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Assignments and Transfers Affecting Federal Diversity Jurisdiction

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ASSIGNMENTS AND TRANSFERS AFFECTING FEDERAL DIVERSITY JURISDICTION

Within the limits of federal jurisdiction prescribed by the Constitution, Congress has the power to define the jurisdiction of the lower federal courts. Occasionally, the legislators have used that power to withhold from those courts part of the jurisdiction permitted by the Constitution.[1] A good example is federal diversity jurisdiction. Article III, section 2, of the Constitution provides that "The Judicial power shall extend . . . to Controversies . . . between Citizens of different States." The district courts, however, have been given the power to hear such cases only in certain circumstances. The limitations have been accomplished by express and implied statutory exceptions[2] to the grant of a general power to hear diversity cases.[3]

1. There are two arguments that any Congressional limitation on the jurisdiction provided in the Constitution is void. The first is that the Constitution automatically vests jurisdiction in the federal courts established by Congress, and Congress may not legislatively restrict that jurisdiction. Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483, 506 (1928) [hereinafter cited as Friendly]. The second argument is that even if the jurisdiction of the lower federal court derives from Congress, not the Constitution, Congress has a duty to confer jurisdiction to the extent provided therein. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328 (1816) (dicta); Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship,* 78 U. PA. L. REV. 179, 180 (1929). Moreover, Congress must establish lower federal courts because the power to create such courts (article III, section 1 and article I, section 8) carries with it the implied condition that such power will be exercised. Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?,* 18 A.B.A.J. 499, 503 (1932).

These arguments have been unsuccessful and the United States Supreme Court has consistently held that Congress has the power to limit the jurisdiction of the lower federal courts. The clearest statement of the rule is Kline v. Burke Constr. Co., 260 U.S. 226 (1922). The Company, a Missouri corporation, brought suit in federal court against citizens of Arkansas. The Court rejected the Company's argument that allowing a concurrent suit concerning the same subject matter in a state court would make the proceeding in federal court futile, thus depriving it of its right, under the Constitution and acts of Congress, to sue in federal court:

> [Congress] may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part.

Id. at 234 (citations omitted). *See also* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); McIntyre v. Wood, 11 U.S. (7 Cranch) 503 (1813); Turner v. Bank of North America, 4 U.S. (4 Dall.) 6 (1799). *See generally* D. CURRIE, FEDERAL COURTS 87-105 (1968).

2. Statutory limitations include 28 U.S.C. §§ 1332(a) ($10,000 amount in contro-

Despite the United States Supreme Court's decisions in *Erie Railroad Co. v. Tompkins*[4] and its progeny, there are advantages to being able to sue or defend in federal court.[5] It is therefore important for attorneys to be able to determine accurately whether the district courts may hear a case. Also, precise statutes will aid the courts in quickly progressing from jurisdictional issues to the merits. Thus, the statutory restrictions on the exercise of federal diversity jurisdiction should be clearly defined and specific enough to allow consistent application.[6] With respect to one of these limitations, 28 U.S.C. § 1359,[7] clarity has not been attained.

The problems with section 1359 are caused by its imprecise language: "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." In applying this statute, the following questions must be asked: (1) what facts will show that a party was "improperly or collusively made or joined";[8] (2) what facts indicate that there was a purpose to invoke federal jurisdiction; and (3) will the existence of other "legitimate" purposes bar application of the statutory prohibition? The discovery of definite answers to these questions has been left to the courts. Unfortunately, "[f]ew general principles . . . appear to be carried forward through the cases to govern decision in subsequent cases presenting different factual contexts."[9]

This comment examines the application of section 1359 to assignments and transfers which affect federal diversity jurisdiction.[10]

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versy requirement), 1332 (c) (defining the citizenship of corporations and insurance companies), and 1359 (1970). For a discussion of court imposed limitations see Vestal and Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956).

3. 28 U.S.C. § 1332(a) (1970).

4. 302 U.S. 64 (1938).

5. *See* Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962); McCormick and Hewins, *The Collapse of "General Law" in the Federal Courts*, 33 ILL. L. REV. 126, 144 (1938).

6. Bradbury v. Dennis, 310 F.2d 73, 74 (10th Cir.), *cert. denied*, 372 U.S. 928 (1962). *See also* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 15-18 (1968).

7. 28 U.S.C.§ 1359 (1970).

8. The "improperly or collusively" test is also used to determine the real party in interest required under FED. R. CIV. P. 17(a). *See, e.g.*, Dunham v. Robertson, 198 F.2d 316 (10th Cir. 1952).

9. Ferrera v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

10. Section 1359 is applicable in other situations. The courts are divided as to

Throughout the following discussion, the focus is directed toward the determination of more uniform standards for the interpretation of the statute. The purpose of section 1359, from which general guidelines may be drawn, is examined in part I. Part II includes a survey of cases which have dealt with assignments and transfers to invoke or defeat federal diversity jurisdiction. Certain factors the courts have relied on, and certain rules they have developed, in attempting to answer the questions posed above will be explained, and the decisions will be evaluated in light of the guidelines established in part I.

I. THE PURPOSE OF SECTION 1359

The first inquiry in the interpretation of any statute is to the purpose for which it was enacted. Some courts have found the purpose of section 1359 to be the prevention of frauds upon their jurisdiction.[11] Fraud, however, is as imprecise a term as "improperly or collusively" and is of little help in establishing general guidelines for application of the statute to particular factual situations. A more precise definition of the purpose of section 1359 requires an analysis of the purpose of federal diversity jurisdiction, for, as previously noted, section 1359 is a limitation on the exercise of that jurisdiction.

Following extensive and heated debate, the provision authorizing federal diversity jurisdiction was added to the Constitution.[12] The controversy continued as amendments which would have withheld that jurisdiction from the lower federal courts were introduced and subsequently defeated.[13] It is from the debates regarding the original grant

whether its prohibition applies in the case of an appointment of a non-resident executor or administrator. Comment, *Appointment of Non-resident Administrators to Create Federal Diversity Jurisdiction,* 73 YALE L.J. 873 (1964). It is clear that if the transaction is improper or collusive and the only purpose is to create federal jurisdiction, section 1359 prohibits a district court from taking jurisdiction in the case of an assignment or transfer to satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a) (1970). Woodside v. Beckham, 216 U.S. 117 (1910). Proof of some other legitimate purpose will probably allow the district court to take jurisdiction. Bullard v. City of Cisco, 290 U.S. 179 (1933). *See also* text accompanying notes 70-75, *infra.*

Section 1359 applies to both the original and removal jurisdiction of the district courts based on diversity of citizenship.

11. *See, e.g.,* Williams v. Nottawa, 104 U.S. (14 Otto) 209 (1881). *Williams* dealt with the predecessor of section 1359, Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472, which contained the same prohibition. *See* text accompanying notes 29-30, *infra.*

12. U.S. CONST. art. III, § 2. Some of the original constitutional plans did not include such a provision. Friendly, *supra* note 1, at 484-85.

13. These amendments were of two types. The first, which was actually introduced

and the subsequently proposed amendments that the purpose of federal jurisdiction may be discovered. Alexander Hamilton argued that its purpose was to provide for the enforcement of the privileges and immunities clause.[14] His analysis is probably incorrect, however for "a writ of error to any State Court disregarding that Clause was an adequate remedy."[15]

The generally accepted view is that federal diversity jurisdiction was adopted to provide non-residents an impartial tribunal free from the possibility of local prejudice which might prevail against them in courts in the state of which their adversary was a citizen.[16] Federal courts, with juries drawn from a larger population and judges appointed for life, offer this protection. Even this view has been challenged. One commentator has claimed that such a purpose "has been written into the clause [providing for federal diversity jurisdiction] by judicial interpretation"[17] rather than by an honest examination of the purpose of the founding fathers. This argument is

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prior to the adoption of the Constitution itself, would have restricted federal diversity jurisdiction to the Supreme Court by removing Congress' power to create lower federal courts. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 153 (1971). Similar amendments, which would have limited Congress' power to the creation of admiralty courts, were proposed during the first congress. Friendly, *supra* note 1, at 502; Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 123 (1923) [hereinafter cited as Warren].

The second type would simply have removed the diversity clause from the Constitution. Sponsors of these amendments argued that state courts could deal with diversity cases just as fairly and efficiently as the federal courts, and the expense of creating the lower federal courts could thereby be avoided. Friendly, *supra* note 1, at 502. These amendments were rejected on the grounds that the lower federal courts would have to be established anyway, to handle admiralty cases, and that there was a lack of confidence in state judiciaries.

14. THE FEDERALIST, No. 80, at 590 (J. Hamilton ed. 1909) (A. Hamilton).

15. Warren, *supra* note 13, at 82-83.

16. *Id.* at 83. It is important to note that it is the fear of local prejudice, not the actual existence of prejudice, against which federal diversity jurisdiction protects. *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (Frankfurter, J. concurring); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809). In *Deveaux*, Chief Justice Marshall stated "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 citizens, or between citizens of different states." 9 U.S. (5 Cranch) at 87 (emphasis added). This distinction is important to the continued validity of federal diversity jurisdiction. If actual prejudice was the test, it *might* be argued that that jurisdiction should be abolished because actual prejudice is no longer demonstrable. On the other hand, there is evidence that the fear of local prejudice still exists. *See* 51 VA. L. REV. 178, 179-84 (1965); Summers, *Analysis of the Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937-38 (1962).

17. Friendly, *supra* note 1, at 492.

based on the assumption that, because there was no valid reason for a fear of local prejudice in state courts during the time the Articles of Confederation were in force, there is no reason to suspect that protection against that fear was the purpose of the constitutional provision for that jurisdiction.[18] Rather, it is suggested that the real fear was of the local prejudice of state legislators who appointed state judges and who often had the power to control the ultimate disposition of law suits. However, the existence of other sources of local prejudice and the fact that there may have been only isolated cases in which such prejudice was shown by state courts does not justify rejection of the idea that local prejudice was in fact feared. Many scholars have noted that the authors of the Constitution were impressed by the need for a strong national economy, which could only be achieved if businessmen could move around the country free from the apprehension incident to suing and being sued in the courts of the state of their adversaries.[19] Thus, as Chief Justice Marshall noted in *Bank of the United States v. Deveaux,*[20] federal diversity jurisdiction was provided to protect against the possible fears of non-residents, "[h]owever true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation."

Given this purpose of federal diversity jurisdiction, it might be argued that the federal courts should have the power to hear all cases in which the citizenship of any of the opponents is diverse. However, the decision to invest those courts with diversity jurisdiction was left to Congress,[21] and in the exercise of this discretion the members of the first Congress did not extend the protection of federal jurisdiction so far. In *Strawbridge v. Curtiss*[22] the United States Supreme Court held that those legislators, in providing the statutory basis for federal diversity jurisdiction, intended to allow the lower federal courts to hear only those cases in which the citizenship of each of the plaintiffs is different from that of each of the defendants. According to the Court, the first Congress apparently believed that the common citizenship of any pair of opponents would avoid local prejudice,

18. *Id.* at 493.
19. *See, e.g.,* Moore and Weckstein, *Diversity Jurisdiction: Past, Present and Future,* 43 TEXAS L. REV. 1, 16-17 (1964); Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States,* 19 A.B.A.J. 71, 75 (1933).
20. 9 U.S. (5 Cranch) 61, 87 (1809).
21. *See* note 1, *supra.*
22. 7 U.S. (3 Cranch) 267 (1806).

regardless of the citizenship of other parties to the suit. Although this interpretation does not conform to the generally accepted purpose of the constitutional provision for federal diversity jurisdiction[23] and although Congress possesses the power to provide otherwise,[24] the *Strawbridge* complete diversity rule remains. Thus, until Congress changes this rule, the purpose of the statutory diversity jurisdiction of the district courts is to protect against the fear of local prejudice only when there is complete diversity between plaintiffs and defendants.

The first Congress, in extending diversity jurisdiction to the lower federal courts, also recognized that assignments present special opportunities for abuse of that jurisdiction. Presumably, this was the reason those courts were prohibited, in section 11 of the Judiciary Act of 1789,[25] from exercising jurisdiction in "any suit to recover the contents of any promissory note or other chose of action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents *if no assignment has been made.*" The scope of this provision, however, when considered in light of the purpose of federal diversity jurisdiction as interpreted in *Strawbridge,* was too broad. If the assignor were a citizen of the same state as the assignee's opponent and had retained an interest in the subject matter of the controversy, section 11 would be appropriate. The assignor could be considered a party to the suit by the assignee and, as such, the suit would not be within the *Strawbridge* interpretation of the extent of federal diversity jurisdiction. The statute, however, went farther. It not only prohibited the exercise of jurisdiction in cases in which the assignor retained an interest, but also in cases in which he parted with all his interest. In the latter case, if the assignee were not a citizen of the same state as his opponent, the only adversaries would be citizens of different states. The assignor could not be considered a party and, therefore, protection against the fear of local prejudice might be justified.

Section 11 was repealed in 1948 by the same Act in which section 1359 was adopted.[26] Commentators almost completely ignored the

23. *See,* Currie, *The Federal Courts and the American Law Institute,* 36 U. CHI. L. REV. 1, 18-25 (1968). Even Chief Justice Marshall regretted this decision. C. WRIGHT, LAW OF FEDERAL COURTS § 24 (1970).

24. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).

25. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. Foreign bills of exchange were excepted.

26. Act of June 25, 1948, ch. 646, 62 Stat. 935.

adoption of section 1359,[27] perhaps because a similar statute had been in force since 1875.[28] The 1875 Act provided, in addition to the prohibition now in section 1359, that the lower federal courts could not exercise jurisdiction in cases which did "not really and substantially involve a dispute or controversy properly within" their jurisdiction. It was probably adopted to solve a problem created when, also in the 1875 Act,[29] section 11 was amended to exempt from its application promissory notes negotiable by the law merchant. This exemption would have allowed a great number of suits based on assignments to be tried in federal court merely because the assignee plaintiff or defendant was a citizen of a state other than that of his opponent. The assignor could have retained an interest without barring the exercise of federal diversity jurisdiction even though he should have been considered a party. If he were a citizen of the same state as the assignee's opponent, the suit was not one for which the protection federal diversity jurisdiction affords was intended. Therefore, the jurisdictional limitations of the 1875 Act and those of section 11 attacked the same problem: abuses of federal diversity jurisdiction. Yet while the latter was absolute in its terms, having no regard to the question of whether protection of the non-resident assignee was necessary, the 1875 Act was more flexible. It forced the courts to focus on the nature of the controversy to determine whether the transaction by which the assignee acquired title made the suit one to which federal diversity jurisdiction was not intended to apply, rather than merely on the citizenship of the assignor as required by

27. A short discussion, with no indication of the purpose of section 1359, appears in J. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 160 (1949).

28. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472 provided:

> That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit 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, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just. . . .

This provision was also repealed when section 1359 was adopted. Act of June 25, 1948, ch. 646, 62 Stat. 935.

29. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 472. This provision was changed to exempt promissory notes made by corporations. Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552.

section 11. Transfers came within the scope of the statutory prohibition for the first time.[30] A curious limitation was added. Under the 1875 Act, even if a transfer or assignment were determined to be improper or collusive, jurisdiction was not barred unless the purpose of the assignment was to invoke federal jurisdiction. This limitation is curious because improper or collusive are conclusionary terms, seemingly broad enough to encompass a purpose to manufacture federal jurisdiction. This limitation will be considered in part II.

The 1875 Act and section 1359 are so similar that the purpose of the former should be attributed to the latter. Thus, section 1359 requires the federal courts to closely scrutinize assignments and transfers to determine whether the subsequent controversy is one to which the protection of federal diversity jurisdiction should apply. The identification of cases in which the statutory prohibition applies is a problem with which the federal courts have struggled for nearly one hundred years.

II. THE FEDERAL COURTS AND SECTION 1359

"[J]urisdiction represents the distribution of judicial power in our federal system as blueprinted by the Constitution and declared by Congress; and the federal courts ought therefore to be mindful to stay within defined limits."[31] The federal courts have always held that the limit of federal jurisdiction prescribed by section 1359 prohibits them from hearing cases to which their diversity jurisdiction was not intended to apply.[32] Before examining the facts the courts have looked to in attempting to remain within the jurisdictional boundary pre-

30. Improper and collusive transfers had been prohibited at common law for some time. *See, e.g.*, Barney v. Baltimore, 73 U.S. (6 Wall.) 280 (1867); Jones v. League, 59 U.S. (18 How.) 76 (1855); Smith v. Kernochen, 48 U.S. (7 How.) 198 (1849); McDonald v. Smalley, 26 U.S. (1 Pet.) 620 (1828); Maxfield's Lessee v. Levy, 4 U.S. (4 Dall.) 330 (1797); Maxwell's Lessee v. Levy, 2 U.S. (2 Dall.) 380 (1797).

For example, in *Maxwell's Lessee v. Levy*, a citizen of Pennsylvania conveyed his interest in land to the lessor plaintiff, a citizen of Maryland, for the purpose of creating federal jurisdiction. The Court held the transfer colorable and collusive and an insufficient basis for federal jurisdiction because no consideration passed from the plaintiff to the transferor for the conveyance. The opposite result was reached in *Smith* because the assignment was for value.

31. J. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 160 (1949).

32. *See, e.g.*, Kramer v. Caribbean Mills, 394 U.S. 823 (1969); Ferrera v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

scribed by section 1359, the procedures they have adopted in making such inquiries should be noted.

First, while section 1359 may always be advanced by a party to the suit as a bar to the exercise of federal diversity jurisdiction, the court must acknowledge the defect on its own motion whenever it appears that the statutory prohibition may apply.[33] Second, if jurisdiction is challenged by either party or by the court, the burden is on the party asserting jurisdiction to prove the facts necessary to sustain it.[34] Finally, whenever an assignment or transfer under which a party claims title to the subject matter in controversy is challenged as improper or collusive within the meaning of section 1359, the court must examine all the conditions and circumstances surrounding the transaction in deciding whether to exercise jurisdiction.[35]

Although these procedures are well-suited to the identification of cases in which the courts should refuse to exercise jurisdiction, the question of what particular factual situations require a refusal remains. This question will be considered first with regard to assignments and transfers which create federal diversity jurisdiction. The use of assignments and transfers to defeat that jurisdiction will be examined separately, for, by its terms, section 1359 does not apply to such schemes. The third section of this part will include an appraisal of the problems created by section 1359 and the need for limitations on the exercise of federal diversity jurisdiction.

33. Williams v. Nottawa, 104 U.S. 209 (1881). *Williams* concerned the predecessor of section 1359, Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472. The 1875 Act was quite specific in imposing this duty on the court. *See* note 28, *supra*. Although section 1359 is not as specific, it has been held that the federal courts are similarly obligated to raise the jurisdictional issue if it appears that the statutory prohibition may apply and the parties have not raised the issue. Bradbury v. Dennis, 310 F.2d 73 (10th Cir.), *cert. denied*, 372 U.S. 928 (1962).

34. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936). The reason for placing the burden of proof on the party asserting jurisdiction is that, because the federal courts are courts of limited jurisdiction, there is a presumption against jurisdiction throughout the case. Grace v. American Cent. Ins. Co., 109 U.S. 278 (1883); Town of Lantana, Florida v. Hopper, 102 F.2d 118 (5th Cir. 1939). Despite the decision in *McNutt*, one district court has recently held that the burden of proving collusion under section 1359 is on the party alleging it. Duffy v. Currier, 291 F. Supp. 810 (D. Minn. 1968).

35. Dickson v. Tattnal County Hospital Authority, 316 F. Supp. 531 (S.D. Ga. 1970). This includes a consideration of the pleadings, affidavits, depositions and other documentary evidence. Henley v. Miller Golf Equip. Corp., 300 F. Supp. 872 (D. P. R. 1969).

A. Assignments and Transfers Creating Federal Diversity Jurisdiction

An example of the most common situation in which section 1359 might be advanced as a bar to the exercise of jurisdiction will be helpful before discussing the question of whether the statutory prohibition applies. Two citizens of Washington make a contract and one fails to perform. The other party then assigns his rights under the contract to a citizen of another state who sues the breaching party in federal court. In applying section 1359 to these kinds of cases, the courts have recognized that there are two tests in the statutory language.[36] The first is whether the transaction by which the assignee or transferee acquires title to the subject matter in controversy is improper or collusive, and the second is whether the purpose of that transaction was to invoke federal jurisdiction. The two tests are separate, yet both must be answered affirmatively to apply the statutory prohibition.

The well-established rule with regard to the first test is that a transfer or assignment is not improper or collusive if the assignor or transferor parts with all of his interest in the subject matter in controversy.[37] *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*[38] is often cited as authority for this proposition even though the rule actually predates the 1875 Act in which the improper or collusive test was first adopted.[39] The factual situation *Black and White* illustrates the extreme situation in which the complete transaction rule was applied, for the transfer was clearly made for the purpose of invoking federal jurisdiction. Shortly before the suit, plaintiff Black and White was incorporated in Tennessee by shareholders of a Kentucky corporation of the same name. All the assets of the Kentucky corporation were transferred to the plaintiff and the former was dissolved. The plaintiff continued the same business in Kentucky and then brought suit in federal district court against two Kentucky corporations. The Court held the exercise of federal jurisdiction was correct; the transfer was not improper or collusive

36. Many of the cases discussed in this section were decided under the 1875 Act, which included the same test now found in section 1359. *See* text accompanying notes 25-26, *supra*. Since the tests are identical, only section 1359 will be referred to.
37. *See generally*, 3A J. MOORE, FEDERAL PRACTICE ¶ 17.05, at 157 (2d ed. 1968).
38. 276 U.S. 518 (1928).
39. *See* note 30, *supra*.

because it was a *complete transaction in which the transferor retained no interest.*

The issue in the first test, then, is: when has the assignor or transferor retained an interest in the subject matter of the controversy? The courts have identified several factual situations as indicative that the transferor or assignor has retained an interest in the subject matter and outcome of the litigation. The most common is an assignment for collection only. *Kramer v. Caribbean Mills, Inc.*[40] is a recent example. Respondent Caribbean Mills, a Haitian corporation, failed to perform a contract it had made with a Panamanian corporation. To allow the suit to be heard in federal district court,[41] the Panamanian corporation assigned its entire interest in the contract to petitioner Kramer for one dollar stated consideration. By separate agreement, Kramer promised to pay ninety-five percent of the damages he recovered to his assignor. The Court held the "pay back" agreement, coupled with Kramer's lack of previous connection with the controversy, made the assignment one for collection only and, therefore, improper or collusive within the meaning of section 1359. The assignor retained a substantial interest in the rights assigned. The same result has been reached in cases involving assignments and transfers of bonds and other instruments of indebtedness for collection only[42] and the transfer of a tort claim in trust for the benefit of the injured parties.[43] Most assignments for collection only are easily identified by an agreement by the assignee to pay the amount recovered, less a specified percentage to cover the expenses of bringing the suit and some compensation, to the assignor.[44] It is correct to hold that the assignor has retained an interest in the subject matter in controversy because he will directly benefit from any recovery by the assignee.

The ability of the transferee to assert defenses to a suit by the trans-

40. 394 U.S. 823 (1969).

41. Diversity jurisdiction includes the power to hear suits between aliens and citizens of a state. 28 U.S.C. § 1332(a)(2) (1970). As *Kramer* illustrates, section 1359 applies to these types of cases as well.

42. *See, e.g.,* Woodside v. Beckham, 216 U.S. 117 (1910); Inhabitants of the Township of Bernards v. Stebbins, 109 U.S. 341 (1883); Williams v. Nottawa, 104 U.S. 209 (1881).

43. Ferrera v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), *aff'd,* 393 F.2d 934 (2d Cir. 1968).

44. For example, in Woodside v. Beckham, 216 U.S. 117 (1910), items of indebtedness had been assigned to the plaintiff with "the agreement that each of the several assignors should remain the absolute owner of his or their claims, and should contribute his proportion of the expenses of collection." *Id.* at 119.

feror to recover on the debt owed him by the transferee in consideration of the transfer should not be a consideration in determining whether the transferor has retained an interest.[45] Resolution of the jurisdictional issue cannot await a suit between the two to determine the validity of those defenses.

The transferee's lack of association with the subject matter in controversy has often been held to show that the transferor has retained an interest in the property, thus rendering the transfer improper or collusive. Examples are cases in which the transferee has never seen the property to which he claims title,[46] has never received title or does not learn of a bill of sale executed to him until shortly before the suit is commenced.[47] None of these factors, standing alone, should constitute collusion or impropriety, but in combination they may show that the transferor or assignor did not part with his interest. These cases usually also involve a lack of consideration for the transfer, another factor the courts have looked to in deciding whether the assignor or transferor has retained an interest. Stated consideration is not sufficient; the courts have required that such consideration actually be paid.[48] Whether non-negotiable notes which have not been paid at the time the suit is commenced will satisfy the consideration requirement is an unresolved question. In *Farmington Village Corp. v. Pillsbury*[49] the Court held such unpaid notes would not satisfy the consideration requirement, but there the transfer was accompanied by an agreement by the transferee to pay the assignor fifty percent of the recovery in excess of the amount of the note. Absent such a payback agreement, the proper test would seem to be whether the transferor and transferee had agreed that the notes would not be paid if the latter failed to recover or that some of the debt might be forgiven if the recovery were less than the amount of the notes. Facts from which such an agreement might be implied should also be considered.

45. Peterson v. Sucro, 93 F.2d 878 (4th Cir. 1938). In *Peterson*, the defendant contended that a conveyance of land was improper or collusive because the notes were non-negotiable and the deed contained covenants of warranty, breach of which might allow the transferee to offset any claim on the notes.

46. *See, e.g.*, Hayden v. Manning, 106 U.S. 586 (1883); Little v. Giles, 118 U.S. 596 (1886). In *Little*, the transferee of land had never even been in the city in which the land was located, nor did he know its value.

47. Lake County Comm'rs v. Dudley, 173 U.S. 243 (1899).

48. Waite v. Santa Cruz, 184 U.S. 302 (1902); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895); Little v. Giles, 118 U.S. 596 (1886); Hayden v. Manning, 106 U.S. 586 (1883).

49. 114 U.S. 138 (1885).

An exception to the consideration requirement is a transfer by gift. Absent an improper agreement, a failure of delivery, or a donee unassociated with the subject matter, a gift will divest the donor of all of his interest and should not be considered improper or collusive.[50]

The transferor or assignor has surely retained an interest if he holds back part of the property.[51] A more difficult question is presented when the assignor parts with all his interest, but he holds some power to compel a reconveyance. In *Lehigh Mining and Mfg. Co. v. Kelly*[52] a Virginia corporation had claimed lands owned by residents of that state. A Pennsylvania corporation was organized by the stockholders of the Virginia corporation and all of the latter's interest in the land was transferred. The Pennsylvania corporation then brought suit in federal court to establish its title to the land. On appeal, the United States Supreme Court held the power of the shareholders to compel a reconveyance from the Pennsylvania to the Virginia corporation without valuable consideration was equivalent to an agreement to reconvey and, therefore, improper or collusive.[53] Cases in which the assignor corporation is dissolved prior to the commencement of a suit by the assignee[54] or is about to be dissolved at that time[55] are distinguishable, for there is no longer an assignor to whom a reconveyance may be compelled. The results in cases dealing with a power to compel a reconveyance seem correct to the extent they deal only with the retained interest test. Any recovery by the assignee or transferee will almost certainly be returned, in some manner, to the transferor or assignor. Thus, the courts are justified in holding that the transferor has retained an

50. South Dakota v. North Carolina, 192 U.S. 286 (1904). This case does not, of course, involve diversity of citizenship, but its principles should apply to diversity cases.

51. Ikeler v. Deposit Trust Co., 39 F. Supp. 371 (E.D. Mich. 1941).

52. 160 U.S. 327 (1895).

53. *Id.* at 337. The same result was reached in Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908). In that case, the transferor corporation received all the stock of the transferee corporation in exchange for the assets transferred.

54. Black and White Taxicab and Trans. Co. v. Brown and Yellow Taxicab and Trans. Co., 276 U.S. 518 (1928).

55. *Cf.*, Amalgamated Clothing Workers v. Curlee Clothing Co., 19 F.2d 439 (8th Cir. 1927), *cert. denied*, 277 U.S. 585 (1928). The court held that the test was whether the transferee corporation was so independent and free as to the property transfered as to justify jurisdiction, regardless of whether the transferor corporation was in existence and could have compelled a reconveyance at the time the suit was filed. Factors such as (1) a close identity between the assignor and assignee and (2) the nature of the assignee's interest in the subject matter have been examined in determining whether the assignee was sufficiently independent and free to allow the court to exercise jurisdiction. *See, e.g.*, Henley & Co. v. Miller Golf Equip. Corp., 300 F. Supp. 872 (D.P.R. 1969); Steinberg v. Toro, 95 F. Supp. 791 (D.P.R. 1951).

interest in the property and that the transaction is improper or collusive within the meaning of section 1359.

If the assignor has control of the litigation, has solicited the assignee to bring suit, and has agreed to reimburse the assignee for his expenses, the courts have held that the transaction is improper or collusive.[56] Such facts show that the assignor has retained an interest in the subject matter; the presumption that the proceeds of a suit by the assignee will be paid to the assignor is justified.[57]

In determining whether a transfer or assignment is improper or collusive, should the only test be whether the assignor or transferor retained an interest in the subject matter? Both "improperly" and "collusively" are broad enough terms to include a complete transfer or assignment accomplished to invoke federal jurisdiction. The issue here —whether a purpose to invoke federal jurisdiction, without any retention of interest, will show that a party has been improperly or collusively made or joined—is to be distinguished from the second section 1359 test. The latter test is whether such a purpose exists at all.

Supreme Court decisions under the 1875 Act[58] seem to hold that a purpose to invoke federal jurisciction, by itself, is not improper or collusive.[59] However, some district courts have concluded that section 1359 requires a consideration of motive in determining the propriety of the transaction.[60] They have distinguished prior Supreme Court cases on the ground that those decisions only held motive irrelevant after the transfer or assignment was found to be absolute. When the question is whether the transfer is absolute, a consideration of the purpose of the transaction is appropriate. The question has not

56. *See, e.g.* Woodside v. Beckham, 216 U.S. 117 (1910); Farmington Village Corp. v. Pillsbury, 114 U.S. 138 (1885).

57. Although the scope of this comment is limited to assignments and transfers affecting federal diversity jurisdiction, it should be noted that the courts have also held that solicitation, control and an agreement to reimburse expenses will fall within the prohibition of section 1359, even if there is no transfer or assignment. The statute applies to parties who are improperly made *or* joined. Cashman v. Amador & Sacramento Canal Co., 118 U.S. 58 (1886). *See* Wheeler v. Denver, 229 U.S. 342 (1913) (insufficient control to call for application of the section 1359 prohibition). *See also* Matthies v. Seymour Mfg. Co., 23 F.R.D. 64 (D. Conn. 1958).

58. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472. *See* notes 28-30 and accompanying text, *supra*.

59. *See, e.g.*, Cross v. Allen, 141 U.S. 528 (1891).

60. Ferrera v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968); Steinberg v. Toro, 95 F. Supp. 791 (D. P.R. 1951). Both courts reasoned that the decisions under the 1875 Act only regarded motive as irrelevant after the transaction had first been found to be a complete one in which the transferor or assignor had parted with his entire interest.

been presented to the Supreme Court since the adoption of section 1359, but in *Kramer v. Caribbean Mills, Inc.*[61] the Court indicated that it might reconsider its prior decisions.[62]

Whether a reconsideration is appropriate depends on the proper method of determining when the protection afforded by federal diversity jurisdiction is warranted. If that determination is to be made solely on the basis of the citizenship of the parties, the retained interest test should remain as the sole criterion for determining whether a transfer or assignment is improper or collusive. This test is the only one which tells us whether the assignor or transferor may be considered a party; motive is irrelevant to this determination.

However, if we are to look beyond the citizenship of the parties in determining whether federal jurisdiction is necessary, a different result is reached. The purpose of federal diversity jurisdiction is to protect against the out-of-stater's fear of local prejudice. It has been suggested that there is no reason to protect a party who has created diversity himself, for he should be forced to accept the consequences of his voluntary actions.[63] Is there any reason for protecting an assignee who has acquired all of the assignor's interest in the subject matter, but who made the acquisition for the purpose of invoking federal jurisdiction? The obvious distinction is that the assignee has not created diversity by himself. However, he has been a party to the creation and, therefore, should also be forced to accept the consequences of his acts. More important, it is logical to conclude that the assignment was made not to gain the protection of federal jurisdiction, but rather to achieve other benefits of suing in federal court. If the assignor wanted to avoid local prejudice, he should not have made the assignment. There would have been no prejudice against him in a court of his own state, and had suit been brought in another state both he and his opponent would presumably be equally subject to prejudice against out-of-state litigants. Since the purpose of federal diversity jurisdiction is to protect non-residents, rather than to secure for them whatever procedural advantages there are to suing in federal court, federal jurisdiction seems unnecessary when a purpose to invoke it is found to accompany an assignment or transfer. The section 1359 prohibition

61. 394 U.S. 823 (1969).
62. *Id.* at 828 n.9.
63. Comment, *Manufactured Federal Diversity Jurisdiction and Section 1359*, 69 COLUM. L. REV. 706, 722-23 (1969).

should apply whenever such a purpose is found, regardless of whether the transaction is one in which the assignor or transferor parts with his entire interest in the subject matter. But until the complete transaction rule is changed, the "improperly or collusively" test and the purpose test will remain separate and it will continue to be possible to bring a claim within federal jurisdiction by assigning it to another solely to create such jurisdiction, so long as the transferor parts with all his interest.

Even though the transferor or assignor has retained an interest, making the transaction improper or collusive, the prohibition in section 1359 will not necessarily apply. By the terms of section 1359 itself, exercise of jurisdiction by the district courts is barred only if such a transaction is accompanied by a purpose to invoke federal jurisdiction.[64] Before examining the facts which indicate a motive to invoke federal jurisdiction, one important distinction must be noted. It is a motive to invoke federal jurisdiction generally, not a motive to invoke the jurisdiction of a *particular* federal court, which calls for application of the statutory prohibition in cases involving an improper or collusive transfer or assignment. For example, a citizen of Washington with a claim against a citizen of Oregon, over which a federal court would normally have jurisdiction, might assign part of that claim to a California resident to enable the suit to be brought in a federal court in California. Reasoning that the phrase "such court" in section 1359 means a particular federal court, it might be argued that jurisdiction should not be exercised. However, motive to invoke the jurisdiction of a particular federal court does not call for the application of the section 1359 prohibition if diversity of citizenship exists between the assignor and the assignee's opponent.[65] The issue under section 1359 is one of jurisdiction, not venue.

The question of what facts will show a motive to invoke federal jurisdiction has not been given much consideration by the federal courts. In many cases, such a motive has been stipulated or admitted, and the courts have concentrated on the question of whether the as-

64. The courts have uniformly held that the motive test need not be made if the transition is not first shown to be improper or collusive. *See, e.g.*, Black & White Taxicab & Trans. Co., v. Brown & Yellow Taxicab & Trans. Co., 276 U.S. 518 (1928). *See generally* 3A J. MOORE, FEDERAL PRACTICE ¶ 17.05, at 157 (2d ed. 1968).

65. Sterrett v. Hydro-United Tire Corp., 32 F.2d 823 (E.D. Pa. 1929); Stimson v. United Wrapping Mach. Co., 156 F. 298 (W.D.N.Y. 1907); Bolles v. Lehigh Valley R. Co., 127 F. 884 (S.D.N.Y. 1904).

signment or transfer was improper or collusive.[66] In other cases the courts seem to presume the motive was to invoke federal jurisdiction because no other motive appeared.[67] However, some motive-establishing characteristics have been identified. For example, a transfer to a corporation which had no business other than bringing suits based on diversity of citizenship was held to show a motive to invoke federal jurisdiction.[68] A similar motive was shown by a history of state court actions concerning the same property by the transferor or assignor prior to the transaction by which the assignee or transferee acquired title.[69]

A more difficult question is whether the court should exercise jurisdiction when one motive for the transfer or assignment is to invoke federal jurisdiction, but other motives are also present. In *Bullard v. City of Cisco*[70] the United States Supreme Court adopted a "dominant purpose" test. The Court held that the principal purpose of a transfer of bonds to a trustee was to enable a satisfactory adjustment of the defendant's financial difficulties and that this motive would prevail over the motive to invoke federal jurisdiction.[71] The same tolerance policy has allowed the exercise of jurisdiction where one of the purposes for the transfer or assignment to a citizen of another state was the dissolution of a partnership[72] and an effort to gain benefits of the corporate laws of another state, even though a purpose to invoke federal jurisdiction was also found.[73] Economic considerations for a

66. *See, e.g.*, Lake County Comm'rs v. Dudley, 173 U.S. 245 (1899); Lehigh Mining and Mfg. Co. v. Kelly, 160 U.S. 327 (1895).

67. Farmington Village Corp. v. Pillsbury, 114 U.S. 138 (1885); Ferrera v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

68. Southern Realty Ins. Co. v. Walker, 211 U.S. 603 (1909).

69. Miller & Lux, Inc. v. East Side Canal & Irr. Co., 211 U.S. 293 (1908); Lehigh Mining and Mfg. Co. v. Kelly, 160 U.S. 327 (1895); Hayden v. Manning, 106 U.S. 586 (1883).

70. 290 U.S. 179 (1933). *Bullard* involved an assignment to create the amount in controversy requirement of 28 U.S.C. § 1332(a) (1970). The assignors were citizens of New York and Ohio and the defendant was a Texas city. However, the same test should apply to assignments to create diversity of citizenship.

71. *Id.* at 190.

72. Dickson v. Tattnal County Hospital Authority, 316 F. Supp. 531 (S.D. Ga. 1970). The *Dickson* court found that the transferor parted with his entire interest in the subject matter in controversy. However, the court considered motive in determining whether the transaction was improper or collusive. *See* text accompanying notes 62-66, *supra*.

73. Amalgamated Clothing Workers v. Curlee Clothing Co., 19 F.2d 439 (8th Cir. 1927), *cert. denied*, 277 U.S. 585 (1928). The transfer had been planned for several years before the controversy arose.

transfer might also predominate over a motive to invoke federal jurisdiction.[74]

On its face, section 1359 does not provide for a consideration of other purposes. If the assignment or transfer is improper or collusive, a motive to invoke federal jurisdiction should call for an application of the statutory prohibition, regardless of whether other purposes can be shown. However, justification for the dominant purpose test would be that individuals should not be precluded from making transfers and assignments merely because such transactions may affect federal jurisdiction. It might be argued that freedom of interstate movement and of economic activity demand that this test be retained. An assignee or transferee should not lose his right to sue and be sued in federal court if, for example, economic reasons for a transfer predominate over a purpose to invoke federal jurisdiction. This argument, however, ignores the appropriate test for determining whether a federal court should take jurisdiction on the basis of diversity of citizenship: is the protection that jurisdiction affords necessary? The same argument made earlier in discussing whether such a purpose, by itself, made a transfer or assignment improper or collusive is applicable here. A purpose to invoke federal diversity jurisdiction indicates an attempt to secure procedural benefits of federal jurisdiction, not its protection, so the section 1359 prohibition should apply regardless of the existence of other purposes. Thus, only if the transaction is not motivated by a purpose to invoke federal jurisdiction should the district court hear the case.[75]

B. *Assignments and Transfers to Defeat Federal Diversity Jurisdiction*

By its terms, section 1359 does not apply to assignments or trans-

74. National Surety Corp. v. Inland Properties, Inc., 286 F. Supp 173 (E.D. Ark. 1968). The transferor was in the loan business and its ability to borrow depended upon its having as few fixed assets as possible. It transferred fixed assets to a subsidiary in return for a note and mortgage. The court did not consider whether the economic reasons for the transfer were dominant because it held the transfer was complete and, therefore, not improper or collusive. However, the factual situation illustrates a case in which the dominant motive test may include a consideration of economic motives.

75. For a discussion of the motive problem see Comment, *Appointment of Non-Resident Administrators to Create Federal Diversity Jurisdiction,* 73 YALE L. J. 873, 881-82 (1963). *Cf.* Comment, *Manufactured Federal Diversity Jurisdiction and Section 1359,* 69 COLUM. L. REV. 706 (1969).

fers which defeat federal diversity jurisdiction. The courts, although sometimes reluctantly,[76] have recognized this limitation.[77] Thus, a citizen of Oregon with a claim against a citizen of Washington might assign it to another Washington citizen and effectively prohibit the district courts from hearing the case.[78] There are two cases in which an assignment or transfer might not defeat federal diversity jurisdiction. In the example above, if the Washington assignee sued the Washington defendant in a state court in Oregon, the defendant might attempt to remove the case to federal court. The district court might totally disregard the assignee if he is merely a nominal or formal party,[79] and the court might then dismiss the suit or delay it until the assignor was made a party.[80] The same result might be reached if the potential defendant, a citizen of Washington, had assigned his interest to a citizen of Oregon and the Oregon plaintiff attempted to bring a suit in federal court. However, it is very difficult to prove that one is a nominal party. The courts have held that the assignment of only the legal title to a tort claim is enough to defeat federal diversity jurisdiction[81] and have even decided that the jurisdiction was defeated where the assignee received only one one-hundreth interest in a tort claim.[82]

The limitation of section 1359 to devices which create federal diversity jurisdiction has been criticized as "an undeniably inequitable rule" because only plaintiffs may attempt to take advantage of such devices.[83] This may be true in cases in which the potential defendant cannot assign his interest as, for example, in tort cases. An injured party might assign part of his claim to a citizen of the same state as the defendant, thus prohibiting the defendant from removing a case brought in a court in the state of which the injured party was a citizen. But this criticism is not true in every case. A landowner anticipating a

76. Gentle v. Lamb-Weston, Inc., 302 F. Supp. 161 (D. Mo. 1969).
77. Oakley v. Goodnow, 118 U.S. 43 (1886); Krenzien v. United Services Life Ins. Co., 121 F. Supp. 243 (D. Kan. 1954).
78. If the Washington assignee sued the Washington defendant in an Oregon state court, the defendant could not remove the case because diversity of citizenship is lacking. *See* 28 U.S.C. §§ 1332(a), 1441(a) (1970). If the suit was commenced in a state court in Washington, the defendant could not remove to federal court even if the suit was brought by an Oregon plaintiff. 28 U.S.C. § 1441(b) (1970).
79. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 24, at 82-83 (1970). *See also Ex parte* Nebraska, 209 U.S. 436 (1908).
80. FED. R. CIV. P. 17(a), 19.
81. Bernblum v. Travelers' Ins. Co., 9 F. Supp. 34 (W. D. Mo. 1934).
82. Heape v. Sullivan, 233 F. Supp. 127 (E.D.S.C. 1964).
83. 40 VA. L. REV. 803, 804 (1954).

suit by a citizen of another state challenging his title might convey his title to a citizen of that state, thereby preventing the potential plaintiff from bringing a suit in federal court. A potential defendant in a contract case might just as easily assign his interest.

It has also been argued that since federal diversity jurisdiction is justifiable,[84] devices to defeat it should not be permitted.[85] On the other hand, allowing devices to defeat that jurisdiction has been supported on the grounds that they help "alleviate the chronic over-crowded condition of the dockets in the federal courts."[86] However, this argument apparently presumes that state court dockets are less crowded, a grossly inaccurate assumption.[87] Moreover, there are better ways to alleviate the crowded conditions in the federal courts.[88]

Another argument in favor of allowing such jurisdiction-defeating devices is that they keep cases determined by state law in the state courts.[89] This contention goes to the basic criticism of federal diversity jurisdiction, that it is contrary to the basic principles of federalism because it interferes with state autonomy.[90] It is urged that the judicial power of each state should be co-extensive with its legislative power[91] and that federal diversity jurisdiction undercuts the power of state courts.[92] This argument is often rebutted by contending that diversity cases are part of the federal court system.[93]

84. Federal diversity jurisdiction has often been attacked. For a discussion of a bill introduced in the 1930's to abolish it see Comment, *Limiting Jurisdiction of Federal Courts*, 31 MICH. L. REV. 59 (1932).

85. 47 YALE L. J. 145 (1938).

86. The business of federal courts has increased substantially since World War II. S. REP. No. 1830, 85th Cong., 2d Sess. (1958). *But see* Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 So. CAR. L. REV. 677, 680 (1965) (arguing that there is no evidence of uniformly crowded conditions in the federal courts).

87. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 319 (1967) [hereinafter cited as Wright]; Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?*, 18 A.B.A.J. 499, 501 (1932).

88. *See, e.g.*, Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (concurring opinion); Moore and Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 26 (1964); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 1, 13 (1963). Most frequently cited is expansion of the federal judiciary.

89. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 160 (1969) [hereinafter cited as ALI STUDY].

90. Field, *Diversity of Citizenship: A Response to Judge Wright*, 13 WAYNE L. REV. 489, 494 (1967).

91. ALI STUDY, *supra* note 89, at 99.

92. For example, there is no state court review of federal decisions interpreting state law. For a discussion of this problem see S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 20 (1971).

93. Moore and Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43

All of these arguments ignore the proper basis for determining whether devices to defeat federal diversity jurisdiction should be permitted. "The basic question is the promotion of the administration of justice, not political compromise."[94] Thus, the only relevant factor is the purpose of the power of federal courts to hear controversies between citizens of different states. As noted earlier, [95] that purpose is to protect against non-residents' fear of local prejudice. That fear is of no concern when an assignment or transfer is made to defeat federal jurisdiction, because the suit will be tried either in the state of which the assignee's adversary is a citizen or in a state of which neither the assignee or his adversary are citizens, in which case both stand on the same footing. The adversary may complain that there is prejudice against him in his own state,[96] but that is not a concern of federal diversity jurisdiction.[97] Thus, it is appropriate that section 1359 does not apply to devices to defeat federal diversity jurisdiction.

C. An Appraisal

1. The Need to Limit Federal Diversity Jurisdiction

There are both practical and theoretical justifications for limiting federal diversity jurisdiction. As noted in the previous section,[98] it has been argued that that jurisdiction, by which federal courts decide cases to be determined by state law, is an infringement on the autonomy of the states. This has been identified as essentially a states' rights argument[99] which is of diminished importance today. However, there is a more compelling reason for limiting federal diversity jurisdiction. That jurisdiction should be limited to cases in which the protection it affords is necessary.

TEXAS L. REV. 1, 25 (1964); THE FEDERALIST, No. 80, at 588-90 (J. Hamilton ed. 1909) (A. Hamilton).

94. Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 887 (1931).

95. *See* notes 12-24 and accompanying text, *supra*.

96. ALI STUDY, *supra* note 89, at 107.

97. Denial of access to federal courts in such cases is justified on the ground that a resident is properly held responsible for the actions of the courts of his state because he has the power to change them. *Id.* However, it is questionable how much one individual can do. *See also* Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 73 (1933).

98. *See* notes 89-93 and accompanying text, *supra*.

99. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 164 (1971).

Many "practical" reasons for limiting federal diversity jurisdiction have been identified. Some of the most important are: (1) it causes congestion in the federal courts, due both to the number of diversity cases[100] and to the special burdens incident to deciding diversity cases;[101] (2) it makes for a waste of the federal judiciary;[102] (3) federal diversity jurisdiction is discriminatory because only the non-resident gets a choice of jurisdiction[103] and because the expense of suing in federal court makes it difficult for poor people to bring actions there;[104] and (4) it places property rights above human rights because, with few exceptions, a non-resident may not remove state criminal cases to the federal courts.[105] These reasons have all been advanced as supporting the complete abolition of federal diversity jurisdiction. Although complete abolition does not seem warranted,[106] these reasons at least justify a restriction of that jurisdiction to those cases in which its exercise is necessary.[107] Statutes restricting jurisdiction, however, should be precise and clear enough to allow predictable and easy application. With the present section 1359, this is not the case.

2. *The Special Problems of Section 1359*

The major problem with section 1359 is the use of the words "improperly" and "collusively." "As words used to delineate jurisdiction, they ought to be cast in black and white, but we find them in the deci-

100. Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts,* 48 N.D.L. REV. 1 (1971).

101. Wright, *supra* note 87, at 321-22 (arguing that the burden is not excessive).

102. ALI STUDY, *supra* note 89 at 100. For a discussion of methods to avoid this problem see Wright, *supra* note 87 at 323-25.

103. One commentator has argued that this is a problem with the removal power, not with federal diversity jurisdiction. Parker, *The Federal Jurisdiction and Recent Attacks Upon It,* 18 A.B.A.J. 433, 438-39 (1932). *See also* Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States,* 19 A.B.A.J. 71, 73 (1933).

104. Parker, *The Federal Jurisdiction and Recent Attacks Upon It,* 18 A.B.A.J. 433, 438 (1932) (arguing the expense is not so onerous). For an argument that the expense of suing in federal court is no greater than the expense of suing in state court see Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?,* 18 A.B.A.J. 499, 501 (1932).

105. S. REP. No. 530, 72d Cong., 1st Sess. (1932).

106. The recent proposed revision of the jurisdiction of the federal courts, S. 1876, 92d Cong., 1st Sess. (1971), still provides for federal diversity jurisdiction. The American Law Institute, which authored the proposals in the bill, acknowledges the need for that jurisdiction in certain cases. ALI STUDY, *supra* note 89, at 106-110.

107. *Cf.* ALI STUDY, *supra* note 89, at 108.

sional gray zone."[108] As the discussion in part I indicated, the courts have spent much time attempting to establish more definite meanings. This experience "has demonstrated the inappropriateness of such imprecise terms to establish jurisdictional boundaries."[109] A checklist of factors showing the assignor or transferor has retained an interest in the subject matter in controversy is helpful, but the courts must still spend time examining jurisdictional facts. A new approach is necessary. The final section of this comment examines a workable alternative to the difficult language of section 1359.

CONCLUSION—AN ALTERNATIVE PROPOSAL

On May 14, 1971, Senator Burdick of North Dakota introduced a bill, the Federal Court Jurisdiction Act of 1971, which provides for a substantial revision of federal jurisdiction.[110] If adopted, the new bill would change section 1359 in two ways. The first subsection of the new version would retain the improper or collusive prohibition now in section 1359 and, in addition, would prohibit the district courts from hearing cases "in which any party has been made or joined . . . pursuant to agreement or understanding between opposing parties, in order to invoke the jurisdiction of such court."[111] This addition would have little effect on transfers and assignments affecting federal diversity jurisdiction, for none of the cases has involved such an agreement between opposing parties. The second subsection, dealing specifically with assignments and transfers, is more significant:[112]

> Whenever an object of a sale, assignment or other transfer of the whole or any part of any interest in a claim or other property has been to enable or to prevent the invoking of federal jurisdiction . . . jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred.

108. Bradbury v. Dennis, 310 F.2d 73 (10th Cir. 1962), *cert. denied,* 372 U.S. 928 (1962).

109. Ferrera v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), *aff'd,* 393 F.2d 934 (2d Cir. 1968).

110. S. 1876, 92d Cong., 1st Sess. (1971). The bill was authored by the American Law Institute. *See* ALI STUDY, *supra* note 89.

111. S. 1876, 92d Cong., 1st Sess. § 2(e)(1) (1971). This provision would become 28 U.S.C. § 1307(a).

112. *Id.* This provision would become 28 U.S.C. § 1307(b).

This represents a substantial departure from present law and is almost a return to the provision in section 11 of the Judiciary Act of 1789.[113] The only difference is that the new provision does not apply unless "an object" of the transaction is to invoke federal jurisdiction, while the section 11 prohibition was absolute if jurisdiction were otherwise affected.

The virtue of the second subsection is its simplicity. The courts must only determine whether an object of the transaction was to defeat or invoke federal jurisdiction.[114] If such an object is shown, the courts need not embark on the time consuming process of running through a checklist of factors indicating the assignor or transferor has retained an interest in the subject matter. As noted earlier,[115] a purpose to invoke federal jurisdiction should be enough, by itself, to prohibit the district court from hearing the case. The major difficulty with the second subsection is that it applies to devices to defeat federal jurisdiction. Because of the need to limit federal jurisdiction in diversity cases and, more importantly, because the protection that jurisdiction affords is unnecessary where federal jurisdiction has been defeated, this provision should be omitted.[116]

The first subsection of the bill should be abandoned. First, omitting the improper or collusive test will make the jurisdictional issue clear. Second, the situations which the first subsection was probably intended to cover may be handled in more precise ways. The problem of the appointment of non-resident administrators, executors and guardians is already solved in other parts of the new bill.[117] Changes of domicile to invoke federal diversity jurisdiction may be handled by providing that domicile at the time the cause of action arises is determinative, rather than domicile at the time the action is commenced.[118]

113. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. *See* note 25 and accompanying text, *supra*.

114. Whether an object of the transaction was to defeat or invoke federal jurisdiction will depend on the intent of the parties to the transaction.

115. *See* notes 57-63 and accompanying text, *supra*. For an argument that this rule is too harsh, and that a "but-for" test could be adopted see Comment, *Manufactured Federal Diversity Jurisdiction and Section 1359*, 69 COLUM. L. REV. 706, 726 (1969).

116. *See* notes 86-97 and accompanying text, *supra*.

117. First, transfer is defined to include such an appointment. S. 1876, 92d Cong., 1st Sess. § 2(e)(1) (1971). This provision would become 28 U.S.C. § 1307(b). More important, executors, administrators, guardians and the like would be deemed citizens of the state of the person they represent. S. 1876, 92d Cong., 1st Sess. § 2(e)(1) (1971). This provision would become 28 U.S.C. § 1301(b)(3).

118. Williamson v. Osenton, 232 U.S. 619 (1914) (domicile at time of suit determines jurisdiction).

The courts already have the power to deny jurisdiction if the parties improperly agree to invoke federal jurisdiction.[119] If the first subsection is intended to include the retained interest test, the subsection might still be abandoned because the courts need no legislative authority to apply this test.[120] Thus, by omitting the first subsection and the reference to devices to defeat federal jurisdiction in the second section, the proposal would be both appropriate and clear.

Further improvement on the problem of assignments and transfers to invoke federal diversity jurisdiction could be made if the retained interest test were abandoned. This would leave the courts with only the motive test in determining whether jurisdiction exists. Once freed from the examination of factors showing a retained interest, the courts could focus on precisely defining situations in which an object to invoke federal jurisdiction is shown. The end result would be certainty with respect to the jurisdictional issue, freeing the courts for their most important function, a decision on the merits. However, before the retained interest test can be abandoned Congress must abolish the complete diversity rule.[121] This would be a radical step, certainly against the trend of limiting federal diversity jurisdiction, and is unlikely. Thus, it is the duty of the courts to further refine the checklist of factors showing the assignor or transferor has retained an interest in the subject matter, with a view to making the list even more precise and comprehensive.

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119. FED. R. CIV. P. 21 provides that "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Thus, if the opponents agreed that one who might have been named as a party should be omitted to satisfy the complete diversity rule, the court might require that that individual be added and then deny jurisdiction.

120. *See* note 39 and accompanying text, *supra*.

121. For an argument which would support the abolition of the complete diversity rule see Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 18-25 (1968).

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