of the matter is that the constitutionists had to conciliate Mason as to the powers of the federal judiciary, on which his position was most dangerous and intransigent.

The foregoing, it is hoped will serve not only to correct a possible misconstruction but also to illustrate the insecurity of the evidence on which the historical argument referred to in the text rests and the nice problems involved in its interpretation. This is not to reject opinion evidence as such but to require that it be subjected to the usual canons of historical construction and not to press it schematically to undue and uncorroborated conclusions. One requisite at least is to set the evidence in the texture of the time and place, which, for the Virginia Convention, Beveridge has so completely portrayed, *ibid.* 357 *et seq.*

<sup>13</sup> Friendly seems alone to have made an effort to verify his conclusions from the opinion evidence by reference to more specific information. He states: "Only if we could find that the state judges had been notoriously unfair to foreigners, would we be in a position to place much faith in the genuineness of the classical theory. It is, of course, impossible to obtain accurate information on this subject. The early state reports give us only a fraction of the cases heard before the appellate tribunals, themselves an infinitesimal fragment of the total amount of litigation. But such information as we are able to gather from the reporters entirely fails to show the existence of prejudice on the part of the state judges." *Op. cit. supra* note 1, at 493.

This is a line of inquiry which needs to be more adequately followed. As Friendly well suggests, the early state reports represent only a fraction of an "infinitesimal fragment of the total amount of litigation," and this from the appellate cases, which are scarcely calculated to reflect the vagaries of juries or even judges at *nisi prius*. It is the more necessary to have a comprehensive search made, if the existence of local prejudice at the time is to be disproved, as Friendly intimates. A very few authenticated instances would demonstrate the contrary.

It has not been possible to investigate the formal evidence in detail but it may perhaps be suggested that the theory of no local prejudice is presumptively improbable. No contemporary denial of the existence of local prejudice has been found. Indeed, for specific types of cases, there is contemporary evi-



Nor has the argument in Congress, directed to the limitation of the federal jurisdiction in cases involving citizens of different

dence of local prejudice. Thus, speaking of the treatment of aliens in the Virginia County courts, Madison remarked, "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us." ELLIOT, *op. cit. supra* note 5, III at 583. And the situation in the land grant cases was so notorious as to warrant a specific provision of federal jurisdiction, even in cases not involving diversity of citizenship. To give a single illustration, Randolph, who can scarcely be regarded as having had a pro-Constitutional bias, stated: "Under the old government, as well as this, reprisals have been made by Pennsylvania and Virginia on one another. Reprisals have been made by the very judiciary of Pennsylvania on the citizens of Virginia. Their differences concerning their boundaries are not yet perhaps ultimately determined. The legislature of Virginia, in one instance, thought this power right. In the case of Mr. Nathan, they thought the determination of the dispute ought to be out of the state, for fear of partiality," *ibid.* 571. As is well known, the difficulties as to land grants continued for some time and led to agitation against the federal jurisdiction based on diversity of citizenship, as may be illustrated by the controversy as to the Virginia and Kentucky land laws, described by WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) I, at 219 *et seq.*; II, at 96 *et seq.*

More generally, the contemporary records are full enough of evidence of local feelings. See c. XII, in NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION* (1924) at 544 *et seq.* It was difficult to anticipate that such feelings, in the parlous state of justice at the time, (see Friendly, *op. cit. supra* note 1, at 497 and Randolph's stringent summary of the situation, ELLIOT, *op. cit. supra* note 5, III, at 66), should not have found expression on occasion in verdict of jury or judicial decision, as it did in state regulation, *e. g.*, for the relief of debtors. Nor, on the point of its prejudicial effect upon citizens of sister states, are the regulations as to process, which, as in the case of the Rhode Island tender law, tended to provoke reprisals by other states, validly distinguishable from the decisions by which they were given practical effect. Madison's analysis of the "Vices of the Political System of the U. States" is instructive on the point: "Paper money, instalments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other State, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations." 2 HUNT, *op. cit. supra* note 2 (1901), at 362.

The historic basis of the federal diverse-citizenship jurisdiction cannot well be tested by a narrow reference of "local prejudice" to judicial decisions apart from legislation. It is true, for instance, that glaring difficulties such as those arising from land grants and paper-tender acts, were specifically provided for in the Constitution; the diversity jurisdiction was one of several granted to the federal courts to guarantee "equal privileges and immunities" and to assure the enforcement of the not unrelated constitutional restrictions upon the states in those cases which had been most productive of disharmony, typically involving the interests of aliens or of the citizens of more than one state. That this provision was not without justification is suggested by the fate of the judges who in 1786 ventured to declare the Rhode Island paper-tender act unconstitutional in *Trevett v. Weeden*, (see HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1914) at 92). The doctrine of judicial review was in its infancy; even today, as indicated in note 1, it does not reach discriminatory judicial decisions or assure to foreign corporations generally "equal privileges and immunities" with the citizens of the several states. As Hamilton re-

states, passed the stage of preliminary opinion. The central proposal,<sup>14</sup> to abolish the federal jurisdiction in suits between citizens of different states, has been reported favorably by the Senate Judiciary Committee, but without the benefit of a hearing.<sup>15</sup> Obviously, the considerations advanced in the committee report, namely, (a) that the expense attendant upon federal litigation will be saved to the parties and inequality of litigating power as between the resident individual and the foreign corporation eliminated, (b) that the jurisdiction unreasonably "makes property rights more valuable than human rights", and (c) that the congestion in the federal courts will be thereby substantially relieved, are still to be examined, even for legislative purposes.<sup>16</sup> Incidentally, it has been noticed that the interest in the federal diversity jurisdiction is subject to sectional influences; "in the Eastern

---

marked, "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union." THE FEDERALIST, *supra* note 1, at 600, No. LXXXI (1788).

Thus, the statement, quoted in note 10, that this "phase of the 'judicial power of the United States' did not grow out of any serious defects of the Confederacy nor did it anticipate glaring evils", would appear to be neither verified nor even plausible. More judicious is the view of FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 10, that the federal jurisdiction in cases of diverse citizenship was desired by its proponents, "Not because of any *a priori* notions of political science but as a practical remedy for the ineffectiveness of the Confederacy and the distintegrating tendencies of state governments." The subject of "local prejudice" would seem to invite scientific examination.

<sup>14</sup> The Norris bill, as finally amended, *supra* note 7.

<sup>15</sup> In discussing the bill in the Senate, Senator Norris said that no particular hearings were necessary since it was "entirely a legal proposition",—"purely a question of practice that the lawyers on the Judiciary Committee understand as well as do other attorneys." He further stated: "The only excuse and the only reason of which I know that has ever been given for the present practice is prejudice in one State against the citizens of another State, and the litigants go into a federal court in order to avoid that prejudice. If such a condition existed 150 years ago, it has certainly disappeared now; there is not anything to it; it is entirely a fiction, as I look at it." 69 CONG. REC. 6378 (1928). Later discussion disclosed opposition to the bill on the part of the bar; a report by the Committee on Jurisprudence and Law Reform of the American Bar Association was submitted opposing the bill and requesting that the "bill be recommitted to the Judiciary Committee in order that hearings may be had". See 69 CONG. REC. 8078, 8080 (1928); (1928) 53 A. B. A. REP. 424, 430, etc.

<sup>16</sup> See SEN. REP. No. 691 to accompany S. 4357, Limiting the Jurisdiction of District Courts of the United States, 71st Cong. 2d Sess. May 20, 1930. See also SEN. REP. No. 626 to accompany S. 3151, Limiting the Jurisdiction of District Courts of the United States, 71st Cong. 1st Sess. March 27, 1928.

States there is no very large number of cases in the annual number resting upon that ground of jurisdiction, but as you go West and South you find an enlargement of causes turning upon citizenship and a lesser proportion of causes that fall under the other general heads of jurisdiction dependent upon the subject-matter."<sup>17</sup>

While thus the winds of political opposition to the federal diverse-citizenship jurisdiction blow prevailingly from the West and South, the doctrinaire attack finds its distinguished advocate in the distant East. Its salient points may be somewhat peremptorily sketched for our purposes in a series of propositions. 1. "Not inherent reasons but practical justifications explain the past judiciary acts and must vindicate jurisdiction in the future." "A *priori* reasoning", "unchanging political principles", and "the prepossessions of the familiar", are "unsafe guides."<sup>18</sup> 2. "A powerful judiciary implies a relatively small number of judges." Therefore, if the prestige of the federal courts is to be maintained, increase in federal judicial business cannot be met "merely

<sup>17</sup> See 21 CONG. REC. 10218 *et seq.* 10220 (1890). In a very interesting study by Hannah G. Roach, dealing with sectional influences in Congress, the author concludes that, "So long as sections retain their differences of geological formation, natural resources, and economic interests, national policies must be the product of compromises and adjustments between sections, and sectionalism, or diversity in unity, must continue to be a fundamental condition of our national life." Roach, *Sectionalism in Congress 1870 to 1890* (1925) 19 AM. POL. SCI. REV. 500, 526.

There seems to be some basis for the hypothesis that the state legislation and the proposals in Congress intended to restrict or abolish diverse-citizenship jurisdiction have been influenced, if not inspired, by sectional considerations. Thus, the state statutes designed to prevent foreign corporations from removing cases to the federal courts have typically occurred in southern, western, and midwestern states, such as Arizona, Arkansas, Kentucky, Alabama, Oklahoma, Missouri, Indiana, South Carolina, Wisconsin, Minnesota, Iowa. See U. S. DEPARTMENT OF COMMERCE, *Report of the Commissioner of Corporations on State Laws Concerning Foreign Corporations* (1915) 119, 149, 193. See also 2 STIMSON, *AMERICAN STATUTE LAW* (1892) 215. And the recent proposals in Congress to curtail or abolish the federal jurisdiction in private civil actions have come chiefly from western and midwestern representatives. For references to the bills in question, submitted by Norris (Nebraska), Parks (Arkansas), Walsh (Montana), Caraway (Arkansas), see *supra* note 7.

It will be recalled that the unconstitutionality of state anti-removal statutes was finally settled in the case of *Terral v. Burke Construction Co.*, 257 U. S. 529, 42 Sup. Ct. 188 (1922). This has, of course, served to focus the perennial attempts to limit the federal civil jurisdiction still more definitely in Congress.

<sup>18</sup> See Frankfurter, *op. cit. supra* note 10, at 506, 514; Frankfurter, *The Federal Courts* (1929) 58 NEW REPUBLIC 273, 274.

by making more judges," but should "be stopped at its legislative source".<sup>19</sup> 3. The diverse-citizenship jurisdiction of the federal judiciary is the basis of "state litigation in the federal courts", the federal or non-federal character of litigation being determined by the locus of legislative control.<sup>20</sup> 4. "The diversity cases represent one of (the) heaviest items" in the federal court business.<sup>21</sup> As indicated in the Appendix to this article, this would seem, *prima facie* at least, to be a rumor, which, like Mark Twain's death, has been greatly exaggerated. The preliminary evidence is that the diversity cases form a relatively small and decreasing percentage of the total federal cases and maintain a fairly constant ratio to the total civil litigation, state and federal. 5. The chief justification for the jurisdiction, fear of local prejudice, is belied by the changes in our national economic structure, which "no longer allow the easy assumption that in the West and in the South state jurors and judges are economic Ishmaelites".<sup>22</sup> 6. By

<sup>19</sup> Frankfurter, *op. cit. supra* note 10, at 515, 516, 530.

<sup>20</sup> *Ibid.* 517, 520.

<sup>21</sup> *Ibid.* 523.

<sup>22</sup> *Ibid.* 522.

The proposition advanced to indicate the invalidity of the classical local prejudice argument is, in sum, that the present need of the federal diverse-citizenship jurisdiction, a factor present during the entire development of our economic and financial structure since 1789, may be discounted by pointing to the development itself. But the process by which a constant factor in the development can be thus discarded for purposes of present analysis is not indicated.

Naturally, such an argument may be turned to an opposite conclusion. It is stated that "statistics on these matters are lacking, but there can be no question of increase in the financing of western and southern development by local capital", *ibid.* This, together with the dispersion of holdings and financial agencies throughout the country, is taken as a showing that local prejudice against foreign creditors is not easily to be assumed. Of course, on a matter such as this, the specific information to be derived from statistics and other sources is crucial. Undoubtedly, increase of population, development of invention, manufacture, and transportation and the like are basic conditions of financial growth. The point, however, is whether the *rate of growth* of local as well as foreign investment would have been as great as it has been, in the absence of such potential control as the federal courts have exercised. Still more, whether actual circumstances are such at the present time as to require the continuance of the federal check upon local policy or prejudice. The argument might well be tested in specific types of cases: thus, (1) suppose that the federal courts had followed the state decisions in Iowa, for instance, and thus had not established the interests of investors in municipal bonds as they did in *Gelpcke v. Dubuque*, 1 Wall. 175 (U. S. 1864), how readily could such bonds be marketed in the East or elsewhere, see note in (1893) 27 AM. L. REV. 393 *et seq.*; or (2) suppose that the case of *Terral v. Burke Construction Co.*, *supra* note 16, had been decided contrariwise and the states were thus able to prevent foreign corporations from removing cases to the federal courts,

giving non-residents a choice of forum denied to residents, "diverse-citizenship jurisdiction has elements of unfairness" which are accentuated by the doctrine of *Swift v. Tyson*—a doctrine which, "with all its offspring, is michievous in its consequences, baffling in its application, untenable in theory, and . . . a perversion of the purposes of the framers of the First Judiciary Act." <sup>23</sup>

---

what effect might this have upon the national economic structure, particularly in those businesses, such as insurance or intrastate transportation, which involve the prospect of extensive litigation? It would seem that the argument requires a specific and verifiable analysis of matters such as these. Certainly, if the federal diverse-citizenship jurisdiction be no longer significant to the national financial or business structure, (the contrary would be indicated by the large estimate of the number of cases involved given in the same argument, Frankfurter, *op. cit. supra* note 10, at 523), it becomes a little difficult to comprehend the substantial basis for the concern evinced in Congress as to either the retention or the removal of the jurisdiction.

<sup>23</sup> *Ibid.* 524, 526.

It is a large question, somewhat aside from the present discussion, how far the doctrine of *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842), has tended towards uniformity of law in this country. For the present, it may be noticed that in the enunciation of the argument outlined in the text above, the assertion is made that "*Swift v. Tyson* does not make for uniformity . . . Evidence is wanting that state courts yield their own law", Frankfurter, *op. cit. supra* note 10, at 528. And in support of the statement, cases are cited in the footnote, *ibid.* 529, n. 150, to show that in New York and, following the New York doctrine, in Arkansas, Connecticut, Maine, Minnesota, Missouri, Ohio and Wisconsin, the rule as to the effect of antecedent consideration declared in *Swift v. Tyson* was not followed.

This treatment of the matter is fragmentary and inappropriate. Thus, there is no indication that effort has been made to discriminate between those situations in which state courts have been faced with a choice between their own precedents and *Swift v. Tyson* and those in which they were considering a question not previously decided in the jurisdiction. Clearly, an indication that state courts have been rather naturally reluctant to depart from their own precedents despite the federal decisions will by no means show that *Swift v. Tyson* did not make for uniformity in the latter situations. And, while it is true that, literally speaking, the showing of a single subsequent exception to *Swift v. Tyson* will indicate that it has not resulted in complete uniformity, this is obviously to misconceive the problem. The question is not whether the doctrine attained the monotonous perfection of uniformity but rather the degree to which it has tended to reduce uncertainty and inconsistency in the development of law in this country. And this will be tested, not by the isolated exceptions, but by their significance in the larger history of which they form a part.

However, these and other general aspects of the problem must be left to be more adequately canvassed at a later date. For the present, it is sufficient to note the egregious limitations of the evidence even on the basis taken. Presumably, the categorical negative that "evidence is wanting that state courts yield their own law", in the first place, would need to be supported by a complete showing of its application to all decisions involved in all jurisdictions, yet the evidence is ten cases from eight jurisdictions out of forty-eight. In the second place, the evidence is in fact unrepresentative; although the eight jurisdictions, in which it is intimated *Swift v. Tyson* was not followed, were

not the only ones in which the broad *dictum* of that case was not always observed, see Jones, *The Law of Collateral Securities* (1880) 14 AM. L. REV. 465, 485n, yet the trend of doctrine in the larger number of jurisdictions was in accord with the federal decisions. For instance, in the leading Maryland case, *Maitland v. The Citizens' National Bank of Baltimore*, 40 Md. 540, 562, 564, (1874), Judge Alvey stated:

"The leading American case upon this subject is that of *Swift vs. Tyson*, 16 Pet., 1. In that case the Supreme Court of the United States, by Mr. Justice STORY, stated fully the grounds upon which the principle rests, that he who receives a negotiable instrument, as a promissory note, in payment of, or as collateral security for, a precedent debt, without other consideration, is a holder for value, within the rule of protection against antecedent equities . . . .

"The principle thus asserted in *Swift vs. Tyson*, appears to have been sanctioned and followed by the Courts in many of the leading commercial States of the Union, as in Massachusetts, Connecticut, New Jersey, California, Illinois, Indiana, Missouri, Louisiana, South Carolina, Rhode Island and Vermont, as will be seen by reference to the judicial reports of those States . . . . While, on the other hand, the Courts of New York, and those of some of the other States, following the case of *Bay vs. Coddington* . . . . have held that it is not sufficient to protect the note in the hands of the holder, that he received it merely as collateral security for a pre-existing debt, or even as nominal or conditional payment of such debt, unless he had given some new consideration for it; that a note so taken is not received or negotiated in the usual course of trade. But Chancellor KENT, who gave the opinion in *Bay vs. Coddington*, and which, upon the same reasons assigned by the Chancellor, was affirmed in the Court of Errors, while stating the law in the text of his Commentaries, vol. 3, p. 81, in accordance with that opinion, has appended a note, in which he said he was inclined to concur in the decision of *Swift vs. Tyson*, as the plainer and better doctrine."

In the third place, it seems not improbable, therefore, that *Swift v. Tyson* had some part in preparing the final triumph of the doctrine enunciated by Justice Story in § 25 of the Negotiable Instruments Law even in the jurisdictions which have been placed in question, (New York, 1897; Arkansas, 1913; Connecticut, 1897; Maine, 1917; Minnesota, 1913; Missouri, 1905; Ohio, 1902; Wisconsin, 1917. See 5 UNIFORM LAWS ANNOTATED, (1930), vii, 164). As the draftsman of the Negotiable Instruments Law has stated, § 25 "abolishes the rule in the leading case of *Coddington v. Bay*", CRAWFORD, NEGOTIABLE INSTRUMENTS LAW, ANNOTATED (1st ed. 1897) 30. Incidentally in the Commissioners' Note to Section 52 of the Uniform Bills of Lading Act, as in other uniform acts, the general principle of uniformity in the interpretation of the act is expressly referred to *Swift v. Tyson*, 4 UNIFORM LAWS ANNOTATED (1922) 77. Finally, it will appear from examination of the cases in the very jurisdictions in question, that the actual *decision* in *Swift v. Tyson* was not rejected in any of the eight jurisdictions, subject to the qualifications introduced in the New York cases adverted to below, while the wider *dictum* of Justice Story, was accepted in three of the eight states—Arkansas, Connecticut and Minnesota. It is pertinent to refer briefly to the doctrinal evidence on this last point for the period prior to the adoption of the Negotiable Instruments Law.

It is a somewhat elementary proposition that cases are to be read with reference to their facts. WAMBAUGH, THE STUDY OF CASES (1894) c. II, 8 *et seq.* It may, therefore, be noticed that the decision of *Swift v. Tyson* was on a certificate of division from the Southern District of New York as to whether a *bona fide* indorsee of a bill of exchange, which had been received in payment of an existing debt before maturity, is affected by the antecedent equities. In delivering the opinion of the Supreme Court, Justice Story said: "Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for

a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business." *Supra*, at 19. Justice Catron, in a concurring opinion, stated that he was "unwilling to sanction the introduction into the opinion of this Court (of) a doctrine aside from the case made by the record, or argued by the counsel, assuming to maintain that a negotiable note or bill pledged as collateral security for a previous debt, is taken by the creditor in due course of trade." *Ibid.* 23.

It is, therefore, pertinent to distinguish, in a consideration of the reception of the doctrine of *Swift v. Tyson* in state courts, between the *decision* and the *dictum* or, in other words, between cases in which negotiable paper is received in *payment* of an antecedent debt and those in which it is received as *collateral security* therefor. Other types of situations could be distinguished, *e. g.*, those involving accommodation paper, but need not be considered for the present purpose. With the distinction suggested in mind, it will be sufficient to cite the more important leading cases in the several jurisdictions which have been placed in question under an analysis suggesting the relation of these cases to *Swift v. Tyson*:

I. Negotiable instrument received in payment of previous debt.

a. State decisions prior to 1842 in accord with the decision in *Swift v. Tyson*: *New York*, *Bank of St. Albans v. Gilliland*, 23 Wend. 311 (N. Y. 1840); *Connecticut*, *Brush v. Scribner*, 11 Conn. 388 (1836), citing *Payson v. Coolidge*, Fed. Cas. No. 10860 (C. C., D. Mass. 1814), *aff'd*, *Coolidge v. Payson*, 2 Wheat. 66 (U. S. 1817); *Maine*, *Homes v. Smith*, 16 Me. 177 (1839), followed in *Norton v. Waite*, 20 Me. 175 (1841), in which *Swift v. Tyson* was cited as authority for the doctrine.

b. State decisions prior to 1842 contrary to the decision in *Swift v. Tyson* and reversed after 1842: *Ohio*, *Riley and Van Amringe v. Johnson*, 8 Ohio 527, 529 (1838), *rev'd*, *Carlisle v. Wishart*, 11 Ohio 173 (1842), expressly on the authority of *Swift v. Tyson*. The court stated in the *Carlisle* case: "It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform rule of *all*, as it now is of *most* of the states. And in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law, is of much interest to the mercantile world." *Supra* at 191, 192.

c. Question first decided after 1842 in accord with decision in *Swift v. Tyson*: *Arkansas*, *Bertrand v. Barkman*, 13 Ark. 150 (1852), expressly following *Swift v. Tyson*; *Minnesota*, *Stevenson v. Heyland*, 11 Minn. 198 (1866), citing *Swift v. Tyson*; *Missouri*, *Fitzgerald v. Barker*, 96 Mo. 661 (1888), following the federal cases; *Wisconsin*, *Atchison v. Davidson*, 2 Pin. 48 (Wis. 1847), citing *Swift v. Tyson* as authority.

II. Negotiable instrument received as collateral security for previous debt.

a. State decisions prior to 1842 contrary to the doctrine of *Swift v. Tyson*, followed after 1842: *New York*, *Coddington v. Bay*, 20 Johns. 637 (1822), followed in *Stalker v. McDonald*, 6 Hill 93 (N. Y. 1843), in which Chancellor Walworth stated: "I have, therefore, thought it my duty to re-examine the principles upon which the decision of this court in *Coddington v. Bay*, was founded, notwithstanding it was deliberately made, with the concurrence of, at least, one of the ablest judges who has ever adorned the Bench of this State, and has been acquiesced in and followed by all the courts of the State for more than twenty years. And I have done it not only out of respect to the decision actually made by the Supreme Court of the U. S. in the case alluded to, but also because the opinion of the distinguished judge who pronounced its decision, is of itself entitled to very great weight upon a question of commercial law; although what he said in that case respecting the transfer of a negotiable note as a mere security for the payment of an antecedent debt, was not material to the decision of any question then before the court, and is, therefore, not to be taken as a part of its judgment in that case." *Supra* at 95.

b. Question first decided after 1842 contrary to doctrine of *Swift v. Tyson*: *Maine*, *Bramhall v. Beckett*, 31 Me. 205 (1850), in which *Swift v. Tyson* is expressly referred to as a case in which "the point was not raised, and where the decision turned upon other considerations"; in *Smith v. Bibber*, 82 Me. 34, 19 Atl. 89 (1869), the court refused to overrule the *Bramhall* case, but added: "If the question was an open one here, we should be inclined to adopt the federal rule, as the one best sustained by principle and authority." *Ohio*, *Roxborough v. Messick*, 6 Ohio St. 448 (1856), distinguished in *Pitts v. Foglesong*, 37 Ohio St. 676 (1882), in a case involving an accommodation indorsement. In the *Roxborough* case, the court stated that "All that is said in *Swift v. Tyson* . . . in regard to the rule to be adopted where negotiable paper is taken as collateral security, for a pre-existing debt is *obiter*," *ibid.* 457. *Wisconsin*, *Cook v. Helms*, 5 Wis. 107 (1856), in which the court followed the New York cases in preference to "some dicta in the opinion of Story, J., in the case of *Swift v. Tyson*."

c. Question first decided after 1842 in accord with doctrine of *Swift v. Tyson*: *Connecticut*, *Bridgeport City Bank v. Welch*, 29 Conn. 475 (1861), citing the case of *Swift v. Tyson*.

d. *Dictum* after 1842 contrary to *Swift v. Tyson* later overruled: *Arkansas*, *Exchange National Bank v. Coe*, 95 Ark. 387, 127 S. W. 453 (1910), expressly overruling the *dictum* in the *Bertrand v. Barkman* case (1852), in which the court had said: "But this question, as to the extinguishment of a pre-existing debt, came up directly before the supreme court of the United States in the case of *Swift v. Tyson*, (16 Peter R. 1), and it was held by the whole court as sufficient to satisfy the rule, and this is in accordance with what we think is the overwhelming current of decisions. Judge STORY, however, who delivered the opinion of the court in that case, went out of the record and asserted beyond this, that a negotiable note or bill pledged as collateral security would stand on the same footing as one purchased in market for money, or taken in extinguishment of a previous debt. Judge CATRON, however, in that case dissented from all that was beyond the record, and subsequently Chancellor WALWORTH, in the case of *Stalker v. McDonald, et al.* (6 Hill R. 93), examined in detail all the authorities referred to by Judge STORY to sustain his views, and shows very satisfactorily that they were, in a great degree, misconceived." *Supra* at 160, 161. In the *Exchange National Bank* case, it was said: "The trend of modern decisions is in favor of the rule adopted in the federal courts as tending to promote uniformity in the different jurisdictions. This is considered important, in view of the increased dealings between the citizens of different states and because the courts of the national government do not recognize the decisions of the state courts on the question." *Minnesota*, In *Becker v. Sandusky Bank*, 1 Minn. 311, 319 (1856), Sherburne, J., stated in a *dictum*: "I commenced an examination of this case under a full conviction that the answer would also be bad as to any equities between the original parties prior to the endorsement; that the law was as laid down by Judge Story in *Swift against Tyson*, 16 Peters' Repts., 1. But a careful examination of the authorities leads me to doubt the correctness of that opinion upon this point. The authorities cited by Judge Story to sustain his view upon this point in that case will be found, with a very few exceptions, based upon an endorsement of negotiable paper, as *payment* of an antecedent debt, and not as *collateral security* for the payment. It should be recollected that in the case of *Swift vs. Tyson*, the bill of exchange was endorsed in *payment* of an antecedent debt, and not as collateral security; and that so far as the opinion relates to an assignment as collateral security, it is foreign to the question which was before the Court, and 'its weight of reason must depend upon what it contains.' See *Carroll vs. Lessee of Carroll et al.*, 16 How. U. S. Rep., 287. But even as the mere *dictum* of Judge Story, I would not presume to dissent from it without very strong reasons or the support of high authority. The opinion, however, has been reviewed by Chancellor Walworth in the case of *Stalker vs. McDonald*, 6 Hill Rep., 93, in which it seems to me to be clearly shown that the *dictum* of Judge Story cannot be supported as sound law." In *Rose-*



mond v. Graham, 54 Minn. 323, 56 N. W. 38 (1893), in which it was stated that "The question has never been decided in this court", the federal rule was followed: "This being a matter of general commercial law, the rulings in the federal courts will everywhere follow that of the supreme court, as above indicated, irrespective of what the state courts may declare to be the law in their respective jurisdictions. Diverse rules of law, affecting ordinary commercial transactions, cannot be finally declared and enforced by different courts within the same jurisdiction without resulting evils too great to be disregarded. Without assuming now to determine as to which side of the question is supported by the better reason, it is considered that our decision should be such that there shall be but one rule of law recognized and enforced in all the courts in this state." *Missouri*, The *dictum* in Goodman v. Simonds, 19 Mo. 106 (1853), contrary to the doctrine of Swift v. Tyson, was reversed by *dicta* in Grant v. Kidwell, 30 Mo. 455 (1860), and Boatman's Saving Institution v. Holland, 38 Mo. 49 (1866), in accord with the doctrine. The holding in these cases, however, was not followed and the earlier doctrine of Goodman v. Simonds was sustained in the case of Loewen v. Forsee, 137 Mo. 29, 38 S. W. 712 (1897), on the authority of Railroad Co. v. National Bank, 102 U. S. 14 (1879).

It should be remarked that the "subtle refinements" in the New York decisions, which have been said to have resulted from the rule in Coddington v. Bay, 20 Johns. 637 (N. Y. 1822), CRAWFORD, *op. cit. supra*, at 32, did not involve the principle applied in Bank of St. Albans v. Gilliland, *supra*, but rather the question as to what facts were sufficient to constitute the receiving of a negotiable instrument in "payment" of an existing debt. The only New York decision to the contrary, which has been found, is that in Rosa v. Brotherson, 10 Wend. 85 (N. Y. 1833), which was explained and distinguished in Smith v. Van Loan, 16 Wend. 659 (N. Y. 1837). See the excellent summary by Finch, J., in Mayer v. Heidelberg, 123 N. Y. 332, 25 N. E. 416 (1890). Indeed, in Coddington v. Bay, it was said by Woodworth, J., that to constitute a holder who had taken a bill for an antecedent debt a holder for value, "something must be paid in money or property, or some existing debt satisfied thereby, or some new responsibility incurred in consequence of the transfer," *loc. cit. supra*, at 646. As explained in the case of Homes v. Smith, *supra*, in New York, a bill or note taken for a pre-existing debt was "not payment, unless expressly agreed to be received in payment." In other states, such as Maine, negotiable paper received for a pre-existing debt was payment of it, unless the contrary was made to appear. And, therefore, while "in New York, the taking of such paper, if not collected, would occasion no loss," in such jurisdictions "it would cause the loss of the whole debt." From this and the various exceptions which were grafted upon the rule in Coddington v. Bay, the confusion in the New York law sprang. But, as indicated, it does not disturb the conclusion that, before 1842, the decision in Swift v. Tyson had been anticipated in the New York decisions.

The foregoing analysis could, of course, be expanded by the inclusion of other jurisdictions, but considerations of space and simplicity preclude. For the same reasons, other instances of conflict between federal and state decisions, referred to in the note cited above, are not here considered. However, in view of the fact that Alabama decisions under the case of Fenouille v. Hamilton, 35 Ala. 319 (1859), involving the problem here discussed, are cited to show that the Alabama courts continued to follow their decisions thereunder, despite the decision in Oates v. First National Bank, 100 U. S. 239 (1879), it is of interest to note that there was no conflict between the two cases, as seems to be suggested. In the Oates case, collateral security was given under an agreement to extend the time of payment of an antecedent debt, and the decision accorded with the *dictum* in the Fenouille case. In general, the Alabama courts accepted the decision in Swift v. Tyson, *e. g.*, Bank of Mobile v. Hall, 6 Ala. 639 (1844), expressly followed Swift v. Tyson, but declined to follow Story's *dictum* in cases involving the receipt of negotiable instruments as collateral security for previous debts.

The results of the preceding partial analysis of the decisions in the eight jurisdictions, in which it is said, in the note cited, "state courts expressly refused to follow *Swift v. Tyson*", may be briefly summarized. In general, no decision by the courts in these jurisdictions has been found, expressly refusing to follow the actual decision in *Swift v. Tyson*. On the contrary, the law of New York, Maine, and Connecticut was settled in accord with that decision prior to 1842; in Arkansas, Minnesota, Missouri, and Wisconsin, *Swift v. Tyson* was explicitly followed in the leading cases after 1842; and, in Ohio, a case prior to 1842 was overruled, expressly in order to bring the law into conformity with *Swift v. Tyson*.

Further, in cases involving the receipt of negotiable instruments as collateral securities for antecedent debts, there is evidence that even the *dictum* of Justice Story had substantial influence. In Connecticut, the doctrine of *Swift v. Tyson* was followed, while in Arkansas and Minnesota and for a period in Missouri, the earlier *dicta*, subsequent to *Swift v. Tyson*, were overruled, so as to bring the law into conformity with the doctrine of that case. In five states, Justice Story's *dictum* was not followed just because it was *dictum*, either in view of prior decisions, as in New York, or since the New York doctrine was preferred, as in Maine, Missouri, Ohio and Wisconsin. And, if space permitted, it could be shown that, even in these jurisdictions, the *dictum* of Justice Story was not without effect, as indicated by decisions carving various exceptions out of the rule in *Coddington v. Bay*.

It remains to remark that, on the effect of *Swift v. Tyson* as to the position of a holder receiving a negotiable instrument in payment of an antecedent debt, only one of the ten state decisions cited by the author is specifically in point, and this case, *Bertrand v. Barkman*, *supra*, expressly followed *Swift v. Tyson*. And, on the effect of Story's *dictum* as to the situation where collateral security was received, four or at most five of the ten decisions cited are technically relevant. Thus, *McBride v. Farmer's Bank of Salem*, 26 N. Y. 450 (1863), turned upon whether the assignee of a foreign payee bank could recover the proceeds of a note from a foreign collecting bank in the New York courts; *Cary v. White*, 52 N. Y. 138 (1873), presented a question of priorities under the recording act, and did not involve a negotiable instrument; in *Bertrand v. Barkman*, *supra*, the instrument was received in payment of an antecedent debt and the court followed *Swift v. Tyson* in the decision although not Justice Story's *dictum* in the *dicta*; in *Becker v. Sandusky City Bank*, *supra*, the equities claimed against the holder were subsequent to the indorsement; and, in *Cook v. Helms*, *supra*, although the facts do not clearly appear, the court apparently based its decision on the ground that the holder was not *bona fide*. And, in any event, the case of *Webster v. Howe Machine Co.*, 54 Conn. 394, 8 Atl. 482 (1886), is not indicative of the situation in Connecticut, as the liability of an accommodation acceptor, resident in New York, of a bill payable in New York, was involved and the court stated that it applied the law of New York as the *lex loci contractus*. The fragmentary showing, such as it is, that *Swift v. Tyson* had no persuasive effect in state courts, therefore, rests principally upon *dicta*. It is, of course, true that *dicta* have had at times potent influence upon the course of decision and, as such, deserve attention. It is, nevertheless, interesting to note that the battle is apparently waged with *dicta*, not the most reputable form of opinion evidence, against the *dictum* of Justice Story. The visceral reaction, one might say, is to vocal behavior.

The foregoing analysis will perhaps have suggested that *Swift v. Tyson* has not been without influence in the development of commercial law in this country. But, at the same time, this is only a limited, theoretical and partial sampling of a large development, which has, by reason of the pattern considered, left completely out of account the dominating institutional influences. It is not rashly to be taken as conclusive on the validity or invalidity of "the federal common law." The matter is one which begs for serious attention, if only that the much abused case of *Swift v. Tyson* may not be further misunderstood.

7. *Ergo*, "Is there not ample basis for re-examining the present jurisdiction in the federal courts in cases where there is not even the warrant of enforcing a federal right?"<sup>24</sup>

It is not to the purpose here to appraise the detail of the foregoing argument, although to avoid the inference of tacit consent, certain specific difficulties on major points are alluded to in the notes<sup>25</sup> and the Appendix. What is noticed, however, is the fact that it is possible to formulate a similarly consistent and persuasive argument to the opposite conclusion. The various propositions of such an argument have indeed been stated<sup>26</sup> and may be outlined as follows: 1. The basic question is the promotion of the administration of justice, not political compromise. 2. The maintenance of its traditional jurisdiction is essential to the prestige of the federal judiciary; by additions to its personnel and improvements in procedure the federal judiciary should be accommodated to its proper business and not the business to the traditional organization. 3. The diverse citizenship cases, being provided for in the Constitution, are federal, not state cases, and are, therefore, properly cognizable in the federal courts. 4. "No single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of Federal courts there, with a juris-

---

<sup>24</sup> Frankfurter, *op. cit. supra* note 10, at 522, 525. He also states, *ibid.* 525, "The right to remove to the federal court a litigation between non-residents in a state court will not survive analysis"; and that "it is hard to justify any retention of federal receivership except as to interstate enterprises", *ibid.* 526.

The point of view summarized in the text was set forth upon several occasions. See, in addition to the article cited in note 10, Frankfurter, *The Federal Courts* (1929) 58 NEW REPUBLIC 273; Frankfurter, *Address before the New Jersey State Bar Association* (1928-9) YEAR BOOK, NEW JERSEY STATE BAR ASS'N 99; FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) 292.

<sup>25</sup> See especially *supra* notes 22, 23 and also 1, 12 and 13 on the historical aspects of the argument.

<sup>26</sup> Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts* (1922) 47 A. B. A. REP. 250, 258; (1922) 8 A. B. A. J. 601, 604; Stone, *Fifty Years Work of the United States Supreme Court* (1928) 53 A. B. A. REP. 259, 263; (1929) 8 ORE. L. REV. 248-68; Newlin, *Proposed Limitations upon Our Federal Courts* (1929) 15 A. B. A. J. 401, 403; *Report of Committee on Jurisprudence and Law Reform of the American Bar Ass'n* (1928) 53 A. B. A. REP. 419, 424, 430; ROSENBERG, SWAINE AND WALKER, *CORPORATE REORGANIZATION AND THE FEDERAL COURT* (1924) v. 53. And see the general summary in Brown, *The Jurisdiction of the Federal Courts based on Diversity of Citizenship* (1929) 78 U. OF PA. L. REV. 179.

diction to hear diverse citizenship cases.”<sup>27</sup> By depriving the federal courts of this jurisdiction, “a serious blow will be directed at the financial structure which has been built up in a long course of years.”<sup>28</sup> 5. The jurisdiction is not unfair; it minimizes actual discrimination flowing from existent local prejudice and extends an equal privilege to all citizens involved in litigation outside the state of residence. 6. The diverse citizenship jurisdiction, far from producing legal diversity, is essential to the harmonious and uniform development of law in this country, particularly in the federal courts. 7. In sum, the proposals to restrict the federal jurisdiction in civil cases to which the United States is not a party contemplate “the first step toward a system, alien to Anglo-Saxon ideas of civil liberty, of having one kind of law and procedure governing the rights of individuals among themselves and another controlling rights growing out of their relations to the Government.”<sup>29</sup>

These arguments, *pro* and *contra*, are propounded, not as a demonstration of the merits or demerits of the federal “diversity” jurisdiction, but as an experimental sample of a familiar type of theoretical discussion. Some time since, with more particular reference to the traditional “vested rights” theories of the “conflicts of laws”, an effort was made to outline the scientific limitations of analysis, stated in metaphorical broad principles and inadequately verified as to their practical purposes and effects.<sup>30</sup> Without rehearsing the theoretical aspects of the matter, it may here be noticed that both arguments as to the federal diverse-citizenship jurisdiction, outlined above, present difficulties in part analogous to those there noticed. In the first place, a complicated problem of the administration of justice is oversimplified; no sufficient account is taken of regional variations, of possible diversity according to type of case, trade practice or legal system. In the

---

<sup>27</sup> Taft, *op. cit. supra* note 26, at 259.

<sup>28</sup> *Report of Committee on Jurisprudence and Law Reform, supra* note 26, at 435.

<sup>29</sup> *Ibid.* 432.

<sup>30</sup> Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468, 476 *et seq.*

second place, the crucial items of controversy are in effect anticipated,—such as the primary facts as to the actual distribution of the judicial business in question between federal and state courts, the existence and effects of local prejudice in the administration of justice, the actual correlation between the federal jurisdiction and national uniformity, particularly of commercial law, and so forth. In the third place, the purpose is not ascertainment but persuasion,—the cogent formulation of intuitive opinion based at best upon an unexposed individual experience. In sum, both arguments betray the masterful genius of the advocate, by which detail is subordinated to compulsive theory and theory appears more than the tentative sublimation of research. Of this, as art, there can be no criticism; for scientific purposes, however, this, the usual literary mode of legal discourse is not the most apposite, since it is not explicitly calculated to observe and explain representative phenomena.

At the least, the scientific impotence of uncorroborated theory and individual opinion is suggested by our experimental sample. As Doctor Johnson observed in the debates on the Constitution, "The controversy must be endless whilst Gentlemen differ in the grounds of their arguments."<sup>31</sup> In the present instance, the vital parts of the argument are the premises of fact, and these are a disputatious bed of Kilkenny cats. Thus, two sets of proposals, comparable in logical cogency and legislative plausibility each supported by authority and ardently vindicated by actual interests, can be set forth with diametric premises and conclusions. It is enough to shake the most hardy faith in the infallibility of mere dialectic or personal intuitive experience as a means to truth. Until a more secure basis of inference is provided, there can scarce be a present choice between the competing views, which is not controlled by immediate interest or intuitive prejudice. Ultimately, there appears no solution but by war, historical attrition, majority rule or compromise, or objective study.

---

<sup>31</sup> 3 HUNT, *op. cit. supra* note 2 (1902), at 312.

## II

A brief examination of the contemporary discussion, political, historical and doctrinaire, as to the jurisdiction of the federal courts in controversies between citizens of different states, has thus led to the conclusion that it has been conducted predominantly on the level of individual, intuitive opinion. For reasons indicated, it is proposed that effort should be made to provide the basis for impersonal analysis and verification. The present purpose is to suggest the lines which an inquiry looking in this direction might well take, at least in its initial stages. The proposal has certain implications which first need to be specified.

In the first place, the study proposed is not *de lege ferenda*. The subject-matter is chosen, not with any view to proposals of immediate reform, but in the texture of a more general study of the administration of justice. It involves no designs upon the present distribution of judicial business in either the federal or state courts other than to subject it to scientific study. Neither the abolition nor the maintenance of the "diversity" jurisdiction of the federal courts is advocated, but only the disinterested analysis of its phenomena. The issue does not need to be elaborated. The history of science suggests that in the long run the study of correlations is as fruitful as the study of ameliorative devices. It warrants patient curiosity in the analysis and verification of phenomena as well as the indulgence of otherwise laudable, reformist motivation in legal research.

Hence, in the second place, the study, being disinterested in reform, is not projected as a stage in the propagandization of particular ideas. It seeks to ascertain, not to promulgate. The validity of this choice in scientific work is generally recognized, in theory if not always in practice.<sup>32</sup>

---

<sup>32</sup> "Significant advance in the social sciences requires that we keep rigorously apart the modes by which we arrive at tentative truths and working hypotheses, and the process of securing their acceptance with such modification and qualification as a world of compromise requires. To borrow, as is the custom these days, the language of the business world, it is vital not to confuse the production of ideas with their distribution. The two involve different processes, different methods, different atmospheres, above all, different temperaments. It is, I believe, fatal to the development of new ideas to pursue them in an atmosphere and with the processes that predominantly reflect a desire to 'put

Nor is the proposed study conceived as practical in still a third and related sense. Its immediate purpose is scientific observation and not necessarily professional prediction. There is a difference not always duly noticed. Roughly speaking, the scientific interest is in the specific as an instance of a potential typification, whereas the technical problem is to apply the formula to the specific. The concern of the lawyer, as craftsman or advocate in the practice of his art, is necessarily with the disposition of specific cases, typically by reference to anticipated judicial decision. Legal science may and predominantly does adopt an analogous point of view, doubtless for the reason that it is still in professional swaddling-clothes. However, the advantage of science is that this point of view is not compulsory. As is elsewhere suggested,<sup>33</sup> the scientific interest may appropriately be directed to description, to the study of verified correlations of human conduct; it may well disclaim the prognostication of individual results in given cases. Furthermore, it is not limited to the appellate decision as a point of reference in prediction: it may study the effects as well as the conditions of judicial decision; it may take as its primary institutional focus, not the court, but the lawyer, the legislator, the client, or the social institution. Hence, for much the same reasons that it is preferred to the reformist point of view, the scientific view-point is preferred to the professional,—namely, because it is less trammelled by practical exigencies, less restricted by tradition, and, therefore, more hopeful of long results. These results

---

over' ideas. Those who have the aptitude for discovery, for invention, for fashioning new hypotheses are seldom equipped to secure their practical applications. An indispensable condition for fruitful theoretical research is the right kind of intellectual climate for important ideas to come to life. That means a total lack of the urgencies of the immediate and a freedom from worry about all the accommodations and compromises that become pertinent when ideas are to be formulated for acceptance. This may all sound very abstract, but it expresses the deepest conviction I have regarding the most concretely indispensable condition for seminal or even significant thinking in law. There must be freedom from pressure for results, for approval by committees or conferences or foundations, for satisfying this hope and allaying that fear, which necessarily and properly condition the whole psychological atmosphere under which the work of securing acceptance for ideas proceeds." Frankfurter, *Conditions for and the Aims and Methods of Legal Research* (1930) 15 IOWA L. REV. 129; (1930) 6 AM. L. SCHOOL REV. 663, 667.

<sup>33</sup> Yntema, *The Purview of Research in the Administration of Justice* (1931) 16 IOWA L. REV. 337.

may well be of the highest significance to the profession, even as a basis of prediction, but this possibility does not necessarily control the methods of science. In this regard, the apparently more impractical point of view becomes practical.

Let us not misunderstand. In yet another sense, the proposed study is intensely practical. It proposes to ascertain the actual and not merely to embroider the theoretical. Thus, it involves the most intimate integration of theory and practice.

### III

The orientation of the study proposed is in the administration of justice. More specifically, it has to do with the distribution of litigation. It is, therefore, not a study of the federal diverse-citizenship jurisdiction as such, but rather a study of jurisdiction by reference to a selected experimental sample, consisting of the types of civil cases concurrently cognizable in federal and state courts. In other words, the purpose is to begin with the experimental testing of method and theory. What this signifies must be more specifically developed in the ensuing discussion, but at this juncture the points of contrast with recognized fields of study may conveniently be noticed.

On the one hand, analogous studies could be envisaged, relating specifically to the jurisdictional system either of a particular state or states or of the federal judiciary.<sup>34</sup> Studies of this

---

<sup>34</sup> The information available as to the distribution of civil litigation in this country is scattered and highly fragmentary. For the federal courts, the studies, which have thus far been made, have been historical in character and are principally concerned with the work of the Supreme Court. The outstanding monograph is by FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927), reprinted from (1924) 38 HARV. L. REV. 1005; (1925) 39 HARV. L. REV. 35, 325, 587, 1046; (1926) 40 HARV. L. REV. 431, 834, 1110, in which the history of the various Judiciary Acts is considered from the point of view of the Supreme Court and with particular reference to the printed legislative materials. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) is a mine of historical information, particularly as to the more important decisions of the Supreme Court. The more recent work of the Court is summarized in HANKIN AND HANKIN, *UNITED STATES SUPREME COURT 1928-29* (1929); *ibid.*, *PROGRESS OF THE LAW IN THE U. S. SUPREME COURT 1929-30* (1930); Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1; Frankfurter and Landis, *Business of the Supreme Court at October Term, 1928* (1929) 43 HARV. L. REV. 33; Frankfurter and Landis, *Business of the Supreme Court at October Term, 1929* (1930) 44 HARV. L. REV. 3. The absence of detailed monographic studies of



nature, however, would not be to the present purpose and for two chief reasons. First, as already explained, the present study is not conceived with a primary view to the reform of either the federal or a state judiciary; hence, it need not accept the limitation to a peculiar system of courts which such a purpose would necessarily require. Second, it is believed that the concurrent administration of civil justice in the federal courts cannot be safely isolated for the purposes in hand from that in the respective state courts, or *vice versa*. The fact that the concurrent litigation to be examined in each state, the substantive law and procedure and the officials concerned,—judges, lawyers, and juries,—come in large part from the same geographic and economic area argues strongly for the possibility of significant relations between two concurrent systems of justice, inviting comparative study, and renders a study of the subject with reference to either system alone prospectively lop-sided.<sup>33</sup>

---

individual district courts, to which Frankfurter and Landis draw attention, *op. cit. supra*, at 52n., and of a competent system of federal judicial statistics, to which they repeatedly refer, *ibid.* 53n. 220, 221, 248, has precluded the systematic treatment of the system of the federal courts as a whole.

The literature for the administration of justice in the state courts is still more sporadic and scattered. For the more general references on the subject, such as there are, see WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* (1929) at 616 *et seq.* and 630; Marshall, *The Beginnings of Judicial Statistics* in RICE, *STATISTICS IN SOCIAL STUDIES* (1930) 89 *et seq.*; Yntema, *op. cit. supra* note 33, at 358, 359.

<sup>33</sup> Aside from the fact that the federal district courts and the state courts concurrently operate in the same geographical areas and so are subject to much the same general conditions, there are specific points at which similarities between the federal and state trial courts may be anticipated: (1) Divergencies in the personnel of the court are in some degree lessened by the fact that both federal and state judges are residents of the state and presumably imbued with the training and traditions of the local bar. (2) Similarly, differences which might otherwise exist between the federal and the state bar are to a large extent obviated through the fact that litigation in both federal and state courts is very largely handled by the local bar and, in particular types of cases, often by the same attorneys. (3) To a degree, cultural divergencies which might otherwise appear in the character of the jury are likewise lessened by the fact that they are drawn from the same region. (4) Save on specific questions, the effect of the "conformity" rule is to remove in a large degree the differences which might otherwise exist in the substantive law; for the most part the federal and state courts decide in accordance with the same statutes and precedents. (5) The same is true to some degree of procedural practices.

Thus, not only is the litigation in the federal and state courts of a particular state drawn from the same institutional sources and geographic area, but there is also sufficient relation between the federal and state judicial systems as such, to make it not only possible but desirable in the study of the distribution of litigation to regard the litigation in each state as a unit.

On the other hand, the subject-matter to be studied is of a character intimately related to the more general fields of legal procedure and, more especially, to what is known as the "conflicts of laws". Like the latter subject, it concerns choice of court and choice of law but in situations of two systems in a single area instead of two systems in two geographical areas. Furthermore, the inquiry is not only as to the technical basis of jurisdiction but also why the case is brought to the particular court. Thus, attention is in a degree fixed upon the administration of justice by courts and lawyers; the problem is to ascertain types primarily in the official activity studied and to refer to them socio-economic institutional factors. The converse method of referring official activity to systematically ascertained, non-official, socio-economic types is one which holds promise but is not adapted, initially at least, to the problem in hand.

This focus of investigation serves to indicate somewhat the levels at which information should be sought. Four such levels may be distinguished: *first*, the formal published sources, the statutes and reports; *second*, the formal written sources, the records of courts; *third*, informal information as to official activity of judges, lawyers, juries and other officers of justice; *fourth*, informal information as to non-official activities affected. The more usual type of legal study, limited in general to the level of the statute and the appellate report,—as is being more fully indicated elsewhere,—would be highly hypothetical on crucial aspects of actual practice.<sup>36</sup> The same applies, only in less degree, to studies which extend to the official records, a valuable but not too eloquent source of information. At the least, an effort to probe the realities of such things as the choice of forum should reach as far as the lawyer's office, in view of the fact that the technical decision there takes place. Hence, one aspect of the problem is methodically to obtain and utilize the informal records or other information available to lawyers. Necessarily, the results of a study of the three first levels of information will need to be correlated with non-official phenomena. The present inquiry, however, is not

---

<sup>36</sup> Yntema, *op. cit. supra* note 33, at 348 *et seq.*

directed to the first-hand investigation of such phenomena, save insofar as they fall within its focus. For the rest, it will perforce rely upon the results of other investigations.

Parenthetically, a possible confusion of ideas may be noticed at this point. A study of the administration of justice which rejects the theoretical formulation of intuition as a methodology does not by hypothesis exclude opinion evidence. The point is important; the difference is between erecting an inverted theoretical pyramid upon a more or less narrow, individual and cryptic, intuitive experience, on the one hand, and, on the other, utilizing the testimony of competent observers secured under proper conditions and for appropriate purposes. The utility of the latter method of investigation is writ large upon our judicial and legislative history. In the study proposed, there are certain points on which the opinion of those responsible for decision is the most direct source of information, *e. g.*, with respect to the grounds of choice of forum. Such opinions can be secured in sufficient instances to be representative, with reference to points of fact concerning specific, actual cases, from expert lawyers and with relative objectivity and comparability. In a case such as this, it would be unscientific to disregard the participant expert and to rely solely upon inference from less immediate conditioning factors.<sup>37</sup>

---

<sup>37</sup> The term "opinion evidence" is used in the general sense of record of opinion or judgment, whether as to particular facts or more comprehensive situations. It should be noted, however, that the distinction commonly made between such "subjective evidence" and what is called "objective evidence" is one of degree of detail and not of kind. The unsatisfactory nature of the distinction between the two may readily be illustrated. Thus, for example, if I see a man raise a gun, see a puff of smoke, hear a report, see another man in the line of fire fall, smell his blood, etc., is the evidence of my senses "subjective" or "objective"? Again, if the next day, I *read* in the newspaper an item as to the homicide, is this a "subjective" or an "objective" *datum*? Or if the prosecuting attorney decides to prosecute in view of the evidence of witnesses, is he acting on "subjective" or "objective" *data*? Will the indictment which is then drawn up be "subjective" or "objective" in its scientific character? Will the evidence put in at the trial, the instructions of the judge, the verdict of the jury, be scientifically "subjective" or "objective"? Will the loss to the widow be "subjective" or "objective"?

To be more specific, is the pleading of an attorney stating his client's case or, even further, the opinion of a judge rendering judgment, perhaps along lines suggested in the attorney's brief, or the docket entries, made by the clerk of court, "subjective" or "objective" evidence as to the facts in the case?

It would seem that any and all of the foregoing items can be described, as one pleases, as either "objective" or "subjective". Even an *opinion* as to whether some prospective course of events is desirable or will occur, will be

The fact is that the lawyer plays an important role, not only in the administration of justice generally, but in the distribution of litigation. In the first place, a possible legal controversy first comes into definite contact with the wheels of justice typically in the lawyer's office; in a large number of instances, as to the proportional significance of which there is little definite information, it is there settled or otherwise disposed of. In the second place, not only does the lawyer normally participate in a decision to litigate, but he in some degree determines the time and, if more than one court is open, the place as well. At times, the choice of forum, which of necessity is largely the lawyer's province, may be between different courts of a single system, *e. g.*,—of law and equity, of general or special jurisdiction,—or between the courts of different states, as well as between the federal and state courts in a given state. In all these situations, between which there are strong analogies from the viewpoint of the distribution of litigation, the lawyer, therefore, becomes a focal point of as much or even more

---

under certain conditions the most "objective" in its nature. The conclusion is that an "objective", meaning a reliable, *datum* is one which is conceived to be more pertinent to a given inquiry for a given purpose than others which are described as "subjective".

This "objective-subjective" futility may be avoided by focusing upon the definition of the sources of information which should be employed in investigation and more particularly upon the establishment of the precautions which should be observed in the utilization of all evidence for scientific purposes. Certain of the more important precautions may be suggested. First, the sample, record or opinion, should be representative, not individual. Second, the record or opinion should, if possible, be secured in an objective setting; thus statements made *arguendo*, as in political debate, need to be verified or discounted. Third, the record or opinion should relate to a specific rather than a general subject-matter—if possible to concrete cases rather than large issues of belief. Fourth, the record or opinion should be expert; it should evidence the conclusions of individuals, not merely theoretically competent, but who are themselves experienced with the point of inquiry. Fifth, records or opinions utilized as a basis of inference should be comparable, both as to the experience of those from whom they proceed and as to the specific subject-matter to which they relate. And, of course, no matter what the character of the evidence, unwarranted inferences are to be avoided.

The difficulty which is sometimes felt as to contemporary opinion evidence is, in part, due to failure to observe these precautions or inability at times to secure sufficiently representative opinion, in part to a hasty prepossession in favor of the written, official record. In this we may observe the influence of historical technique, which has sanctified the document because it almost invariably has no other contemporary source of information. But it should be obvious that there is no particular virtue in the written word as historical evidence, other than that it is more likely to be preserved. What is needed are not inflexible rules for the exclusion of historical evidence, but competent and comprehensive methods of search and evaluation.

significance than the court. Both, indeed, may be the actors in a drama, the major lines of which are written by more primitive socio-economic forces. But even so, it is essential to ascertain their practices, which, in the case of the lawyer, are not typically represented in the reports or records.

The inquiry in mind is thus simply regarded as one of the administration of justice. With equal propriety, it could be generally formulated in a political or behaviorist setting. The suggested view-point is chosen, however, not because it is believed to be intrinsically distinguishable from the alternatives, but for quite incidental reasons. For one thing, the alternatives seem scarcely to advance the issue. It may be said that law is in a high sense political,—“legislative in its grounds”, to use the phrase of Mr. Justice Holmes,<sup>38</sup>—or that it has to do with human conduct, and there is virtue in so saying. These are at present general antidotes to formalism in legal study, but, once truly admitted, their analytical power is spent. They do not enable us to discriminate, being general, and serve no more than to preface the basic problem of detailed analysis. Moreover, the alternatives are liable to misconstruction. The formulation in terms of politics might perhaps seem to traditionally law-conscious minds to suggest the drawing of a distinction, which to us seems false, between the legal and political study of the administration of justice.<sup>39</sup> And for

---

<sup>38</sup> HOLMES, *THE COMMON LAW* (1881) 35.

<sup>39</sup> There seems to be a difference of opinion as to whether proposals relating to the federal jurisdiction in diverse-citizenship cases present legal or political questions. Senator Norris, in explaining why no hearing was had on his bill to abolish the jurisdiction (*supra* note 15), described it as “entirely a legal proposition”, 69 CONG. REC. 6378 (1928). On the other hand, according to Frankfurter, the definition of the federal jurisdiction by Congress in the Judiciary Acts involves “issues of the very stuff of American politics to be settled or avoided by compromises of one generation only to reappear in the next. They are not technical issues nor within the special province of lawyers. The formulation of the compromises demands legal skill, and of a high order. But the bases of adjustment must be available by statesmen and ought both to enlist and satisfy public understanding.” *Op. cit. supra* note 10, at 500.

As suggested in the text, the problems of federal diverse-citizenship jurisdiction may be described as political, but not in a sense which, for scientific purposes, distinguishes them from *legal* problems. For such purposes, the point of view suggested long since by Mr. Justice Holmes is taken, namely, that the law, though logical in form, is in substance based upon political considerations. As is stated in *THE COMMON LAW*: “Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under

reasons that we do not understand, the formulation in terms of human behavior appears to evoke in certain quarters images of "visceral reactions" (perhaps by a hasty limitation of behaviorism to the theories of such as J. B. Watson),<sup>40</sup> and the analysis that is proposed is not essentially in physiological terms. In any event, each of the three formulations may be taken to prescribe the same end,—which seems to us of far greater importance than the general terminological setting chosen,—of fixing inquiry upon actual human conduct, its conditions and interrelations, in lieu of upon the theorization of intuition or opinion. The formulation in terms of the administration of justice at least suggests that the terms and propositions of analysis to be verified are chosen in the context of the subject-matter studied,—a suggestion which we prefer to that of borrowing from allied fields, however closely related.

With these observations in mind, the problems of analysis may be more directly considered.

#### IV

The study is of the distribution of litigation. And it is to be made by reference to observed phenomena. The major analytical problems involved in this proposal have to do with (a) the choice of standards of measurement, (b) the sample to be studied, its basis of selection and convenient limits, (c) the segregation of types within the sample, (d) the statement of mass or typical dimensions or trends within the phenomena, (e) the hypothetical analysis of factors and the correlation of the ratios or trends determined with these factors.

The first problem is, therefore, to determine upon a technique by which types and standards of measurement can be eventually

---

our practices and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." *Loc. cit. supra* note 38. This point of view has the incidental advantage of not appearing to draw a distinction, which might appear perhaps somewhat invidious and is indeed not justified, between lawyers and statesmen. For a further discussion, see Yntema, *Mr. Justice Holmes' View of Legal Science* (1931) 40 *YALE L. J.* 696.

<sup>40</sup> See, for instance, Beale *et al.*, *Marriage and the Domicile* (1931) 44 *HARV. L. REV.* 501, 501, 529; Cohen, *Justice Holmes and the Nature of the Law* (1931) 31 *COL. L. REV.* 352 at 365 *et seq.*; Adler, *Law and the Modern Mind: a Symposium* (1931) 31 *COL. LAW REV.* 91, 92.

established and formulated. There are at least four possible *modi operandi*.

The first possible mode is to limit the initial purpose of investigation to a report upon widely representative phenomena, conveniently classified and covering the area marked out for study. In the development of a broad and somewhat unexplored field, there is much to be said for this strategy; it is, indeed, the method that Darwin followed in laying the basis for his epochal evolutionary theories.<sup>41</sup> At the same time, the report can be only a first stage; it becomes fruitful as the experimental ground of comparison and classification. And, while it seems at the present highly desirable in the study of the administration of justice generally to concentrate maiden effects upon the report of actual conditions,<sup>42</sup> in the study of a more restricted problem it is possible and appropriate to regard the report as an integral part of the more advanced problems of correlation and measurement.

The second mode of measurement is, in reliance upon current information as to the subject-matter, to set up hypothetical standards, ideals, criteria or norms, by which to classify and measure. The real difficulty with this proposal for the case in hand lies in the state of the current information; only the most rudimentary data as to the actual operation of concurrent jurisdiction or, indeed, as to the administration of justice generally, are available.<sup>43</sup>

---

<sup>41</sup> As Darwin stated: "By collecting all facts which bore in any way on the variation of animals and plants under domestication and nature, some light might perhaps be thrown on the whole subject. My first note book was opened in July 1837. I worked on true Baconian principles, and, without any theory, collected facts on a wholesale scale, more especially with respect to domesticated productions, by printed inquiries, by conversation with skilful breeders and gardeners, and by extensive reading. When I see the list of books of all kinds which I read and abstracted, including whole series of Journals and Transactions, I am surprised at my own industry. I soon perceived that selection was the keystone of man's success in making useful races and animals and plants. But how selection could be applied to organisms living in a state of nature remained for some time a mystery to me." I FRANCIS DARWIN, LIFE AND LETTERS OF CHARLES DARWIN (1887) 67.

This "systematic inquiry" was followed by what Pearson has described as "the period of self-examination, which lasted four or five years and it was not less than *nineteen years* before he gave the world his discovery in its final form". See PEARSON, THE GRAMMAR OF SCIENCE (3d ed. 1911) 32, 33. See the discussion in Frankfurter, *op. cit. supra* note 32.

<sup>42</sup> For a discussion of this point, see Yntema, *op. cit. supra* note 33.

<sup>43</sup> There seems to be general agreement as to the urgent need of systems of judicial statistics: "Nor shall we be able to know how our courts function

Thus, for instance, it might be postulated that a certain degree of economy in time and in expense should characterize the administration of justice and that there should be sufficient predictability in its operation to satisfy the desire,—especially of commercial enterprises,—to be able to forecast decision. But, in the absence of actual and comparatively representative information, any norms thus postulated as to economy or predictability in the administration of justice, could scarcely be defined in other terms than those of subjective personal judgment. Nor is it to be expected that intuitively derived norms will have the flexibility or the precision of detail which theories, as it were proliferated, in response to observed phenomena may well have. Furthermore, there is a certain risk that norms thus intuitively established will automatically delimit the range of interest in phenomena. Naturally, these difficulties are present in greater or less degree in all investigation; hypothesis and concept are primary tools of analysis. Nevertheless, it is desirable to minimize the difficulties and this

---

until an effective system of judicial statistics becomes part of our tradition . . . . The annual judicial statistics of England and Wales, Scotland, and Ireland, are a challenging commentary on our own lack of self-critique", FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 52n. "There is an almost complete absence of statistical data regarding the operation of courts in the adjudication of civil cases. Nor is there much in the way of the consideration of the problem of devising and operating a system for the collection and presentation of such statistics", WILLOUGHBY, *op. cit. supra* note 34, at 647. "Ours is the only modern nation without data concerning the work of its courts. It would be difficult to exaggerate the extent of our loss in this respect. It prevents agreement as to the causes for alleged defects. It prevents a common understanding and acceptance among judges of their responsibility. It leaves us without data greatly needed for social, criminal and procedural legislation." *The Unified State Court (1917)* 1 JOUR. AM. JUDICATURE SOC. 5 (quoted in FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 220n.)

There is some prospect that the serious deficiencies in the federal judicial statistics, referred to in these statements, will be remedied in some measure in the near future. In the Report of Conference of Senior Circuit Judges, October, 1930, Chief Justice Hughes indicated that the Judicial Conference has taken under consideration the improvement of federal judicial statistics. ANNUAL REPORT OF THE ATTORNEY-GENERAL OF THE UNITED STATES (1930) 4, 8. Also, certain studies authorized by the National Commission on Law Observance and Enforcement and especially that of the committee of which Dean Clark is chairman, will provide statistical and other information as to the federal courts, much needed and not now available.

The studies of the administration of justice initiated by The Institute of Law in Ohio and Maryland have the purpose of supplying analogous information as to the administration of justice in these states and, more particularly, of making possible the formulation of state systems of judicial statistics. See FIRST REPORT OF THE JUDICIAL COUNCIL OF OHIO (1931) 7 *et seq.*, and also the references in Yntema, *op. cit. supra* note 33, at 358n.



a highly *a priori* mode of standardization in an uncharted field does not assure. It is, therefore, not reasonable to anticipate that emphasis on this method of evaluation is the most promising for the purpose in hand. It may be so but the odds are long. Concepts and norms are needed, not absolute and intuitively ascertained, but operational and responsive to representative, experimental observation.

The third and fourth modes of establishing types and standards are comparative. That is to say, the subject-matter to be reported and classified is initially selected with a view to representing two or more comparable ranges or systems of phenomena, whereas the first two modes typically involve the study of a single range. Where it can be employed, the comparative method is, of course, the most advantageous, since it not only permits the governing hypotheses to be initially stated in terms of a fairly coherent and sometimes quite operable range of phenomena, but it also enables hypotheses to be checked against more than one independent control-unit. This, as will be indicated, not only makes for greater assurance in the conclusion but also facilitates the problems of factor-analysis.

The distinction between the third and fourth modes of comparative analysis turns upon whether one of the two or more ranges of phenomena under consideration is thought to be the more significant and, hence, to furnish the standard types. Reference has already been made to a highly interesting project of this character, in which the types for the study of judicial behavior are to be furnished by the extra-legal activities of the social institutions affected. It has also been explained that this method is not adapted to the problem in hand, since the activities to be studied and classified dominantly operate within the administration of justice itself. Consequently, in relating such activities to extra-judicial factors, it is not necessary to postulate beforehand degrees of significance between the official and non-official, but they may be permitted to develop in the course of investigation.<sup>44</sup>

---

<sup>44</sup> No criticism is implied of the study of official institutions by reference to non-official activities. Indeed, investigation of this character is of vital importance to our knowledge of law, by reason of the fact that legal phenomena

The fourth and essentially comparative mode of evaluation is, therefore, primarily chosen for the present study. Its distinction from the preceding three methods lies in the statement and testing of hypothetical types and standards by reference to two or more distinct samples or ranges of phenomena, which are initially regarded as equivalent. Its first concern is, therefore, the selection of the samples or ranges of phenomena. To this consideration must now be given.

In the selection of convenient samples or unitary ranges of phenomena relating to the distribution of litigation for comparative study, it will be convenient to regard the subject-matter as tri-dimensional. This involves a gross classification according to judicial system, geographic area, or period, in which homogeneity as to subject-matter is assumed. Other comparative dimensions are, of course, conceivable but unnecessary for the present purpose.

If now it can be assumed that the judicial systems in question are geographically fixed and that comparative study is to be limited to not more than two judicial systems, in one or two geographic areas, for one or two defined periods, there will appear five alternative bases of selection. To illustrate, let  $S$  be a single judicial system under consideration and  $S_1$  and  $S_2$ , two such systems;  $P$  a single geographic area and  $P_1$  and  $P_2$ , two different areas; and  $T$  a single period and  $T_1$  and  $T_2$ , two different periods. Then, the comparative types may be symbolized as follows:

1.  $S$  at  $P$  tempo  $T_1/S$  at  $P$  tempo  $T_2$ .
2.  $S_1$  at  $P$  tempo  $T/S_2$  at  $P$  tempo  $T$ .
3.  $S_1$  at  $P$  tempo  $T_1/S_2$  at  $P$  tempo  $T_2$ .
4.  $S_1$  at  $P_1$  tempo  $T/S_2$  at  $P_2$  tempo  $T$ .
5.  $S_1$  at  $P_1$  tempo  $T_1/S_2$  at  $P_2$  tempo  $T_2$ .

---

are frequently sporadic manifestations of economic and social phenomena. The possibilities will be suggested by the important studies in the field of commercial banking, which are now in course of publication by Underhill Moore: Underhill Moore and T. S. Hope, Jr., *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703; Underhill Moore and Gilbert Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts, I Legal Method: Bankers' Set-off, II Institutional Method, III The Connecticut Studies* (1931) 40 YALE L. J. 381, 555, 752.

It may perhaps be remarked that, much as the institutional focus in the study of commercial banking is set by the commercial banking institutions, so in a study of judicial administration, such as is here contemplated, the institutional focus is in the courts and other official institutions.

It is obvious that this scheme will be further elaborated in dealing with a larger number of judicial systems, geographic areas, or periods.

If now it be granted that the *differentiae* between two judicial systems can be more readily fixed than those between two geographic areas or periods, considered as units of human activity, it will appear that the second type is the most advantageous for initial study, since the variations arising from divergence in geographic area or period can be reasonably eliminated by hypothesis, (even admitting that there is no complete geographic or periodic identity *in detail*). On the other hand, the first type, which represents a possible method of comparative historical study, involves the difficulties inherent in factoring general social and economic changes. The third type, which contrasts two different, concurrent and co-geographic systems at different periods, is subject to the same observation. The fourth and fifth types, which suggest the more usual situation of two different judicial systems in different areas, considered in the one case, without, and in the other with reference to different periods, may exist either within a given geographically specialized judicial system (by considering the geographic units of the system as the equivalents of separate judicial systems) or in a situation of two autonomous judicial systems in two different areas. In either case, the problems of geographic and, in the case of the fifth type, of periodic factors are present. In view of these considerations, the present study, being an experimental preliminary endeavor, is primarily of phenomena corresponding to the second type or, in other words, of contemporaneous, concurrent jurisdictions in the same geographic area. It need scarcely be remarked that the concurrent jurisdictions of the state and federal courts are of this character and afford convenient, possible samples for comparative study.

However, it should be noted that, although the general socio-economic background of concurrent jurisdiction in the same area and period may, by tentative hypothesis, be regarded as one and the same, it cannot be assumed that the judicial structures having concurrent jurisdiction, are entirely homogeneous as to personnel, procedure, or law. This circumstance is, however, rather advan-

tageous than the contrary. In the first place, as has above been intimated, the concurrent jurisdictions, to which attention is being directed, may be expected to exhibit similarity, greater than would normally be true of jurisdictions separated in time or space, but nevertheless partial, not complete. In the second place, the range of divergencies is thus not merely limited but is in a degree limited to specific administrative characters, which can be more readily fixed than those of a more general, cultural nature, whether of geographic or periodic origin. Analysis must, therefore, seek to indicate how the points of difference can be defined and to lay the basis for the comparison of corresponding sets of concurrent jurisdictions in various state areas, so as to isolate particular divergent factors, so far as possible. Thus, the salient advantage of studying the distribution of litigation by reference to contemporaneous, concurrent jurisdictions in a given area, is that experimental conditions can be in some measure controlled by narrowing and selecting the range of divergent factors.

## V

There remain the problems of what may be termed factor-analysis, of suggesting the modes by which phenomena selected in accordance with the foregoing analysis may be classified, stated in trends, and correlated with factors, expressive of conditions in the administration of justice. Recurrences within the phenomena studied will be suggestive, but it will be necessary to do more than observe repetition. The single case may be a crucial experiment.

One and a complex set of problems has already been hinted at; the analysis above was said to assume homogeneity of subject-matter. But, obviously, the assumption presupposes a sufficient classification of the types of cases studied according to their nature and social derivation. This will, among other things, envisage the relation of judicial practices to the extra-legal institutional life from which litigation flows. As intimated elsewhere,<sup>45</sup> it is likely that the convenient unit for comparative purposes will remain the

---

<sup>45</sup> YNTEMA, *THE ASCERTAINMENT OF FACTS AS TO THE ADMINISTRATION OF JUSTICE. INTERIM STATEMENT-STUDY OF JUDICIAL ADMINISTRATION IN OHIO* (1930) 8 *et seq.* 13.

controversy, and that it will need to be dissected in terms of the parties and the transaction, as well as of the technical processes involved, their actual conditions and effects. The problems involved can scarcely be said to have been seriously faced in other than traditional terms, at least as far as civil litigation is concerned, nor can they here be further discussed.

Furthermore, this more general classification of case-types will require refinement from the point of view of the distribution of litigation. For instance, the concurrent litigation in a given state selected for examination will need to be defined, not only by reference to the specific types of situations in which jurisdictional concurrence is there possible, but also in view of the determination of the forum. Thus, the cases of the concurrent types should be classified, not only according to the court in which they are actually litigated, but also according to the court in which they might have been litigated. And the cases, thus grouped, should again be distributed and analyzed according to the party having the power of selection of the forum and the mode or stage in which it occurs. It will thus appear that the sample to be studied in a particular state is not merely dual, as it should comprehend both the federal and the state cases of the concurrent types, but even quadruple, as these cases will again be divided according as there is or is not concurrence into four ranges of case-phenomena.

Assuming these classifications, it will be requisite to establish mass bases of comparison between the four ranges of cases in the sample on points such as follow: 1. Total number of cases in each range and of each significant type. 2. Similar totals over a period of time so as to verify trends. 3. Cost totals, standardized so as to give the average cost per case of each type. 4. Intervals of time between initiation of case and trial and between trial and ultimate disposition. 5. Certainty and predictability of the outcome in terms of: (i) Ratio of cases settled to total number of cases brought. (ii) Ratio of cases tried to total number of cases brought. (iii) Ratio of cases resulting in judgment for plaintiff to total number of cases brought. (iv) Ratio of cases tried in which plaintiff obtained judgment to cases tried and decided for defendant. (v) Ratio of amount adjudged to plaintiff

to amount claimed, (in both liquidated and unliquidated damage cases), and of amount collected to amount awarded by judgment.

Having thus stated each of the four ranges of phenomena observed in the state and federal cases, concurrent and non-concurrent, in terms which will in a sense serve as common denominators, it will be possible to make tentative findings as to the drifts of the civil litigation in question and of the specific types. In this further comparisons will be useful, *e. g.*,—(a) the ratio of state cases to federal cases; (b, c, d, e) the ratios of cases originating in federal courts, or of cases involving a choice of the state courts, to the total number of concurrent cases: (f, g) the ratios of concurrent state or federal cases to the total number of non-concurrent cases. By thus formulating conditions in a given state over a period of time in ratios stated in common terms, not only will some indication be given of the drifts of concurrent litigation within the state itself, but a comparison of the ratios of concurrence in different states may be tried. It is highly desirable to provide such a basis in order to take advantage of the varying conditions under which the phenomena of concurrence operate in different state areas. The questions involved in the correlation of the phenomena of concurrence with their peculiar conditions raise the problem of factor-analysis, which may now be briefly faced.

It has above been indicated that the selection of concurrent litigation for study minimizes geographic and periodic divergencies, and thus serves to narrow the range of conditions operative in a given area so as to control somewhat experimental observation. Further, that the sample suggested provides four ranges of case-phenomena, comprising both concurrent and non-concurrent cases in the state and federal courts, by reference to which correlations can be established and the factors in some measure isolated. Add to this that the limited range of conditions, thus isolable without immediate reference to those of geographic or periodic origin, may be varied and controlled in some degree by appropriate selection from the forty-eight state areas, each of which provides varying sets of divergencies between the state and federal courts therein, and the major outlines of the problem of

factor-analysis emerge. Its concern is two-fold: with the selection of the factors or conditions to be correlated with the concurrent phenomena as initially stated, and with the isolation of such factors so as to verify or correct tentative correlations. In other words, the problem is to relate the types of concurrence with further typical but variant factors in the phenomena.

The selection of factors must be in some degree by cut and try. Yet the hypotheses to be tried need not be launched simply from the limbo of intuition; in the present instance, the analysis has already pointed to an area in which they are likely to be found and indicated a method. This is by a determination of the divergencies between the state and federal courts in the state chosen for study. Preliminary samplings have suggested the possible significance of factors such as:

(1) Selection, tenure and powers of the judge. The possible variations range from the situation in states where the position and powers of the state judges are substantially comparable to those of the federal judge,—where, in other words, they are appointed for life and have power both to comment upon the evidence and to direct the verdict of a jury,—to that in states where, in contrast to the federal judiciary, the state judges are elected for limited terms, have very limited powers in the conduct of the trial and are subject to judicial recall.

(2) Character of the jury. The districts, urban or rural, and the economic or cultural levels from which juries are drawn may vary in the state as contrasted with the federal courts and the variances may well be found significant.

(3) The substantive rule of law governing the specific type of case. It is well known that, under the doctrine of *Swift v. Tyson*, the federal courts may, in given cases, disregard the state law.<sup>46</sup> Conversely, subject to certain constitutional limitations, the state courts are not bound to follow the law applied by the federal courts. There is thus a possibility of difference between the precedents followed in the state and federal courts, which may be material in specific instances.

---

<sup>46</sup> See *supra* note 23.

(4) Procedure. The state and federal remedies may not correspond or may be differently administered. Thus, the procedural practices in the state courts proper may range from the type of the group of code states, which have purported to abolish the common law forms of action and the traditional distinction between law and equity, to that of the federal courts, which retain the historic distinction between law and equity and tend to emphasize the forms of action by the theory of the pleading. Or, apart from such formal differences, there may be significant variations in the actual administration of similar rules, *e. g.*, of evidence, in the state and federal courts.

(5) State of the calendar or docket. In general, congestion in the state or federal dockets will be primarily controlled by the great mass of non-concurrent litigation and by the organization of the respective courts. This will condition the dispatch of judicial business which varies materially in the state courts, as well as in the federal courts themselves, which, for example, in certain districts are said to be literally overwhelmed with prohibition cases.

(6) Cost of litigation in the state as contrasted with the federal courts.

(7) Convenience and accessibility of location of federal and state courts to specific litigants. The possible influence of these considerations is qualified by varying rules as to venue in the various states.

(8) Specialization of practice in law-offices, which may influence the selection of the forum and qualify the personnel of the local federal bar.

Although the preceding enumeration is only suggestive, not exhaustive, of the possible factors with which the distribution of concurrent litigation may be correlated, it may be well to explain, in view of the emphasis often given to local prejudice in this subject-matter, that local prejudice will probably not be found a useful analytical counter and for two reasons. The first is the ubiquitous and undifferentiated character of the concept; consequently, it will be preferable to direct the analysis to more specific relations, from which indications as to local prejudice may be drawn, as for instance, the ratios of predictability, the relation



between the position of the judge or the character of the jury to the decision, etc. The second is that, the state and federal judges and juries being drawn from the same state area, both courts may well be subject to similar sectional influences, except as to specific items which must be segregated as suggested. In other words, the existence of local prejudice is as a rule to be inferred from more specific factors, and in its larger aspects will need to be studied in more than one section of the country. Nor can the study of concurrent jurisdiction rest with the determination of local prejudice; its presence or absence is not necessarily critical, as is generally assumed. In short, local prejudice is an item to be considered more especially in connection with the second aspect of the factor-analysis under discussion,—the correlation and isolation of factors.

As to this, it will be remarked, in the first instance, that a certain measure of precision can be secured in the study of the cases even within a single state area. By selecting a state in which the disparities between the state and federal courts are not too wide and numerous for initial study, by classifying the cases into specific types, and by selecting the types so as to reduce the number of factors under observation, (possibly to a single factor), and by verifying the correlations thus obtained by comparison with types in which the factors are alternated, tentative inferences will be indicated. Thus, if three analogous groups of cases can be selected, the first involving factor *A*, the second factors *B* and *C*, and the third factors *A*, *B*, and *C*, the correlations suggested by the first type can be verified by comparing the second and third types. Necessarily, the process will be far more intricate and cautious than this, but the illustration will crudely suggest the method.

For various reasons, it can scarcely be anticipated that the study of concurrent jurisdictions in any given state will permit anything but highly tentative conclusions or that all significant factors can be thus isolated. Even in the larger federal districts, the sample will provide but a limited number of cases for specific types and, in any event, the factors which can be manipulated in the manner suggested will be restricted to those indicated by the

disparities in the particular state and federal courts. Furthermore, for reasons already suggested, the study of concurrent jurisdictions in a single state is not competent to indicate the influence of geographic or sectional influences, which, for instance, may well prove of special significance in the ascertainment of possible local prejudices. Hence, to establish the basis for the more adequate verification of working hypotheses as to the facts of concurrence, it will be desirable to extend the inquiry to a representative selection of state jurisdictions.

The method involved in this more extensive study will be, in the first instance, simply an expansion of that above outlined. The state areas should be selected so as to provide representation, not only of the different sections or economic and social *milieux* of the country, but also of the more specific variant factors deemed to be significant in the internal administration of justice. Presumably, it will be advantageous to select for initial examination a jurisdiction in which the state system of justice most nearly approximates the federal and the economic conditions are typical, in order to reduce a complicated problem to the simplest possible terms and to provide a starting point from which to gauge phenomena in other jurisdictions. In any event, the successive analyses of the situation in each of the state areas thus selected may follow lines as above suggested. With the results of such representative studies in hand, the analysis of determinant factors may be more comprehensively and more confidently prosecuted.

The analysis, worked out primarily for the study of a given state area, has in general assumed the negligibility of geographic factors for the purpose in hand, on the ground that for any given type of case they may be taken to be identic within the area. In its final stage, the extension of the inquiry to several state areas will permit the assumption to be tested by a comparison both of the mass statistical correlations in the different areas, if and when available, and of the phenomena in particular types of cases in different areas, in which the non-geographic factors are more or less similar. It may be added that analogous procedures could, if desired, be employed for the determination of periodic factors.

The analysis thus outlined contemplates a study of the distribution of litigation, essentially objective, comparative, rational and experimental. It does not promise the prompt reform of theoretically assumed evils in the administration of justice. It does not presuppose phenomenal simplicity in diversity. It proposes to utilize the tools of rational hypothesis but, rejecting the self-sufficiency of intuitive theory as a scientific fallacy, it would endeavor to relate concept and theory to representative experience. Nor does the analysis purport to be comprehensive or final. Indeed, important avenues of inquiry have been consciously abstracted, slighted or even ignored, in order to reduce matters to minimal terms. It is not offered as an inherently necessary mode of examining the interesting phenomena of concurrent jurisdiction; variations of technique or hypothesis may be found more fruitful, and, in any event, we are not of those who put much faith in a *priority* of method. With such a character, painstaking and tentative, the proposal will doubtless not attract those who solicit an intuitive conception of law, simple, confident, attainable without effort and without delay. It could scarcely be otherwise; the traditional way of normative logic and reform is not that of science.

Yet, perhaps, the previous remarks, fragmentary as they must be, will suggest certain conclusions, not without implication. First, as is being slowly perceived, that the administration of justice in this country is a greater unity of diversity than that of any particular system of courts, state or federal, and that, certainly within the sphere of jurisdictional concurrence, the problems of the distribution of litigation between the state and federal courts are problems, not so much of federal jurisdiction, as of the administration of justice within the several states. And further, that some such patient process of investigation as has been sketched,—of analysis and verification, not of mere intuitive theorization,—must be undertaken, if the facts as to the actual distribution of the more important types of civil litigation in this country are to be explained, valued, or even stated,—facts that are all too cavalierly taken for granted in current discussion. As things stand, the bliss of ignorance is the frequent inspiration of theory and reform.

## APPENDIX

"The Flood of Diversity of Citizenship Litigation"<sup>47</sup>

There is at the present time no one in this country who, by virtue of scholarly study and academic position, is entitled to speak with greater authority on questions of federal jurisdiction than Professor Felix Frankfurter. The brilliantly written monograph on "The Business of the Supreme Court", jointly authored with Professor James Landis, and a comprehensive series of articles, already alluded to,<sup>48</sup> are highly suggestive and useful. Under the circumstances, it has been necessary to examine the evidence and conclusions offered in these works as to the federal diverse-citizenship litigation for the purposes of the proposed study. And it has seemed only fair, as queries developed on particular points, to state the grounds of dubiety, at least in a preliminary way.

This feeling has been strengthened by the fact that apparently rather definite conclusions have been reached as to the federal diverse-citizenship jurisdiction, which have not been permitted to waste their sweetness on the academic air. They have been set forth by their author as a basis for the reform of the federal judiciary in this subject-matter<sup>49</sup> and there is some indication that they have been in part accepted as a basis of argument even by those who do not share the view that this branch of the federal jurisdiction should be severely restricted by Congress, if not abolished.<sup>50</sup> The matter is, therefore, of present public interest.

<sup>47</sup> FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 82.

<sup>48</sup> *Supra* notes 24 and 34.

<sup>49</sup> Thus, the article, *The Federal Courts*, *supra* note 18, in which suggestions were made as to the federal diverse-citizenship litigation, was addressed to the then prospective National Commission on Law Observance and Enforcement, which was appointed shortly thereafter, May 20, 1929.

<sup>50</sup> Compare, for instance, the statement in the address of the Hon. Gurney Newlin: "Another argument sometimes advanced by those who seek to abolish the diversity of citizenship jurisdiction of the Federal Courts is that such a step would materially relieve the present congestion of the dockets of such courts. That such would be the effect in large measure I do not deny, for the reason that at the present time between 20 per cent. and 30 per cent., approximately, of the cases arising in the Federal courts are based upon the diversity of citizenship jurisdiction." *Op. cit. supra* note 26, at 404.

See also the statement of Senator Norris in the Report of the Committee on the Judiciary: "Of all the suggestions which have been made from any source there is none which will bring as much relief as would the enactment of this proposed bill. It is estimated that the work of the Federal judiciary would be decreased from 25 to 40 per cent. if this bill should be enacted into law. Not only would this relief for the Federal judiciary take place, but it would do it without any injustice of any kind coming to any person or corporation. We are continually met with the demand for more judges, and if

The principal specific queries, which have thus developed as to the argument set forth in these works and sketched in the first section of this analysis, are four: 1. That inferences from the evidence as to the historic basis of the federal diverse-citizenship jurisdiction, are suggested, which appear to be uncritical of the nature and extent of the evidence and, in some degree, contrary thereto. The details have been previously discussed.<sup>51</sup> 2. That, as before indicated,<sup>52</sup> the negligibility of local prejudice as a present basis for the federal diverse-citizenship jurisdiction is suggested by an argument drawn from the development of a national economic structure, which does not offer a basis for evaluating the contribution of the federal judiciary to a situation in which it is and has been a constant factor. 3. That the doctrine of *Swift v. Tyson* is said not to make for uniformity, on evidence which is quite unrepresentative. A small part of the detail involved has been outlined.<sup>53</sup> 4. That, on the indications now available, the proportion of the litigation in the federal district courts attributable to the jurisdiction of controversies between citizens of different states is grossly overestimated.

It is not controverted that, improbable as it is, on the points mentioned the argument may eventually prove to be true; all that is suggested is that the argument on these points does not accurately summarize the existing evidence for scientific purposes. With the obvious practical implications, these remarks do not deal. For the showing on the first three points, reference may be made to the notes as indicated; on the fourth point, a summary of part of the evidence available is here given.

The statement to which attention is directed is that:

“Certainly the obvious abuses of diversity jurisdiction should be promptly removed by legislation—on plain grounds of policy, and to relieve the overburdened federal dockets.

---

we provided for enough district judges to do all the work of the district courts and keep the dockets of those courts up to date, it would require a very large number of additional judges, prosecuting attorneys, United States marshals, and all other officials which necessarily go to the establishment and maintenance of courts of justice. If all the cases involving diverse citizenship should be left for the State courts, where they fairly and honestly belong, this congestion in Federal courts would be relieved, the demand for more Federal judges would disappear, and all this would occur without any injustice to anyone.” SEN. REP. 691, *supra* note 7, at 5.

<sup>51</sup> *Supra* notes 10, 12 and 13.

<sup>52</sup> *Supra* note 22.

<sup>53</sup> *Supra* note 23.

In the absence of an adequate system of federal judicial statistics, we are without an exact basis for analyzing the scope and nature of federal court business. That the diversity cases represent one of its heaviest items is common knowledge. According to the usual estimate, they constitute one-third of the business of the district courts. An examination of ten recent volumes of the Federal Reporter shows that out of 3618 full opinions, 959, or 27 percent, were written in cases arising solely out of diversity of citizenship."<sup>54</sup>

The statement was repeated on at least three occasions<sup>55</sup> and has seemingly been accepted as authoritative in practical discussion.<sup>56</sup>

In view of the divergence between this estimate and preliminary findings from other sources, an effort was made at verification. In the first instance, the Annual Reports of the Attorney General of the United States were consulted, and the results are in part indicated below in Table I, which covers the period from 1904, when the present classification was introduced. In addi-

<sup>54</sup> Frankfurter, *op. cit. supra* note 10, at 523.

In his review of HART, *TENURE OF OFFICE UNDER THE CONSTITUTION* (1930), in (1930) 44 HARV. L. REV. 145, Professor Landis does not venture an estimate. He states: "So again, Mr. Hart in describing the area of modern government says that the jurisdiction of the federal courts over cases of diverse citizenship has greatly expanded. P. 4. So far as the grant of statutory jurisdiction is concerned, the reverse is true. And as to the tendency to resort to federal courts upon this ground, the Johns Hopkins Institute of Law is now, I believe, spending several thousands of dollars in the laudable effort to discover whether it is on the increase or decrease."

The statement as to the grant of statutory jurisdiction may be compared with FRANKFURTER AND LANDIS, *op. cit. supra* note 34 at 64, 65, where it is said: "Thus, from many sources flowed new and deeper streams of business to the federal courts. All of them were powerfully reinforced by the Removal Act of 1875. From 1789 down to the Civil War the lower federal courts were, in the main, designed as protection to citizens litigating outside of their own states and thereby exposed to the threatened prejudice of unfriendly tribunals. Barring admiralty jurisdiction, the federal courts were subsidiary courts. The Act of 1875 marks a revolution in their function. . . . The old jurisdiction in cases of diverse citizenship was retained. It had been enormously extended in practice through the developing doctrine of corporate citizenship, as well as by legislation prior to 1875. To the increasing volume of litigation due to diversity of citizenship, the Act of 1875 opened wide a flood of totally new business for the federal courts. This development in the federal judiciary, which in the retrospect seems revolutionary, received hardly a contemporary comment." See also *ibid.* 105, 230, 293.

It should perhaps be added that the reference to the Institute of Law was not authorized.

<sup>55</sup> See, in addition to the article cited above in note 10, the paper in the NEW REPUBLIC, *supra* note 24, at 276 and the address before the New Jersey State Bar Association, *supra* note 24, at 122.

<sup>56</sup> See *supra* note 50.

tion, a careful study was made of the cases in the ten volumes of the Federal Reporter, (13-22 inclusive, 2d series), on which the statement was based, and the results are summarized in Table II. In both instances, the enumeration is of cases in the federal district courts and, in the second table, particular care was taken to discriminate those cases in which diversity of citizenship was the sole ground of federal jurisdiction. It has been impossible to explain the disparity between the count of cases summarized in Table II and that given in the statement above, except perhaps on the theory that in the latter case the cases in the district courts were not distinguished from those on appeal. Needless to say, the cases in the circuit courts of appeals have no direct bearing upon the percentages of litigation in the district courts.

Our estimate, which is subject to revision as better evidence becomes available, is, therefore, that the diverse-citizenship cases constitute at present something like five per cent. of the total litigation in the federal district courts, instead of 27%. This does not seem excessive, as the percentage of private civil cases has not exceeded 12.4% in the past eight years and, in the reports consulted, the "diversity" cases form less than a third of the private civil cases.

A further and more revealing inference is suggested by the items tabulated. "Critical analysis", we are told, "differentiates merely temporary congestions from permanent accretions of business, calling for permanent relief."<sup>57</sup> As Table I shows, in the twenty-seven years from 1904 to 1930, the total number of federal trial cases has quadrupled; the civil cases to which the United States is a party have increased more than twelve-fold; criminal cases about five times; and bankruptcy litigation is almost four times as frequent. On the other hand, admiralty cases have increased by hardly more than 50%, while the private civil cases, including those between citizens of different states, have not quite doubled. Stated in terms of percentages of the total federal litigation, the civil cases to which the United States is a party have increased from 3½% to over 12%; the criminal cases from 36% to between 45% and 50% and the proportion of bankruptcy cases remains about one-third. In contrast, the percentage of admiralty cases has declined from 3% to something over 1%, and that of the private civil cases from about 25% to about 10%. As soon as something like an index of the general increase in litigation in this country since 1900 is available, the trends can be

---

<sup>57</sup> FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 244.

interpreted with more confidence. For the present, the figures do not warrant the assumption that the federal courts have been called upon to bear a disproportionate share of civil litigation,—rather the contrary. And they clearly indicate that the expansion of federal trial litigation has been most disproportionate in the cases to which the United States is a party, criminal and civil. The general statistics may be deceptive, but they do not tend to show that the diverse-citizenship cases, only a fraction of private litigation in the federal courts, bulk at all large in the total, whether absolutely, proportionately or prospectively. The “flood” recedes upon casual inspection.

Two further remarks are pertinent. In the first place, it was obviously somewhat preposterous to take the reports referred to in Table II as a statistical basis for estimating federal trial litigation. Apparently less than one case in a hundred and fifty in the federal district courts is reported. And, as a comparison of the tables below will suggest, the federal trial reports are not representative. Criminal cases, constituting almost half of the total trial litigation, occupy from three to eight per cent of the reports; about fifteen per cent of the reports are of admiralty cases, which form two per cent. or less of the total of cases tried. The selection of cases in the reports, moreover, is not only unequally distributed but is not a fair random sample within the distribution. Cases are reported, not because they are typical but because they are not so,—because they involve novel problems or new applications of law. Hence, it was not to be anticipated that the reports would representatively reflect the actualities of litigation, as their essential purpose is rather to develop legal doctrine under the principles of *stare decisis*. Once more is the rather obvious point illustrated, that the reports are a fragmentary and biased evidence of what in fact takes place in the halls of justice,<sup>58</sup> and particularly in that strategic institution, whose “activities are all that most litigants are ever concerned with”, “the American Trial Court.”<sup>59</sup>

Secondly, even were the reports sampled representative of the actual trial litigation, the method of simple enumeration employed is not of itself an eligible basis of inference as to the diverse-citizenship litigation. It is indiscriminating. Parity of individual cases is taken for granted on vital points,—“the types and volume of litigation, the character of issues, the duration of trials,

---

<sup>58</sup> Cf. Yntema, *op. cit.* *supra* note 33.

<sup>59</sup> We are indebted for this expression to Dean Arnold, Book Review (1931) 40 YALE L. J. 833, 835.



the speed of disposition, the delay of appeals.”<sup>60</sup> On other scores, the method is as defective. In effect, it proposes to dispatch the matter of federal diverse-citizenship litigation on superficial assumptions of uniformity in judicial administration, law and litigation throughout the country and fails to suggest the significance of the federal litigation in question to the total civil litigation in any state. Figures, so arrived at, may be scantily suggestive, but they do not solve; as the preceding analysis has endeavored to show, the crucial problems are those of description, classification, and interpretation and not of mere enumeration.

Current juristic realism has recently been admonished for “faith in masses of figures as having significance in and of themselves,” combined with “insistence on the unique single case.”<sup>61</sup> The admonition has perhaps not been most usefully addressed to the realists. It might have been supposed that so elementary a suggestion were least needed by those, who, by experience, not merely theoretical or vicarious, with the detailed problems of judicial statistics, have very soon been made painfully aware of the limitations and difficulties as well as the possibilities. But the precept finds point in the present instance. In the light of this discussion, it may be paralleled by two other precepts, quite as elementary and, it would seem, equally relevant,—namely, that the sample should be appropriate to the purpose and that the sums should be faithfully done. These three, be it remarked, are not merely statistical precepts; they apply with as much force to the manipulation of the symbols which are words.

---

<sup>60</sup> FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 220. See also *ibid.* 244 and 253.

<sup>61</sup> Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697, 701, 707.

TABLE I

CASES FILED IN THE FEDERAL DISTRICT COURTS OF THE UNITED STATES  
(EXCLUDING ALASKA, HAWAII AND PORTO RICO), 1904-1930\*

*Number of Cases Filed Each Year*

Year	Total No. Cases	Civil Cases to			Bank-ruptcy	Private Civil Cases	Percentage of Private Civil Cases
		which U. S. is a Party	Criminal Cases	Admiralty			
1904	49818	1787	18296	1560	17047	11128	22.3
1905	50984	1974	18669	1593	16913	11835	23.2
1906	45846	1667	17280	1628	12941	12330	26.9
1907	50064	2618	18007	1540	14123	13776	27.5
1908	44050	3194	13034	2191	16803	8828	20.0
1909	44920	3134	14128	1379	17983	8296	18.5
1910	45607	3155	14407	1601	18017	8427	18.5
1911	47553	3773	14788	1673	19308	8011	16.9
1912	49729	3975	15601	1619	19700	8834	17.8
1913	51696	3723	16425	1991	20870	8687	16.8
1914	56701	4083	18088	1865	22875	9790	17.3
1915	61686	3555	19490	2047	27519	9075	14.7
1916	63894	3473	19916	2296	27271	10938	17.1
1917	61041	3509	19373	2505	24789	10865	17.8
1918	70869	2856	34344	2659	20331	10679	15.1
1919	79207	4942	46868	2576	13989	10832	13.7
1920	90091	5667	54998	3198	13515	12713	14.1
1921	107755	9665	53399	4550	22711	17430	16.2
1922	128394	9607	59181	4391	38014	17201	13.4
1923	140896	10915	69640	3015	41152	16174	11.5
1924	146138	13545	69243	3048	43356	16946	11.6
1925	158040	16056	75273	2904	45469	18338	11.6
1926	151926	17313	67719	2822	46190	17882	11.8
1927	152879	17664	64108	3614	48596	18897	12.4
1928	179495	20513	82722	2820	52909	20531	11.4
1929	187308	24147	85574	2267	57102	18238	9.7
1930	196953	24713	86719	2489	62643	20389	10.4

\*The cases enumerated in the table for years 1904-1911, include the cases in the federal circuit and district courts, which are comparable to the federal district cases after 1911, when the circuit courts were abolished and their jurisdiction transferred to the district courts. See Judicial Code, 36 STAT. 1168 (1911). Cf. 28 U. S. C. A. § 434 (1928).

TABLE II

CASES IN THE FEDERAL DISTRICT COURTS REPORTED IN VOLUMES 13-22, INCLUSIVE, OF THE FEDERAL REPORTER 2D SERIES (AUGUST, 1926-FEBRUARY, 1928)

Volume Number	<i>Number of Cases in Each Volume</i>								<i>Percentages.</i>	
	Total Number Cases	Civil Cases to which U. S. is a Party	Criminal Cases	Admiralty Cases	Bankruptcy Cases	Private Civil Cases	Cases Involving Diversity of Citizenship Solely	Other Private Civil Cases	Private Civil Cases	Cases Involving Diversity of Citizenship Solely
13	135	36	10	10	21	58	27	31	43.0	20.0
14	193	54	9	39	26	65	17	48	33.7	8.8
15	143	33	6	31	23	50	20	30	35.0	14.0
16	99	24	8	14	9	44	14	30	44.4	14.1
17	165	37	14	24	18	72	22	50	43.6	13.3
18	152	41	6	16	46	43	10	33	28.3	6.6
19	105	33	8	13	19	32	10	22	30.5	9.5
20	114	41	3	11	15	44	14	30	38.6	12.3
21	214	74	12	31	25	72	14	58	33.6	6.5
22	125	36	10	20	15	44	14	30	35.2	11.2
Total	1445	409	86	209	217	524	162	362	36.3	11.2