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## MANUFACTURING FEDERAL DIVERSITY JURISDICTION BY THE APPOINTMENT OF REPRESENTATIVES: ITS LEGALITY AND PROPRIETY.

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AND

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### *Introduction*

The subject of federal diversity jurisdiction, with the problems inherent therein, has been the object of research among legal scholars, constitutional fabricators and jurisprudential analysts since the inception of our Constitution.<sup>1</sup> The subject of this Article is a very narrow segment of the diversity jurisdiction of the federal courts. The Article is limited to those controversies to which a representative has become a party after the primary activity of other persons has caused the controversy to arise. It will deal with executors, administrators,

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1. FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 86-102, 136-41 (1928); Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A.J. 499 (1933); Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 149, 265 (1933); Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A.B.A.J. 499 (1932); Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433, 437-439 (1932); Morse, *Judicial Self-Denial and Judicial Activism—The Personality of the Original Jurisdiction of The Federal District Courts*, 3 CLEV.—MAR. L. REV. 101, 126 (1954); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520-530 (1928); McGovney, *A Supreme Court Fiction: III*, 56 HARV. L. REV. 1225 (1943); Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 234 (1948); *Limiting Jurisdiction of Federal Courts—Comments by Members of Chicago University Law Faculty*, 31 MICH. L. REV. 59 (1932); Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097 (1931); Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931); Keeffe, *Twenty Nine Distinct Damnations of the Federal Practice—and a National Ministry of Justice*, 7 VAND. L. REV. 636, 655 (1954).

trustees of an express trust, receivers, guardians, assignees, subrogees, injured parties under direct action statutes, corporations, class actions and unincorporated associations. In order to explore this subject effectively, general principles of diversity jurisdiction and the specific problems of collusion, the real party in interest, capacity to sue and be sued, citizenship and other related subjects shall be examined. The effect of the Federal Rules of Civil Procedure in this area will also be considered. Finally, the Article will consider some observations and recommendations on the general issue of federal diversity jurisdiction.

## I

### A General View of the Subject

In 1833, Joseph Story wrote of the Constitution's diversity clause as follows:

“. . . Although the necessity of this power may not stand upon grounds quite as strong, as some of the preceding, there are high motives of state policy and public justice, by which it can be clearly vindicated. There are many cases, in which such a power may be indispensable, or in the highest degree expedient, to carry into effect some of the privileges and immunities conferred, and some of the prohibitions upon states expressly declared, in the constitution. . . .

“Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals. . . .

“. . . A corporation, as such, is not a citizen of a state in the sense of the constitution. But . . . a citizen of a state is entitled to sue, as such, notwithstanding he is a trustee for others, or sues in *autre droit*, as it is technically called, that is, as representative of another. . . .”<sup>2</sup>

In 1954, of the same clause Felix Frankfurter wrote:

“The stuff of diversity jurisdiction is state litigation. . . .

“A legal device like that of federal diversity jurisdiction which is inherently, as I believe it to be, not founded in reason, offers constant temptation to new abuses. . . .

“. . . Is it sound public policy to withdraw from the incentives and energies for reforming state tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid state courts?”<sup>3</sup>

2. STORY, COMMENTARIES 628-29, 632 (1833).

3. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53, 54-55, 60 (1954) (concurring opinion).

The evidence we have as to the early history of diversity jurisdiction leaves us somewhat lacking in conclusive answers as to the purposes underlying the constitutional and legislative provisions.<sup>4</sup> The traditional reason, that it was necessary to have protection from local prejudice against nonresidents, was classically stated by Chief Justice Marshall:

“However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.”<sup>5</sup>

Mr. Justice Story reiterated this reason perhaps more pointedly:

“The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. . . . No other reason than that which has been stated can be assigned, why some, at least, of these cases should not have been left to the cognizance of the state courts.”<sup>6</sup>

There was not much discussion of diversity jurisdiction prior to the conventions for ratification of the Constitution, and the traditional reason has been severely questioned.<sup>7</sup> There seems to be some evidence of a fear of state legislators as a danger to out-of-state creditors; of a lack of confidence in elective judges; of a fear of legislative review in some states; and a desire to create strong businessmen’s courts.<sup>8</sup> Madison felt that this was just a temporary provision which would allow federal courts to handle these controversies until “they find the tribunals of the states established on a good footing.”<sup>9</sup>

The constitutional provision that “The judicial Power shall extend to . . . Controversies . . . between Citizens of different

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4. Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71 (1933); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

5. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

6. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

7. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

8. *Id.* at 495-498. See also Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948).

9. 3 ELLIOT, DEBATES 536 (2d ed. 1941). Washington himself stated in his second annual address to Congress in 1790: “The laws you have already passed for the establishment of a Judiciary System have opened the doors of Justice to all descriptions of persons. You will consider in your wisdom, whether improvements in that system may yet be made; . . .” 31 WRITINGS OF GEORGE WASHINGTON 167 (Fitzpatrick ed. 1939).

States”<sup>10</sup> did not establish courts vested with this jurisdiction. It provided limits or boundaries within which Congress could establish courts with such jurisdiction.<sup>11</sup> Congress responded with the Judiciary Act of 1789, vesting the circuit courts with original jurisdiction concurrent with the states, of suits “between a citizen of the State where the suit is brought, and a citizen of another State.”<sup>12</sup>

The nation was not very concerned about federal jurisdiction until the Constitution was nearly a century old. Until that time the federal courts were not overloaded and Supreme Court Justices had time to sit frequently on circuit. With transportation more difficult, controversies did not cross state lines as frequently; they were more often local in character and therefore solely within the jurisdiction of the state courts.

Significantly, there was no change in the diversity jurisdiction until 1875, when the provision was broadened to include any suit “in which there shall be a controversy between citizens of different States. . . .”<sup>13</sup> Until this time there had been little strain on the diversity jurisdiction of the federal courts. In the same 1875 Act, however, there were included various restrictions on the federal jurisdiction, including the anti-collusion provision which found wide use for the next thirty-five years.<sup>14</sup>

In 1887 Congress raised the jurisdictional amount to \$2,000<sup>15</sup> but made no other changes in the diversity provisions although the Judicial Code experienced a major revision. Again in 1911 the jurisdictional amount was raised to \$3,000<sup>16</sup> Until 1948 there were no changes made in the jurisdictional provisions, with the exception of the 1940 extension of the diversity clause to include citizens of the District of Columbia.<sup>17</sup> In 1948, during another major revision of the Judicial Code, no change was made in the basic grant of diversity jurisdiction, but the anti-collusion and anti-assignment clauses were combined into a more general provision.

The present statute provides:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum

10. U. S. CONST. art. III, § 2.

11. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Turner v. Bank of North-America*, 4 U.S. (4 Dall.) 8 (1799).

12. Act of Sept. 24, 1789, c. 20, § 11, 1 STAT. 73, 78.

13. Act of March 3, 1875, c. 137, § 1, 18 STAT. 470.

14. Act of March 3, 1875, c. 137, § 5, 18 STAT. 470, 472.

15. Act of March 3, 1887, c. 373, § 1, 24 STAT. 552.

16. Act of March 3, 1911, c. 231, § 24, 36 STAT.

17. Act of Apr. 20, 1940, c. 117, 54 STAT. 143.

or value of \$3,000 exclusive of interests and costs, and is between:

- (1) Citizens of different States: . . .”<sup>18</sup>

Congress has adopted the exact language of the Constitution with respect to diversity jurisdiction. It has not attempted to define this language; this has been left to the courts. Accordingly, the courts, where they define the jurisdiction, are primarily construing the statute.

The question of the citizenship of a representative party as the basis for federal jurisdiction first arose in the Supreme Court in 1808 in *Chappedelaine v. Dechenaux*.<sup>19</sup> By that time the Supreme Court had already ruled that diversity of citizenship must exist between all plaintiffs and all defendants.<sup>20</sup> Thus, in *Chappedelaine v. Dechenaux*, a finding that either the executor or his testator were of diverse citizenship from the defendant would not have sufficed. The facts of the case were that the plaintiffs, both citizens of France, were executors of the estate of a Georgia decedent. They sued on a debt due their testator from another Georgia testator for whom the defendant, also a Georgian, was executor. Thus, if the parties had to stand on the citizenship of their testators, jurisdiction would have failed, since the original debt would have produced a purely local controversy had the testators lived until settlement of the debt. An impatient Chief Justice Marshall interrupted counsel at the very beginning of his argument on the jurisdictional question, with the remark that “The present impression of the court is, that the case is clearly within the jurisdiction of the courts of the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the circuit court.”<sup>21</sup>

Thus, the Supreme Court predicated the diversity jurisdiction of the federal courts on the now well-established procedural rule that the parties need only be the proper parties to the action at the time the jurisdiction of the court attaches.<sup>22</sup>

18. 62 STAT. 930 (1948), 28 U.S.C. § 1332 (1952).

19. 8 U.S. (4 Cranch) 306 (1808).

20. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Thus, if any one plaintiff and any one defendant had identical citizenship, diversity was destroyed.

21. 8 U.S. (4 Cranch) 306, 308 (1808). It is interesting to speculate whether Marshall's position would have been so abruptly unquestionable to him had it been a controversy between citizens of different states, rather than one where “an alien is a party” under 1 STAT. 73, 78 (1789). It seems doubtful that it would have been.

22. That this test is procedural is evident from the jurisdictional significance of the real party in interest provision, FED. R. CIV. P. 17(a). See 3 MOORE, FEDERAL PRACTICE 1311-1329 (2d ed. 1948); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 448-457 (3d ed. 1951); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 5-23 (Rules ed. 1950). See also, 1 KENT, COMMENTARIES 348, 349 (2d ed. 1832); the rule there stated was repeated verbatim in 1 KENT, COMMENTARIES 349 (13th ed. 1884).

## II

## General Principles

There are several principles of law which have permeated the courts' interpretation of federal diversity jurisdiction based on representation. A brief discussion of these principles at this point will aid in a better understanding of the later development of specific diversity problems.

*Real Party In Interest*—At common law an action could be instituted only in the legal titleholder's name. Those having equitable interests could not bring suit on their own account.<sup>23</sup> Later development allowed one having the beneficial interest to start suit for his own benefit in the legal owner's name, with the beneficial owner as the real party in interest.<sup>24</sup> In the foregoing situation one having the beneficial or equitable interest could sue in his own name in equity. As law and equity became one, suits were permitted in the name of the real party in interest.<sup>25</sup>

The real party in interest is that person whom the law recognizes to have the right to come into court and seek relief.<sup>26</sup>

Certain courts, when dealing with the real party in interest concept, have used Rule 17(a) of the Federal Rules of Civil Procedure to develop this principle. The federal courts have long had a procedural rule that every action shall be prosecuted in the name of the real party in interest. Formerly this was Equity Rule 37,<sup>27</sup> and it is presently Rule 17(a) of the Federal Rules of Civil Procedure. It states:

"Every action shall be prosecuted in the name of the real party in interest: but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; . . ." <sup>28</sup>

23. *Edmunds v. Illinois Central Ry.*, 80 Fed. 78 (C.C.N.D. La. 1897); *Thomas-Bonner Co. v. Hoover, Owens & Rintachler Co.*, 284 Fed. 377, 383 (S.D. Ohio, 1920), *aff'd*, 284 Fed. 386 (6th Cir. 1922); Clark and Hutchins, *The Real Party in Interest*, 34 YALE L. J. 258, 261, 262, 276 (1925).

24. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U.S. 379 (1888); *Delaware County Comm'rs v. Diebold Safe & Lock Co.*, 133 U.S. 33 (1890); *Taylor Co. v. Anderson*, 275 U.S. 431 (1928).

25. See Clark and Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 1291, 1310-1312 (1935).

26. See Simes, *The Real Party in Interest*, 10 KY. L.J. 60, 61 (1922); Clark and Hutchins, *The Real Party in Interest*, 34 YALE L.J. 258 (1925); 3 MOORE, FEDERAL PRACTICE 1305 (2d ed. 1948).

27. *Lloyd Moore Inc. v. Swartz*, 26 F. Supp. 188 (E.D. Pa. 1938).

28. FED. R. CIV. P. 17(a).

The language of the rule is not absolutely clear.<sup>29</sup> It has been commented that the "but" clause does not delineate an exception to the real party in interest rule; rather that the enumerated parties are to be included as real parties in interest within the meaning of the rule and their listing is made so as to insure this right.<sup>30</sup>

This provision is designed to be a procedural rule, but the courts have afforded it, as the cases later considered will show, a jurisdictional status. Congress did not expressly give it a jurisdictional status, since no substantive changes were intended by the codification according to the enabling statute.<sup>31</sup> Nor could the rule make any change in the pre-existing requirements for jurisdiction in the federal courts, for Rule 82 itself provides:

"These rules shall not be construed to extend or limit the jurisdiction of the United States courts or the venue of actions therein".<sup>32</sup>

Consequently, Rule 17(a) applies to the entitling of an action once federal jurisdiction attaches.

*Collusion*—For various reasons, litigants have found it desirable to take their suits into federal rather than state courts.<sup>33</sup> This has often led attorneys to prepare their cases with an eye to the creation of a diversity of citizenship. Occasionally these schemes have been scrutinized in the light of a congressional instruction which provides that:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."<sup>34</sup>

29. Professor Moore has stated that: "Its meaning perhaps would be more accurately expressed if it read: An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced. The reason for its retention, no doubt, was due to the feeling that judicial construction by the federal equity courts and the courts of the states that have such provisions had reduced its ambiguities to a minimum, and that an experiment with other language might only cause new difficulties." Moore, *Federal Rules of Civil Procedure: Problems Raised by the Preliminary Draft*, 25 GEO. L. J. 551, 564-65 (1937).

30. 3 MOORE, FEDERAL PRACTICE 1365 (2d ed. 1948).

31. 48 STAT. 1064 (1934), 28 U.S.C. § 2072(2) (1952): "Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

32. FED. R. CIV. P. 82.

33. See Kaufmann Estate, 87 Pa. D & C 401 (O.C., Phila. 1954); Johnson, Minor, 3 Fid. Rep. 337 (1953). In the latter case, Van Roden, P.J. (O.C. Del. County) refused to remove a non-resident guardian who had been appointed solely to create diversity.

34. 62 STAT. 935 (1948), 28 U.S.C. § 1359 (1952).



This statute has a long and troubled history. In the first Judiciary Act of 1789 Congress prohibited jurisdiction of the circuit court

“unless a suit might have been prosecuted in such court to recover the said contents [of any chose in action] if no assignment had been made, except in cases of foreign bills of exchange.”<sup>35</sup>

This was a wooden rule. It militated against many *bona fide* transfers and kept controversies out of the federal courts which might just as well have been there. It more than served to curb the fear of collusive assignment. On the other hand, it excepted two important types of choses in action from its coverage: foreign bills of exchange and corporate bearer paper.<sup>36</sup> Nothing prevented the use of assignments of these choses in action to create the necessary diversity of citizenship. To overcome the restrictions of the clause, the courts found it advisable to limit the term “chose in action” by excluding from its scope (1) an implied in law duty or promise,<sup>37</sup> and (2) a transfer of a property interest.<sup>38</sup>

In 1875 Congress passed a statute designed to cut down on the manufacture of federal jurisdiction. It authorized dismissal of any suit which

“does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act . . .”<sup>39</sup>

This act survived in substance until in 1948 it was combined with the earlier anti-assignment provision to form the present section 1359,<sup>40</sup> which was thought to eliminate much “legislative jargon”<sup>41</sup> and take a more direct approach.

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35. Act of Sept. 24, 1789, c. 20, § 11, 1 STAT. 73, 78, 79. See *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). In 1875 the statute was amended further to exclude “promissory notes negotiable by the law merchant,” 18 STAT. 470. It was re-enacted in substantially the same form in 1888, 25 STAT. 433, and in 1911, 36 STAT. 1091.

36. See *Bonnafee v. Williams*, U.S. (3 How.) 574 (1845).

37. See *Irvine v. Bankard*, 181 Fed. 206 (C.C.D. Md. 1910) *aff'd per curiam*, 184 Fed. 986 (4th Cir. 1911).

38. *Brown v. Fletcher*, 235 U.S. 589 (1915). See also, generally, HALL, COLLUSIVE SUITS IN THE FEDERAL COURTS 54-70 (unpublished thesis in Harvard Law School Library 1931); CHAFFETZ & GLOVER, THE BOUNDARY LINES OF THE FEDERAL DIVERSITY JURISDICTION 15-19 (unpublished thesis in Harvard Law School Library 1930).

39. Act of March 3, 1875, c. 137, § 5, 18 STAT. 470, 472. See *Farmington v. Pillsbury*, 114 U.S. 138 (1885) (corporate bearer paper collusively assigned).

40. 62 STAT. 935 (1948), 28 U.S.C. § 1359 (1952).

41. See Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 ILL. L. REV. 566, 569 (1941).

Though a variety of collusive arrangements to create diversity have failed,<sup>42</sup> the statute has not proved sufficient, especially in recent years.<sup>43</sup> The purpose of denying a hearing to collusive suits was to prevent the dockets of the federal courts from being overcrowded with suits which were not within the purview of the Constitution or Congress.<sup>44</sup>

Much of the difficulty with this statute has arisen because the courts are loathe to give weight to the motive or purpose behind the appointment of any particular representative.<sup>45</sup> If the representative holds a valid legal appointment according to the applicable law, then the federal court will usually accept that appointment as valid for federal jurisdictional purposes as well as for the substantive purposes.<sup>46</sup>

42. *Steinberg v. Toro*, 95 F. Supp. 791 (D.P.R. 1951), *Martineau v. City of St. Paul*, 78 F. Supp. 892 (D. Minn. 1948), *aff'd*, 172 F.2d 777 (8th Cir. 1949); *French v. Jeffries*, 149 F.2d 555 (7th Cir. 1945), *cert. denied*, 326 U.S. 755 (1945); *Cerri v. Akron-People's Telephone Co.*, 219 Fed. 285 (N.D. Ohio 1914); *Southern Realty Co. v. Walker*, 211 U.S. 603 (1909); *Morris v. Gilmer*, 129 U.S. 315 (1889); *Farmington v. Pillsbury*, 114 U.S. 138 (1885); *Little v. Giles*, 118 U.S. 596 (1886); *Wilson v. Knox County*, 43 Fed. 481 (C.C. Mo. 1890); *Sere v. Pitot*, 10 U.S. (6 Cranch) 332 (1810); *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698 (2d Cir. 1915); *Northern Ins. Co. v. St. Louis & Ry.*, 15 Fed. 840 (C.C. Mo. 1883); *Newgass v. New Orleans*, 33 Fed. 196 (C.C. Mo. 1888). *Western Millers Mut. Fire Ins. Co. v. Thompson*, 95 F. Supp. 993 (D. Mo. 1951).

43. 62 STAT. 935 (1948), 28 U.S.C. § 1359 (1952). Our research has been able to discover only seventeen opinions which have construed section 1359 during the past eight years. In three cases jurisdiction was denied on other grounds. *Moynihn v. Elliott*, 195 F.2d 363 (5th Cir. 1952); *Young v. Powell*, 179 F.2d 147 (5th Cir. 1950); *Smith v. Sperling*, 117 F. Supp. 780 (S.D. Cal. 1953). In eleven opinions jurisdiction was upheld and section 1359 was held not applicable. *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955); *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954); *Birmingham Post v. Brown*, 217 F.2d 127 (5th Cir. 1954); *Jaffe v. Philadelphia & Western R.R.*, 180 F.2d 1010 (3d Cir. 1950); *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949); *Lisenby v. Patz*, 130 F. Supp. 670 (E.D.S.C. 1955); *Fallat v. Gouran*, 122 F. Supp. 610 (E.D. Pa. 1954), *rev'd on other grounds*, 220 F.2d 325 (3d Cir. 1955); *Petrikin v. Chicago, Rock Island & Pacific Ry.*, 15 F.R.D. 346 (W.D. Mo. 1954); *Liberty Mutual v. Tel-Mor*, 92 F. Supp. 445 (S.D.N.Y. 1950); *Odlevak v. Elliott*, 82 F. Supp. 607 (D. Del. 1949); *Jaffe v. Philadelphia & Western R.R.*, 80 F. Supp. 416 (E.D. Pa. 1948), *aff'd*, 180 F.2d 1010 (3d Cir. 1950). Three opinions, all quite weak, based their ouster of jurisdiction on section 1359. *Steinberg v. Toro*, 95 F. Supp. 791 (D.P.R. 1951); *Birkens v. Seaboard Service*, 96 F. Supp. 245 (D. N.J. 1950); *Martineau v. City of St. Paul*, 78 F. Supp. 892 (D. Minn. 1948), *aff'd on other grounds*, 172 F.2d 777 (8th Cir. 1949).

44. *Lehigh Mining and Mfg. Co. v. Kelly*, 160 U.S. 327 (1895).

45. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931): After the Louisiana widow had sued the Oklahoma defendant and had taken a voluntary non-suit three times, she had an Oklahoma citizen appointed administrator in her stead to sue on behalf of the estate of the Louisiana decedent. Defendant's motion to remove was denied. The anti-collusion statute, it was said, did not apply, since it only referred to collusive creation of federal jurisdiction, whereas here jurisdiction was sought to be avoided or defeated.

46. *Jaffe v. Philadelphia & Western R.R.*, 180 F.2d 1010 (3rd Cir. 1950); *Greene v. Goodyear*, 112 F. Supp. 27 (M.D. Pa. 1953); *Hopkins v. Pennsylvania Power and Light Co.*, 112 F. Supp. 136 (E.D. Pa. 1953); *Burns v. Adam*, 114 F. Supp. 355 (E.D. Pa. 1953); *Krivan v. Hourican*, 117 F. Supp. 909 (W.D. Pa. 1954); *Gould v. Suburban Gas & Electric Light Co.*, 243 Fed. 930 (D. Mass. 1917); *Stewart v. Patton*, 32 F. Supp. 675 (W.D. Tenn. 1940); *Sisk v. Pressley*, 81 F. Supp. 16 (E.D.S.C. 1948); *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co. of N. Y.*, 27 F. Supp. 485 (S.D.N.Y. 1939); *Cooper v. American Airlines, Inc.*, 149 F.2d 355 (2d Cir. 1945).

Some state court judges, however, are hesitant to accept this responsibility to determine federal jurisdiction when they make an appointment.<sup>47</sup>

*Alignment of parties* — The federal courts are not bound by the parties' own alignment of plaintiffs and defendants but may rearrange them into their true positions, considering the genuine nature of the interests presented.<sup>48</sup> Although diversity is thus occasionally destroyed, the courts often preserve diversity by this action and are loathe to realign a corporation where so doing would possibly destroy the necessary diversity.<sup>49</sup>

*Citizenship* — One of the necessary prerequisites to diversity jurisdiction is that all the litigants have the necessary citizenship, as opposed to mere residence or other status not rising to the equivalent of citizenship. Others more learned have expounded this jurisprudential labyrinth, so here only attention will be drawn to this factor.<sup>50</sup> Briefly, citizenship is dependent upon domicile,<sup>51</sup> a semi-permanent inhabitation and a mental attitude or intention to remain indefinitely,<sup>52</sup>

47. See Kaufmann Estate, 87 Pa. D & C 401 (O.C., Phila. 1954). The Orphans' Court of Philadelphia was asked to appoint a foreign guardian for a local minor who had been injured in a local automobile collision with a local citizen. Citing its general policy not to appoint foreign guardians, the court first refused to appoint an active New York businessman as guardian. But upon petition to appoint a Philadelphia lawyer who was a citizen of New Jersey, the court acquiesced. It found that, because damage verdicts are higher and pleading and evidence rules are more liberal in the federal courts, it was more in the interests of the minor to appoint a foreign guardian.

48. Indianapolis v. Chase Nat'l Bank of New York, 314 U.S. 63 (1941), *rehearing denied*, 314 U.S. 714 (1941); Schmidt v. Esquire, Inc., 210 F.2d 908 (7th Cir. 1954), *cert. denied*, 348 U.S. 819 (1954); Foster v. Carlin, 200 F.2d 943 (4th Cir. 1952); Grant County Deposit Bank v. McCampbell, 194 F.2d 469 (6th Cir. 1952); Soderstrom v. Kungsholm Baking Co., 189 F.2d 1008 (7th Cir. 1951); Hallmark Productions v. Mosley, 190 F.2d 904 (8th Cir. 1951); Thomason Co. v. Lumbermens Mut. Cas. Co., 183 F.2d 729 (4th Cir. 1950); Peters v. Standard Oil Co. of Tex., 174 F.2d 162 (5th Cir. 1949); Carneal v. Banks, 23 U.S. (10 Wheat) 181 (1825); Wormley v. Wormley, 21 U.S. (8 Wheat) 421 (1823); Wood v. Davis, 59 U.S. (18 How.) 467 (1855).

49. In shareholders' derivative suits the parties are aligned as their interests appear. If the corporation is dominated by persons hostile to the plaintiff's action the corporation will not be aligned with the plaintiff so as to defeat diversity. Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947); Opici v. Cucamonga Winery, 73 F. Supp. 603 (D. Cal. 1947); Richardson v. Blue Grass Mining Co., 29 F. Supp. 658 (E.D. Ky. 1939), *aff'd*, 129 F.2d 291 (6th Cir. 1942), *cert. denied*, 317 U.S. 639 (1942); Doctor v. Harrington, 196 U.S. 321 (1905); Tucker v. National Linen Service Corp., 92 F. Supp. 502 (N.D. Ga. 1950), *aff'd*, 188 F.2d 265 (5th Cir. 1951), *cert. denied*, 342 U.S. 828 (1951); Motor Terminals v. National Car Co., 92 F. Supp. 155 (D. Del. 1949). *But cf.* Smith v. Sperling, 117 F. Supp. 781 (S.D. Cal. 1953), and comments thereon in 54 COLUM. L. REV. 629 (1955), 68 HARV. L. REV. 193 (1954), 40 VA. L. REV. 492 (1955).

50. The "citizenship" basis of diversity is founded on citizenship "of different states" or "of a state". See 62 STAT. 930 (1948), 28 U.S.C. § 1332 (1952).

51. Baker v. Keck, 13 F. Supp. 486 (E.D. Ill. 1936); Hammerstein v. Lyne, 200 Fed. 165 (W.D. Mo. 1912). See 18 GEO. WASH. L. REV. 254 (1950); Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953).

52. Brown v. Keane, 33 U.S. (8 Pet.) 112 (1834); Pannill v. Roanoke Times Co., 252 Fed. 910 (W.D. Va. 1918); Hammerstein v. Lyne, 200 Fed. 165 (W.D. Mo. 1912);

as manifestly demonstrated by the party.<sup>53</sup> It is the citizenship of the parties at the inception of the suit that controls for diversity purposes,<sup>54</sup> and jurisdiction cannot fail once it attaches.<sup>55</sup>

*Capacity* — Capacity is a personal right to come into court and be heard.<sup>56</sup> In the representation case, the question becomes whether the representative has received proper legal authentication as such, either by an appointing court with proper jurisdiction or by valid legal transfer between parties.<sup>57</sup> Capacity in the federal courts is defined by Rule 17(b).<sup>58</sup> Strictly speaking, capacity is a term without jurisdictional connotations in the federal courts. However, some courts have heavily stressed the jurisdictional effect of capacity.<sup>59</sup>

*Controversy* — According to the Constitution, as well as the jurisdictional statute, there must exist a "Controversy" between the parties on whom jurisdiction is to depend. A controversy exists whenever a substantive right exists in favor of or against the party in question.

"To sustain diversity jurisdiction there must exist an 'actual,' *Helm v. Zarecor*, 222 U. S. 32, 36, 'substantial,' *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77, 81, controversy between citizens of different states . . . It is our duty to 'look beyond the pleadings and arrange the parties ac-

Poppenhauser v. India-Rubber Comb Co., 14 Fed. 707 (S.D. N.Y. 1883); Valentine v. Powers, 85 F. Supp. 732 (D. Neb. 1948); Garberson v. Garberson, 82 F. Supp. 706 (N.D. Iowa 1949); Blaine v. Murphy, 265 Fed. 324 (D. Mass. 1920); Linton v. Cantrell, 34 F. Supp. 782 (E.D. Tenn. 1940).

53. Shoaf v. Fitzpatrick, 104 F.2d 290 (6th Cir. 1939), *cert. denied*, 308 U.S. 620 (1939); Maynard v. Finney, 92 F.2d 454 (5th Cir. 1937), *cert. denied*, 303 U.S. 648 (1937); Davis v. Dixon, 184 Fed. 509 (S.D. W. Va. 1910); Dossett v. Davis, 29 F. Supp. 483 (E.D. Tenn. 1939); Leave v. Boston Elevated Ry., 14 F. Supp. 775 (D. Mass. 1936); Tudor v. Leslie, 35 F. Supp. 969 (D. Mass. 1940); Welsh v. American Surety Co. of New York, 186 F.2d 16 (5th Cir. 1951); Maple Island Farm, Inc. v. Bitterling, 196 F.2d 55 (8th Cir. 1952), *cert. denied*, 344 U.S. 832 (1952); Jennings v. Fanti, 96 F. Supp. 264 (M.D. Pa. 1951); Stine v. Moore, 213 F.2d 446 (5th Cir. 1954).

54. Grant County Deposit Bank v. McCampbell, 194 F.2d 469 (6th Cir. 1952); Lyons v. Weltmer, 174 F.2d 473 (4th Cir. 1949), *cert. denied*, 338 U.S. 850 (1949).

55. Mollance v. Torrance, 22 U.S. (9 Wheat.) 537 (1824).

56. United States v. Association of Am. Railroads, 4 F.R.D. 510 (D. Neb. 1945).

57. Moore v. Mitchell, 281 U.S. 18 (1930).

58. FED. R. CIV. P. 17(b): "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the laws of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., secs. 754 and 959(a)".

59. Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955), discussed *infra*.

cording to their sides in the dispute.' *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' *Dawson v. Columbia Trust Co.*, *supra*, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principle purpose of the suit,' *East Tennessee, V. & G. R. v. Grayson*, 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 385."<sup>60</sup>

*Jurisdiction vs. Venue*—Proper venue should not be confused with validity of jurisdiction when considering the diversity clause.<sup>61</sup> Venue relates to the place where the court sits and dispenses justice; jurisdiction applies to the power of the court to hear either the issue or the parties.<sup>62</sup> The Federal Rules of Civil Procedure do not affect the venue issue,<sup>63</sup> but a federal court may not consider venue until it determines that it has jurisdiction over the controversy.<sup>64</sup> The question of venue is beyond the scope of this article.

*Removal*—Removal of a cause of action from a state court under the applicable provisions of the Judicial Code,<sup>65</sup> is subject to exactly the same limitations and restrictions as an action commenced in the federal courts.<sup>66</sup> The diversity issue is not affected because the case is a removed one.

### III

#### Application to Specific Areas

##### *Executors and Administrators*

It is almost universally held that where an executor or administrator of an estate of a deceased person is a party to an action in the federal courts, it is his personal citizenship which will govern

60. *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69-70 (1941), *rehearing denied*, 314 U.S. 714 (1941).

61. *Cross v. Oneida Paper Products Co.*, 117 F. Supp. 919 (D.N.J. 1954); *Dental Precision Shoulder v. Caulk Co.*, 7 F.R.D. 203 (E.D.N.Y. 1947). For an elaboration of this point see Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954).

62. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939).

63. *Doyle v. Loring*, 107 F.2d 337 (6th Cir. 1940), *cert. denied*, 309 U.S. 686 (1940).

64. *Riley v. Union Pac. R.R.*, 117 F.2d 673 (7th Cir. 1949), *cert. denied*, 338 U.S. 911 (1950); *Kibler v. Transcontinental & Western Air, Inc.*, 63 F. Supp. 724 (E.D.N.Y. 1945); *Herrington v. Thompson*, 61 F. Supp. 903 (W.D. Mo. 1945).

65. 62 STAT. 937 (1948), 28 U.S.C. § 1441 (1952).

66. 28 U.S.C.A. § 1441(a). *Cf. Lopata v. Handler* 121 F.2d 938 (10th Cir. 1941), an unusual situation *re* removal. For a general view of the subject see BOULWARE, A GUIDE TO REMOVAL AND ITS PREVENTION (1948).

in determining the diversity jurisdiction.<sup>67</sup> The courts have arrived at this determination by adopting the real party in interest test.<sup>68</sup>

Thus, since the early case of *Chappedelaine v. Dechenaux*<sup>69</sup> the Supreme Court has recognized that the citizenship of the decedent is to be disregarded.<sup>70</sup> Upon the death of the decedent the cause of action becomes vested solely in the personal representative; he alone may determine whether to bring or defend an action, and what course to pursue in the protection of the decedent's property. Furthermore he is liable to the estate and the beneficiaries for breach of fiduciary duty.<sup>71</sup>

Likewise, persons interested in the estate of the decedent as beneficiaries,<sup>72</sup> creditors,<sup>73</sup> survivors,<sup>74</sup> legatees<sup>75</sup> or distributees<sup>76</sup> generally have no importance in determining the diversity of citizenship requirement.<sup>77</sup> It is the person with the legal interest, not those equitably interested, to whose citizenship the court looks.<sup>78</sup>

These results are indisputable if we accept the real party in interest test for federal jurisdiction. The executor or administrator must be the real party in interest in order that the estate may be administered as a unity. The real party in interest provision applies principally to determine by or against whom actions may be brought.<sup>79</sup> A person who is dead may not bring an action or be sued, so the

67. For a general collation of cases see Annot., 77 A.L.R. 910 (1932) and Annot., 136 A.L.R. 938 (1942). See also 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 15, 19-20 (Rules ed. 1950); BENDER, FEDERAL PRACTICE MANUAL 161 (1952); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 471 (2d ed. 1945); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 917 (1953); 3 MOORE, FEDERAL PRACTICE 1313-1314, 1365-1370 (2d ed. 1948).

68. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931); *Childress v. Emory*, 21 U.S. (8 Wheat.) 642 (1823); *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954); *Kerrigan's Estate v. Joseph A. Seagram & Sons, Inc.* 199 F.2d 694 (3d Cir. 1952); *Jaffe v. Philadelphia & Western R.R.*, 180 F.2d 1010 (3d Cir. 1950).

69. 8 U.S. (4 Cranch) 306 (1808).

70. *Rice v. Houston*, 80 U.S. (13 Wall.) 66 (1871). *But see Curran v. Mackay Radio & Telegraph Co.*, 123 F. Supp. 83 (S.D.N.Y. 1954).

71. See *Miller v. Sunde*, 1 N.D. 1, 3, 44 N.W. 301, 302 (1890). The duty, apparently, "is limited to faithful, honest administration and the payment of claims legally allowed against the estate with proceeds from assets of the estate" and it ceases when the estate is closed. *Young v. Moore*, 127 F. Supp. 265 (E.D. Mich. 1954).

72. *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945).

73. *Cf. Irvine v. Bankard*, 181 Fed. 206 (C.C.D. Md. 1910), *aff'd without opinion*, 184 Fed. 986 (4th Cir. 1911).

74. *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954).

75. *Young v. Powell*, 179 F.2d 147 (5th Cir.), *cert. denied*, 339 U.S. 948 (1950).

76. *Geyer v. John Hancock Mut. Life Ins. Co.*, 50 N.H. 224, 9 Am. Rep. 185 (1871). *But see Thames v. Mississippi*, 117 F.2d 949 (5th Cir.), *cert. denied*, 314 U.S. 630 (1941); *Schneider v. Eldredge*, 125 Fed. 638 (C.C.N.D. Ill. 1903); *Mississippi Power Co. v. Archibald*, 189 Miss. 332, 196 So. 760 (1940).

77. *American Bible Society v. Price*, 110 U.S. 61 (1884).

78. *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954).

79. FED. R. CIV. P. 17(a). See notes 29 and 31, *supra*.

decedent is clearly ruled out as the real party in interest. The other classes of interested people, such as creditors or distributees, are usually represented by more than one person with not necessarily similar interests. To make them the real parties in interest would lead to difficult and often insurmountable problems of service and jurisdiction, as well as general inefficiency of administration. The sole representative, in the person of the executor or administrator, must be the real party in interest.<sup>80</sup>

The diversity of citizenship must have existed at the time action was instituted.<sup>81</sup> The controversy will have arisen before or at the time of the decedent's death. Should federal jurisdiction thus depend on the fortuitous circumstance that one party to the controversy happened to die before the controversy reached the litigation stage?

Let us take a recent case in point. In *Jaffe v. Philadelphia & Western R. R.*,<sup>82</sup> decedent was killed by defendant's high-speed trolley car. Decedent and defendant were both citizens of Pennsylvania, as was decedent's widow, to whom recovery would inure under the wrongful death statute. A stenographer in the office of the widow's attorneys, chosen primarily because she was a citizen of New Jersey, was appointed administratrix. The court of appeals upheld federal jurisdiction, attacked under the anti-collusion statute<sup>83</sup> as well as the real party in interest provision.

The *Jaffe* case might be rationalized on the theory that the defendant won anyway, since the court of appeals affirmed the district court's finding that defendant was not negligent; thus the jurisdictional question was not as clearly presented as it would have been if the court had given judgment to the plaintiff. But such analysis is not valid. It is the court's duty at all times to assure itself that jurisdiction exists, and no court can proceed when it does not in fact possess jurisdiction.<sup>84</sup> The jurisdictional question seems to have been thoroughly considered by the court which appears to have had this principle well in mind.

80. *Childress v. Emory*, 21 U.S. (8 Wheat.) 642, 669 (1823).

81. See *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 381-382 (1884): "[T]he difference of citizenship on which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of the removal." And jurisdiction, having once attached, will not be defeated by a party's later change of domicile, *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824), nor by the death of a party and the substitution of a non-diverse representative, *Dunn v. Clarke*, 33 U.S. (8 Pet.) 1, 2 (1834). This rule may also hold true for voluntary substitutions such as the appointment of a trustee or receiver. Cf. *Hardenbergh v. Ray*, 151 U.S. 112, 118 (1894).

82. 180 F.2d 1010 (3d Cir. 1950). Followed in *Krivan v. Hourican*, 117 F. Supp. 908 (W.D. Pa. 1954); *Hopkins v. Pennsylvania Power & Light Co.*, 112 F. Supp. 136 (E.D. Pa. 1953).

83. Act of March 3, 1911, c. 231, § 37, 36 STAT. 1098.

84. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379 (1884).

Does the *Jaffe* case present a controversy between citizens of different states? If the decedent had been fortunate enough to have lived, his action for injuries against the same defendant would have been limited to the state courts. The injury was to a co-citizen, and it is the liability for injury which is being litigated, whether the plaintiff is the injured party still living or his personal representative after death. Does not the controversy attach to the two parties involved in the primary action, i.e., the trolley car striking the decedent, rather than attach several hours later when he dies or several weeks later when some largely disinterested person is appointed his personal representative?

Another recent case is *McCoy v. Blakely*,<sup>85</sup> in which a non-resident administrator was appointed for the sole purpose of creating jurisdiction after the decedent's "non-diverse" father had served as administrator for ten months. This fact was said not to violate section 1359 as a matter of law, and the court relied on the district court's specific finding that collusion did not exist.

It is difficult to imagine more appropriate cases in which to apply the anti-collusion statute<sup>86</sup> than the *Jaffe* and *McCoy* cases. The courts, however, were worried by having to consider motive in order to find collusion.<sup>87</sup> They felt that if the administrator was validly appointed by the proper probate court, then the court is bound by that appointment and cannot go behind it to determine the *reasons* the widow wished this particular appointment. Motive itself is not a legal consideration. But where collusion is in issue, then the question is one of fraud on the court and on the other parties, thus requiring a look to see whether the party charged with collusion had an intent to deprive others of their legal rights. This concept has been applied frequently in cases where a litigant has changed citizenship in order to get into the federal courts.<sup>88</sup> However, it has been applied only

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85. 217 F.2d 227 (8th Cir. 1954). In addition, the decedent's non-diverse parents were held not to be real parties in interest so as to defeat jurisdiction.

86. The present provision, which the *Jaffe* court said represented no substantial change, reads: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 62 STAT. 935 (1948), 28 U.S.C. §1359 (1952).

87. The Court relied principally on *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931), *supra*, note 45. See also 3 MOORE, FEDERAL PRACTICE 1319-1324 (2d 1948). 1 CYCLOPEDIA OF FEDERAL PROCEDURE 485-491 (3d ed. 1951).

88. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327 (1895); *Morris v. Gilmer*, 129 U.S. 315 (1889); *Dossett v. Davis*, 29 F. Supp. 483 (E.D. Tenn. 1939). *But see* *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928); *Williamson v. Osenton*, 232 U.S. 619 (1913). See also, FISHMAN, SOME PROBLEMS OF DIVERSITY JURISDICTION 4-15 (unpublished thesis in Harvard Law School Library 1929).



very sparingly to the appointment of representatives.<sup>89</sup> Of course, there may be other purposes than solely the creation of federal jurisdiction for the appointment of a foreign representative. For those other purposes the appointment could be perfectly valid. To say that it is not valid to create federal jurisdiction is not to destroy the appointment, for the appointee is then just as free to pursue his remedies in the state courts. It does not necessitate "going behind" a valid probate court appointment,<sup>90</sup> as was thought by the court in the *Jaffe* case, but merely determining a matter over which the probate court itself had absolutely no power, namely, federal jurisdiction. Therefore, it would appear that a federal court is not fulfilling its duty when it does not consider whether fraud on the jurisdiction has been committed by asking if there was an intent to deprive any party of legal rights. i.e. the right to non-removable state court litigation.

Litigants have attempted to draw a distinction in cases where the grant of administrative letters to a foreign representative took place in the forum state, but without success. It is the personal citizenship of the representative which governs, and that cannot be altered merely by accepting a fiduciary appointment in another state,<sup>91</sup> even where the law of the appointing state deems the appointee to have thereby changed his citizenship.<sup>92</sup>

The courts have developed two exceptions to the general rule that it is the citizenship of the executor or administrator which governs. The first is where he is a mere nominal party acting as a conduit through which a specified action is required to be brought.<sup>93</sup> Thus, where Mississippi required all sheriffs to give a bond for faithful performance to the Governor and all suits on the bonds to be brought through the Governor, in a suit on the bond of a Mississippi sheriff for the use of several New York citizens, the court, finding jurisdiction, said:

“. . . in no just view of the constitution or law [Judiciary Act] can he be considered as a litigant party: both look to things

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89. *Martineau v. City of St. Paul*, 78 F. Supp. 892 (D. Minn. 1948), *aff'd on other grounds*, 172 F.2d 777 (8th Cir. 1949), *Cerri v. Akron-People's Telephone Co.*, 219 Fed. 285 (N.D. Ohio 1914) (This case may have been overruled, sub silentio, by *Harrison v. Love*, 81 F.2d 115 (6th Cir. 1936), which relies on the *Mecom* case, note 87 *supra*.)

90. See *French v. Jeffries*, 149 F.2d 555 (7th Cir. 1945), *cert. denied*, 326 U.S. 755 (1945).

91. *Amory v. Amory*, 92 U.S. 186 (1877).

92. *E.g.*, *Memphis Street Ry. v. Moore*, 243 U.S. 299 (1917).

93. *Maryland, for Use of Markley v. Baldwin*, 112 U.S. 490 (1884); *Browne v. Strode*, 9 U.S. (5 Cranch) 303 (1809). Where the executor of a deceased trustee is a mere nominal party to perform the ministerial act of conveying title it is the citizenship of the deceased trustee which will govern. *Walden v. Skinner*, 101 U.S. 577 (1879).

not names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law.

“ . . . Executors and administrators are not in this position, they are the actors in suits brought by them; the personal property of the decedent is vested in them; the persons to whom they are accountable, for whose benefit they act, can bring no suit to assert their rights against third persons . . . ; nor can they interfere with the conducting of the suit. . . .”<sup>94</sup>

The other exception is a very tenuous one, and has not yet been passed on by the Supreme Court. Where, in a statutory action, the recovery may be sought by either the administrator (or executor) or the beneficiaries but an election must be made, then the administrator, if he sues, has been held to be a mere nominal party with no personal interest, analogous to a next friend.<sup>95</sup>

Thus, in normal probate administration, if there appears to be some advantage to bring an action in the federal courts, the requisite diversity is easily manufactured. The executor or administrator is the real party in interest and so will be the party to whose citizenship the court looks, and the anti-collusion statute generally will not be applied.

### *Trustee*

The rule is universal that when a trustee vested with valid authority to sue is a party to an action it is his citizenship alone which governs the jurisdiction of the federal courts.<sup>96</sup> The citizenship of the grantor<sup>97</sup> or the beneficiaries is immaterial.<sup>98</sup> Furthermore, the trustee is an indispensable party to an action to recover property which is in his possession.<sup>99</sup>

94. *McNutt v. Bland*, 43 U.S. (2 How.) 9, 14-15 (1844).

95. *Thames v. Mississippi for Use and Benefit of Shoemaker*, 117 F.2d 949 (5th Cir.), cert. denied, 314 U.S. 630 (1941).

96. *Dodge v. Tulleys*, 144 U.S. 451 (1892). 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 15, 19-20 (Rules ed. 1950); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 417 (2d ed. 1943); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 917 (1953); 3 MOORE, FEDERAL PRACTICE 1365-1370 (2d ed. 1948). *Kelley v. Queeney*, 41 F. Supp. 1015 (W.D.N.Y. 1941). In *Bullard v. Cisco*, 290 U.S. 179 (1933), where bonds were assigned in trust under a bondholders' protective agreement, the Court recognized that the transferors would be the ultimate beneficiaries but stated that "Resort to litigation was not the principal thing in mind when [the agreement was] made, and that what was intended was to invest the trustee with full title. . . ." 290 U.S. at 190. See also *Dunn v. Waggoner*, 11 Tenn. (3 Yerg.) 59 (1832), where a state court, finding identity of citizenship between trustee and defendant, denied federal jurisdiction.

97. *Gardner v. Brown*, 88 U.S. (21 Wall.) 36 (1874).

98. *Knapp v. Railroad Co.*, 87 U.S. (20 Wall.) 117 (1873); *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172 (1870).

99. *Massachusetts & Southern Construction Co. v. Cane Creek Township*, 155 U.S. 283 (1894); *Baker v. Dale*, 123 F. Supp. 364 (W.D. Mo. 1954).

The reason for this is again based upon the real party in interest rule. In many situations, such as in railroad trust deeds, or bondholders' trust indentures, there will be many hundreds or thousands of beneficiaries.<sup>100</sup> It would not seem wise to require that we look beyond the trustee's citizenship in cases where the beneficiaries are widely spread among the states and the controversy does not in fact have a local flavor. The trustee is the proper party. Particularly, as is often the case, the trustee's citizenship ought to govern where the acts of the trustee himself acting in his fiduciary capacity, are drawn in question.<sup>101</sup> The case is somewhat removed from the ordinary action involving an administrator, where the acts in dispute will usually have been committed by or against his decedent. Where a stranger deals with the trustee, he is aware of his citizenship at the time of the transaction. Federal court litigation is thus foreseeable.

As with the other types of representatives, the place of appointment of the trustee, where such is done by court decree, is immaterial.<sup>102</sup>

The device of transfer to a trustee of a property interest has withstood attacks as a collusive creation of federal jurisdiction in the most obvious of cases. Thus, where a trust, created in 1920 with an Arkansas trustee, contained provision for substitution of the trustee, he could resign in 1926 in favor of a Missouri trustee who immediately brought action against the Arkansas defendant; the land which composed the trust was located there—a most local controversy. Yet, the court found there was no collusion and federal jurisdiction was valid.<sup>103</sup>

Apparently no judicial inroads have been made on the steadfast rule as applied to trustees, at least where a *bona fide* trust is created.<sup>104</sup> In one wide area, however, the trustee, though the proper party to the action, is bound by statute by another's citizenship. That area is bankruptcy, where the trustee is limited to those courts where the bankrupt himself might have sued.<sup>105</sup> This rule, however, is subject to two exceptions: (1) Any suit by the trustee to which the

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100. See note 96 *supra*.

101. *Cf. Barber v. Powell*, 222 N.C. 133, 22 S.E.2d 214 (1942), *petition to remand denied*, 135 F.2d 728 (4th Cir.), *cert. denied*, 320 U.S. 752 (1943).

102. *Shirk v. City of La Fayette*, 52 Fed. 857 (C.C.D. Ind. 1892).

103. *Mathis v. Hemingway*, 24 F.2d 951 (8th Cir. 1928). See also *Curb & Gutter Dist. No. 37 of Fayetteville v. Parrish*, 110 F.2d 902 (8th Cir. 1940).

104. Under the old assignment clause and presumably under present section 1359 trusts were subject to attack for being mere colorable assignments. Thus, in *Maxfield's Lessee v. Levy*, 4 U.S. (4 Dall.) 330 (1797), jurisdiction was denied where a naked trust was created by an obviously colorable conveyance of land.

105. Bankruptcy Act of 1898 § 23, 30 STAT. 552, as amended, 11 U.S.C. § 46(b) (1952). In corporate reorganizations under Chapter X, where section 23 is inapplicable, the trustee may bring any plenary action in the federal courts.

defendant consents, need not be brought where the bankrupt might have sued; (2) in like manner suits may be brought by the trustee under sec. 60(b), 67(c) and 70(e) to recover voidable preferences and fraudulent transfers by the bankrupt, regardless of the defendant's consent.<sup>106</sup>

### Receivers

It has generally been held that in an action by or against a receiver for a corporation or an individual the receiver stands on his own personal citizenship in the federal court when the sole jurisdictional basis is diversity of citizenship.<sup>107</sup>

Though the Supreme Court has never had occasion so to hold, it has taken occasion to group receivers with other representatives:

“. . . representatives may stand upon their own citizenship in . . . the federal courts irrespectively [sic] of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers etc. . . .”<sup>108</sup>

As with other types of representatives, it is immaterial where the receiver was appointed. Thus, if a receiver who is a citizen of State A is appointed by a court in State B for a corporation incorporated in State B, and the receiver sues or is sued by a citizen of State B, there is diversity.<sup>109</sup>

No distinction seems to have been made between suits by or against a receiver for causes of action arising while he was operating the business, and suits on causes of action arising before his appointment.<sup>110</sup> The most common type of action involves a railroad which a receiver has continued to operate for the benefit of creditors. It is clearer that diversity exists if a litigated accident occurred while the receiver was operating the road than if it happened before the receiver appeared.<sup>111</sup> But this distinction has not been judicially expressed,

106. 30 STAT. 562, 564, 565 (1898), 11 U.S.C. §§ 96(b), 107(c), 110(e) (1952).

107. For a collation of cases, see Annot., 148 A.L.R. 804 (1944); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 472 (2d ed. 1943); 3 MOORE, FEDERAL PRACTICE 1313 (2d ed. 1948).

108. *New Orleans v. Gaines's Administrator*, 138 U.S. 595, 606 (1891). See also *Mexican Central Ry. v. Eckman*, 187 U.S. 429, 434 (1903).

109. *Farlow v. Lea*, 8 Fed. Cas. 1017, No. 4649 (C.C.N.D. Ohio 1877). See *Davies v. Lathrop*, 12 Fed. 353, 358 (C.C.S.D. N.Y. 1882): "The defendant, while an officer of the New York court and sued as such, was a citizen of New Jersey. He was a representative as much as an executor or a trustee is. In fact, he was a trustee. The personal citizenship of the executor or trustee is what is regarded."

110. Compare *Barber v. Powell*, 222 N.C. 133, 22 S.E.2d 214 (1942), *petition to remand denied*, 135 F.2d 728 (4th Cir.), *cert. denied*, 320 U.S. 752 (1943), with *Brisenden v. Chamberlin*, 53 Fed. 307 (C.C.D.S.C. 1892).

111. *Ibid.*

which seems consonant with the rule applied to other types of representatives.

The citizenship of the corporation<sup>112</sup> or individual<sup>113</sup> whose assets the receiver controls is immaterial. Likewise, the citizenship of the creditors for whose benefit the debtor's assets are being managed or distributed need not be considered.<sup>114</sup>

The receiver was not treated as an assignee under the old assignee clause,<sup>115</sup> and presumably would not be treated as such by the new anti-collusion statute which succeeded the assignee clause.<sup>116</sup>

As with other representatives, the receiver is treated as the real party in interest and it is that test which is controlling in the determination of diversity of citizenship. Thus, in an action for negligent death against the receiver of a railway company, the court stated:

". . . It is an error to say that the receiver is not a real party in interest. Perhaps the plaintiff could have sued the railway company, leave to that end having been obtained. . . . But a judgment in that event would be posterior in lien to the mortgages on the property. The receiver has been sued in order to give the plaintiff a claim on the property and income in his hands. . . . The receiver operating the railway is himself a common carrier, and is liable as such . . . this court . . . has appointed the receiver to hold, supervise and control it. He represents the property . . . the jurisdiction of this court . . . depends upon the citizenship of the parties to the record."<sup>117</sup>

It has further been held that the receiver himself is a "necessary," or, more accurately, an indispensable party to an action for negligence against the company in receivership; the receiver has taken title to the property of the insolvent debtor, holding it in trust for the creditors in whose behalf he was appointed, and jurisdiction may not be founded by not joining him.<sup>118</sup>

It is clear also that the mere fact that a receiver is appointed by a federal court does not, in and of itself, allow him to invoke

112. *Barber v. Powell*, 222 N.C. 133, 22 S.E.2d 214 (1942), *petition to remand denied*, 135 F.2d 728 (4th Cir.), *cert. denied* 320 U.S. 752 (1943).

113. *Coal & Iron Ry. v. Reherd*, 204 Fed. 859, 883 (4th Cir.), *cert. denied* 231 U.S. 745 (1913): "When the plaintiff was made the arm of the Virginia court as its receiver to collect and take in hand the assets of the partnership, he was by the law constituted the sole actor. . . ."

114. *Irvine v. Bankard*, 181 Fed. 206 (C.C.D. Md. 1910), *aff'd without opinion*, 184 Fed. 986 (4th Cir. 1911).

115. *Ibid.* *But cf.* *Bradford v. Jenks*, 3 Fed. Cas. 1132, No. 1,769 (C.C.D. Ill. 1840).

116. 62 STAT. 935 (1948), 28 U.S.C. § 1359 (1952).

117. *Brisenden v. Chamberlain*, 53 Fed. 307, 310 (C.C.D.S.C. 1892).

118. *Moore v. Los Angeles Iron & Steel Co.*, 89 Fed. 73 (C.C.S.D. Cal. 1898).

the jurisdiction of the federal courts as a controversy arising under the laws of the United States.<sup>119</sup> One exception to this rule is made in the case of receivers appointed for national banks, which could have, of course, sued in a federal court by virtue of their creation by Congress.<sup>120</sup>

The recent case of *Chapman v. St. Louis & S. W. Ry.*,<sup>121</sup> is interesting as a possible slight divergence from the general rule. In that case there was an action for negligent death by the decedent's father, a citizen of Texas, against the receiver, a citizen of Missouri, appointed by a Missouri court for a railway incorporated in Texas. By seemingly specious reasoning, the court said that since the railroad was required to be operated by the receiver in accordance with state law, the Texas venue requirement that suit may be brought in the county of the accident would be meaningless unless the court in such vicinity had jurisdiction over the receiver. Therefore, reasoned the court, since this venue provision is valid in this case, the citizenship of the receiver may be disregarded. The cases cited by the court do not support its position or its reasoning. On the basis of precedent the case seems clearly wrong. Its importance, however, lies in its reluctance to find federal jurisdiction. This was an action based on state law. Funds necessary to the recovery were located in Texas according to statute and the only out-of-state connection was the citizenship of the receiver and the place of his appointment. The lower courts may be feeling the pinch of the general rule to look no further than the citizenship of the receiver.

### *Guardians*

The jurisdictional status of a guardian has been frequently litigated. The Supreme Court, however, has passed but once on a guardian's jurisdictional claim. In 1903 Chief Justice Fuller said for a unanimous court:

"If in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by the guardian *ad litem* or next friend."<sup>122</sup>

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119. *Gay v. Ruff*, 292 U.S. 25 (1934). An action ancillary to the one for the receiver's appointment by a federal court may be instituted regardless of citizenship. *White v. Ewing*, 159 U.S. 36 (1895). But, of course, diversity must have existed in the action for the appointment of the receiver if based on state law.

120. *Gibson v. Peters*, 150 U.S. 342 (1893).

121. 71 F. Supp. 1017 (N.D. Tex. 1947).

122. *Mexican Central Ry. v. Eckman*, 187 U.S. 429, 434 (1903).

This statement is in line with the real party in interest test applied to other representatives, though it oversimplifies the test. The guardian need only be vested by the law of the place of his appointment with incidents of ownership of the claim sufficient to qualify him as the proper party to the suit.<sup>123</sup> It is the function of the federal court to characterize his status as that of the real party in interest or not.<sup>124</sup> An action involving the disposition of a ward's property will require the general guardian to be an indispensable party.<sup>125</sup>

Usually the guardian will have been appointed by the forum state. But if the guardian is one appointed in another state, he has first to be recognized for the purpose of suing by the forum state; then the law of the appointing state is controlling to determine whether the guardian is vested with power sufficient to be the real party in interest.<sup>126</sup> Thus, capacity to sue is tested by the law of the forum; the guardian's powers are determined by the law of the state of appointment; and it is the federal court which will characterize him as the real party in interest or not.<sup>127</sup>

The *Eckman* case<sup>128</sup> involved the general guardian of an infant. A Texas guardian appointed by a Texas court sued a Massachusetts corporation in a federal court in Texas to recover for injury to his ward, an Illinois minor. In sustaining jurisdiction, the Court found that by the law of Texas the guardian was "entitled to the possession and management of all property belonging to the ward" and was entitled "to bring and defend suits by or against him. . . ." Three Texas cases were cited to show that a guardian need not make his ward a party to any action. In two cases the general guardian was permitted by the Texas courts to enforce in his own name rights which ran only to his ward; in the third suit was by a next friend.<sup>129</sup>

123. The guardian is one of those representatives enumerated in FED. R. CIV. P. 17(a), page 206 *supra*, with permission to sue in the district courts as the real party in interest.

124. The guardianship area is given special treatment in FED. R. CIV. P. 17(c): "(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." This provision does not seem to add much to Rule 17(a).

125. *Hart v. Feely*, 109 F. Supp. 3 (M.D. Pa. 1953).

126. FED. R. CIV. P. 17(b), *supra*, note 58.

127. See 3 MOORE, FEDERAL PRACTICE 1314-1315, 1365 (2d ed. 1948); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 455-456 (3d ed. 1951); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 37-39 (Rules ed. 1950).

128. *Mexican Central Railway Co. v. Eckman*, 187 U.S. 429 (1903).

129. *Id.* at 434-436.

Prior to this case there had been dictum in the Supreme Court stating that

“The case of such a guardian [appointed in a state in which the guardian but not the ward was a citizen] differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. . . .”<sup>130</sup>

At the outset the guardian *ad litem*, or the next friend or committee, ought to be distinguished from the general guardian or curator. It is uniformly held that the representative who holds appointment either by a court (the guardian *ad litem*) or by natural personal relationship with the ward (the next friend) for the sole purpose of prosecuting or defending the particular action at bar is merely a nominal party whose citizenship is to be disregarded.<sup>131</sup> This is so because states have been uniform in subjecting such guardians to court control in the management of the ward's property; so limited are the powers with which such a guardian is vested that the federal judiciary characterizes the ward, rather than the guardian, as the real party in interest.<sup>132</sup>

A different result has obtained with respect to general guardians. There is great variation in state laws and there is considerable variation in federal characterization of these state-appointed representatives.<sup>133</sup>

In *Stout v. Rigney*<sup>134</sup> a Missouri curator brought suit for a foreign insane party against a citizen of Missouri. The court, in upholding federal jurisdiction, characterized the ward as the real party in interest. Title to the property, it found, has remained in the ward and suits had to be brought in the name of the ward in Missouri, despite a statute, not referred to in the opinion of the court, requiring a guardian to prosecute all actions for his ward, to manage the estate and settle demands on the estate.

In *Wilcoxon v. Chicago, B. & Q. R. R.*<sup>135</sup> suit was brought against a citizen of Illinois by an Illinois guardian, appointed in Iowa, on behalf of an Iowa insane. The Iowa statute provided that: “The action of

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130. *Lamar v. Micou*, 112 U.S. 452, 472 (1884).

131. *E.g.*, *Blumenthal v. Craig*, 81 Fed. 320 (3d Cir. 1897); *Horzepa v. Dauski*, 40 F. Supp. 476 (E.D.N.Y. 1941). See also *In re Moore*, 209 U.S. 490 (1908).

132. *E.g.*, *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949).

133. 47 A.L.R. 319 (1927).

134. 107 Fed. 545 (8th Cir. 1901).

135. 116 Fed. 444 (C.C.S.D. Iowa 1902).



a person judicially found to be of unsound mind must be brought by his guardian."<sup>136</sup> But the ward was held to be the real party in interest and jurisdiction was upheld. The Court said that even though a guardian could sue in his own name and managed and controlled the ward's property, title had remained in the ward and the guardian was sufficiently under the control of the appointing court to make him merely a nominal party.

These two cases were decided before the Supreme Court decided the *Eckman* case<sup>137</sup> in 1903. No case held the general guardian to be but a nominal and inconsequential party from 1905 until 1949.<sup>138</sup> Then, in *Martineau v. City of St. Paul*<sup>139</sup> an Illinois guardian brought suit in a Minnesota federal court for injuries to his minor ward. The ward and the defendant were both citizens of Minnesota. A state statute provided that a guardian might "sue without joining with him the person for whose benefit the action is brought."<sup>140</sup> Stating that the local probate court could not transmute a local controversy into one involving citizens of different states, the court of appeals denied jurisdiction by holding that the Minnesota decisions showed that the action must be brought by the guardian in the name of the ward, who was the real party in interest. Collusion was not made a basis for decision in this case, but was in fact an alternative ground for the holding by the district court denying jurisdiction.<sup>141</sup>

In *Fallat v. Gouran*<sup>142</sup> an action was brought by a New Jersey guardian, the daughter of the injured Pennsylvania ward, against a Pennsylvania defendant. The Pennsylvania statutes allowed a guardian to prosecute actions for the incompetent; but title remained in the in-

136. IOWA CODE § 3481 (1897).

137. *Mexican Central Ry. v. Eckman*, 187 U.S. 429 (1903), notes 122, 128, *supra*.

138. During this period from 1905 to 1949 six cases held the guardian stood on his own citizenship. The only major opinion among these decisions was in *Detroit v. Blanchfield*, 13 F.2d 13 (6th Cir. 1926), where it was held that the Michigan statute, identical with Rule 17(a), allowing a guardian to sue in his own name, made the out-of-state guardian the real party in interest. This case apparently overruled the sixth circuit's earlier decision in *Toledo Traction Co. v. Cameron*, 137 Fed. 48 (6th Cir. 1905), decided just after the *Eckman* case but without reference to it. The other cases were all clouded by collateral issues: *New York Evening Post Co. v. Chaloner*, 265 Fed. 204 (2d Cir.), *cert. denied*, 252 U.S. 591 (1920) (restoration of incompetent's mind appears to have rendered the question moot); *Pulver v. Leonard*, 176 Fed. 586 (C.C.D. Minn. 1909) (Pleading defect; the citizenship question would now be ruled by the subsequent eighth circuit decision in the *Martineau* case); *Ansaldi v. Kennedy*, 41 F.2d 858 (D. Mass. 1930) (court unclear whether plaintiff is a general guardian or a guardian *ad litem*); *Smith v. Burt*, 46 F.2d 336 (W.D. La. 1930) (By Louisiana statute, an incompetent assumes the same citizenship as his curator).

139. 172 F.2d 777 (8th Cir. 1949).

140. MINN. STAT. ANN. § 540.04 (1947).

141. *Martineau v. City of St. Paul*, 78 F. Supp. 892 (D. Minn. 1948).

142. 220 F.2d 325 (1955).

competent;<sup>143</sup> a guardian's death did not abate the action;<sup>144</sup> a judgment was the obligation only of the incompetent;<sup>145</sup> and compromise or settlement could take place only under court supervision.<sup>146</sup> Jurisdiction was denied by the district court, strictly on the theory that the ward, not the guardian, was, under these statutes, the real party in interest. The anti-collusion statute, raised by the defendant, was considered not applicable; the court relied on the *Jaffe* case in the same circuit.<sup>147</sup>

The third circuit reversed, specifically declining to follow the eighth circuit in the *Martineau* case. The test, said the court, is only whether the guardian has the capacity to sue. If so, he may stand on his own citizenship. This position is, as the court recognized, a full return to the statement of the rule in the *Eckman* case. The test applied by the district court in the *Fallat* case, that the guardian's powers other than that of capacity to sue were made so subject to the control of the appointing court that only the ward could be considered the real party in interest, was rejected.

The *Fallat* case states: "It is our conclusion that it is not the citizenship of the incompetent, whether or not he be the real party in interest, which governs but the citizenship of the guardian, provided he has the capacity to sue."<sup>148</sup> By the adoption of the capacity test, the *Fallat* case sets itself apart from the other similar cases in this area. The case implies that the other courts have misinterpreted the true basis of diversity and that when the other courts speak in terms of real party in interest, they really mean to base the decision on capacity to sue.<sup>149</sup>

The ultimate diversity determination would in most cases be the same, whether one adopts a capacity or real party in interest criteria. Therefore, there seems little reason to delve Pandora-like into new juristic linguistic variations on an old theme. It suffices to say that the various text commentaries, law review excursions, and case precedents predominately speak in terms of real party in interest with em-

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143. PA. STAT. ANN. tit. 50, § 1633 (1954).

144. *Id.* tit. 50, § 1842.

145. *Id.* tit. 12, R. 2063 (1951).

146. *Id.* tit. 12, R. 2064 (1951).

147. *Jaffe v. Philadelphia & Western R.R.*, 180 F.2d 1010 (3d Cir. 1950), note 82 *supra*.

148. 220 F.2d 325, 326 (3d Cir. 1955).

149. The opinion cites the *Elbert* case, *infra* note 180, as supporting the capacity test basis and quotes the Supreme Court as follows: "This conclusion to disregard the tortfeasor's citizenship in the instant case for purposes of federal jurisdiction is fortified by cases honoring the states' characterization of a guardian or other fiduciary as determinative of the real party in interest in federal litigation". Although the court did emphasize capacity, they spoke in terms of real party in interest.

phasis on capacity as an important element in determining who is the real party in interest; there seems little reason to stir otherwise calm waters.

Attempt has been made to distinguish cases where the ward is an infant from cases where the ward is an incompetent.<sup>150</sup> It will be noticed that the statutes under which the district court decided *Fallat v. Gouran* apply only to incompetents.<sup>151</sup> The authority seems strongly to indicate that this distinction may in fact have been made; yet the courts have never articulated it. The distinction, however, seems far-fetched. True, the infant is under a disability for a definable period of time, while the incompetent's disability is regarded as not dependent on passage of time but on the physical and mental condition of the ward. The incompetent is accorded public protection only until this disability disappears. But while the disability is in existence, the qualities of the guardianship are no different whether the ward is an infant or an incompetent.<sup>152</sup>

The federal courts are forced to apply a state procedural rule, *i.e.* whether a guardian can sue by himself, to determine their own jurisdiction. The state courts are not concerned with federal jurisdictional problems when they give guardians such powers.<sup>153</sup> Should not the rules be made by someone who will at least consider their effect on the important aspect of federal jurisdiction?

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150. See Annot., 47 A.L.R. 319 (1927). But see 3 MOORE, FEDERAL PRACTICE 1314-1315 (2d ed. 1948); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 455-456 (3d ed. 1951); 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 37-39 (Rules ed. 1950).

151. Incompetents' Estates Act of 1951, PA. STAT. ANN. tit. 50 §§ 1631-2041 (Supp. 1954).

152. Pugh v. Jones, 134 Iowa 746, 112 N.W. 225 (1907); 25 AM. JUR. § 60 (Supp. 1953).

153. In Kaufmann Estate, 87 Pa. D. & C. 401 (O.C., Phila. 1954), President Judge Charles Klein of the Philadelphia Orphans' Court, in an extensive and carefully considered opinion, concluded from all the various facts presented to him, that it would be in the best interests of an injured minor to appoint a New Jersey guardian in order to create the necessary diversity for federal court jurisdiction. At page 405, he stated: "In any event, from a careful consideration of the record in this case I am convinced that verdicts in accident cases in the Federal courts are generally higher than those rendered in similar cases in our State courts. . . . Whether or not, in any specific case, the appointment of such nonresident guardian creates such diversity of citizenship as to enable him to bring suit in the Federal courts is a matter which the Federal court, alone, is competent to adjudicate and upon which this court can only speculate." Further in the case it is stated: "It has been suggested that it may be improper or indelicate for the parties to seek to create diversity of citizenship in order to permit suit to be started in the Federal court. The hearing judge, after careful consideration has reached the conclusion that there is no merit to this suggestion."

The court in the Martineau Case by way of dicta commented on this problem. "We think that a Probate Court of Minnesota, by appointing a nonresident as a guardian for a Minnesota minor, cannot transmute what is purely a local controversy into one between citizens of different states, or confer jurisdiction of the controversy upon the United States District Court for the District of Minnesota." *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949). In support of this dicta, see 3 MOORE, FEDERAL PRACTICE § 312 (2d ed. 1948).

### *Assignees*

Assignment of an interest in property presents a problem somewhat different from that of subrogation<sup>154</sup> or fiduciary representation.<sup>155</sup> Assignment creates a legal interest in the successor, as opposed to the equitable interest received by the subrogee. And it is a legal interest created by the parties themselves and not by operation of law as in the case of most fiduciary representatives. When an assignment is complete, the assignor retains no interest, legal or equitable, in the property assigned.

This method of transferring property was well known at the time the nation was founded, and there was some discussion of the diversity clause in connection with it in the state conventions for ratification of the Constitution. Men feared the manufacture of federal jurisdiction by the mere sale of their property to a foreign citizen. This fear found expression in the First Congress, which promptly passed the famous assignee clause in the Judiciary Act of 1789.<sup>156</sup>

The present operative 1948 statute has only once been applied to defeat an assignment.<sup>157</sup> The emphasis now is on the collusion or impropriety which might be involved in any transfer, without distinguishing between assignments and other transfers.

This seems to be one area where the courts have narrowly construed the grant of jurisdiction. When the assignment is genuine, the assignor's *bona fide* successor in interest is his assignee, and if it is the kind of interest which is assignable, then the other original party must assume the risk of assignment to an assignee from a different state. He can make the interest non-assignable if federal courts are distasteful to him.

Nevertheless, there is a wealth of decisions to support nearly any position on the jurisdictional effect of an assignment. The early cases usually struck down jurisdiction where it depended on the diver-

154. See pp. 229-237 *infra*.

155. See pp. 212-226 *supra*.

156. Act of Sept. 24, 1789, c. 20, § 11, 1 STAT. 73, 78. See Warren, *New Light on the History of the First Judiciary Act of 1789*, 37 HARV. L. REV. 49, 79-80 (1923).

157. See *Steinberg v. Toro*, 95 F. Supp. 791 (D.P.R. 1951), where jurisdiction was denied. In *Petrikín v. Chicago, R.I. & P. Ry.*, 15 F.R.D. 346 (W.D. Mo. 1954), the court refused to defeat under section 1359 a damage claim which had been assigned by an Illinois insurance company back to its Missouri insured, who then brought action in the state court against the Illinois tortfeasor. The cause was removed, but defendant later attacked the district court's jurisdiction. The court seems to say that because the plaintiff sued in the state court, the assignment was not made for the purpose of invoking federal jurisdiction. The court evidently was satisfied that collusion did not exist, even though this assignment was of a kind which would not have survived attack under the old assignee clause.

sity of an assignee,<sup>158</sup> but not always.<sup>159</sup> Recently, litigants seem to have found the courts more willing to find a reason for legitimizing the assignment.<sup>160</sup> But there is not uniformity even today.<sup>161</sup> Nor have the federal courts been able to find a workable rule where litigants have attempted to defeat jurisdiction. Usually the courts will accept such defeat.<sup>162</sup> But we must note with interest the recent case of *Lisenby v. Patz*<sup>163</sup> where each of several plaintiffs assigned one one-hundredth of his accident claim to a co-citizen of the defendant in an effort to insure trial by the courts of the plaintiff's home-state courts. The court refused to remand to the state court, stating that the plaintiff-assignee must have a "real interest, i.e. a genuine interest, as distinguished from an interest solely by way of accommodation to the assignor-plaintiff."<sup>164</sup> The court further said:

" . . . this decision is not based upon the accepted fact that to permit partial assignments in personal injury cases would totally destroy the right of removal by reason of diversity of citizenship. Congress could probably correct this evil by appropriate legislation but this is not the duty of the courts. Indeed, if the practice of using a nominal plaintiff-assignee continues to spread, Congress may be required to act as the underlying reasons for protecting a non-resident defendant will be completely removed within a

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158. *Cashman v. Amador & Sacramento Canal Co.*, 118 U.S. 58 (1886); *Farmington v. Pillsbury*, 114 U.S. 138 (1885); *Turnbull v. Ross*, 141 Fed. 649 (4th Cir. 1905); *Board of Commissioners v. Schradsky*, 97 Fed. 1 (8th Cir. 1899); *Norton v. European & N.A. Ry.*, 32 Fed. 865 (C.C.D. Me. 1887). A fair inference of a collusive arrangement, if dismissed under the collusion statute, was all that seemed necessary. *Chandler v. Town of Attica*, 22 Fed. 625 (C.C.N.D.N.Y. 1885). In *Little v. Giles*, 118 U.S. 596, 603 (1886), the Court said that ". . . when [the interest of the nominal party] is simulated and collusive and created for the very purpose of giving jurisdiction, the courts should not hesitate to apply the wholesome provisions of the law."

159. *E.g.*, *Lanier v. Nash*, 121 U.S. 404 (1887).

160. *Moynihan v. Elliott*, 195 F.2d 363 (5th Cir. 1952) (jurisdiction based on extension agreement between assignee and original maker); *Petrikin v. Chicago, R.I., & P.R.R.*, 15 F.R.D. 346 (W.D. Mo. 1954) (re-assignment of insurance company's subrogated claim). Judge Clark has said: "Since the claim is owned and may be sued upon by someone, all a defendant may properly ask is such a party plaintiff as will render the judgment final and res adjudicata of the right sued upon" which, in turn, is determined by Fed. R. Civ. P. 17(a). *Rosenblum v. Dingfelder*, 111 F.2d 406, 407 (2d Cir. 1940).

161. *Steinberg v. Toro*, 95 F. Supp. 791 (D.P.R. 1951); *Bickens v. Seaboard Service*, 96 F. Supp. 245 (D.N.J. 1950) (assignment of several claims of less than \$3000 to a single plaintiff to aggregate over \$3000 for the purpose of collection only held insufficient); *Golden v. St. Bernard Trappers' Ass'n*, 10 F.2d 220 (E.D. La. 1926).

162. In the leading case of *Oakley v. Goodnow*, 118 U.S. 43, 44, 45 (1886) the Court said, speaking of the 1875 anti-collusion statute: "And by analogy to this law, it may perhaps, be a good defense to an action in a state court, to show that a colorable assignment has been made to deprive the United States court of jurisdiction; but, as before said, it would be a defense to the action, and not a ground of removing that cause into the Federal Court." See also, *Rosecrans v. William S. Loyler, Inc.*, 142 F.2d 118 (8th Cir. 1944); *Krenzien v. United Services Life Ins. Co.*, 121 F. Supp. 243 (D. Kan. 1954); *Bernblum v. Travelers' Ins. Co.*, 9 F. Supp. 34 (W.D. Mo. 1934).

163. 130 F. Supp. 670 (E.D.S.C. 1955).

164. *Id.* at 674.

period of a few years, due largely to the increasing popularity of survival statutes being enacted by the legislatures of many states.”<sup>165</sup>

The courts today seem to apply two tests to determine the jurisdiction validity of an assignment. Firstly, under state law, the assignment itself must be valid. Secondly, as we have seen above, there must not be collusion upon the jurisdiction of the court.<sup>166</sup> Does not this require an investigation of the reasons or intent behind the transfer? It does not invalidate the transfer to find it was collusive; it merely disappoints an incautious transferor, who learns, as he should already have known, that he could not transmute his interest in a local controversy into one with a federal flavor.

### *Subrogees*

The subrogee stands in much the same position with respect to federal jurisdiction as the executor or administrator. The subrogee is not a trustee in the same sense, yet this has not seemed to deprive him of the substantial interest in the action and his personal citizenship is determinative of federal jurisdiction.

Without dissent, jurisdiction has been found where there was identical citizenship between the subrogor and the defendant,<sup>167</sup> so that suit might not have been brought in the federal courts had not the element of subrogation interposed a new party. The leading case is *New Orleans v. Gaines's Administrator*,<sup>168</sup> where plaintiff asserted certain rights against the city previously belonging to its grantees with whom plaintiff had settled independently. The court, disposing also of the assignment clause of the Judiciary Act,<sup>169</sup> stated that

“Subrogation is not assignment. The most that can be said is, that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have re-

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165. *Ibid.* See also and compare *Phoenix Mut. Life Ins. Co. v. England*, 22 F. Supp. 284 (W.D. Mo. 1938), with *Daldy v. Ocean Acc. & Guarantee Corp.*, 38 F. Supp. 454 (E.D. Mo. 1941).

166. See 3 MOORE, FEDERAL PRACTICE 1324-1329, 1334 (2d ed. 1948); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 8-11 (Rules ed. 1950); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 491-492 (3d ed. 1951); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 555-583 (2d ed. 1943); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 720-721, 918 (1953).

167. For a collation of cases, see 6 A.L.R.2d 137 (1949). See also 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 11-15 (Rules ed. 1950); 1 CYCLOPEDIA OF FEDERAL PROCEDURE 472 (2d ed. 1943); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 917 (1953); 3 MOORE, FEDERAL PRACTICE 1313, 1346-1351 (2d ed. 1948).

168. 138 U.S. 595 (1891).

169. Act of March 3, 1875, c. 137 § 1, 18 STAT. 470.

peatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle.”<sup>170</sup>

The subrogation problem most frequently arises in the insurance field. An insured person will suffer a loss, and his insurance company will compensate him for the loss, thus becoming subrogated to the rights of its insured against the wrongdoer.<sup>171</sup> This is normally only an incident of indemnity insurance.<sup>172</sup> In states which allow the subrogee to sue by himself as the real party in interest only if he has paid the entire amount of the loss, giving adherence to the old rule against splitting causes of action, the insurer must do so to stand on his own citizenship.<sup>173</sup> Some states allow the subrogee to sue by himself regardless of the proportion of the legal claim to which he has become subrogated.<sup>174</sup>

The rule, however, does not present a serious challenge to ambitious litigants. For where it appears that as a result of subrogation, federal court jurisdiction will depend on whether the insurance company has made compensation to its insured, the company can merely withhold or speed up its payments to its own advantage. In fact, it has even been held that where the company has made the myopic blunder of compensating its insured so that jurisdiction would have been destroyed, it could quickly re-assign its claim against the tortfeasor back to the insured so as to restore federal jurisdiction.<sup>175</sup>

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170. 138 U.S. 595, 606 (1891).

171. *E.g.*, *United States v. Aetna Cas. and Surety Co.*, 338 U.S. 366 (1949); *United States v. American Tobacco Co.*, 166 U.S. 468 (1897); *Van Wie v. United States*, 77 F. Supp. 22 (N.D. Iowa 1948); *Continental Ins. v. Bahcall*, 39 F. Supp. 315 (E.D. Wis. 1941). See HARRIS, A TREATISE ON THE LAW OF SUBROGATION §§ 3, 13 (1889); SHELDON, SUBROGATION § 3 (2d ed. 1893); Langmaid, *Some Recent Subrogation Problems in the Law of Suretyship and Insurance*, 47 HARV. L. REV. 976 (1934); Comment, 5 ALA. L. REV. 276 (1953); Comment, 43 CAL. L. REV. 85 (1955); Note, 55 COLUM. L. REV. 1076 (1955); Note, 38 GEO. L. J. 646 (1950).

172. See *Boiserine v. Maryland Casualty Co.*, 112 F.2d 409 (8th Cir. 1940).

173. *Travelers' Insurance Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426 (6th Cir. 1911). See also *Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp.*, 92 F. Supp. 445 (S.D.N.Y. 1950). For a statement of this position in a non-diversity case with respect to FED. R. CIV. P. 17(a) see *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 380 (1949).

174. See *Continental Cas. Co. v. Ohio Edison Co.*, 126 F.2d 423 (6th Cir. 1942).

175. *Petrikov v. Chicago, R.I. & P. R.R.*, 15 F.R.D. 346 (W.D. Mo. 1954).

*Direct Action Statutes*

Some states, by means of so-called direct action statutes, allow an injured person to bring action directly against the wrongdoer's insurer alone.<sup>176</sup> Though different in some respects from the cases we have already considered, the problem takes on very similar proportions when the requisite diversity of citizenship exists between the complainant and the defendant insurance company, but is lacking between the complainant and the wrongdoer.

Only in Louisiana have the courts dealt with the problem. Perhaps this is because in that state alone the direct action statute has been interpreted to extend to insurance policies written outside Louisiana.<sup>177</sup> In other direct action states, where the statute applies only to policies written within the forum state, diversity problems do not arise frequently, because most companies incorporated outside the direct action state will naturally require that its policies be written elsewhere than in the direct action state, so that their policy's "no-action" clause<sup>178</sup> will be effective. Thus, any company caught by the direct action statute in any state but Louisiana will, practically always, be a corporation incorporated and doing business solely in the forum state, and thus deemed to be a citizen of that state. There will, therefore, be no diversity even between the complainant and the defendant insurer. But with the advent of the *Watson* case<sup>179</sup> it seems likely that more and more direct action states will extend their statutes to policies written outside the forum state, thus introducing the same diversity problems which the Supreme Court so recently decided in passing on the Louisiana direct action statute in *Lumbermen's Mutual Casualty Co. v. Elbert*.<sup>180</sup>

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176. LA. CIV. CODE ANN. art. 22: 655 (West 1953); R. I. GEN. LAWS c. 258, § 3815 (1923); WIS. STAT. § 85.25 (1951).

177. See the companion cases, *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 (1954) and *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954).

178. Typical was the "no action" clause in the insurance contract involved in the *Elbert* case: "No action shall be against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been fully determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." It is also provided that bankruptcy or insolvency of the insured shall not relieve the insurer. See footnote 3 to the Supreme Court's opinion.

179. *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954).

180. 348 U.S. 48 (1954). "The burden placed on the Louisiana federal courts by the Direct Action Statute has been very heavy. In the Eastern District the Baton Rouge Civil Action docket is made up almost entirely of cases brought under this provision, while the New Orleans Civil Action Docket is at least 50 to 60% made up of such cases." Letter from A. Dallam O'Brien, Jr., Clerk, United States District Court, Eastern District of Louisiana, to Mercer D. Tate, January 12, 1956. See also 53 MICH. L.R. 1000 (1955), 66 HARV. L. REV. 1529 (1953), 40 VA. L. REV. 801 (1954), 29 TUL. L. REV. 525 (1954).



The *Elbert* case was brought in the federal court in Louisiana by a citizen of Louisiana injured in an automobile accident in Louisiana, caused by the alleged negligence of another Louisiana citizen. The defendant, an Illinois corporation, had issued in Louisiana a public liability policy to the husband of the alleged wrongdoer, insuring members of his family in the operation of the family car. Defendant had been certified to do business in Louisiana and had consented in writing to be sued under its direct action statute. The district court, despite the fact that the alleged tortfeasor had not been made a party, dismissed the complaint for lack of jurisdiction because the controversy was substantially between two parties who were citizens of the same state.<sup>181</sup> The court of appeals reversed.<sup>182</sup> The Supreme Court affirmed that reversal with a holding in favor of federal diversity jurisdiction.<sup>183</sup>

Between whom was the controversy? There is first the underlying tort liability of the alleged wrongdoer. Secondly, there is the liability of the insurer on the contract of insurance which it has issued. The Supreme Court read this Louisiana statute as differentiating between actions against the insurer alone and actions against either the tortfeasor alone or together with the insurer and forcing an election of remedies upon the complainant. She is thus compelled to seek one remedy, according to the Court's view, for two completely separate rights or controversies. On the one hand she has a non-diversity remedy against the wrongdoer with respect to their controversy. On the other hand she has a remedy against the insurer directly with respect to the statutory "controversy." She must look before she leaps, for the point of no return is when either remedy is sought.<sup>184</sup>

The difficulty with this analysis is that it treats the two separate causes of action, if in fact they are mutually exclusive, as entirely independent of each other. In fact, the cause of action against the insurer could in no way exist were it not for the existence of the

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181. 107 F. Supp. 299, *rehearing denied with opinion*, 108 F. Supp. 157 (W.D. La. 1952).

182. 201 F.2d 500, *rehearing denied, with dissenting opinion*, 202 F.2d 744 (5th Cir. 1953). Cf. *New Amsterdam Cas. Co. v. Soileau*, 167 F.2d 767 (5th Cir. 1948). 6 A.L.R.2d 128 (1949); *Lewis v. Manufacturers Casualty Ins. Co.*, 107 F. Supp. 465 (W.D. La. 1952).

183. *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 (1954).

184. There is clear language in the Louisiana cases which supports the Court's position. Unfortunately it is all dictum, and it seems questionable that the Louisiana court would adhere to its dicta if faced with a complainant who had sued the insurance company directly, lost on a contract defense, and comes now against the wrongdoer.

cause of action by the complainant against the tortfeasor.<sup>185</sup> The one is built on top of the other. The tort controversy must be the basic proposition on which can be grounded the subsequent proposition of the insurer's contract liability. It is true that certain defenses are lost to the insurer in the direct action,<sup>186</sup> thus changing the complexion of the controversy between it and the complainant from what it would be if there were two separate actions. But the basic controversy of the complainant against the tortfeasor must no less exist.

The analysis we have applied to fiduciary representatives is well applied here also.<sup>187</sup> Could not the federal courts interpret a time element into the word "controversy" as used in the Constitution and the jurisdictional statute? By so doing the federal courts could rule that in the direct action case the controversy attached when the primary activity of the parties reached such a stage of completion that a cause of action became assured and a controversy existed. The contract of insurance was not made for the benefit of any third party; it was made for the protection of the insured, so the complainant may not claim as a third party beneficiary. Nor can the statute be said to create a vested interest in the public and to make all insurance contracts conclusively issued for the benefit of the general public. If this had been the intention of the Louisiana legislature, compulsory liability insurance would have been the solution.<sup>188</sup> Therefore, the insurer did not enter into the picture automatically upon the happening of the accident, but only at such time as complainant learned of the insurance policy and insurer was notified of the accident.

In the Supreme Court the insurer also raised the question whether it was the real party in interest. In holding the insurer the real party in interest the Court said that:

"to disregard the tortfeasor's citizenship in the instant case for purposes of federal jurisdiction is fortified by cases honoring the states' characterization of a guardian or other fiduciary as determinative of the real party in interest in federal litigation. *New Orleans v. Gaines's Administrator* . . . ; *Mexican Central R. Co. v. Eckman*. . . . There is even greater justification for dis-

185. The Direct Action Statute has been held to create a substantive right which becomes vested immediately upon injury to pursue a remedy against the insurer. *Fisher v. Home Indemnity Co.*, 198 F.2d 218 (5th Cir. 1952).

186. See *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122 (1950) (defense of failure to receive prompt notice of accident is lost.); *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935) (defense that injured party is the insured's wife is lost).

187. See pp. 212-226 *supra*.

188. This has been the solution adopted in Massachusetts. 3 ANN. STAT. MASS. c. 90, §§ 34A-34J (1954).

regarding the tortfeasor's citizenship here than for disregarding the citizenship of a beneficiary since the insurer—unlike a fiduciary—has a direct financial interest in the outcome of this litigation.”<sup>189</sup>

There can be little doubt that the insurer is the real party in interest.<sup>190</sup> Whether that is a valid test for citizenship in diversity actions we have already explored.<sup>191</sup>

Was the tortfeasor an indispensable party under Rule 19(a)? The insurance company thought so, but the Court disagreed. To have held him so would have ousted jurisdiction, for there would not have been complete diversity between all plaintiffs and all defendants.<sup>192</sup> Viewing the statute as creating an optional right vested in the complainant to proceed against either the tortfeasor or the insurer, the Court felt that complete disposition of the entire claim could be made in the one action, without injustice to any of the participants.

But suppose that complainant brought such a direct action against the insurer, who interposed the defense that the insured tortfeasor had failed to pay his premiums for the past year, thus causing the policy to lapse; the insurer wins without ever litigating the issue of its insured's tort liability. Is complainant to be barred from a day in court on the tort controversy?<sup>193</sup> The Supreme Court seems to think it would. Suppose, either that the Supreme Court has misinterpreted the Louisiana court on this question or that the issue arises in another state where the complainant would be allowed a second try. If there is recovery against the tortfeasor, he will certainly have a right of action against his insurer on his contract. It is his first time in court on the contract issue and certainly he will not be bound by the prior determination to which he was not a party. If in the second litigation of the contract issue with a new party, possibly different evidence and a different jury, the insurer might now lose and be subject to a liability from which it had already freed itself. Even if the insurer

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189. 348 U.S. 48, 51. Is the Court correct in saying that it is the states' characterization of a fiduciary as derivative of the real party in interest? Or is it a federal characterization based on state-given powers. See pages 6-7 *supra*.

190. For a recent and interesting distinction between “real party in interest” and “capacity” as applied to a guardian under Louisiana's Direct Action Statute, See *Beugston v. Travelers Indemnity Co.*, 132 F. Supp. 512 (W.D. La. 1955).

191. See pp. 206-207 *supra*.

192. The complainant and one defendant would both be Louisiana citizens, thus ousting jurisdiction under the doctrine of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

193. See *Developments in the Law—Res Judicata*, 64 HARV. L. REV. 818, 862-863 (1952). RESTATEMENT, JUDGMENTS § 96(1) (1942).

wins, it will have been subjected to defending the same matter twice.<sup>194</sup>  
Is not this an injustice to one of the parties?

The classic test of indispensability in the federal courts is found in *Shields v. Barrows*:

“Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.”<sup>195</sup>

Indispensability raises a question of federal procedure, and in this case of federal jurisdiction, which is to be determined in accordance with the federal, not state, characterization.<sup>196</sup>

It would seem to be inconsistent with equity and good conscience to allow the insurer to be twice exposed to liability on its contract of insurance. But the controversy will be left in such a condition when the tortfeasor is not joined, at least in a state where the complainant is free to pursue a second action against the tortfeasor when unsuccessful because of a contract defense in the first action against the insurer. To remedy this the only answer is to require complainant to join the tortfeasor, thus eliminating the requisite diversity of citizenship.<sup>197</sup>

The anti-collusion statute<sup>198</sup> was not raised in the *Elbert* case. In view of the general reluctance in recent years to apply this statute it is doubtful that it would have availed the insurer of anything. But it is interesting to speculate what a court might do were it inclined to respect the statute as one of strict limitation. The provision, it will be recalled, does not stipulate by whom the party has to be “improperly or collusively made or joined to invoke the jurisdiction” of the district court. Could this possibly be interpreted to apply to a state legislature? If it were shown that a substantial reason for passing the direct action statute was so that these actions could be brought in the federal courts, where juries are not reversible on appeal<sup>199</sup>

194. See 66 HARV. L. REV. 1529 (1953).

195. 58 U.S. (17 How.) 129, 139 (1851).

196. *Cowling v. Deep Vein Coal Co.*, 183 F.2d 652 (7th Cir. 1950); *Lawrence v. Sun Oil Co.*, 166 F.2d 466 (5th Cir. 1948). See Note, 65 HARV. L. REV. 1050, 1051-1052 (1952). *Contra*: *Dunham v. Robertson*, 198 F.2d 316 (10th Cir. 1952).

197. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

198. 62 STAT. 935 (1948), 28 U.S.C. § 1359 (1952).

199. In Louisiana, state appellate courts are not bound by determination of facts by the jury. See *Wright v. Paramount-Richards Theatres*, 198 F.2d 303, 305-306 (5th Cir. 1952).

and damage recoveries tend to be higher,<sup>200</sup> then would this be collusion on the federal jurisdiction?

Combined with the constitutional principle that the states are without power to extend the jurisdiction of the federal courts,<sup>201</sup> the anti-collusion statute might carry some convincing power. It would require a strict reading of the statutory provision, but such a strict reading has often been urged with respect to jurisdictional statutes. Mr. Justice Frankfurter has said:

". . . The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the over-whelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business . . . 'The policy of the [diversity] statute . . . calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' "<sup>202</sup>

The *Elbert* case is going to make it difficult for the jurisdictional question to be raised in any other state. Having gone this far, most litigants will be deterred from pressing the issue further, even though the statutes be slightly different. Lower federal courts are not likely to be impressed with subtle distinctions. The one possible distinction most likely to succeed seems to be one based on the optional right of action which the Supreme Court found in the Louisiana statute. If, in Louisiana or some future direct action state, it can be shown that there is available to the complainant something more than an optional right, that she does have a possibility of a second chance against the other party, then she may be able to press a more forceful argument that the matter in controversy is between complainant and tortfeasor, or that the tortfeasor is an indispensable party.

In the meantime, new states may adopt the Louisiana formula. New states are bound to have even more flooded federal courts. And

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200. See Judge Rives dissenting in *Elbert v. Lumberman's Mut. Cas. Co.*, 202 F.2d 744 (5th Cir. 1953); *Kaufmann Estate*, 87 Pa. D. & C. 401, 404 (O.C., Phila. 1954).

201. *Cf. Terral v. Burke Construction Co.*, 257 U.S. 529 (1922).

202. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, 77 (1941), *rehearing denied*, 314 U.S. 714 (1941).

state court determinations of intrastate controversies based on state law will become fewer and fewer.

*Corporations, Unincorporated Associations,  
and Class Actions*

Though not directly within the scope of this discussion, there are three types of representative actions which seem worthy of mention in passing. The first of these is the suit in the corporate name. Chief Justice Marshall felt that a corporation was not a citizen within the meaning of the Constitution.<sup>203</sup> His Court held that a suit in the corporate name was, for jurisdictional purposes, a suit by or against all the stockholders. Later, however, the Court deemed a corporation a citizen, though an artificial person, of the state of its incorporation, thus reversing its original position.<sup>204</sup> This position was later rephrased so that there arose a conclusive legal presumption that the stockholders of a corporation were all citizens of the state of incorporation.<sup>205</sup> This presumption has prevailed to the present.<sup>206</sup>

The second type is the suit by or against an unincorporated association, such as a partnership, board of trustees or labor union. The fiction of personal citizenship has never been extended to such an entity. The citizenship of all the individual members is controlling, not just that of the officers or managers.<sup>207</sup> This is an area where capacity is irrelevant; even if the association has, under the applicable law, the capacity to sue or be sued as an entity, it still has no jurisdictional status as an entity.<sup>208</sup> Once again, the underlying philosophy

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203. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

204. *Louisville, C. & C. R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844).

205. *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 329 (1854).

206. See McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225 (1943), and Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202 (1946).

207. *E.g.*, *Chapman v. Barney*, 129 U.S. 677 (1889). Union officials suing to compel recognition of union as bargaining agent had no interest in the subject matter. Motion to drop such parties sustained, *Railway Employee's Dep't of AFL v. Virginian Ry.*, 39 F. Supp. 354 (E.D. Va. 1941); *Oil Cooperative suing for injuries to member companies not the "real party in interest."* *Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942); *Service station association not a proper party to sue for damages to its members despite a charter provision that it act for their benefit.* *Alabama Independent Serv. Station Ass'n v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N.D. Ala. 1939); *Union not a proper party to enforce an individual employment contract based on agreement with union.* *Joint Council Dining Car Employees Local 370 v. New York Cent. R.R.*, 7 F.R.D. 376 (N.D. Ill. 1946); where state gives parents equal control over minor children, both are proper parties in suit on behalf of minor, *Constance v. Gosnell*, 62 F. Supp. 253 (S.C. 1945).

208. *E.g.*, *Philadelphia Local 192 of American Federation of Teachers v. American Federation of Teachers*, 44 F. Supp. 345 (E.D. Pa. 1942).

is that it is the individual members who are the real parties in interest.<sup>209</sup>

The third type is the class action. Here the courts have carved an exception out of the rule stated in the preceding paragraph. For reasons of expediency the courts have looked only to the citizenship of the parties of record<sup>210</sup> and not to the citizenship of other members of the class.<sup>211</sup> It does not matter, as it does with respect to the aggregation of the amounts of claims for jurisdictional purposes, whether the suit is, as Professor Moore divides them, a true, hybrid or spurious class action.<sup>212</sup> The question most frequently arises in the shareholder's derivative suit. Even though the corporation in such a suit must be made a defendant<sup>213</sup> and recovery will also inure to the corporation,<sup>214</sup> jurisdiction will not be defeated.<sup>215</sup> It should be noted that Rule 23(b)(2) requires that the stockholder's complaint allege "that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction."<sup>216</sup>

#### IV

#### Observations and Suggestions

Diversity jurisdiction can reasonably be said to be the result of the local prejudice against out-of-state litigants which the framers of the Constitution had experienced or anticipated and the desire to encourage the commercial growth of the nation by allowing nationwide business interests to litigate their controversies in a country-wide, uniform legal framework which would allow, not only for a more efficient dispensing of justice, but also a unity of treatment and procedure upon which they could rely.

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209. *Thomas v. Board of Trustees*, 195 U.S. 207 (1904); *Levering & Garrigues Co. v. Morrin*, 61 F.2d 115 (2d Cir. 1932), *cert. granted* limited to all questions except diversity, 287 U.S. 590 (1932). See 3 MOORE, FEDERAL PRACTICE 1407-16 (2d ed. 1948).

210. *Ayers v. Wiswall*, 112 U.S. 187 (1884); *Montgomery Ward & Co. v. Langer*, 168 F.2d (8th Cir. 1948). See 3 MOORE, FEDERAL PRACTICE 3485-86 (2d ed. 1948).

211. *Irwin v. Missouri Valley Bridge & Iron Co.*, 19 F.2d 300 (7th Cir.), *cert. denied*, 275 U.S. 540, second petition *denied* 275 U.S. 572 (1927).

212. 3 MOORE, FEDERAL PRACTICE 3486 (2d ed. 1948).

213. *Koster v. American Lumbermen's Mut. Cas. Co.*, 330 U.S. 518 (1947).

214. *Davenport v. Dows*, 85 U.S. 626 (1873); *Greenberg v. Giannini*, 140 F.2d 550 (2d Cir. 1944).

215. See 3 MOORE, FEDERAL PRACTICE 3530-34 (2d ed. 1948).

216. FED. R. CIV. P. 23(b)(2). See 3 MOORE, FEDERAL PRACTICE 3530 (2d ed. 1948).

There is now a great overcrowding of the federal courts<sup>217</sup> and a large percentage of this burden is due to the abuse of diversity jurisdiction, where the federal court is merely acting as an alter ego to the state court.<sup>218</sup> It is an aberration of the federal system to allow these plaintiffs to come into the federal courts with cases of circumscribed state interest. As a result litigants are forced to wait unreasonable lengths of time to have their cases adjudicated, frequently causing severe injustices.<sup>219</sup> The present situation is a blot on the bar, bench and federal system.

Litigants prefer the federal courts because the rules of evidence are more liberal, the verdicts obtained in a federal court are frequently larger than those obtained in comparable situations in a state court, the bench of the federal court is less susceptible to local influences and there is less opportunity for local prejudice. The attorney for the plain-

217. The statistics compiled in the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1954) show the great increase that has occurred in the utilization of the federal judicial system:

Figures based on number of civil cases commenced.

Basis of Jurisdiction	1950	1951	1952	1953	1954
Total Cases	54,622	51,600	58,428	64,001	59,461
U.S. Cases	22,429	19,424	22,880	23,881	19,949
	} Total				
Private Cases	32,193	32,176	35,548	40,120	39,512
Federal Question	6,775	6,474	7,663	8,892	7,547
Diversity	13,124	13,490	15,135	17,383	18,615
	} Private				
Admiralty	2,757	2,550	2,764	3,223	2,947
General Local Jurisd.	9,537	9,662	9,986	10,532	10,403

Cases Filed, Terminated, and Pending 1941-54.

	No. of Judges at End of Yr.	Commenced	Civil Cases Terminated	Pending
1941	197	38,477	38,561	29,394
1954	251	59,461	57,903	68,431
% increase	27.4	54.5	50.2	132.8

For earlier statistics, see Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 16-17 (1948); Shafroth, *Federal Judicial Statistics*, 13 LAW & CONTEMP. PROB. 200 (1948); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 234-236 (1948); Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A.J. 499 (1933); AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, Pt. II, 47, 99-100, 102, 105 (1934).

218. In New York plaintiffs often experience delays of three to four years before having their cases adjudicated. Mr. Justice Frankfurter commented on the situation that "the vice is the availability of diversity jurisdiction. What is true of New York is true, in varying degrees, of every big center." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 58 (1954).

219. "The serious fact is that in 1955, although there were occasional gains in the calendars of the district courts, on the whole the congestion and delay in civil cases which has been noticeable in recent years increased. The number of districts in which this trend was manifest was greater than in the year before. The ratio of civil cases pending at the end of the year to the number terminated during the year, which in 1941 was 76 percent, was at the end of 1955 117 percent. This means that whereas in 1941 the district courts at their current rate of disposition could have disposed of the civil cases pending, aside from new cases, in approximately 9 months, at the end of 1955 they would have needed for that purpose approximately 14 months." ANNUAL



tiff further may consider the fact that federal judges are appointed for life and therefore more likely to be free from local political controversies. Federal judges have more liberal power to comment upon the state of the evidence and have a greater freedom in directing the verdict. Finally, federal rules of procedure are less confining than those of the state courts and there is a lesser degree of technical forms of pleadings and motions.

Costs are much greater in the federal courts for several reasons. The Federal Rules of Civil Procedure allow for a fuller presentation of a litigant's case, thus extending the length and scope of a trial. Usually there is a greater distance for the litigant, his attorney and witnesses to travel to the federal court than to the state courts. If the case is appealed the distances are even greater to travel to the seat of the federal court of appeals. Here the advantage often goes to the corporation, which, with limitless resources, money and time, can make federal litigation unreasonably expensive and time-consuming. But this privilege is a two-edged sword: it works in favor of the corporation by increasing the costs to the individual litigant, but the corporation is subject to greater damage verdicts in tort cases as a result of trial in a federal court.

There is much that can be done to alleviate the abuses of federal diversity jurisdiction. Diversity jurisdiction is not a constitutionally created right, but rather it is a congressional response to the powers given by the Constitution to create the necessary federal court apparatus. The Constitution does not require that there be diversity jurisdiction. It merely provides that "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States. . . ." 220

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REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 5 (1955).

"In 1955 the district courts terminated 58,974 civil cases, which were more than 1,000 above the number terminated in the previous year, 57,903. Nevertheless the number terminated was 401 less than the number begun, 59,375, so that the backlog of civil cases pending went up from 68,431 to 68,832. Although the increase of 401 was less than 1 percent, the hope for a decrease was not fulfilled.

"The median time for disposition of the normal civil cases terminated by trial in the 86 districts having solely federal jurisdiction, increased from 13.5 months in 1954 to 14.6 months in 1955, 16.7 months for cases tried by the court without a jury, and 12.6 months for cases tried with a jury. This time has risen more than half from 1947 when it was only 9 months. The condition is one of grave concern since the time within which a litigant who has a law suit for a federal court can expect to have it disposed of, is for him very important. In 1955, 40 districts showed increases in this time and only 20 decreases. Also while last year there were only 24 districts in which the median time exceeded the national median of 13.5 months, this year there were 25 districts in which the median time exceeded the higher national median of 14.6 months." ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 7, 8 (1955).

220. U.S. CONST., art. III, sec. 2.

It has been strongly advocated that diversity jurisdiction be abolished.<sup>221</sup> A representative statement on this thesis holds:

"What is needed is a total reconsideration of the jurisdiction, guided by the principle that federal judicial energy should be preserved for vindication of those interests which, because the Congress has considered them of national importance, have become the subject of the federal substantive law. Within that sphere and that alone, federal courts can function as creative agents, the authorized interpreters of Constitution, treaty, and statute, the acknowledged sources of that subordinate and interstitial legislation which must come in any system from the courts.

"In many ways the worst part of diversity jurisdiction is that it debases the judicial process, reducing federal judges to what Judge Frank has called 'ventriloquist's dummy to the courts of some particular state'—because they lack the requisite authority to speak themselves. *Erie v. Tompkins* was a necessary corrective of an act of usurpation but the federal system will be at its best when federal courts concern themselves primarily with federal law and there is smallest room within the range of their adjudication for the *Erie* doctrine to apply."<sup>222</sup>

Twice bills have been reported favorably out of committee in the Senate to abolish diversity jurisdiction.<sup>223</sup> The committee headed by Senator Norris stated:

"No sound reason can be given why Federal district courts should have jurisdiction based solely upon a diversity of citizenship. In fact, under existing law, . . . Federal courts do not have jurisdiction on account of diversity of citizenship unless the amount involved is \$3,000., or more. There is no reason, if the Federal court should have jurisdiction in such cases, where \$3,000. is involved, why it should not have a similar jurisdiction if the case involved only \$2,500.; and if the Federal court should be deprived of jurisdiction where the amount in dispute is \$2,900., there is no logical reason why such jurisdiction should be given if the amount is increased to \$3,000."<sup>224</sup>

221. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *LAW & CONTEMP. PROB.* 216, 235 (1948); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *CORNELL L.Q.* 499, 522 (1928); 18 *GEO. WASH. L. REV.* 254 (1950). Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROB.* 3. See Senator Norris's report, S. REP. No. 691, 71st Cong., 2d Sess. (1930). See also Mr. Justice Frankfurter's dissent in *Burford v. Sun Oil Co.* 319 U.S. 315 (1942).

222. *Lumbermen's Mut. Cas. Co. v. Elbert* 348 U.S. 48, 58 (1954). Mr. Justice Frankfurter further stated at pages 53-54 "But our holding results in such a glaring perversion of the purpose to which the original grant of diversity jurisdiction was directed that it ought not to go without comment, as further proof of the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."

223. S. REP. No. 691, 71st Cong., 2d Sess. (1930); S. REP. No. 530, 72d Cong., 1st Sess. (1932).

224. S. REP. No. 691, 71st Cong., 2d Sess. (1930).

The defenders of diversity jurisdiction hold that there was an historic basis for it and that the reasons supporting its establishment are equally apropos today.<sup>225</sup>

It has been stated:

"To my way of thinking there has been a great deal of loose, unreliable talk about the undesirability of diversity jurisdiction. Certain people have made the matter a party line. . . . From my study of diversity cases I would say that not only has diversity jurisdiction by and large been good, it has served as a stimulus, and a needed one, to state law development. . . . There may be some limitations we should place on diversity jurisdiction but if we are to develop as a nation, it would seem to me that far from destroying diversity jurisdiction we should broaden and extend it. National businesses need it. . . ." <sup>226</sup>

There now exists a basic homogeneity in our legal fabric. National business interests little fear sporadic outbreaks of state court legal lapses detrimental to their interests. Prejudice may well exist in certain local situations and when it appears its effect can be nullified. State appellate procedure now seems capable of coping with this problem and where the state machinery fails there exists federal review on the basis of due process.<sup>227</sup>

The diversity jurisdiction in many ways seems antithetical to many tenets of our democratic society. It is a jurisdiction which seems to give greater importance to property rights than to human rights. If a Pennsylvanian negligently runs a car over a New Jersey citizen in New Jersey he may be extradited if apprehended elsewhere and brought to New Jersey to be tried for manslaughter by the courts of New Jersey. Yet the same Pennsylvanian is assured of a trial in the federal courts if he so desires it in a wrongful death action brought by the survivors and representatives in New Jersey. So too, the federal courts are open to an out-of-state debtor but not an out-of-state criminal. This is indeed an anomaly.

In 1952 the House Judiciary Committee favorably reported bills to raise the jurisdictional amount to \$10,000,<sup>228</sup> but the plan failed.

225. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1932). See note 226 *infra*.

226. Keffe, *Twenty-Nine Distinct Damnations of the Federal Practice—and a National Ministry of Justice*, 7 VAND. L. REV. 636, 655-656 (1954). See also Morse, *Judicial Self Denial and Judicial Activism—the Personality of the Original Jurisdiction of the Federal District Courts*, 3 CLEV.-MAR. L. REV. 101, 142-145 (1954); Newlin, *Proposed Limitations Upon Our Federal Courts*, 15 A.B.A.J. 401, 403 (1929).

227. U.S. CONST. amend. XIV.

228. H.REP. No. 1506, 82d Cong., 2d Sess. (1952). See also H.R. No. 6435, 81st Cong., 1st Sess. (1949). Note also that a bill was introduced in the House of Representatives, H.R. 7203, 84th Cong., 1st Sess., on July 7, 1955, to raise the jurisdictional amount of 28 U.S.C. §§ 1331 and 1332, but the bill was pigeonholed.

The solution of raising the requisite dollar value for federal court jurisdiction seems a controversial one. The initial grant in 1789 was restricted to cases in which the matter in dispute involved a substantial monetary amount in order to prevent defendants from going long distances to defend small claims.<sup>229</sup> But this evil seems well controlled by the \$3,000. restriction. An increase in the jurisdictional amount only arbitrarily decreases the number of cases handled without a sound consideration of the substantive elements of the problem. If a reason for diversity jurisdiction is based on the fact that a federal forum is necessary to adjudicate controversies which cross state boundaries this problem is not solved by raising the jurisdictional amount. Furthermore, such a solution will tend to inspire allegations of greater damage. If there is a sound current need for diversity jurisdiction it seems unfair to raise arbitrarily the requisite dollar amount. If there is no present need for diversity jurisdiction the problem should be faced forthrightly and not dealt with in this manner to placate those hostile to the principle.

It has been suggested that corporations be deemed citizens of the states where they are doing business for the purposes of federal diversity jurisdiction.<sup>230</sup> The adoption of this recommendation would eliminate a large number of diversity cases, since corporations would no longer be considered solely citizens of their place of incorporation.<sup>231</sup>

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229. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 39 (1953).

230. Attorney General William D. Mitchell's Bill, S. 937, 72d Cong., 1st Sess. (1931), and H.R. 10594, 72d Cong., 1st Sess. (1932). The bill was recommended to Congress by President Hoover; see Sen. Doc. No. 65, 72d Cong., 1st Sess. (1932). The Bill stated ". . . That where a corporation organized under the laws of one or more States or under the laws of one or more foreign countries, carries on business in a State other than the one wherein it has been organized, it shall for purposes of jurisdiction in a district court of the United States be treated as a citizen of such State wherein it carries on business as respects all suits brought within that State between itself and residents thereof and arising out of the business carried on in such State." For a full discussion of this area see, McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225, at 1231-52 (1943). For a list of source material dealing with the issues of the period see, HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 894, n 1. (1953). Congress has recognized the abuse of corporations doing business in several states trying to evade state courts. In 1934 and 1937 Congress enacted legislation forbidding the district courts from having jurisdiction by virtue of diversity of citizenship in taxation, rate-making, and certain other types of cases where it can be shown that the state courts are prepared to act. See 48 STAT. 775; 50 STAT. 738. The foregoing is not only important as an indication of the congressional awareness of corporate abuse of diversity jurisdiction, but is equally important to illustrate the power of Congress to act in this area and as an historical precedent of congressional action to correct diversity jurisdiction abuses. See *Lavin v. Lavin* 182 F.2d 870 (2d Cir. 1950), *re: Judge Learned Hand's* comments on this problem, supporting the theory that corporations be made citizens of the state where they are doing business; Note, 39 CALIF. L. REV. 138 (1951).

231. "The corporate anomaly is, of course, judicially created and may yet yield to an attack in the Supreme Court. Statistical analysis suggests that correction of this ancient and "malignant" error would reduce by 70 per cent the recent volume of diversity cases in the federal courts." Wechsler, *Federal Jurisdiction And The Revision Of The Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 237 (1948).

This idea has merit and should be considered and presented to Congress.

Certain factions feel that the overcrowding in the federal courts could be corrected by the appointment of more judges and the expansion of the present court facilities.<sup>232</sup> This may help, but the suggestion does not face up to the symptoms creating the problem. These suggestions would not increase the prestige nor the ability of the federal courts to broaden their operation. Rather, it would only water-down the federal courts' effectiveness by expanding too quickly, before trying other approaches to the overcrowding.<sup>233</sup> Mr. Justice Frankfurter believes that the appointment of new federal judges would actually weaken the federal judiciary. He stated, "A powerful judiciary implies a relatively small number of judges."<sup>234</sup>

A strong argument can be marshalled for the position that the federal courts should not accept diversity jurisdiction based on appointive representatives, such as guardians, where the federal court feels that the appointment was made for the main purpose of creating federal diversity jurisdiction.

Allowing diversity jurisdiction in cases where an out-of-state representative is appointed to create federal jurisdiction is a perversion of the diversity concept. Neither social prejudice nor any other reason presented as an historic basis of diversity is present in this situation. Rather, adroit lawyers are trying to get full measure for their clients. These lawyers are to be congratulated for their persistence in their client's cause. State court appointments made with a view toward creating diversity are to be accepted for it is in the best interest of the litigant to have his case tried in a federal court and this is the state court's primary consideration. But, the foregoing situations do not warrant federal court consideration and should be removed from the federal dockets. They are not within the purview of the reasons for the establishment of diversity jurisdiction and only serve to clutter the federal courts with purely state controversies.

The issue of abolishing diversity jurisdiction per se and the question of denying access to federal courts to representatives appointed to create diversity jurisdiction, are separate and distinct issues. One can reasonably assume a posture favorable to the historic view of diversity

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232. H.R. REP. No. 1506, 82d Cong., 2d sess. 1 (1952).

233. The House Committee on the Judiciary recognized that the appointment of additional judges had helped to relieve some of the overcrowding but stated that the continued addition of judges was no solution to the basic problem. See H.R. REP. No. 1506, 82d Cong., 2 Sess. 1 (1952). See also Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

234. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928).

jurisdiction. It is very difficult, if not impossible, to find sound jurisprudential reasons supporting jurisdiction where it is created by the appointment of an out-of-state representative solely to take advantage of the more liberal atmosphere of the federal courts. This will not do. There is no panacea for the correction of the foregoing problem. It could be remedied by a congressional statute leaving broad discretion in the district court to accept or reject cases of the abusive type.

Congress could also rewrite the collusion statute in such a manner as to preclude improper appointments. Section 1359 of the Judicial Code, since its passage in 1948, has proved ineffective to cope with the ingenuity of the bar. The statute's purpose would be much better served if it were to read:

The District Court shall not have jurisdiction of a civil action in which any party, by assignment, appointment or otherwise, has been made a party for the purpose of invoking the jurisdiction of such court.

This language would take care of the case where the attorney arranges to have an out-of-state secretary in his office appointed guardian, executrix or administratrix in order to gain entry into the federal court.

The omission of the words "improperly or collusively" which appear in the suggested statute would allow more flexibility to the courts in dismissing such cases. Collusion is a strong term which the courts are frequently loathe to apply, and it more often connotes an understanding between the opposing sides to a litigation, rather than an arrangement by the persons interested in only one side of a case. The proposed language would allow dismissal wherever the court felt that an appointment was made in violation of such a rule; the court need not attack the appointment itself but only its effect on federal jurisdiction; and the court need only find that one of the reasons, not the sole or major reason, for the assignment or appointment was to invoke federal jurisdiction.

Until Congress takes some action along the suggested lines, however, no valid reason can be shown why the courts themselves should not take a more stringent attitude toward the schemes of litigants designed for entry into the federal courts. Though section 1359 of the Judicial Code may not be worded to avoid ambiguity, it does offer a solution. Many courts have stumbled over the consideration of motive. This has been unnecessary, as has been pointed out above, since the court's investigation of motive in the case of appointment of a representative is no more than a search into the purpose of the

parties and a determination of whether the appointment may be successful in creating jurisdiction. In no way does such investigation attack collaterally the appointment itself, but only one effect of the choice.

It is indeed surprising that courts have refused to take a strict look at jurisdictional qualifications. It is undisputed that the federal courts are courts of limited and enumerated jurisdiction,<sup>235</sup> thus requiring a presumption against the existence of jurisdiction which may be rebutted only by clear evidence that there has been a congressional grant which will include the case at bar.<sup>236</sup> Many courts seem to have forgotten this basic principle.

The federal courts could expand and adopt the concept of *forum non conveniens*,<sup>237</sup> as they have in *Gulf Oil Corp. v. Gilbert*,<sup>238</sup> when solely local controversies arise in the federal courts due to the appointment of a foreign representative. It is not convenient for the federal courts to decide local issues of a circumscribed state controversy where diversity is based upon a fiction. This is wise especially in view of the overcrowded situation of the federal courts.

The federal courts have dismissed an action pursuant to the doctrine of *forum non conveniens* where its jurisdiction was based on the diversity of the parties and the action was one of circumscribed local state interest.<sup>239</sup> In the *Gulf Oil* case the court had jurisdiction of the subject matter based on diversity of the parties. The case was dismissed by the District Court for the Southern District of New York

235. *E.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). See Wheaton, *Federal Rules of Civil Procedure Interpreted*, 25 CORNELL L.Q. 28, 58 (1939); Note, 46 HARV. L. REV. 521, 522 (1933); Comment, 39 YALE L.J. 388 (1930); Comment, 37 YALE L.Q. 983, 985-986 (1928).

236. *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1923); *Seligman's Inc. v. United States*, 30 F. Supp. 895 (W.D. La. 1939).

237. 28 U.S.C.A. § 1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." For a general discussion of *forum non conveniens* see: Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41 (1930); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935); see Note, *Power to Decline the Exercise of Federal Jurisdiction*, 37 MINN. L. REV. 46 (1952).

238. 330 U.S. 501 (1947). See cases cited therein.

239. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Broderick v. Rosner*, 294 U.S. 629 (1934); *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929); *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923); *Anglo-American Provision Co. v. Davis Provision Co. No. 1*, 191 U.S. 373 (1903); *Simons v. Simons*, 187 F.2d 364 (D.C. Cir. 1951); *Melvin v. Melvin*, 129 F.2d 39 (D.C. Cir. 1942); *Curley v. Curley*, 120 F.2d 230 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 614 (1941); *Smith v. Sperlberg*, 117 F. Supp. 781 (S.D. Cal. 1953) and cases cited therein. See also, *Koster v. Lumberman's Mut. Cas. Co.*, 330 U.S. 518 (1947).

due to the fact that the plaintiff had the choice of federal and state forums in Virginia, the situs of the accident. The Supreme Court sustained the District Court and considered the public interest in the suit to prevent the accumulation of litigation in congested federal court centers, the unnecessary burdening of the community where the district court sat with jury duty on people who had no relation to the litigation, and the local state interests which would prefer localized issues to be decided in the interested state courts. Further, the Supreme Court stated that there was no compelling need to complicate the law suit with difficult problems of the conflicts of laws. The foregoing variation of the doctrine of *forum non conveniens* should be applied by the district court in situations where diversity of jurisdiction has been abused.<sup>240</sup> The approach is novel, but warranted.

The Supreme Court may have an opportunity to correct the abusive representative situation since the 3rd Circuit *Fallat* case<sup>241</sup> and 8th Circuit *Martineau* case<sup>242</sup> are basically at variance.

The *Martineau* case bases diversity upon the real party in interest. The *Fallat* case states capacity to sue is the true test. When called upon to delineate the law the court could hold that capacity to sue is not the basis for diversity, but rather the real party in interest is the one upon whom diversity must be predicated. The Supreme Court in the past has based diversity jurisdiction of a representative on the real party in interest test; considering capacity an element in the determination.<sup>243</sup> This holding would tend to limit diversity to those more intimately interested in the controversy and limit the out-of-state representative, appointed to create diversity, to the citizenship of the real party in interest for jurisdictional purposes. Historically, capacity to sue has been one of the factors indicating who the real party in interest is. Nonetheless, it is suggested that this factor be relegated to use in determining whether the appointive representative is closely enough associated with the suit to preclude any suspicion that he was appointed to create federal diversity jurisdiction.

The Federal Rules of Civil Procedure bear upon this problem. These rules do not affect diversity jurisdiction, which is a congressionally given right by virtue of the Constitution. The rules must

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240. Commenting on this, see Comment, 37 YALE L.J. 983, 985-986 (1928) stating: "The frequent practice of bringing suit in New York, solely for the purpose of obtaining a larger recovery than is usually allowed in the states where the plaintiff resides, is persuasive of the propriety of refusing jurisdiction in such a case."

241. *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955).

242. *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949).

243. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954); *Mexican Central Ry. v. Eckman*, 187 U.S. 429 (1903); *New Orleans v. Gaines's Administrator*, 138 U.S. 595 (1891). See 3 MOORE, FEDERAL PRACTICE §§ 311, 330 (2d ed. 1948).



be limited to the procedural aspects of the suit.<sup>244</sup> It is not our purpose to get entangled in the Gordian knot of delineating procedure or substance.<sup>245</sup> It will suffice to say that it is a reasonable and preferred manner to read Rule 17(a) as relating to the captioning of an action in the federal court, rather than a factor in determining federal jurisdiction.<sup>246</sup> Any substantive connotations of Rule 17(b) must fall in the face of the dire need to limit federal diversity jurisdiction to its original purpose. Consequently, if an out-of-state representative is appointed to create diversity jurisdiction, his appointment fails to do so, even though he has the capacity to sue under the state law where the district court is sitting. If the out-of-state guardian comes before the district court raising a federal question, his capacity is determined by Rule 17(b), but Rule 17(b) has no effect unless federal jurisdiction attaches. It is the thesis of this Article that it should not attach in those aforementioned cases which abuse federal diversity nor should any federal procedural rules aid the aberration. So too, Rule 17(c) should apply once federal jurisdiction attaches and should not aid in creating diversity. It must be emphasized that the Federal Rules of Civil Procedure become effective after federal jurisdiction attaches; there is no room for a bootstrap argument.

### Conclusion

The general concept of federal diversity jurisdiction must be differentiated from the specific aberration of the out-of-state representative appointed to create diversity.

There is little reason, historically, rationally or jurisprudentially, to permit federal jurisdiction in those cases where an out-of-state rep-

244. See *Mississippi Power Company v. Archibald*, 189 Miss. 332, 196 So. 760 (1940), where the court held an administrator was only a nominal party and consequently his citizenship was not material in determining federal diversity jurisdiction. The court made no reference to Rule 17. See also *Bengtson v. Travelers Indemnity Company*, 132 F. Supp. 512 (W.D. La. 1955).

The opponents of the above reasoning state that the decisions decided under the old Conformity Act (28 U.S.C.A. § 728) require that the federal courts, in actions at law, follow as nearly as possible the rules of procedure in the states in which the District Court is sitting. With the adoption of the Federal Rules of Civil Procedure, which discontinued the distinction between legal and equitable actions and set up uniform rules of procedure for all of the federal courts, the Conformity Act was in reality repealed and the reasoning of the various decisions based upon it cancelled. See 45, W. VA. L.Q. 5 (1942). *Contra*, it must be realized that the Federal Rules of Civil Procedure do not enlarge federal diversity jurisdiction since the action is a state action and the governing law is state law, see 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 482, 488 (Rules ed. 1950); 3 MOORE, FEDERAL PRACTICE § 17.02, .03, .04, .09 (2d ed. 1948); *Angel v. Bullington*, 330 U.S. 183 (1947); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Partin v. Michaels Art Bronze*, 202 F.2d 541 (3d Cir. 1953).

245. See *Guaranty Trust Co. v. York*, 326, U.S. 99 (1945).

246. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Angel v. Bullington*, 330 U.S. 183 (1947); *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3d Cir. 1953).

representative has been appointed to create diversity jurisdiction. This tangential deviation should be uprooted and destroyed.

The larger question of the conceptual metamorphosis of federal diversity jurisdiction per se is neither black nor white. The concept must stand or fall on its own merits, and not be eroded piecemeal due to an overcrowded federal court system. There seems little to recommend the upholding of diversity jurisdiction. Whatever valid basis for its formation that existed at its inception has feebled and faded; its historical notoriety carries little present propriety.