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# USE OF ASSIGNMENTS AND APPOINTMENTS TO CREATE OR DESTROY FEDERAL DIVERSITY JURISDICTION

## INTRODUCTION

For many years, it has been possible for lawyers with estates of decedents and persons under disability to obtain an appointment of a non-resident administrator, guardian or executor to acquire federal diversity jurisdiction. Often this non-resident representative has no relation to the deceased or disabled person.<sup>1</sup> Another similar practice, though not as predominant as the appointment of representative parties, is the use of assignments to create federal diversity jurisdiction.<sup>2</sup> The typical case arises, when for purposes of diversity an individual assigns his claim to another. Since *Erie v. Tompkins*<sup>3</sup> the reasons for creating diversity jurisdiction are only procedural and strategic. Parties seeking procedural advantages may create diversity jurisdiction in order to benefit from broader rules of discovery or prevail upon the availability of federal interpleader. Strategic advantages of federal courts over state courts in diversity actions occur both in fact and in the minds of attorneys. In one instance a state court appointed a non-resident administrator based upon empirical research that federal courts generally rendered higher verdicts than state courts.<sup>4</sup> Other strategical reasons for litigating suits in the federal courts include greater confidence in the capacity and independence of federal judges, and the belief that federal juries tend to award larger judgments.<sup>5</sup>

The corollary to the manufacture of diversity jurisdiction is its destruction where it normally would have existed. This destruction can,

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1. See, e.g., *Lang v. Elm City Constr. Co.*, 324 F.2d 235 (2d Cir. 1963), *aff'd* 217 F. Supp. 873 (D. Conn. 1963).

2. See, e.g., *In Re Appropriation By the City of Bethlehem*, 181 F. Supp. 875 (E.D. Pa. 1966).

3. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), held that federal courts in diversity suits must apply state substantive law.

4. See *Kaufmann Estate*, 87 Pa. D & C 401 (O.C. Phila. 1954) in which, in the interests of the minor, the court appointed a non-resident guardian to prosecute suit on the findings of Dean B. F. Boyer of Temple University School of Law that a higher verdict would probably result in the federal courts.

5. See Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962); a study of responses of 121 Wisconsin lawyers who had initiated or removed cases to the federal courts as to what influenced their decisions. The thesis of this article was that the traditional notion of local bias as the reason for enactment of diversity jurisdiction is unfounded in actual practice. From the results tabulated, about 4% of the lawyers questioned indicated local bias was at least a factor for seeking federal diversity jurisdiction.

like creation, be accomplished by the appointment of a representative party<sup>6</sup> or through an assignment of an interest.<sup>7</sup> The obvious goal in either situation is to place citizens of the same state on both sides of the litigation, thereby destroying total diversity.<sup>8</sup> As in the case of manufactured diversity attorneys may have procedural and tactical reasons for remaining in a state court, if possible.<sup>9</sup> In these situations, both the appointment and assignment devices have proved to be as effective in destroying diversity jurisdiction as they are in manufacturing it.<sup>10</sup>

In recent years, the judicial approach that has permitted artificially created or "manufactured diversity", has come under criticism.<sup>11</sup> Recently the United States Court of Appeals for the Third Circuit has taken a new position in creation of diversity cases.<sup>12</sup> However, the corollary practice of defeating diversity, while resting on similar principles, has received less attention. It is the purpose of this article to trace the

6. See *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 77 A.L.R. 904 (1930).

7. See *Ridgeland Box Mfg. Co. v. Sinclair Refining Co.*, 82 F. Supp. 274 (E.D.S.C. 1949); where a 1/100 interest was conveyed to a party with the same citizenship as the defendant, thereby destroying total diversity.

8. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806), which established that all plaintiffs and all defendants must be diverse from each other for federal diversity jurisdiction to exist.

9. Lower litigation costs, familiarity with state judges, local prejudice against an opposing out-of-state party, and degree of participation of the judge in trial have been stated as advantages to litigating in state courts. See Comment, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965).

10. Diversity jurisdiction also demands that the controversy exceeds \$10,000; see 28 U.S.C. § 1332 (1964).

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and cost, . . .

Therefore, it has been suggested that a plaintiff could defeat diversity simply by stating less than the jurisdictional amount in the complaint; see WRIGHT, *FEDERAL COURTS* § 31 at 89 (1963). Though this may be an expensive method by which to avoid federal jurisdiction, if the amount does not meet the jurisdictional minimum, the federal court cannot hear the case; see *Harley v. Firemans Fund Ins. Co.*, 245 F. 471 (W.D. Wash. 1913); *Brady v. Indemnity Ins. Co. of North America*, 68 F.2d 302 (6th Cir. 1933), noted at 12 N. CAR. L. REV. 390 (1933); *Woods v. Massachusetts Protective Ass'n.*, 34 F.2d 50 (E.D. Ky. 1929); Note, *Reduction of Prayer for Relief as Preventing Removal of Action from State Court*, 43 HARV. L. REV. 320 (1929). *Contra*: *Capps v. New Vello Coal Co.*, 87 F. Supp. 369 (E.D. Tenn. 1950).

However, it seems that once a plaintiff has reduced his complaint to avoid federal jurisdiction, he may not later amend and be assured of remaining in the state court. In *Journal Pub. Co. v. General Cas. Co.*, 210 F.2d 202 (9th Cir. 1954), the plaintiff brought an action under his automobile liability policy for cost of defense to a personal injury action brought against him. The first complaint alleged an amount below the jurisdictional amount. However, an amended complaint brought the amount claimed above the jurisdictional amount and the case was removed. Citing *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276 (1917) and *Ayer v. Watson*, 113 U.S. 594 (1884), the court said, ". . . a cause not removable may afterwards become removable." *General Cas. Co. supra* at 204.

11. See *Cohan and Tate, Manufacturing Federal Diversity Jurisdiction By the Appointment of Representatives*, 1 VILL. L. REV. 201 (1956).

12. See *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968), cert. denied, 395 U.S. 903 (1969).

judicial and statutory foundations, for the creation and destruction of diversity, with emphasis on the new trends that are being established, or have been suggested.

#### LIMITATIONS ON THE MANUFACTURE OF DIVERSITY

Presently section 1359 of the Judicial Code is the basic statutory restriction on the creation of diversity.<sup>13</sup> This statute is actually an amalgam of two prior enactments. Diversity jurisdiction was conferred on the federal courts, when they were first created by the Judiciary Act of 1789.<sup>14</sup> However, jurisdiction was prohibited on this diversity basis, "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 the case of foreign bills of exchange."<sup>15</sup>

This was the first anti-assignment clause, which required both the assignee and assignor to be capable of bringing the action on the basis of diversity. However, the statute had its shortcomings, and never fully achieved its purpose.<sup>16</sup> The 1875 Judiciary Act<sup>17</sup> retained the basic wording of the 1789 Act, but also made an exception for promissory notes. In an attempt to add meaning to the existing anti-assignment clause, the Act also prohibited cases, if,

such sort 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 the act.<sup>18</sup>

Through 1948, the basic anti-assignment and anti-collusion clauses remained separate and intact.<sup>19</sup> In 1948, a year of major revision for the Judicial Code, the anti-assignment clause was repealed, but some of its prohibitions were merged into a more general anti-collusion statute.

13. 28 U.S.C. § 1359 (1964)

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.

14. U.S. CONST. art. III, § 2, "The judicial Power shall extend to . . . Controversies . . . between citizens of different States." Act of Sept. 24, 1789 c. 20, § 11, 1 STAT. 73, 78.

15. Act of Sept. 24, 1789 c. 20, § 11, 1 STAT. 73, 79.

16. See Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 ILL. L. REV. 566, 569 (1941), calling the enactment "a jumble of legislative jargon". Dobie, *Jurisdiction of the United States District Court as Affected by Assignment*, 6 VA. L. REV. 533 (1920). See generally Revisers Note to 28 U.S.C. § 1359 (1964).

17. 18 STAT. 470 (1875).

18. 18 STAT. 470, 472 (1875).

19. Former § 37 of the JUDICIAL CODE of 1911, 28 U.S.C. § 80 (1940) retained both sections of the 1875 Act, but extended diversity to include citizens of the District of Columbia. Act of Apr. 20, 1940, c. 117, 54 STAT. 143.

The result of this merger is section 1359, which denies jurisdiction in cases "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."<sup>20</sup>

#### CREATION OF DIVERSITY BY APPOINTMENT OF A REPRESENTATIVE PARTY

The case of *Chappedelaine v. Dechenaux*<sup>21</sup> first established the rule of citizenship for representative parties. There the plaintiffs, citizens of France, were executors of the estate of a Georgia decedent. Acting in their representative capacity, they sued a Georgia executor of a Georgia decedent. If the Court had looked to the citizenship of the testators, it would have found that the federal courts had no jurisdiction since they were both from Georgia. However, Chief Justice Marshall decided that the citizenship of the executors control saying, "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>22</sup>

The Supreme Court thereby determined diversity jurisdiction by the citizenship of the party authorized to bring the action. Consequently, lawyers have been able to create diversity jurisdiction merely by securing a court appointment of a non-resident representative.<sup>23</sup> Providing that state law recognizes that person as the real party in interest, the federal courts have recognized the existence of diversity jurisdiction.<sup>24</sup>

The only real restriction on the creation of diversity through the use of representative parties, has been section 1359 and its predecessors. Basically, section 1359 acts as a check against artificially created diversity by requiring dismissal of cases where the parties have been "collusively" or "improperly" made or joined in order to create diversity jurisdiction. Generally, courts have been loathe to apply section 1359 or its forerunners so long as the real party in interest was maintaining the suit; if the party has a valid appointment according to state substantive law, any motives for that appointment have been ignored.

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20. 62 STAT. 935 (1948) 28 U.S.C. § 1359 (1964).

21. 8 U.S. (4 Cranch.) 306 (1808).

22. *Id.* at 308.

23. See generally 3a MOORE'S FEDERAL PRACTICE 1-120 (2d Ed. 1968); 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, (Wright ed. 1961); WRIGHT, *supra* note 10 at, 81, 82 (1963); Oak and Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259 (1924).

24. 3a MOORE, *supra* note 23, at 111-115.

An early case interpreting section 1359 is *Jaffe v. Philadelphia & W.R.R. Co.*<sup>25</sup> In this case the administratrix was a New Jersey resident employed as a stenographer in the office of the widow's attorney. The Pennsylvania court appointed her, even though the decedent and all other persons involved were Pennsylvania citizens, and the accident in question occurred in Pennsylvania. Jurisdiction in the federal court was upheld on the basis that Pennsylvania law recognized the administratrix as the real party in interest whose duty it was to bring suit and distribute any proceeds from it to the appropriate party. The court held that since the plaintiff was the real party in interest, any motives which may have actuated the appointment would be immaterial in determining whether diversity of citizenship existed, and further, would amount to a collateral attack upon the state probate decree.<sup>26</sup>

The authority of *Jaffe* was strengthened by *Corabi v. Auto Racing Inc.*,<sup>27</sup> also decided by the Third Circuit. In *Corabi*, the mother of the decedent was allowed to resign as administratrix expressly for the purpose of enabling the appointment of a non-resident administrator, so that a wrongful death action could be brought in the federal court. When the action was commenced, the defendant moved to dismiss on the grounds that the appointment, having been made solely for the purpose of creating federal diversity jurisdiction, was collusive within the meaning of section 1359. The district court denied the motion, and the Third Circuit Court of Appeals, sitting *en banc* affirmed; the court held that an appointment of a non-resident administrator solely for the purpose of creating diversity jurisdiction did not violate any provisions of section 1359.

The court found two basic considerations for declaring that jurisdiction existed. The first of these was the decision of the United States Supreme Court in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*<sup>28</sup> In that case, the plaintiff, originally a

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25. 180 F.2d 1010 (3d Cir. 1950).

26. The basis for immateriality of motives in determining diversity of citizenship is found in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931). The reliability of the case has been questioned since *Mecom* concerned the destruction of diversity, not the creation of it. Regardless, the courts have steadfastly called upon *Mecom* to persuade appellants that questioning motives is beyond the power of the federal courts with regard to section 1359 or its forerunners. See, e.g., *Bartell v. Stamm*, 145 F.2d 487 (5th Cir. 1944); *O'Donnel v. Hayden Truck Lines*, 61 F. Supp. 823 (D. Conn. 1945); *Ashley v. Read Const. Co.*, 195 F. Supp. 727 (D. Wyo. 1961); *Borror v. Sharon Steel Co.*, 327 F.2d 165, 1 A.L.R. Fed. 379 (3rd Cir. 1964).

It should also be noted that the *Jaffe* court recognized the possible limitations of *Mecom*, but took the broad view that federal courts cannot attack state probate court decrees simply to question the purpose of the decree.

27. 264 F.2d 784 (3d Cir. 1959).

28. 276 U.S. 518 (1928).

Kentucky corporation, dissolved and reorganized itself in Tennessee so that it could litigate a contract action in the federal court. Once all the assets of the Kentucky corporation were transferred, the Tennessee corporation filed suit in a Kentucky district court.<sup>29</sup> The Supreme Court refused to apply the predecessor to section 1359, and upheld jurisdiction. The Court found that, "the succession and transfer were actual, not feigned or merely colorable. In these circumstances courts will not inquire into motives when deciding concerning their jurisdiction."<sup>30</sup> The *Corabi* court was unable to distinguish *Black & White* because it found that the appointment before it was both real and substantial,<sup>31</sup> that it was validly made merely by reason of the state court action.<sup>32</sup>

The reliance of the *Corabi* court on the *Black & White* decision may be criticized. *Black and White* can probably be distinguished from *Corabi* because in *Black & White* all of the business of the old corporation was transferred to the new corporation; however, in *Corabi* the original resident administratrix handled all matters of a local nature that did not demand a federal district court. After all other matters of the estate except the wrongful death action were completed, the administratrix resigned to allow the non-resident administrator to be appointed. The non-resident administrator's only function was, to create diversity, litigate the matter, and return the proceeds to the estate. Viewed in this light, the appointment does not seem as complete as the transfer of interests in *Black & White*.

The second consideration upon which the court in *Corabi* upheld

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29. In 1928, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was controlling and federal courts were not bound by state substantive law in diversity cases.

30. 276 U.S. at 524.

31. In an earlier case, the Third Circuit held that the real party in interest was immaterial, insofar as the question of diversity was concerned, as long as the general guardian of an incompetent had capacity to sue. *Fallat v. Gouran*, 220 F.2d 325, 326 (3d Cir. 1955). However, that case relies on decisions that have also been construed to affirm the real party in interest rationale; see *City of New Orleans v. Gaines Admin.*, 138 U.S. 595 (1891); *Mexican Central Ry. Co. v. Eckman*, 187 U.S. 429 (1903). Initially the *Corabi* opinion affirms *Fallat* and hints that if *Corabi* is not a real party in interest, then *Fallat* is applicable. However, the main reliance upon the language in *Black & White* seems to affirm the more common principle that the real party in interest is determinative for citizenship in diversity actions.

32. *Black & White* can be contrasted with the earlier case of *Miller & Lux v. East Side Canal And Irrigation Co.*, 211 U.S. 293 (1908). In that case *Miller & Lux* went through the same motions as the plaintiff in *Black & White*, but diversity jurisdiction was denied. The distinction was that in *Miller & Lux* the original corporation remained intact and merely conveyed the cause of action to a dummy corporation. Since the old corporation could compel a reconveyance of the proceeds and actually controlled the litigation, the Court did not consider the conveyance of the cause of act a "real" transaction. 211 U.S. at 300-04; nor did the Court find that the dummy corporation had any real interest in the matter being litigated.

diversity jurisdiction was a literal interpretation of the words "improper" and "collusive" contained in section 1359. The court viewed both words in a restrictive manner. It said:

The word "collusive" is a strong one. The term "collusive" indicates "A secret agreement and cooperation for a fraudulent purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. . . . "An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." (Websters)<sup>33</sup>

The court interpreted this to mean that collusion must exist between the opposing parties to the litigation for section 1359 to apply. This interpretation seems somewhat narrow since the definition does not apparently preclude the collusive agreement being perpetrated by parties on the same side of the litigation. The court also found that "improperly" connotated an impropriety, and thus, reasoned that if Congress had desired section 1359 to apply to the type of case before it, it would have simply omitted the words "improperly" and "collusively", since they would add nothing to the phrase, "to invoke the jurisdiction of such Court." This construction of the language in Section 1359, though plausible, would seem to render the section ineffective, except in rare situations. Its application would thus be limited to transactions which border on the fraudulent.

The rationale of *Jaffe* and *Corabi* has predictably lead to an increase in typically manufactured diversity cases on the federal dockets.<sup>34</sup> Especially since *Corabi*, federal courts;

have uniformly ruled that a party's actions are not "improper" or "collusive" within the meaning of the statute even though the sole motive was to gain access to federal court, if the actions were lawful in themselves.<sup>35</sup>

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33. 264 F.2d 784, 788.

34. See e.g. *Jamison v. Kammerer*, 264 F.2d 789 (3d Cir. 1959), where the same plaintiff had appeared as the administrator in thirty-three other civil actions in the federal district court.

35. WRIGHT, *supra* note 23, at § 31. For a general discussion of cases involving the rationale of *Jaffe* and *Corabi*, cf. annot., 75 A.L.R.2d 717 (1961). Also, for cases upholding diversity of administrators, see *City of Brady v. Finklea*, 400 F.2d 352 (5th Cir. 1968); *Lang v. Elm City Const. Co.*, 217 F. Supp. 873 (D. Conn. 1963), *aff'd* 324 F.2d 235 (2nd Cir. 1963); *Borror v. Sharon Steel Co.*, 327 F.2d 165 (3rd Cir. 1964); *Ashley v. Read Const. Co.*, 195 F. Supp. 727 (D. Wyo. 1961); *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954). For representatives under wrongful death statutes see *Sisk v. Pressley*, 81 F. Supp. 16 (E.D. S.C. 1948); *Janzen v. Goos*, 302 F.2d 421 (8th Cir. 1962); *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945); *County of Todd v. Loegering*, 297 F.2d 470 (8th Cir. 1961); *Suders v. Campbell*, 73 F. Supp. 112 (M.D. Pa. 1947). For venue, citizenship of the administrator, not the state in which appointment is made, is determinative for diversity purposes; see *Buchheit v. United Air Lines, Inc.*, 202 F. Supp. 811 (S.D. N.Y. 1962). Note that in Virginia, the state laws provide that a person who is not a resident of Virginia shall not be appointed



Prior to *McSparran v. Weist*,<sup>36</sup> only one court of appeals questioned the basic rationale of *Jaffe* and *Corabi*. *Martineau v. City of St. Paul*,<sup>37</sup> decided by the Eighth Circuit, found the appointment of a general guardian appointed for the sole purpose of creating diversity to be within the prohibition of section 1359. However, this is an alternative holding, since the Court also noted that Minnesota law does not allow a guardian to stand as a real party in interest.<sup>38</sup>

In *McSparran v. Weist* the Third Circuit reconsidered its decisions in *Jaffe* and *Corabi*. There, the plaintiff, an out-of-state resident, was appointed as an injured minor's guardian for the expressed purpose of creating federal diversity jurisdiction. The court applied a new interpretation to section 1359. It held that, "a nominal party designated solely for the purpose of creating diversity, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named."<sup>39</sup> In so holding the court expressly overruled *Jaffe* and *Corabi*.<sup>40</sup>

One substantial difficulty in reaching this result was the decision of The Supreme Court in *Mecom v. Fitzsimmons Drilling Co.*<sup>41</sup> That case which involved destruction of diversity, indicated that to fail to consider the citizenship of a duly appointed guardian or administrator would be to collaterally attack the order of the state court which made the appointment. Both *Corabi* and *Jaffe* relied on *Mecom* to support their interpretation on section 1359. *McSparran*, however, distinguished *Mecom* on two grounds. First the court emphasized that *Mecom* was concerned with the destruction of diversity where section 1359 was not applicable. A second distinction drove closer to the admonition of *Mecom*, that motives for selecting an administrator are immaterial. As to this contention the court said:

We do not impugn this decree collaterally by refusing to recognize the citizenship of a straw guardian. Guardian he remains, but

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as a personal representative unless a resident is also appointed; see *Holt v. Middlebrook*, 214 F.2d 187 (4th Cir. 1954).

36. See note 12, *supra*.

37. 172 F.2d 777 (8th Cir. 1949).

38. See *County of Todd v. Loegering*, 297 F.2d 470 (8th Cir. 1961). See also *McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954), decided without mentioning *Martineau* and seems to overrule it. Two district courts have not followed the basic rationale of *Corabi*, see *Bogue v. Chicago, B. & Q. R. Co.*, 193 F. 728 (S.D. Iowa 1912); *Cerri v. Akron-Peoples Telephone Co.*, 219 F. 285 (N.D. Ohio 1914). However, these two cases have not been followed and *Cerri* was overruled *sub silentio* in all probability by *Harrison v. Love*, 81 F.2d 115 (6th Cir. 1936).

39. See note 12 *supra*, at 873.

40. *Fallat v. Gouran*, 220 F.2d 325 (3rd Cir. 1955), was also disapproved so far as it approved manufactured diversity.

41. See note 6 *supra*.

since he is acting in the capacity of a straw party we refuse to recognize his citizenship for purposes of determining diversity jurisdiction.<sup>42</sup>

On the basis of this reasoning the court questioned the immateriality of motives in light of the language of section 1359. It seemed to the court that in order to determine if a party was a straw party, whose citizenship would be disregarded, an investigation of the purposes for which the representative was selected would not be irrelevant.

Another conclusion of the *McSparran* court, contrary to that reached in *Corabi*, was that collusion did not have to exist between the opposing parties. The necessary collusion was found to exist:

between the non-resident guardian and the applicant for his appointment in the state proceeding as a result of which one who would not otherwise have been named as guardian has achieved the status from which he claims the right to sue because of his artificial selection solely for the purpose of creating jurisdiction.<sup>43</sup>

The rationale of *McSparran* may create some new problems. When applying the *McSparran* test, that the citizenship of a person named as a representative party solely to create diversity will be disregarded, the criteria for determining whose citizenship controls, the representative's or the beneficiary's, will be subjective rather than objective. No longer will parties openly admit that the appointment was made solely for the purpose of creating diversity. Upon examination of selection criteria of representatives, the chance for perjurious testimony will increase.<sup>44</sup> The burden of proof will be on the party asserting diversity jurisdiction. If the representative party cannot prove that he is not a mere straw party, the citizenship of the beneficiary will be determinative.

However, in two district court cases following *McSparran*, no problem existed in finding a violation of section 1359. In *Dougherty v. Oberg*,<sup>45</sup> the court followed *McSparran*, denying jurisdiction to a non-resident guardian who the court found was appointed solely for the purpose of creating diversity. The court also found important a secondary criterion of *McSparran*. In *McSparran*, as in *Dougherty*, all parties, except the guardian, were citizens of the same state. Thus, this situation lacked any "federal flavor" since the historical basis of diversity jurisdiction, of protecting an out-of-state party against local prejudice, could not pos-

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42. See note 12 *supra*, at 874.

43. *Id.* at 873.

44. See Chief Judge Biggs' dissenting opinion in *Esposito v. Emery*, 402 F.2d 878 (3rd Cir. 1968), a companion case to *McSparran*.

45. 297 F. Supp. 635 (D. Minn. 1969).

sibly be a factor.<sup>46</sup> This opinion is significant for its great reliance on *McSparran* since an alternate holding was available.<sup>47</sup> *Gilchrest v. Strong*<sup>48</sup> also followed *McSparran*, but carried the holding one step further, indicating that the same result would follow, if the primary or dominant purpose were to create diversity.<sup>49</sup>

The court in *McSparran* held jurisdiction would be "improper or collusive" if the selection of the representative party was solely for the purpose of creating diversity. However, a literal reading of the statute, seems to require for its applicability that a person be made a party to invoke the jurisdiction of the court *and* that this be done "improperly or collusively". Thus, making a person a party merely to invoke diversity jurisdiction would seem not to satisfy all the statutory requirements. Perhaps, however, *McSparran* can be interpreted as holding that "making" a person a party *solely* to create diversity jurisdiction is "improper", as contrasted with "making" a person a party "to invoke the jurisdiction of the court." That is, if an otherwise qualified and legitimate representative is selected, partially because of his diverse citizenship, the appointment would not be improper. But, if an otherwise unqualified individual were selected *solely* to create jurisdiction, that appointment would become "improper".

This limited interpretation of the holding in *McSparran* seems preferable to both the mechanistic approach employed in *Corabi*, and the interpretation of *McSparran*, which fails to give effect to all the words of the statute. It should be noted, however, that this suggested approach is in conflict with the indication in *Gilchrest*, that *McSparran* applies if the primary or dominant purpose of the appointment is to create diversity.

#### ASSIGNMENT OF INTERESTS TO CREATE DIVERSITY JURISDICTION

Since the 1948 Revision of the Judicial Code, when the anti-assignment and the anti-collusion clauses were merged into section 1359, the courts have taken two approaches in determining whether an assignment creates diversity jurisdiction. Some courts have strictly adhered to the real party in interest principle and refused to consider the reasons

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46. *Id.* at 637.

47. In Minnesota, the minor ward and not the guardian, is the real party in interest. *Id.* at 640 approving of *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949), on the basis of real party in interest.

48. 299 F. Supp. 804 (W.D. Okla. 1969).

49. *Id.* at 807.

which motivated the assignment. In these cases, diversity jurisdiction has been recognized anytime a party has a right to sue in his own name under state law.<sup>50</sup> These decisions adhere to the rationale of the appointment cases of *Jaffe* and *Corabi*, and have predictably resulted in the encouragement of sham devices to create diversity.<sup>51</sup>

The second approach of courts since the 1948 revision has been to look at all the circumstances surrounding the conveyance of the interest or claim. This is merely an affirmation of pre-revision cases that looked beyond the mere formality of a valid transfer under state law.<sup>52</sup> The cases following this approach have also demanded that the assignee have a substantial interest in the dispute.<sup>53</sup>

*Ferrara v. Philadelphia Laboratories Inc.*<sup>54</sup> has been cited<sup>55</sup> as a careful analysis of the prior authorities which had rejected on various grounds assignments as a means of creating diversity jurisdiction. In *Ferrara*, the assignee of a cause of action was denied diversity jurisdiction because he was directed to retain the same law firm as formerly employed by the assignor and to return all proceeds of any suit to the assignor. Calling upon an "empirical formula which calls for judicial inquiry into all the circumstances",<sup>56</sup> the assignment of the cause of action was held to be "improper" and "collusive" under section 1359. Some factors enumerated in this empirical inquiry included the interest retained in the litigation by the transferor; the motive or purpose for the transfer; the completeness of the transfer; the solicitation of the plaintiff to bring the suit; and, the identity of the party actually controlling the litigation.<sup>57</sup> The decision in *Ferrara* indicates that in

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50. See *Ikeler v. Detroit Trust Co.*, 30 F. Supp. 643 (E.D. Mich. 1939); *In Re Appropriation By the City of Bethlehem*, 181 F. Supp. 875 (E.D. Pa. 1960); *City of Eufaula v. Pappas*, 213 F. Supp. 749 (M.D. Ala. 1963); *Birkins v. Seaboard Service*, 96 F. Supp. 245 (D. N.J. 1950).

51. See *City of Eufaula v. Pappas*, 213 F. Supp. 749 (M.D. Ala. 1963), where one dollar was deemed adequate consideration for transfer of land, the acknowledged reason being to create diversity, and any proceeds would be divided among the grantors.

52. See *Farmington v. Pillsbury*, 114 U.S. 138 (1885), denying jurisdiction to an assignee on the grounds that the assignee must be conveyed the entire title and that the assignor remained the real party in interest, making the assignment fictitious. See also *Little v. Giles*, 118 U.S. 596 (1886); *Lake County Board of Comm'rs. v. Dudley*, 173 U.S. 243 (1899).

53. Cf. *Dunham v. Robertson*, 198 F.2d 316 (10th Cir. 1952); *Rosenberg v. Platt*, 229 F. Supp. 8 (E.D. Wis. 1964); *Paper Makers Importing Co. v. City of Milwaukee*, 165 F. Supp. 491 (E.D. Wis. 1958).

54. 272 F. Supp. 1000 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

55. See note 12 *supra*, at 874 n. 23.

56. *Ferrara v. Philadelphia Laboratories, Inc.*, 272 F. Supp. 1000, 1007 (D. Vt. 1967).

57. Cf. *Amar v. Garnier Enterprises Inc.*, 41 F.R.D. 211 (C.D. Cal. 1966), applies some of the same criteria as *Ferrara*, in finding that a solicited assignee, who had little actual knowledge of the controversy, could not maintain diversity jurisdiction.

this situation the courts should make a searching inquiry into all the circumstances surrounding an assignment to determine if it was, in fact, "improper" under section 1359.

The recent case of *Kramer v. Carribbean Mills Inc.*<sup>58</sup> is the first Supreme Court pronouncement on the issue of "improper" assignments since the 1948 revision. In *Carribbean Mills*, the plaintiff, was assigned a cause of action in contract for one dollar. He then reassigned 95% of any proceeds from the suit back to the original transferor, and brought the action in a federal district court.<sup>59</sup> The Supreme Court affirmed the Fifth Circuit's<sup>60</sup> finding that jurisdiction did not exist, since the assignee was obviously a collection agent selected solely for the purpose of creating diversity. It borrowed language from earlier cases<sup>61</sup> and termed the assignment a contrivance and a pretense which was used collusively to create federal diversity jurisdiction.<sup>62</sup> Viewing the history of section 1359 the Court concluded that this relatively easy way of manufacturing diversity was what Congress specifically intended to prohibit.<sup>63</sup>

The opinion in *Carribbean Mills* may leave open the interpretation that subjective motives are not to be afforded substantial weight in considering such assignments.<sup>64</sup> The Court distinguished the appointment cases saying:

Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court: (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers: and (3) all such representatives owe their appointment to a decree of a state court, rather than solely to an action of the parties.

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58. 394 U.S. 823 (1969).

59. Both *Carribbean Mills Inc.* and the original assignor were alien corporations and, therefore, could not have standing in a United States court. *Kramer*, being a citizen of Texas, brought suit under 28 U.S.C. § 1332(a)(2) (1964).

60. 392 F.2d 387 (5th Cir. 1968).

61. The Court found *Carribbean Mills* indistinguishable from *Farmington v. Pillsbury*, 114 U.S. 138 (1885). *Williams v. Nottawa*, 104 U.S. 209 (1881); *Little v. Giles*, 118 U.S. 596 (1886), were both relied upon in the *Ferrara* case.

However, the Court distinguished and declined to examine those cases where an absolute title was transferred for the purpose of creating diversity. The Court found that this kind of transfer was not "improperly" or "collusively" made. 394 U.S. 823 at 828 n. 9 citing *Cross v. Allen*, 141 U.S. 528 (1891); *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

62. *Kramer v. Carribbean Mills Inc.*, 394 U.S. 823, 827 (1969).

63. *Id.* at 829.

64. *Cf.* Comment, *Manufacturing Diversity Jurisdiction*, 14 VILL. L. REV. 727, 743 (1969).

It is not necessary to decide whether these distinctions amount to a difference for purposes of section 1359.<sup>65</sup>

These distinctions do not seem to create such sharp disparities between creation of diversity by appointment or by assignment so as to make the *McSparran* rationale totally inapplicable to assignment situations. All three distinctions impliedly question the propriety of tampering with a state court appointment, which is not necessary in assignment cases. But both assignments and appointments are strictly a matter of state law. Thus, the distinctions seemed to be substantially weakened by the Court's refusal to accept the contention that the legality of the assignment under Texas law rendered it valid for the purposes of federal jurisdiction:

The existence of federal jurisdiction is a matter of federal, not state law . . . Under the predecessor section, 28 U.S.C. section 80 (1940 ed.), this Court several times held that an assignment could be "improperly or collusively made" even though binding under state law . . . Moreover, to accept this argument would render section 1359 largely incapable of accomplishing its purpose; . . .<sup>66</sup>

This is not inconsistent with the rationale of *McSparran*, that if the dictates of section 1359 are to be followed, motives must be investigated at least to determine if the party is only a straw party.<sup>67</sup> Though the Court did not speak to this problem, since *Kramer* admitted the assignment was substantially made to invoke diversity,<sup>68</sup> it seems unlikely that in a later case the Court would come to a different result merely because of a less enthusiastic admission.

In summary the recent decisions in the entire area of creation of diversity jurisdiction through the use of assignments and the appointment of representatives lead to the following conclusions. Based on *McSparran*, the trend seems to be to discard much of the rationale advanced by the Court in *Mecom v. Fitzsimmons Drilling Co.*, and its application in *Jaffe* and *Corabi*. If *McSparran* is followed then it should be expected that courts will disregard the citizenship of representative parties if their appointment was made solely to create diversity jurisdiction.

The *Carribbean Mills* decision indicates that an assignee's citizenship

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65. *Kramer v. Carribbean Mill Inc.*, 394 U.S. 823, 828 n.9 (1969).

66. *Id.* at 829, citing *Little v. Giles*, 118 U.S. 596 (1886); *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327 (1895). In these cases, only a nominal interest was found to be in the assignee, but the Court also noted that the transfer was made to create diversity.

67. *Cf.* note 12 *supra*, at 874.

68. *Kramer v. Carribbean Mills Inc.*, 394 U.S. 823, 828 (1969).

will not be determinative, if, because of any number of factors he is deemed to be only a collection agent for the assignor. Though the Court in *Carribbean Mills* strictly limited its opinion to the facts of that case, the distinction made between the assignment and appointment cases does not seem bothersome. While *Carribbean Mills* specifically refused to comment on *McSparran*, the determination of when an assignee is to be deemed "a collection agent" seems to require an examination of the motives behind the assignment. This is the very approach taken in *McSparran* to determine when a representative's citizenship is to be determinative for federal jurisdictional purposes.

#### DESTRUCTION OF DIVERSITY JURISDICTION BY APPOINTMENT OF A REPRESENTATIVE PARTY

While section 1359 expresses Congressional intent against collusive creation of federal diversity jurisdiction, there is no applicable federal statute expressly prohibiting avoidance of federal jurisdiction.<sup>69</sup> The product of such a lack of policy is best exemplified by *Mecom v. Fitzsimmons Drilling Co.*,<sup>70</sup> a case that has been cited approvingly by courts which have allowed appointments or assignments to be used to create or destroy diversity jurisdiction. In *Mecom*, both Mrs. Smith, the administratrix, and the decedent were citizens of Oklahoma. She sued a Louisiana corporation for wrongful death in an Oklahoma state court. The defendant removed the case, and Mrs. Smith dismissed the action after a motion for remand was denied. She subsequently brought two more suits in the state court with the same results. Thereupon, Mrs. Smith resigned as administratrix, and Mecom, a citizen of Louisiana, was appointed as administrator. Mecom then brought the action in a state court, and removal followed. When a motion for remand was denied, Mecom appealed, and eventually the Supreme Court reversed and remanded the case to the state court. In its opinion, the Court made three observations which have been frequently cited, whether creation or destruction of diversity was at issue. First, the citizenship of the administrator was held determinative for diversity purposes as long as state law regarded him as the real party in interest and his appointment was valid.<sup>71</sup> Following this reasoning, the Court held that any questioning of the motives for the appointment would be a collateral attack upon the state court decree. Finally, it indicated that if the

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69. 3a MOORE, *supra* note 23, at 152.

70. 284 U.S. 183, 77 A.L.R. 904 (1930), *supra*, note 6.

71. *Id.* at 188.

appointment was not fraudulent the motives for making the appointment were immaterial.<sup>72</sup>

Although other devices for precluding removal, such as the improper alignment of parties,<sup>73</sup> the bad faith joinder of defendants,<sup>74</sup> and the introduction of nominal parties,<sup>75</sup> have generally been ineffective, the appointment of a representative party has remained successful.<sup>76</sup>

#### DESTRUCTION OF DIVERSITY BY ASSIGNMENT

In any state where a cause of action or claim can be assigned, avoidance of diversity jurisdiction can easily be achieved by transferring a right to an individual with the same citizenship as the opposing party.<sup>77</sup> *Provident Sav. Life Assur. Soc'y v. Ford*<sup>78</sup> was the first United States Supreme Court decision interpreting the effect of a colorable<sup>79</sup> assignment on diversity jurisdiction. In that case, the defendant claimed that the assignment was colorable, without consideration, and made to prevent removal. Consequently he asserted that the controversy was between him and the assignor. The Court ignored this contention and denied diversity on the basis of the citizenship of the assignee. After determining that the assignee was the real party in interest, the Court stated:

We know of no instance where the want of consideration in a transfer, or a colorable transfer of a right of action from a person against whom he would not have such a right, has been held a good ground for removing a cause . . .<sup>80</sup>

More recent cases have refused to question the motives for making an assignment; relying on *Mecom* and *Provident*, they have declared the assignee to be the real party in interest, whose citizenship controls for determining diversity.<sup>81</sup>

72. *Id.* at 189.

73. *Cf. Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941).

74. *Cf. Covington v. Indemnity Ins. Co.*, 251 F.2d 930 (5th Cir. 1958).

75. *Cf. Salem Trust Co. v. Manufacturers Fin. Co.*, 264 U.S. 182 (1924).

76. *Cf. Seymour v. Johnson*, 235 F.2d 181 (6th Cir. 1956); *Ockerman v. Wise*, 202 F.2d 144 (6th Cir. 1953); *Mason v. Helms*, 93 F. Supp. 312 (E.D. S.C. 1951); *Breedon v. Atlantic Coast Line R. Co.*, 86 F. Supp. 964 (E.D. S.C. 1949).

77. *See* 3 Moore, *supra*, note 23, at 1306 n. 5, listing state real party in interest statutes. The general rule is that an assignee can be the real party in interest.

78. 114 U.S. 636 (1885).

79. The term "colorable assignment" has been used with various meanings by courts and parties. In *Bernblum v. Travelers' Ins. Co.*, 9 F. Supp. 34, 36 (W.D. Mo. 1934), the term was equated with fictitious. However, the more general and still accurate definition is any assignment which has been made for the purpose of defeating federal diversity jurisdiction. *Cf. Oakley v. Goodnow*, 118 U.S. 43 (1886); *Carson v. Dunham*, 121 U.S. 421 (1887); *Leather Mfgs. Bank v. Cooper*, 120 U.S. 778 (1887).

80. *Provident Sav. Life Assur. Soc'y v. Ford*, 114 U.S. 635 at 641 (1885). *Accord see cases supra*, note 79.

81. A common practice in this area is the assignment of an entire claim by a bene-



While it may be argued that a total assignment of such an interest may legitimately result in the avoidance of diversity, the argument is considerably weakened in the instance of a partial assignment. In *Heape v. Sullivan*<sup>82</sup> the attorney for the plaintiff admitted that the partial assignment was made strictly to defeat removal. A further determination of facts showed that the assignee was an aunt of the plaintiff's attorney, and that she had little knowledge of the suit and with no *bona fide* interest in the plaintiff's claim. Also, this same person had been used previously as an assignee for other causes of action. Over the contention that this assignment was a sham and collusive, the district court remanded the case to the state jurisdiction, saying: "There is nothing before the Court in this case to indicate that the particular assignment involved here was not valid, *bona fide* and made in good faith."<sup>83</sup>

Only a few courts have refused to recognize assignments as a device to avoid diversity jurisdiction. In *Phoenix Mutual Life Ins. Co. v. England*,<sup>84</sup> the insurance company sought a declaratory judgment determining the rights and obligations under the policy. The beneficiary moved to dismiss for lack of diversity, contending that an assignee of his was the real party in interest, although the assignment had been made only to destroy diversity. The court held it had jurisdiction, on the basis that the assignee had no real interest, and it was admitted that the sole reason for the assignment was to destroy complete di-

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ficiary of an insurance policy to a party residing in the same state as the company. Normally, the formalities of the assignment are handled by the beneficiary's attorney, with the beneficiary seldom knowing the assignee at all. Once the suit is prosecuted the proceeds from it are returned to the beneficiary, usually with a small fee going to the assignee. See 1 Barron & Holtzoff, *supra* note 23, at § 103, n. 33. *Bernblum v. Travelers' Ins. Co.*, 9 F. Supp. 34 (W.D. Mo. 1934); *Krenzien v. United Services Life Ins. Co. of Wash. D.C.*, 121 F. Supp. 243 (D. Kan. 1954); *Leshem v. Continental American Life Ins. Co.*, 219 F. Supp. 504 (S.D. N.Y. 1963); *Harrison v. Hartford Fire Ins. Co.*, 55 F. Supp. 241 (W.D. Mo. 1944).

An assignment of a commercial contract solely to avoid diversity has also been upheld. See *Staggers v. Otto Gerden Co.*, 359 F.2d 292 (2d Cir. 1960); *Rosenblum v. Dingfelder*, 111 F.2d 406 (2d Cir. 1940); *Rosecrans v. William S. Lozier Inc.*, 142 F.2d 118 (8th Cir. 1944); *Nierman v. White Motor Parts Inc.*, 269 Mich. 608, 257 N.W. 751 (1934); *Contra*: *Brown v. Ginn.*, 66 Ohio St. 316, 64 N.E. 123 (1902), where a lawyer was assigned the interest of numerous creditors in order to prosecute on the action and return the proceeds, less his expenses. The court held he could not be the real party in interest, since it was not his labor that had produced the sums being sued upon.

82. 233 F. Supp. 127 (E.D. S.C. 1964).

83. *Id.* at 128. See also *Ridgeland Box Mfg. Co. v. Sinclair Refining Co.*, 82 F. Supp. 274 (E.D. S.C. 1949); *King v. McMillan*, 252 F. Supp. 390 (D.C. S.C. 1966); cf. *Pettriken v. Chicago, R.I. & P.R. Co.*, 15 F.R.D. 346 (W.D. Mo. 1954), following similar reasoning for a subrogee. *Verschell v. Firemans Fund Ins. Co.*, 257 F. Supp. 153 (S.D. N.Y. 1966). *Kerigan v. Massachusetts Bonding & Ins. Co.*, 74 F. Supp. 820 (W.D. Mo. 1947).

84. 22 F. Supp. 284 (W.D. Mo. 1938).

versity.<sup>85</sup> It should be noted that in this, all the proceeds of the suit were to enure to the benefit of the assignor and hence, in reality no true assignment had been made.<sup>86</sup>

More significant inroads on the *Provident* rule were made in the recent case of *Gentle v. Lamb-Weston Inc.*<sup>87</sup> There the court sought to distinguish *Mecom* and *Provident* in finding that an assignment of a 1/100 interest did not destroy diversity. In this case, it was held that where an Oregon citizen received an assignment of a 1/100 interest of each plaintiff's claim for the admitted purpose of destroying diversity, the federal court would pierce the assignee's apparent interest and would not allow diversity to be vitiated by the assignments.<sup>88</sup> *Mecom* was distinguished because it involved the appointment of an administrator, not the transfer of an interest. Having distinguished *Mecom*, the court then determined that it would follow a line of cases interpreted to stand for the principle that federal courts should be vigilant "to protect the jurisdiction against cleverly designed maneuvers designed by ingenious counsel to defeat it."<sup>89</sup> While most of these cases involved joinder of parties, the court found the rationale in *Wecker v. National Enameling and Stamping Co.*,<sup>90</sup> to be most compelling:

While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has the right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to

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85. See also *Lisenby v Patz*, 130 F. Supp. 670 (E.D. S.C. 1955), holding that a 1/100 assignment interest will not preclude a federal court from determining who is the "legitimate" party. *Contra*, *Hair v. Savannah Steel Drum Corp.*, 161 F. Supp. 654 (E.D. S.C. 1955), refusing to follow *Lisenby* because it allegedly misconstrued applicable state law. Cf. *Columbia National Life Ins. Co. v. Cross*, 298 Mass. 47, 9 N.E. 2d 402 (1937), where the defendant demurred to an injunction attempting to restrain the assignee from bringing the action in a state court. The demurrer was sustained on the basis of *Provident*.

86. *Phoenix Mutual Ins. Co. v. England*, 22 F. Supp. 284, 286 (W.D. Mo. 1938). *But see* *Daldy v. Ocean Accident & Guarantee Corp. Ltd.*, 30 F. Supp. 454 (E.D. Mo. 1941), which casts doubt on the availability of this rationale on the basis of state legislation recognizing and approving of assignment of claims to avoid diversity jurisdiction.

87. 302 F. Supp. 161 (D. Me. 1969).

88. *Id.* at 166.

89. *Id.* at 165. See *Ex Parte Nebraska*, 209 U.S. 436 (1908); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939); *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206 (1906), (joinder held not to preclude removal. ". . . the Federal Courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals" 200 U.S. 206 at 218); *Updike v. West*, 172 F.2d 663 (10th Cir. 1949).

90. 204 U.S. 176 (1907).

retain their own jurisdiction.<sup>91</sup>

*Provident* and its progeny were distinguished on the ground that they involved assignments of entire claims, not partial assignments. Observing that the Supreme Court has never spoken on the effectiveness of a partial assignment to destroy diversity, the court stated:

It is one thing to say that diversity may be destroyed by an assignment of the assignor's entire claim and quite another to say that diversity may be destroyed by the assignment of a mere one per cent of a claim . . . And a fractional assignment, where the assignor remains a party for the purpose of profiting from local prejudice, is manifestly less defensible.<sup>92</sup>

This reasoning can only be justified if the distinction drawn between *Lamb-Weston* and *Mecom* is legitimate. The determination that the purpose for making the assignment was to benefit from local prejudice is simply an investigation of motives.<sup>93</sup>

Underlying the distinction drawn between the *Lamb-Weston* decision and *Provident* and *Mecom* is the court's disapproval of a merely nominal assignment to destroy diversity. At one point calling it a "cynical device", the court approved of prior language likening the use of assignments to a game used to deny parties their statutory rights.<sup>94</sup> While acknowledging the existence of contrary precedent, the court also noted that commentators have become alarmed and critical of its increased application.<sup>95</sup> Taking the cue from Professor Moore, the court determined that this was an "erroneous doctrine"<sup>96</sup> and relying on *Carribbean Mills*, it denied the contention that the federal court was an improper forum to determine if assignments are invalid to defeat federal jurisdiction. "The existence of federal jurisdiction is a matter of federal, not state law."<sup>97</sup>

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91. *Id.* at 185-186 cited in *Lamb-Weston*, 302 F. Supp. 161, 165 (D. Me. 1969).

92. *Id.* at 164.

93. See discussion of the distinctions made in the *Carribbean Mills* case, *supra*, text accompanying notes 65-68.

94. See note 84 *supra*, at 286.

"The facts showing that the assignment was a mere pretext and that its execution was fraudulent, as that term is used without approbium, it must be ignored. To do otherwise would make federal procedure a game in which the statutory rights of parties might be blocked by an adroit and cleverly designed maneuver of his adversary."

95. *Gentle v. Lamb-Weston Inc.*, 302 F. Supp. 161 (D. Me. 1969); see 3(a) Moore, *supra* note 23, at 156. Field, *Proposals on Federal Diversity Jurisdiction*, 17 S. CAR. L. REV. 669, 671 (1965); A.L.I. Study of Division Between State and Federal Courts, Commentary on Proposed Section 1307 at 104-05 (September 25, 1965 Official Draft); see also 44 HARV. L. REV. 97, 100 (1930); 40 VA. L. REV. 803, 804 (1954); 34 TEX. L. REV. 476, 477 (1956); Note, *The Assignment Device in Diversity Cases: The Illusory Right to Removal*, 85 U. CIN. L. REV. 33, 40 (1966).

96. *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161 (D. Me. 1969) citing 3a Moore, *supra* note 23.

97. *Kramer v. Carribbean Mills Inc.*, 394 U.S. 873 (1969) cited in *Gentle v. Lamb-Weston, Inc.*, 307 F. Supp. 161 (D. Me. 1969).

## PROPOSALS FOR LEGISLATIVE CHANGE

Among the most comprehensive studies advocating change in diversity jurisdiction is that prepared by the American Law Institute.<sup>98</sup> The A.L.I. has proposed two sections, both of which attempt to find a more rational approach to the problem of creation and destruction of diversity jurisdiction through the use of assignments and representative parties. Section 1301(b)(4) provides:

An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same state as the decedent; and a guardian, committee, or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the person represented.<sup>99</sup>

While the above proposal relates only to the appointment of representative parties, another proposal affects both types of "manufactured cases". Section 1307, provides:

(a) A district court shall not have jurisdiction of a civil action in which any party has been made or joined improperly, or collusively, or pursuant to agreement or understanding between opposing parties, in order to invoke the jurisdiction of such court.  
 (b) Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of federal jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests or any kind, whether made by private persons or by a court or by any other official body.<sup>100</sup>

On its face section 1301(b)(4) would immediately end creation of diversity cases by the appointment of a non-resident representative party. Its basic assumption is that these particular suits are essentially local controversies and present no reason to support federal jurisdiction.<sup>101</sup> This approach is much broader than that used in *McSparran* which would deny jurisdiction only if the appointment was made for its jurisdictional impact. Thus, the statute lacks the flexibility of the *Mc-*

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98. The American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (Part I) (Official Draft 1965) (hereinafter cited as A.L.I. Study).

99. A.L.I. Study, note 115 *supra*, at 8.

100. A.L.I. Study, note 115 *supra*, at 23.

101. A.L.I. Study, note 115 *supra*, at 64.

*Sparran* rule because section 1301(b)(4) does not allow for the case involving a non-resident representative which might justifiably invoke federal jurisdiction. *McSparran* and the few cases following it may provide the better approach since diversity jurisdiction would exist for the non-resident plaintiff if his appointment was not solely based on jurisdictional purposes.<sup>102</sup> In essence 1301(b)(4) will preclude the investigation of the motives for making the appointment and create a purely mechanical test.

However, subsection (b) of section 1307, clearly creates a motive test. This section refuses to recognize an assignment or appointment which have been made for the purpose of creating or defeating diversity jurisdiction.<sup>103</sup> It acknowledges that when an appointment or transfer is made solely for jurisdictional reasons they should be disregarded for jurisdictional purposes. This motive test has the additional advantage of precluding the necessity of differentiating between the effects of transactions under state law.

One likely drawback to the motive test is that parties will naturally be reluctant to admit any improper motives for obtaining an appointment or transfer. Thus, preliminary hearings will be necessary to determine the facts relating to the transaction that created or destroyed diversity. Delay and added court costs then become the natural result of the motive test.

#### CONCLUSION

Traditionally the function and purpose of diversity jurisdiction was to protect out-of-state parties from any possible prejudice of local courts and juries.<sup>104</sup> Therefore, it is inconsistent with the nature of the federal system to permit devices that allow a party to either create or avoid federal diversity jurisdiction on grounds unrelated to the purposes of that jurisdiction. Keeping in mind that not all transactions that alter federal jurisdiction should be condemned, the practice is sufficiently

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102. See the post *McSparran* case of *Silvious v. Helmick*, 291 F. Supp. 716 (N.D. W. Va. 1968). In that case the wife of the deceased was appointed administratrix by a West Virginia court, but she was a Virginia citizen. The defendant, a citizen of West Virginia, moved to dismiss on the basis of section 1359. The court held that normally the wife of the deceased is named as administratrix and upheld jurisdiction against the contention of manufactured diversity.

103. In reference to appointment section 1307 seems to contemplate that section 1301(b)(4) would not be adopted.

104. See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816). See generally Frank, *Historical Bases of the Federal Judicial System*, 13 LAW AND CONTEMP. PROB. 3, 22-24 (1948). For a criticism of this analysis see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

widespread as to evidence substantial abuses.<sup>105</sup> In the area of destruction of diversity, if *Mecom* and *Provident* remain valid law, a plaintiff can easily defeat a defendant's power to remove. Where diversity is desired the plaintiff has at least prior to *Carribbean Mills* and *McSparran* been able to force the opposing party into federal court by a mere replacement of one representative party for another or by a simple assignment. While a narrow reading of section 1359 might not prohibit such practices, they smack of forum shopping and should not be allowed as a distortion of the Congressional established jurisdiction.

Undoubtedly the Supreme Court's decision in *Carribbean Mills* is desirable. However, the Court took pains to limit the applicability of its holding. While it neither affirmed nor denied the possibility of a motive test the opinion suggests that the Court might sanction an examination of the circumstances surrounding the transfer as was done in *Ferrara v. Philadelphia Laboratories Inc.* If so, the examination of motives might be the next logical step since the motives can be contended to be one part of the circumstances which surround the transaction. Thus, it is not inconceivable that the Supreme Court might approve the position adopted in *McSparran*.

The result reached by the Third Circuit in *McSparran* seems a desirable one. Hopefully, it will be extended to encompass "destruction" cases as well. Admittedly, Congressional adoption of a comprehensive plan similar in scope to that proposed by the American Law Institute would present an optimum solution to the problem existing in this area. In any case, it seems certain that the law in this area will not be complete until clearly enunciated principles are developed denying both the deliberate manufacturing and avoidance of federal jurisdiction.<sup>106</sup>

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105. See a sample study of cases in the Eastern District of Pennsylvania that revealed that 20.5% of diversity cases brought in that jurisdiction were by out-of-state representatives of Pennsylvania plaintiffs against Pennsylvania defendants. A.L.I. Study 175. See also Cohan & Tate, *supra*, note 11, at 238-40.

106. Cf. 3a MOORE, *supra* note 23, at 166.