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Wencelas J. Wagner

Indiana University School of Law

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Federal Jurisdiction in Diversity and Related Cases

W. J. Wagner*

AN IMPORTANT GROUP OF CASES over which the inferior federal courts in the United States have jurisdiction consists of those in which the parties are "citizens of different States."

Theoretically, it cannot be doubted that controversies "arising under" federal law are proper for adjudication in federal courts, while the necessity of extending the federal judicial power to diversity cases is not readily apparent. However, while Congress withdrew from the original jurisdiction of federal courts cases "arising under" until 1875, it vested in them diversity jurisdiction, to be exercised concurrently with the state courts, by the very first Judiciary Act of 1789, which provided as follows:

". . . (T)he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature . . . where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State."¹

In 1875, jurisdiction was extended to cover all cases provided for by the Constitution; the Act repeated the constitutional words: ". . . between citizens of different States . . ."² The Judicial Code of 1948 did not change this phraseology.³

Obviously, diversity jurisdiction is based upon the premise that state courts may not always be impartial in passing upon cases in which one party is a local citizen, and the other—a resident of another State. To repeat the language of Justice Story: ". . . (S)tate attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or to control, the regular administration of justice."⁴

* Associate Professor of Law, Notre Dame Law School. This article is almost an entire chapter from the author's forthcoming book entitled *Federal States and their Judiciary*.

¹ 1 Stat. 73, 78 (Sec. 11).

² 18 Stat. 470 (Sec. 1).

³ 28 U. S. C. A., Sec. 1332.

⁴ *Martin v. Hunter's Lessee*, 1 Wheat. (14 U. S.) 304, 347 (1816). For similar statements by Chief Justice Marshall, see *Bank of the United States v. Deveaux*, 5 Cranch (9 U. S.) 61, 87 (1809).

Of course, if the basic premise of the diversity jurisdiction is false, the whole idea should fall. The soundness of the premise is difficult to assess by any means; conclusions must rest on suppositions and guesses.⁵ No wonder, advisability of diversity jurisdiction was and still is being discussed. It was disputed in the state convention on ratification of the Constitution. One of its outstanding advocates was Madison, who stated, during the debates in the Virginia convention, that "foreigners cannot get justice done them" in the local courts; this observation was intended to cover aliens as well as residents of other sister States.⁶ It has been asserted, however, that there is no proof of any bias in the state courts against non-residents, that there is no reason to assume it, and that, therefore, the necessity of diversity jurisdiction may be doubted.⁷

The attacks on diversity jurisdiction culminated in suggestions to abolish it. In 1930 and 1932, the Senate Judiciary Committee accepted this idea, and reported bills to that effect.

⁵ Justice W. O. Douglas, in *We the Judges* 84 (1956), stated that at the formation of the Union, "(t)he jealousies among the States, the suspicions and hostilities which the citizens of one State had toward those of another, the prevailing doubts that a Pennsylvania creditor would get justice in a New England court—these created a feeling of insecurity that was not congenial to the mercantile and commercial interests." However, "as the decades have passed," the situation changed considerably (at 95).

⁶ J. P. Frank, *Historical Bases of the Federal Judicial System*, 13 *Law & Contemp. Prob.* 3, 27 (1948).

⁷ H. J. Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 *Harv. L. Rev.* 483 (1928); F. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Cornell L. Q.* 499, 523-530 (1928). A strong plea for the retention of diversity jurisdiction was written by H. E. Yntema and G. H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 *U. of Pa. L. Rev.* 869 (1931); the reply of Professor F. Frankfurter, *A Note on Diversity Jurisdiction—in reply to Professor Yntema*, was published in 79 *U. of Pa. L. Rev.* 1097 (1931). The author advocated putting an end to "abuses" of diversity jurisdiction by legislation. The discussion continued, particularly in the *A. B. A. J.* in 1932 and 1933. Hon. J. J. Parker, in *The Federal Jurisdiction and Recent Attacks Upon It*, 18 *A. B. A. J.* 433 (1932), stressed sovereignty as an argument for diversity jurisdiction, and again defended it in dual sovereignty and the Federal courts, 51 *N. U. L. Rev.* 407, 408-413 (1956). One of the recent pleas for the application of diversity jurisdiction in its full scope was given by M. Wendell, *Relations Between the Federal and State Courts* (1949). Justice Frankfurter continues to criticize the diversity jurisdiction in his pronouncements from the bench. Thus, in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 *U. S.* 48, 54 (1954), he referred to the allegedly "mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction," and asserted that "(a) legal device like that of federal diversity jurisdiction which is inherently . . . not founded on reason, offers constant temptation to new abuses" (at 56). However, the prevailing sentiment among the judges is that this jurisdiction should be retained; see report of a committee in *Administrative Office of the United States Courts, Report of the Judicial Conference of the United States*, 271 (1951).

As it stands today, the diversity jurisdiction covers more instances than necessary to protect the litigants from a possible bias of state courts in favor of its residents. It was pointed out, e.g., that there is no reason for diversity jurisdiction where both parties to the suit are non-residents.⁸

By judicial decisions, scores of rules were developed which help to determine whether diversity jurisdiction lies or not. Many of them have a restrictive effect on the application of the doctrine.

One of the oldest requirements, going along with the general principle that federal jurisdiction is never assumed and must be clearly established, is that diversity of citizenship must clearly appear from the record of the case, before the federal court will agree to adjudicate the dispute on the merits. This idea prompted the Supreme Court to strike off the docket the early case of *Bingham v. Cabot*.⁹ From the short report of the case it appears that the Court

“were early of opinion, that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the circuit court; and that the record, in the present case, was in that respect defective.”¹⁰

The rule is well settled, and the Supreme Court has indicated more than once that it has no intention to relax it in any way.¹¹

In general, for the purposes of determining federal jurisdiction, citizenship of a State is equivalent to United States citizenship plus a domicile in that State,¹² or residence coupled with an intention that it be permanent.¹³ As in other instances of assumption of jurisdiction, the decisive moment is the one at which the

⁸ H. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.* 216, 236-237 (1948). The author takes an intermediate view in the discussion. He opposes strongly the application of the diversity jurisdiction to cases which are not included in the rationale of this jurisdiction, but agrees that there is a solid case for preserving it where state prejudice can be established.

⁹ *Bingham v. Cabot*, 3 *Dall.* (3 *U. S.*) 382 (1798).

¹⁰ *Ibid.*, at 383-384.

¹¹ See, e.g., *Sullivan v. Fulton Steamboat Co.*, 6 *Wheat.* (19 *U. S.*) 449 (1821). In *Cameron v. Hodges*, 127 *U. S.* 322, 325 (1888), the Court said: “This court has always been very particular in requiring a distinct statement of the citizenship of the parties, and of the particular State in which it is claimed, in order to sustain the jurisdiction of [the federal] courts.” See also a note, *Requirement of Federal Appellate Court that Proof of Diversity of Citizenship Appear Upon the Record*, 24 *Col. L. Rev.* 397 (1924).

¹² *Story in Case v. Clarke*, 5 *Fed. Cas.* 254 (C. C. R. I. 1828); *Brown v. Keene*, 8 *Pet.* (33 *U. S.*) 112 (1834).

¹³ *Marks v. Marks*, 75 *F.* 321 (C. C. Tenn. 1896).

suit is brought. Once the jurisdiction of a federal court lies, it continues in later stages of the case, even if subsequently there is no diversity of citizenship.¹⁴ Federal jurisdiction attaches even if a party desiring to have his rights passed upon by the courts manipulates so as to have a case meeting the requirements of diversity of citizenship, with the only purpose of having the suit adjudicated in a federal court, provided that there be no collusion of any kind. The motive of the party in preferring a federal tribunal is immaterial.¹⁵

The courts make efforts to discover whether all the requirements for federal jurisdiction have been complied with, in good faith, by the parties. It happens, however, that they are misled by devices such as the establishment of a fake domicile, pretended assignments of claims, or improper joinder of parties.¹⁶

As in cases "arising under" federal law, those in which the parties have different citizenship may be removed, by the defendant, from state courts to federal courts.¹⁷

Actions have to be "prosecuted in the name of the real party in interest";¹⁸ but in many cases, a party to the suit is acting in a representative capacity, such as a trustee, executor, administrator or guardian. The real party in interest does not appear as a party to the litigation. In such cases, the citizenship of the representative is decisive. "If they are personally qualified by their citizenship to bring suit in the Federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified."¹⁹ Jurisdiction depends "upon the relative situation of the parties named in the record."²⁰

The rule is different in cases of interpleader. The Judiciary Act disregards, in such a situation, the citizenship of the plaintiff of record, and makes federal jurisdiction dependent upon the citizenship of the real parties in interest—that of the adverse claimants to the money or property owed by plaintiff.²¹

¹⁴ One of the early cases in which this rule has been established is *Conolly v. Taylor*, 2 Pet. (27 U. S.) 556, 565 (1829), in which Marshall said: "Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit."

¹⁵ *City of Chicago v. Mills*, 204 U. S. 321 (1907).

¹⁶ For citation of cases and discussion, see e.g. *M. Wendell*, op. cit. n. 7, at 72.

¹⁷ 28 U. S. C. A., Sec. 1441(a).

¹⁸ Rule 17(a), Federal Rules of Civil Procedure.

¹⁹ *Coal Company v. Blatchford*, 78 U. S. 172, 175 (1870).

²⁰ *Ibid.*, at 175.

²¹ 28 U. S. C. A., Sec. 1335.

Federal jurisdiction may attach also by virtue of state legislation, if the statute permits the real party in interest to be sued directly, and this party has citizenship different from that of plaintiff. Thus, the Louisiana Direct Action Statute, held constitutional in *Watson v. Employers Liability Assurance Corp.*,²² allows injured persons to bring direct actions against liability insurance companies that have issued policies contracting to pay liability imposed on the tort-feasors. A separate cause of action against the insurer is established. In *Lumbermen's Mutual Casualty Co. v. Elbert*,²³ the Supreme Court held that even if the tort-feasor and the injured person are citizens of the same state, the federal diversity jurisdiction lies if its requirements are satisfied as between the injured and the insurer, if the tort-feasor is not sued.

Except for prohibiting removal of some actions against railroads from state to federal courts^{23a} Congress has not imposed, for a long time, any restrictions on the exercise of the diversity jurisdiction, so as to limit it to specified subject-matters of the litigation. However, in 1958, an amendment to the Judicial Code withdrew the right to remove to federal courts civil actions arising under the workmen's compensation laws of the states.^{23b}

Diversity jurisdiction vests in the federal courts because of the quality of the parties, not the type of the controversy. However, the Supreme Court has made exceptions to the diversity jurisdiction, which do not seem to be warranted either by statutes or convincing reason. In *Barber v. Barber*,²⁴ decided a hundred years ago, the Court said:

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board."²⁵

This general disclaimer of jurisdiction was later extended to other cases involving domestic relations, such as the custody of

²² *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66 (1954).

²³ *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U. S. 48 (1954).

^{23a} 28 U. S. C. A., Sec. 1445.

^{23b} 28 U. S. C. A., See 1445(c), added on July 25, 1958; see U. S. C. A., Supplement for 1959.

²⁴ *Barber v. Barber*, 21 How. (62 U. S.) 582, 584 (1858).

²⁵ However, in the case before it, the Court sustained federal jurisdiction, three justices dissenting, as the federal court was asked only to prevent a state judgment granting alimony from being defeated by fraud.

children, and also to granting administration of decedent estates, probate of wills, etc. In such cases federal courts are closed to the litigants.²⁶

In investing the federal courts with diversity jurisdiction, the Constitution speaks only about "citizens of different States." The same expression was used in congressional legislation for many years. Clearly, the territories and the District of Columbia are not states, and therefore it was early held that their residents are not covered by the diversity of citizenship rule. Thus, in *Hepburn & Dundas v. Ellzey*,²⁷ Marshall refused to residents of the District of Columbia the right to maintain a suit in the federal Circuit Court for the District of Virginia against a Virginia citizen, as against their claim that the District was a distinct political society, and therefore a "state," according to the definitions of writers on general law. Marshall found that "members of the American confederacy only are the state contemplated in the constitution."²⁸ He recognized that "it [was] extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [the residents of the District]."²⁹ However, he indicated that the courts could not do anything about it as it would amount to changing law by a non-legislative body.

For about a century and a half, the situation did not change. At last Congress decided to do something about it, and enacted a statute in 1940, by virtue of which diversity jurisdiction vested in the federal courts in suits "between citizens of the District of Columbia, the territory of Hawaii, or Alaska and any State or territory."³⁰ A similar result is reached in Sec. 1332 (c) of the Judicial Code of 1948, which provides that "(t)he word 'States,' as used in this section, includes the Territories and the District of Columbia." Recently, this section was supplemented by words: "and the Commonwealth of Puerto Rico," and renumbered as Section 1332 (d).^{30a}

Undoubtedly, this legislation improved the situation. But, in view of the clear wording of the Constitution, its validity is sub-

²⁶ H. M. Hart, Jr., and H. Wechsler, in *The Federal Courts and the Federal System* 1013-1018 (1953) give a collection of cases dealing with this problem.

²⁷ *Hepburn & Dundas v. Ellzey*, 2 Cranch (6 U. S.) 443 (1805).

²⁸ *Ibid.*, at 451.

²⁹ *Ibid.*, at 451.

³⁰ 54 Stat. 143.

^{30a} See U. S. C. A., Supp. for 1959.

ject to doubt.³¹ In quite a few cases on the point, decided in lower federal courts, the decisions were conflicting, the majority holding that the legislation was unconstitutional. In 1949, one of those cases, *National Mutual Ins. Co. v. Tidewater Transfer Co.*,³² reached the Supreme Court. Plaintiff, a corporation organized under the laws of the District of Columbia, had its suit against a Virginia corporation doing business in Maryland dismissed for lack of jurisdiction of the federal district court. The Court of Appeals affirmed. The Supreme Court reversed, by a bare majority of five to four. Justice Jackson, delivering the opinion of the Court, based the conclusion that the statute was constitutional on Art. I of the Constitution rather than on Art. III. As Art. I empowers Congress "to exercise exclusive Legislation in all Cases whatsoever, over [the] District [of Columbia],"²² it could confer on federal courts established under Art. III judicial functions incidental to Art. I.

If on each side of a suit there is just one party, the determination of the citizenship of plaintiff and defendant is sufficient to establish or rule out the diversity jurisdiction. But the question may be more complicated; there may be multiple plaintiffs and defendants. It may be still more intricate if additional problems, such as joinder of parties, class suits, real parties in interest, assignments, etc., are present. The general rule to be applied in such situations was announced early by Marshall, in *Strawbridge v. Curtiss* (1806).³³ It was held that federal jurisdiction does not lie in a case involving multiple parties, where some plaintiffs and some defendants were residents of Massachusetts. Said the Chief Justice that "where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in [federal] courts."³⁴ The rule is today well settled, and federal courts will not entertain diversity jurisdiction if "one of the plaintiffs is a citizen of the same state as the defendant"³⁵ or vice versa. Every one of the plaintiffs must be a citizen of a different State than every one of the defendants.

An exception to the general rule was provided for by Congress in Sec. 1441(c) of the Judicial Code of 1948. Changing

³¹ C. W. Bunn, *A Brief Survey of the Jurisdiction and Practice of the Courts of the United States*, 48 (1949).

³² *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 582 (1949).

³³ *Strawbridge v. Curtiss*, 3 Cranch (7 U. S.) 267 (1806).

³⁴ *Ibid.*, at 267.

³⁵ *Mitchell, Insurance Commissioner of California, v. Maurer*, 293 U. S. 237 (1934).

some former legislation, which originated in the Separable Controversy Act of 1866,³⁶ the Code provides:

“Whenever a separate or independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.”

Obviously, the above provision covers cases between a single plaintiff and a single defendant, in which some claims based on federal law are vindicated in the same action with other claims based on state law. However, the usual situation is the one involving multiple plaintiffs or defendants. Before 1948, the requirement for removal was that one claim in the case could be singled out from other claims as a “separable” controversy. The present statute requires that the controversy be “independent.” This “gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal.”³⁷ However, the difference between separable and independent causes of action might seem to be “in degree, not in kind.”³⁸ Even under the “separate” controversy concept, removal was permitted only if upon it a separate suit could have been brought in federal courts.³⁹ As federal courts are permitted, in their discretion, to adjudicate the entire case, not just the “independent” claim, they may take jurisdiction of some disputes between citizens of the same State, involving only points of state law. The constitutionality of such jurisdiction may be disputed,⁴⁰ but the Supreme Court has applied the relevant legislative provisions in quite a few cases and has never intimated that they should be treated as invalid.

Corporations merit special attention. Should they be treated as mere associations of persons, having no jural personality of their own, as are partnerships, the determination of the citizenship of each shareholder would be necessary before the decision

³⁶ 14 Stat. 306.

³⁷ *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 12 (1951).

³⁸ *American Fire & Casualty Co. v. Finn*, 181 F. 2d 845, 846 (1950).

³⁹ E. R. Holmes, *The Separable Controversy—A Federal Removal Concept*, 12 *Miss. L. J.* 163, 166 (1939).

⁴⁰ Note, *The Constitutionality of Federal Removal Jurisdiction Over Separable Controversies Involving Citizens of the Same State*, 94 *U. of Pa. L. Rev.* 239 (1946).

on whether federal diversity jurisdiction lies could be reached. This approach was applied in the early case of the *Bank of the United States v. Deveaux*,⁴¹ where the Supreme Court said:

“That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.”⁴²

With the extraordinary development of corporations in the last hundred years, it can readily be seen that by the application of the *Deveaux* rule, all important corporations would be excluded from the federal courts, as having shareholders in all the States of the Union. It is no wonder that this rule did not survive for a long time. The approach denounced by the *Deveaux* case was accepted in later cases. In *The Providence Bank v. Billings and Pittman*,⁴³ the Court said, by way of dictum: “The great object of an incorporation is, to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body.” And in *The Louisville, Cincinnati, and Charleston Rrd. Co. v. Letson*,⁴⁴ the Court held that corporations should be assimilated to citizens of the State in which they were chartered, with the following comment:

“. . . (A) corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person.”⁴⁵

And the Court concluded:

“We confess our inability to reconcile these qualities of a corporation—residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States,

⁴¹ *Bank of the United States v. Deveaux*, 5 Cranch (9 U. S.) 61 (1808).

⁴² *Ibid.*, at 86-87.

⁴³ *The Providence Bank v. Billings and Pittman*, 4 Pet. (29 U. S.) 514, 562 (1830).

⁴⁴ *The Louisville, Cincinnati, and Charleston Rrd. Co. v. Letson*, 2 How. (43 U. S.) 497 (1844).

⁴⁵ *Ibid.*, at 558.

unless in consequence of a residence of all the corporators being of the state in which the suit is brought. When the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Courts jurisdiction."⁴⁶

This approach seemed to make sense. The court did not say that a corporation was a citizen of a State.⁴⁷ It only intimated that it should be treated as a citizen. In lack of any constitutional or legislative provisions on the subject, the Court had to find a solution to the problem. The rule was settled that for the purposes of diversity jurisdiction the state of incorporation granted to its corporations a status similar to citizenship. This rule still stands today, but its rationale has changed, in the light of some decisions of the Supreme Court. Thus, in *Ohio and Mississippi Rrd. Co. v. Wheeler*,⁴⁸ the Court approached the problem in another way, finding support for its reasoning in allegedly similar arguments of the Court in the *Letson* case. It approved of the legal presumption that the members of a corporation "are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation . . . must be presumed to be a suit by or against citizens of the State which created the corporate body; and . . . no averment or evidence to the contrary is admissible . . ." ⁴⁹

This approach is an unnecessary fiction⁵⁰ which does not add anything to the prestige of the law and should be avoided.⁵¹ It was applied, however, in later decisions of the Court and still survives. In the Judicial Code, no general rule is laid down. In one specific situation the approach of the *Letson* case is adopted:

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."⁵²

⁴⁶ *Ibid.*, at 559.

⁴⁷ However, in *Insurance Co. v. Morse*, 20 Wall. (87 U. S.) 445, 453-454 (1874), the Court said: "It has also been held many times, that a corporation is a citizen of the State by which it is created, and in which its principal place of business is situated, so far as that it can sue and be sued in the Federal courts. This Court has repeatedly held that a corporation was a citizen of the State creating it, within the clause of the Constitution extending the jurisdiction of the Federal courts to citizens of different States."

⁴⁸ *Ohio and Mississippi Rrd. Co. v. Wheeler*, 1 Black (66 U. S.) 286 (1861).

⁴⁹ *Ibid.*, at 296.

⁵⁰ D. O. McGovney, A Supreme Court Fiction, 56 Harv. L. Rev. 853, 1090, 1225 (1943).

⁵¹ For an endeavor to rationalize the presumption, see F. Green, Corporations As Persons, Citizens, and Possessors of Liberty, 94 U. of Pa. L. Rev. 217 (1946).

⁵² 28 U. S. C. A., Sec. 1348, second paragraph.

When a corporation has been organized under the laws of several States, including the one in which the suit is brought, it must be regarded as a citizen of the latter State;⁵³ however, the rule is different if the corporation registered in that State only because registration was compulsory, and it was necessary to comply with this requirement before transacting any business in the State.⁵⁴

Today, in a substantial majority of diversity cases, corporations are parties to the suit.⁵⁵ It has been asserted that the opening wide of the federal courts to corporations caused much friction and jealousy between the two sets of courts, resulted in putting foreign corporations in a situation more favorable than that of domestic ones,⁵⁶ and that the rule should be changed.⁵⁷ The Judicial Conference of the United States, called annually by virtue of a mandate of the Judicial Code,⁵⁸ recommended in 1951 that for the purposes of the diversity jurisdiction corporations be deemed to be citizens both of the State of their incorporation and of the State in which they have the principal place of business.⁵⁹ In 1955 a bill was introduced in Congress to limit diversity jurisdiction to cases between individuals, excluding corporations.⁶⁰

Congress accepted the recommendation of the Judicial Conference, and in a recent amendment to the Judicial Code provided that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."^{60a}

In a few States attempts were made to curb the right of foreign corporations to remove suits into federal courts. Thus, a

⁵³ *Patch v. Wabash Rrd. Co.*, 207 U. S. 277 (1907).

⁵⁴ *Southern Ry. Co. v. Allison*, 190 U. S. 326 (1903).

⁵⁵ F. Frankfurter sets the figure at 80%. *Op. cit.* n. 7, at 523.

⁵⁶ C. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 90 (1923).

⁵⁷ Various attempts to change the situation are described in D. O. McGovney, *op. cit.* n. 50, at 1225-1252. See also H. Wechsler, *op. cit.* n. 8, at 240. A legislative attempt was made in 1931-1932, when Attorney General Mitchell advanced a bill providing for the treatment of foreign corporations as citizens of States in which they carry business.

⁵⁸ 28 U. S. C. A., Sec. 331: "The Chief Justice of the United States shall summon annually the chief judges of the judicial circuits to a conference . . ."

⁵⁹ Report of the Proceedings of the Judicial Conference of the United States 27 (1951).

⁶⁰ H. R. 5007, 84th Congress.

^{60a} 28 U. S. C. A., § 1332(c), Supp. for 1959.

Wisconsin statute of 1870 required all fire insurance companies, incorporated under the laws of the United States or of the sister States, to agree that they would not remove suits, before they were permitted to transact any business in Wisconsin. The Supreme Court held that the statute was invalid, as it obstructed the absolute right secured by the Constitution to citizens of other States to remove their cases into federal courts. Two justices dissented.⁶¹

By virtue of the Judicial Code, federal jurisdiction lies likewise in cases between "Citizens of a State, and foreign states or citizens or subjects thereof," and "Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."⁶² In the light of constitutional provisions, federal jurisdiction does not attach to cases between two aliens, and a provision of the first Judiciary Act of 1789 extending it to any case in which an alien was a party was held invalid by Chief Justice Marshall.⁶³ The reason for which suits between aliens are not within the jurisdiction of federal courts is obvious. The rationale of this jurisdiction is the fact that local courts may be biased in favor of the state residents, or even American citizens of other States in controversies with aliens; but there should be impartiality when two foreigners litigate. On the other hand, if the Framers assumed that state courts may be biased against residents of other States, there was still more reason to protect aliens against such a bias. The unfair attitude of state courts toward foreigners, argued Madison in the Virginia Convention, "prevented many wealthy gentlemen from trading or residing among us."⁶⁴

Neither the Constitution nor the Judicial Code say anything about the situation in which one party to a suit is an alien, and the other—a citizen of the United States, but not of any of the States, e.g. residing permanently abroad. It seems that by implication such cases should be included in the federal jurisdiction.

Clearly, cases in which multiple parties from different States sue or are sued by an alien come within the federal jurisdiction.⁶⁵ The situation is similar when on one side of a suit there is a citizen or citizens of a State or some States, and on the other—a

⁶¹ *Insurance Co. v. Morse*, 20 Wall. (87 U. S.) 445 (1874).

⁶² 28 U. S. C. A., Sec. 1332(a)(2) and (3).

⁶³ *Hodgson v. Bowerbank*, 5 Cranch (9 U. S.) 303 (1809).

⁶⁴ J. P. Frank, *op. cit.* n. 6, at 27.

⁶⁵ *Niccum v. Northern Assur. Co.*, 17 F. 2d 160 (D. Ind., 1927).

citizen or citizens of different States plus an alien or aliens.⁶⁶ The problem was more difficult if aliens, citizens of the same foreign state, were additional parties to suits between citizens of different sister States. Should the general rule of diversity jurisdiction be applied, there would be no federal jurisdiction, in such cases. However, the clause of the Judicial Code cited above made an exception in this situation.

Frequent resort to the federal diversity jurisdiction results in the fact that at least half of the time of the federal district courts is devoted today to diversity cases.⁶⁷

In order to stop the increase in the number of cases brought into the federal courts, it was suggested that the jurisdictional amount be raised. The Judicial Conference of the United States⁶⁸ recommended in 1951 that the jurisdictional amount be raised, in diversity of citizenship cases, to \$7,500,⁶⁹ and in 1952 it suggested raising this amount to \$10,000.⁷⁰ It was estimated that this increase would eliminate about 39% of all diversity contract cases, and 13% of the personal injury cases.⁷¹ An amendment to the Judicial Code of July 25, 1958, raised the jurisdictional amount in diversity of citizenship and federal question cases to \$10,000.⁷²

The diversity jurisdiction of the federal courts does not extend to cases in which a State of the Union is a party. The Supreme Court said:

“A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States.”⁷³

By virtue of Art. III, Sec. 2(2) of the Constitution, in all cases “in which a State shall be party,” the Supreme Court shall have original jurisdiction.

The necessity of the diversity jurisdiction in such highly integrated federal states as Brazil, Argentina or the United States

⁶⁶ Ryan v. Ohmer, 233 F. 165 (S. D. N. Y., 1916).

⁶⁷ Concurring opinion of Justice Frankfurter in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U. S. 48, 58 (1954); the statement is based on official statistics.

⁶⁸ See 28 U. S. C. A., § 331.

⁶⁹ Report of the Proceedings of the Judicial Conference of the United States 27 (1951).

⁷⁰ *Ibid.* 15 (1952).

⁷¹ Report of the Attorney General to the Judicial Conference of the United States 27 (1955).

⁷² 28 U. S. C. A., §§ 1331 and 1332, Supp. for 1959.

⁷³ *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482, 487 (1894).

may be questioned. However, should a new federation be organized of nations which until federation were quite independent and lived their separate lives, it would seem advisable to adopt it. Account should be taken of the imperfection of human beings and national biases of the judges. Not only in countries of a low degree of development, but also in Western Europe these factors, unconsciously or consciously have such an important influence on the magistrates that in scores of cases lawyers agree to accept unfavorable compromises for their clients in very strong cases rather than risk instituting a suit in a foreign country. Of course, the establishment of a federation in Western Europe would have no immediate effect on the attitude of the courts. The belief that pure legal principles are the only factors in reaching judicial decisions is idealistic but highly unrealistic. Diversity cases in international law federations should be adjudicated by federal courts, the judges of which should assure a maximum impartiality. There are many possible solutions. A suit between a citizen of A and a citizen of B could be handled by a judge, citizen of C. In a court where more than one judge would sit, the tribunal could be composed of citizens of A, B, and C. The procedure and whole experience of "mixed commissions" could furnish many suggestions.

It has been argued that under a properly drafted constitution, decisions of state courts, delivered under irrational bias, should be subject to review by a federal supreme court on constitutional grounds.⁷⁴ This scheme, however, would offer only slight, and in many cases, illusory protection to the party discriminated against. First, because of the costs, troubles; and time involved in litigation, the enormous majority of disputes, adjudicated in a court of first instance, never go further. On the basis of some statistical data which are available, it is safe to say that more than 90% of cases are never appealed. Second, the decree in a case may be strictly conforming to law, and still injustice may be done. It will not appear from the record what the attitude of the judge to the parties was, and anyhow his rulings within the scope of his judicial discretion would not be reviewable regardless of how prejudicial to a party, with the possible exception of instances of clear abuse of discretion.

⁷⁴ P. A. Freund, *The Federal Judiciary*, in *Studies in Federalism* by R. R. Bowie and C. J. Friedrich 106, 114-115 (1954).