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## FEDERAL COURT DIVERSITY JURISDICTION AND THE CORPORATION

One of the most provocative areas of constitutional development in this country has stemmed from the efforts of the corporation to gain for the *persona ficta* the same benefits and rights as those accorded natural citizens. One facet of this epic turns round the corporate "right"<sup>1</sup> to sue and be sued in federal courts as a citizen as that term is used in the diversity statute.<sup>2</sup>

Today, with exceptions to be discussed below, the corporation may gain access to the federal court provided it qualifies as a citizen of a different state or an alien. It is the purpose of this article to trace the birth and maturation of this procedural concept and consider aspects which remain unsettled. Against this background the arguments for and against retention of corporate diversity standing will be analysed in order to provide new insights into the controversy.

When the first Judiciary Act was passed in 1789<sup>3</sup> the private corporation was virtually unknown. Prior to 1790 only 30 private corporations had been chartered in the thirteen states.<sup>4</sup> It was not until 1809 that the question of corporate diversity status arose. In that year in the famous case of *Bank of the United States v. Deveaux*<sup>5</sup> Chief Justice Marshall declared that the corporation was an "invisible, intangible, and artificial being, [a]mere legal entity, [which] is certainly not a citizen. . . ."<sup>6</sup> Marshall went on to rule that the citizenship

<sup>1</sup> See generally G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918).

<sup>2</sup> 28 U.S.C. §1332 (1964).

<sup>3</sup> Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

<sup>4</sup> C. Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 662 (1933).

<sup>5</sup> *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 194 (1809).

<sup>6</sup> *Id.* at 196.

of the officers and the shareholders must prevail and since these parties were alleged to be citizens of Pennsylvania the action against a Georgia citizen was maintained under the diversity provision even though the Chief Justice knew the allegation was a pure fiction since a majority of the plaintiff's shareholders were British subjects.<sup>7</sup> By indulging in this fiction, as will be seen later, Marshall provided the basis for the construction of another fiction of a much expanded dimension.

Corporations, in suits following *Deveaux*, strenuously argued against their "right" to be treated as citizens for diversity purposes. The basis of this protest lay in the fact that it was not until the Supreme Court upheld the validity of state requirements, in 1870 and 1878, that a corporation doing business in the state consent to have itself "found" through service of process on a state official for the purpose of subjecting the foreign corporation to suit in that state.<sup>8</sup> By combining the rule of the *Deveaux* case with the complete diversity requirement of *Strawbridge v. Curtiss*<sup>9</sup> a corporation could defeat diversity jurisdiction in almost every instance since it had merely to allege that one of its shareholders was a citizen of the plaintiff's state.<sup>10</sup>

However, in 1844 the Louisville, Cincinnati, and Charleston Railroad Company, a Tennessee corporation, placed the last straw on the camel's back by alleging that one of its shareholders was a Charleston bank which in turn had a New York shareholder (the plaintiff's state of residence).<sup>11</sup> Justice Wayne speaking for the Court declared that a corporation chartered by a state is "entitled, for the purpose of suing and

<sup>7</sup> C. Warren, *supra* note 4, at 665-66.

<sup>8</sup> *Baltimore & O.R.R. v. Harris*, 79 U.S. (12 Wallace) 65 (1870); *Ex parte Schollenberger*, 96 U.S. 369 (1878).

<sup>9</sup> *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

<sup>10</sup> C. Warren, *supra* note 4, at 670.

<sup>11</sup> *Louisville, C.&C.R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844).

being sued, to be deemed a citizen of that State."<sup>12</sup> In another part of the opinion the Justice commented that the decisions in the *Strawbridge* and *Deveaux* cases had never been satisfactory to the bar and not entirely satisfactory to the Court that had made them; that later courts had followed *Deveaux* not because it was right but because it had been made.<sup>13</sup>

In 1853 the Court gave the appearance of retreating from *Letson* by returning to the Marshall position that the corporation (for diversity purposes) was certainly not a citizen, but then went on to create the fiction that for diversity purposes a conclusive presumption existed that all the shareholders of the corporation were citizens of the state of incorporation.<sup>14</sup> As a conceptual notion the rule laid down in that decision remains, with exceptions to be noted later, the basic law today. Of this rule Justice Shiras was to say in 1896:

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: [t]here is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in 'controversies between citizens of different States.'<sup>15</sup>

The years following the sanction of state court jurisdiction over the foreign corporation produced a swing in corporate preference. The chartering state forum (arguably controlled by the corporation) had been lost and the federal courts appeared to be preferable to the foreign state court. This juxtaposition was stimulated by the industrialization of the late 19th Century and the accompanying increase in industrial

<sup>12</sup> *Id.* at 555.

<sup>13</sup> *Id.* at 556.

<sup>14</sup> *Marshall v. Baltimore & O.R.R.* 57 U.S. (16 How.) 314 (1853).

<sup>15</sup> *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 562 (1896).

injuries, particularly among railroad employees. The typical suit by a railway worker began in the state court of the employee's domicile. At that point the railway would seek removal to the federal circuit court, alleging diversity of citizenship. This procedure involved additional time, expense and usually travel for both parties, but the railway, being in a better position to bear such incidents, was often able to use them as leverage to exact a token settlement from the accident victim.

The widespread employment of such tactics spawned a movement in Congress to deny corporations the diversity avenue to the federal courts. From 1880 through 1910 a bill was frequently before the House which essentially proposed to divest the federal courts of jurisdiction to hear any case involving a corporation upon diversity grounds if such corporation was doing business within that state. In that thirty year period the measure was passed by the House seven times, but was consistently rejected by the Senate.<sup>16</sup>

In 1928 and 1930 Senator George Norris proposed radical curtailment of jurisdiction of the federal circuit courts.<sup>17</sup> The Norris bills went too far for serious Congressional consideration, but the interest generated by their consideration led, in 1931, to the introduction of the Attorney General's Bill which, in effect, would have provided for the same jurisdictional retraction as the earlier proposals.<sup>18</sup> Although the bill met defeat, the debate over it provided an interesting picture of how firmly entrenched the fiction of the *Letson* decision had become with the bar. One commentator has noted that the fictitious heritage of the corporate right was hardly mentioned, but that:

. . . these lawyers told the committees that the Su-

<sup>16</sup> C. Warren, *supra* note 4, at 681.

<sup>17</sup> S. 3151, 70th Cong., 1st Sess. (1928); S. 4357, 71st Cong., 2d Sess. (1930).

<sup>18</sup> S. 937, 72d Cong., 1st Sess. (1931); H.R. 10,594, 72d Cong., 1st Sess. (1932).

preme Court holds that corporations *are citizens* of the states that incorporate them. The representative of the American Bar Association coupled this with an assertion that it was mandatory upon Congress to confer upon the federal courts jurisdiction of 'Controversies . . . between Citizens of different States,' that Congress having conferred it could not withdraw or curtail it, and that corporations being citizens, Congress could not deny them their constitutional right to this jurisdiction.<sup>19</sup>

Despite the failure of the Norris and the Attorney General's measures, pressure continued for the contraction or withdrawal of federal jurisdiction from the corporate litigant. Finally, in 1958 this movement resulted in legislative amendment of the diversity statute.<sup>20</sup> The change was prompted by debate which pointed out that:

This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution . . . is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State.<sup>21</sup>

The report went on to state that such abuse did nothing to fulfill the avowed purpose of diversity jurisdiction, *i.e.*, to prevent local prejudice against outsiders.<sup>22</sup>

Under the terms of § 1332(c) the corporation is to be treated, for diversity purposes, as a citizen of the state of its incorporation and of the state of its principal place of business. The apparent legislative intent of § 1332(c) was to prevent a corporation,

. . . which, though chartered in another state, is in every meaningful respect a local institution, from

<sup>19</sup> McGovney, *A Supreme Court Fiction: III*, 56 HARV. L. REV. 1225, 1234 (1943).

<sup>20</sup> 28 U.S.C. §1332(c) (1964).

<sup>21</sup> S. REP. NO. 1830, 85th Cong., 2d Sess. 4 (1958).

<sup>22</sup> *Id.*

bringing controversies with local citizens into the federal courts.<sup>23</sup>

Logically the bulk of litigation involving a corporation would arise in the state where it carries on the bulk of its activities; and hence, by denying the corporation the diversity "out" in that state, it was thought that the dual purposes of federal jurisdictional contraction and practical justice would be achieved.<sup>24</sup>

It might have been expected that the passage of § 1332(c) would have laid to rest the controversy stirred up by the corporation as a litigant in federal court, but the promise of that amendment was not fulfilled in the decade-plus after its enactment. Two pressing questions still remain unanswered: (1) what legal standard should be applied to determine the corporation's "principal place of business"; and (2) possibly more critical in the long run, does § 1332(c) go far enough? Or, in other words, should the federal courts be closed entirely to the corporate litigant?

The phrase "principal place of business" was drawn from the Bankruptcy Act<sup>25</sup> with the assumption that it would be interpreted according to judicial experience under that Act. Unfortunately, however, the construction experience under the bankruptcy provision tended to do little more than muddle the already confused situation, since about the only discernible principle that had been announced in the bankruptcy law was that the principal place of business was a question of fact to be determined in light of all relevant evidence.<sup>26</sup>

<sup>23</sup> Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1444 (1964).

<sup>24</sup> *Id.* at 1444.

<sup>25</sup> 11 U.S.C. §11(a) (1) (1964).

<sup>26</sup> See, e.g., *Carolina Motor Express Lines, Inc. v. Blue & White Serv., Inc.* 192 F.2d 89 (7th Cir. 1951); *Bank of Commerce v. Carter*, 61 F.2d 986 (8th Cir. 1932).

The courts, thus left to their own devices, attempted in various ways to adapt the rather slippery standard of the statute with its declared purposes: reduction of the federal dockets, and amelioration of the rather anomalous situation whereby the foreign corporation was given a choice of forum merely because of the fortuitous fact that it happened to be chartered in another state.

Two prevailing tests emerged from this effort. Under the first the courts attempted to identify the state where the corporation carried on the bulk of its corporate activity and to designate that state as the place where the corporation carried on its principal business.<sup>27</sup> This standard obviously fulfilled the congressional purpose of limiting access to federal court since the state where a corporation carries on its primary activities would be expected to be the state where it would most often be involved in litigation. The test, however, became a guessing game with different courts applying their own arbitrary criteria and placing varying emphasis on commonly applied denominators.<sup>28</sup> Indeed, an overdrawn consideration of activities determinative of the corporation's principal place of business could work to defeat the avowed docket clearing purpose of the amendment.<sup>29</sup>

Other courts developed the so-called "nerve center" or "home office" test under which the place of business was declared to be where the executive, personnel, advertising, public relations and other policy making departments were located.<sup>30</sup> Naturally the home office test had a certain amount

<sup>27</sup> *Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963); *Anniston Soil Pipe Co. v. Central Foundry Co.*, 216 F. Supp. 473 (N.D. Ala. 1963), *aff'd per curiam*, 329 F.2d 313 (5th Cir. 1964).

<sup>28</sup> See generally Note, 6 UTAH L. REV. 231 (1958).

<sup>29</sup> See *Smith v. Sperling*, 354 U.S. 91, 95, where eight years were spent determining the matter of jurisdiction.

<sup>30</sup> See, e.g., *Scot Typewriter Co. v. Underwood Corp.* 170 F. Supp. 862 (S.D.N.Y. 1959).



of appeal in that it was simple to determine, apply and also would seem to answer the legislative mandate, where, as is common, the bulk of the corporate affairs are conducted in the state of the home office. However, its application in other circumstances might tend to preserve rather than cure the anomaly of the local institution gaining access to the federal courts because the main office (as previously the charter of incorporation) happened to be located in another state.

To resolve the inconsistency of the home office and the place of operations tests some writers have proposed that the courts should employ the place of operations standard where one state quite obviously can be pointed to as the principal place of business, and to resort to the home office test only where no one state answers the requirement as the primary place of operations.<sup>31</sup> Perhaps such an approach is necessary in order to render § 1332(c) useful in the case where a limiting device is really needed—in the case of a giant far flung enterprise—but it is in such a case that the defects of the amendment are most apparent. As Judge Goodrich noted in *Kelly v. United States Steel Corp.*<sup>32</sup>

The concept may get artificial in some cases as indeed it is in the case before us. This great corporation has fourteen divisions of the parent corporation and eleven principal subordinate companies. Its various manufacturing activities are spread over practically all the United States and extend to foreign countries. It has literally dozens of important places of business one of which we must pick out as the principal one because the statute says so (footnotes omitted).<sup>33</sup>

In 1964 Congress responded to a peculiar Louisiana Statute<sup>34</sup> which permitted an injured party to sue an out-of-state insurer without joinder of the insured. The net effect

<sup>31</sup> C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 91 (2d ed. 1970).

<sup>32</sup> 284 F.2d 850 (3d Cir. 1960).

<sup>33</sup> *Id.* at 853.

<sup>34</sup> LA. REV. STAT. tit. 22, §655 (West 1959).

of the law was to permit plaintiffs' attorneys to seek and receive federal jurisdiction via diversity and thereby avoid a quirk of local Louisiana law—the rather liberal appellate provisions for review of jury determinations. Under the 1964 amendment the injured party may sue the insurer in federal court only if he would have been able to sue with the insured party joined.<sup>35</sup> As was the case with the 1958 change, the 1964 revision served only to correct a glaring abuse of corporate access to the federal system through the door of diversity.

Another congressional action designed to curtail federal litigation generally has been that of increasing the jurisdictional amount from time to time,<sup>36</sup> which, it should be assumed, would on balance favor the corporate litigant if it be granted that suits involving corporations will involve a higher sum than the average litigation between individuals.

Apart from this congressional activity, but complementary to it, several Supreme Court decisions have played an important function in limiting the diversity jurisdiction of the district courts. For purposes of this article one in particular is significant. In the case of *United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*<sup>37</sup> the Court was asked to extend the purview of diversity jurisdiction to unincorporated associations, *i.e.*, labor unions. Speaking for the Court Justice Fortas remarked favorably on the realistic similarity between corporations and the unincorporated association, but declined to grant the extension by rather summarily directing the association to make its arguments to Congress.<sup>38</sup> Later in the opinion, almost apologetically, Justice Fortas noted possible problems in determining the state of

<sup>35</sup> 28 U.S.C. §1332(c) (1964).

<sup>36</sup> The Judiciary Act of 1789 fixed this sum at \$500. It was raised to \$2,000 in 1887; \$3,000 in 1911 and to the present \$10,000 figure in 1958.

<sup>37</sup> 382 U.S. 145 (1965).

<sup>38</sup> *Id.* at 150-51.

citizenship of these organizations,<sup>39</sup> a dialogue reminiscent of that used by Chief Justice Marshall.<sup>40</sup> The significance of the *Boulogny* decision rests, however, in the refusal of the Court to push out the borders of diversity coverage although no fundamental substantive differences between the entities existed, and that the union argued, albeit unsuccessfully, for diversity extension not so much to protect it from local prejudice because of being an outsider, but because of its inherent characteristics.

Having reviewed what has been done to reduce the incidence of corporate presence in federal litigation the chief proposal for additional limitation should be considered. The American Law Institute has proposed that for diversity purposes a corporation should be deemed a citizen of every state in which it is incorporated;<sup>41</sup> this to eliminate the curious situation by which a party plaintiff may sue a corporation, which is incorporated in several states, in any state where it is so incorporated except the state of the plaintiff's domicile.<sup>42</sup> Of more significance however, the Institute has recommended that no corporation shall be permitted to utilize the federal courts either originally or through the removal process in any state where it has maintained a local office for more than two years and the action arises out of the activities of that local establishment.<sup>43</sup> It is obvious that the enactment of this provision would tend to lessen the availability of federal courts to the corporation and to that extent do away with the prevailing dichotomy created by that availability, but at the price of the distinction presented by the two year proviso between

<sup>39</sup> *Id.* at 152.

<sup>40</sup> *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 194 (1809).

<sup>41</sup> ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §1301(b) (2) (1969).

<sup>42</sup> See, e.g., *Hudak v. Port Authority Trans-Hudson Corp.*, 238 F. Supp. 790 (S.D.N.Y. 1965).

<sup>43</sup> ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §1302(b) (1969).

the established corporation and the new or expanding corporation. The commentary stresses that this distinction is employed to reduce the likelihood of prejudice (since a corporation doing business in a state for two years should be considered by jurors as a local institution), but still this distinction would seem to have little realistic substance and to be more of a crude rule of thumb.

Furthermore, the application of the proposal would appear to be fraught with possibilities for delay and confusion, not unlike that attending the application of the 1958 diversity amendment, *e.g.*, should non-consecutive periods of business be tacked together and what exactly constitutes an action arising out of contact with a local establishment. The following example is inserted to illustrate just a few thorns which might rise up to pierce the logical gloss of the American Law Institute proposal: Corporation X has engaged in activities in State A for over two years which may be within the purview of the "local establishment" concept as that concept is defined in the proposal.<sup>44</sup> Plaintiff has contracted with X through its local office but the final approval of the contract is made at the home office in State B. Assuming the home office approved the contract to provide Plaintiff with a particular item that was shipped directly to the Plaintiff from State C and that, through negligence of X in manufacturing in State D, injures the Plaintiff upon use in State A, has the corporation a good case for removal in State A, or is such removal bound by application of the provision? At first glance this situation may appear to be far fetched but in the ultra-complex modern business community such an occurrence would be far from impossible. So then, § 1302(b) would appear to invite protected threshold jurisdictional factual considerations over whether or not the corporation had carried on the activities of a local establishment; whether these activities had been carried on for more than two years; and finally, whether the action had arisen out of contact with that local

<sup>44</sup> *Id.*

establishment. Such troublesome questions would of course add to the overcrowded federal docket; but of more importance, it is proposed that jurisdictional status should be definite, predictable and not, as has been the case with § 1332(c), subject to a variety of judicial interpretations.

Indeed, in the opinion of this writer the inescapable weaknesses of the 1958 change to §1332(c) and the American Law Institute proposals are that they seek to reconcile the logical inconsistencies of the fictitious right of the fictitious multistate corporate being to be accorded a federal hearing via diversity. It is submitted that nothing short of a complete and fresh reappraisal of the nature of the corporation must be undertaken. Once this reappraisal has been completed it will become obvious that the *Letson* rule, certainly a quirk in constitutional circles, was also a practical mistake which must now be corrected to eliminate the absurdity of the corporate diversity anomaly and, incidentally, to end the confusion which has attended the congressional and judicial efforts to perpetuate that anomaly while yet confining it to the *Letson* model.

Initially it is apparent that the corporation is endowed as an entity with many characteristics peculiar to that type of organization. For the purposes of this discussion the limited liability attribute is significant since it is generally acknowledged that this characteristic permitted the corporation, as such, to acquire large venture capital accumulations. Speaking in terms of public policy it could be stated that the government permitted the capital contributors, for liability purposes, to remain personally exempt except as to the extent of the contribution actually made. In turn, by holding and using capital accumulations theretofore unobtainable, the corporation assumed an ability to expand its activities to many states and to assume a position of dominance as toward private parties and perhaps toward legislatures, judges and juries. Whether judicial concessions were accorded the corporation because of this influence or merely because the corporation gained a sympathetic ear from a judiciary sensitive to the corporate form as necessary to American economic expansion, the fact

remains, as the reports leading up to the passage of the Sherman Anti-Trust Act<sup>45</sup> illustrate, that concentrated economic power tended to beget political influence which in turn was used to protect and broaden this economic power. Thus it is easy to see why the corporation was able to gain the advantage of a choice of forum when in fact no similarity existed between the natural citizen, whose state citizenship was determined by domicile requirements and a corporation whose citizenship prior to 1958 was determined solely by looking to the state where it had been incorporated and where it conceivably had no other connection.

Four points are immediately apparent from this first examination of the corporate form. First, the corporation's typically strong capital position permits it the leisure of delayed and expensive law suits. Second, this delay and expense often works to the corporation's comparative advantage since it has, vis-a-vis the individual litigant, greater staying power and thus may utilize the threat of a long, drawn-out suit to force the individual into a settlement on the corporation's own terms. Next, it would appear that if there must be a choice made as to who should bear the burden for the multi-state nature of the corporation it should not be borne by the individual citizen but by the corporation which has benefited by a unique governmental treatment enabling it to expand into many different states. To permit otherwise allows it, having taken advantage of its favored position to become for all practical purposes a citizen of several states, to escape the logical implications of that favored treatment. Finally, it may be speculated that the power acquired through capital accumulation may have played a role in gaining for the corporation its status as a citizen for diversity purposes. Certainly the limited liability device was intended by the state to promote economic development; it is questionable that it was intended to create a vested judicial interest for the corporation.

<sup>45</sup> 15 U.S.C. §1 (1964).

Apart from the primary characteristic of the corporation, the fact remains that the courts of the federal sector are over-worked<sup>46</sup> and that this staggering case load is not in the public interest since justice long delayed is justice denied. This result will tend to lessen the general public confidence in and respect for the judiciary, and may in the final analysis end recourse to the courts as an acceptable method for the settlement of disputes. Certainly, local prejudice at the state level would seem to work toward the same end but it is submitted that this defect is preferable to an overcrowded federal court system since it is confined historically to certain states and its manifestation is speculative whereas the clogged federal district court docket works to the detriment of all those who seek its hearing.

Recognizing the need for a federal court limiting device several possibilities might be considered. The jurisdictional amount might be hiked, but this change, it would seem, would be undesirable since it would further remove the individual litigant from federal forum (particularly where a federal question is involved) and serve to make the federal court an exclusive club where only "high priced" litigation is taken.

On the other hand, the federal question area itself could be re-examined to require state hearings in all but suits involving sensitive constitutional rights. This solution, however, would necessarily subject federal and constitutional provisions to a variety of state court interpretations; an area of law which, if it is to be most effective, should be interpreted so as to afford uniform treatment to all citizens regardless of where they happen to live.<sup>47</sup> For this and other reasons no

<sup>46</sup> Between 1960 and 1965 the backlog of cases in district courts grew from 61,251 to 74,395. See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1965).

<sup>47</sup> This principle has been recognized by the Supreme Court where a matter of pressing national concern is at stake; see *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

serious moves have been made to curtail the federal question basis for federal jurisdiction and recent years have witnessed a proliferation of federal laws upon which jurisdiction may be predicated.<sup>48</sup>

Another candidate for reduction of the case load at the federal level is diversity jurisdiction itself,<sup>49</sup> it being accepted that the constitutional provision providing for diversity jurisdiction is permissive only and not mandatory on Congress and hence that such an abrogation could be effected.<sup>50</sup> This argument strikes an appealing chord especially when considered in conjunction with the permissive attitude of the Supreme Court as to what defendant contact with plaintiff's state may subject it to the jurisdiction of that state,<sup>51</sup> and with the believable theory advanced by Frankfurter that the original justification for diversity jurisdiction, *i.e.*, as a preventive against local prejudice, whatever its merit in 1789, has been eroded by the cosmopolitan attitude which the mobile life style of current times has engendered.<sup>52</sup> However, numerous situations can be conjured up in which the jurisdiction must lie in a state far removed from the plaintiff's home and necessarily subject him to inordinate expense and inconvenience to pursue his rights. The clearest example of this situation is presented by the case of the citizen of State A who is injured while on a trip to State B. This argument—maintenance of diversity jurisdiction for individuals—has little validity when applied to the corporate being, however. Certainly, it may be

<sup>48</sup> A prime example of this upsweep can be seen in the number of cases which were spawned by the Securities Exchange Act of 1934 §1065, 15 U.S.C. §78a (1964).

<sup>49</sup> The classic work supporting this view is Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

<sup>50</sup> U.S. CONST. art. III, §2 provides only for the original jurisdiction of the Supreme Court. All other federal jurisdiction is brought into being through congressional action.

<sup>51</sup> *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>52</sup> Frankfurter, *supra* note 49 at 521.



that under some fact situations the corporation may subject itself to liability in states where it is not doing business (hence where there is no citizenship equivalency); for example, through a state's non-resident motorist statute. But, the inherent unfairness of forcing a non-resident individual plaintiff into litigation in a distant state which mitigates against a general abrogation of diversity jurisdiction is simply not as evident when tested against a fact situation involving a foreign corporate defendant, *i.e.*, if a type of litigant must be penalized by limiting diversity jurisdiction, the corporate type is in a better position to bear it.

That the removal of the corporation from the federal court as a diverse citizen would effect a significant reduction in the federal district court caseload can be seen by reference to the 1964 statistics compiled by the Administrative Office of the United States Courts which indicated that in that year a non-resident corporation was involved in 11.3% of all original diversity actions and in nearly 60% of all removal diversity cases, or 3,865 cases out of a total of 20,074 diversity actions.<sup>53</sup>

As has been noted earlier there may be some instances where corporate litigants (particularly corporate defendants) are indeed subject to prejudice. It is possible the fact that the corporation is a foreign organization may be one factor which induces prejudice although it is probable that if it does it operates in conjunction with other factors such as the corporation's size, wealth and practices and in all likelihood plays an insignificant role when compared to them. Indeed, a case can be made for the point that diversity jurisdiction has encouraged the tolerance of prejudice in state courts in local actions by making such prejudice palatable because of its small scale. Should corporations, which play a key role in a state's economic picture, be subjected to intolerable local prejudice, it is to be assumed that they would take action

<sup>53</sup> ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1964).

to avoid that prejudice, *i.e.*, by relocating which in turn should force the state to deal with the prejudice problem as an alternative to losing the economic stimulation of corporate business. As matters now stand a foreign corporation doing business in Louisiana can depend upon the federal courts as a forum; whereas, should the right to that forum be lost the corporation must either accept local prejudice as exerted through local courts or cease business (and obviously employment and capital expenditures) in the state. Hopefully a mass exodus of business from a state would encourage reform measures to minimize the cause of the exodus and grant relief to those injured by it.

Closely related to the last point is the argument that local prejudice is, or should be, simply one factor among many upon which the corporate leadership predicates a decision to do business. To elaborate, when the XYZ Corporation contemplates an expansion into Mississippi, various factors must be considered to determine the feasibility of the move including labor availability and costs, taxes, and market demand to mention just a few. Certainly the expected fairness or hostility of the Mississippi juries and judges could just as easily be considered as simply another anticipated business expense. Here again, states bidding for corporate entry should be expected to take steps to eliminate practices which would damage their position in this campaign.

It is submitted that the original reason for diversity jurisdiction is no longer valid and that the justification for according such jurisdiction to the corporate litigant has no basis either in terms of constitutional imperative or practical necessity.

If it is time to further limit access to the federal courts, a schedule of priorities should be programmed to withdraw that access first from those least entitled to it. As has been shown the concept of the corporation as a citizen for diversity purposes has little to recommend it either from a constitutional or logical view point and attempts to preserve the *Letson*

fiction have been more notable for the confusion which they have created than for their success in eliminating the dichotomy of the multi-state corporation as a diverse citizen.

It is recommended that Congress act to end this dichotomy by enacting an amendment to the diversity provision which will declare simply that for diversity purposes a corporation shall not be deemed to be a state citizen.

In fairness to corporations who would not have entered into business in particular jurisdictions under such a change, I would provide for a waiting period prior to the amendment's effective date to allow such corporations to cease operations in those states; or alternatively, to permit those states to work to remove fears of prejudice.

Finally, I would provide that at any time in a state proceeding involving a corporate litigant not doing business in that state the corporation may petition the appropriate federal district court to remove the case on the grounds of provable prejudice by the state judicial officials and to permit the district court to assume jurisdiction for prejudice shown. Such provisions would provide the corporation with protection against provable prejudice in the state court, would lighten the caseload in the federal district court and correct at last the *Letson* error, an error born of, at best, mistake, preserved by misunderstanding and legitimated by toleration; a toleration which, in light of a strained federal docket, can not now be permitted.

*David W. Jackson*