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PROPOSALS ON FEDERAL DIVERSITY JURISDICTION

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My purpose is primarily one of exposition of the American Law Institute's proposed changes in federal diversity jurisdiction.[1] Knowing, however, that my good friend, Mr. John P. Frank, will take sharp issue with me, I am afraid that I cannot resist—and indeed I will not try very hard to resist—working a little bit of argument in along with the exposition.

In fact, debating these matters with Mr. Frank is somehow reminiscent of the fixed wrestling match on television. We have debated these matters at least twice publicly and more often privately and each of us knows pretty well just what holds the other is going to try and just how hard he is going to twist, but I assure you that this is in no sense a fixed match. Mr. Frank deeply and sincerely believes that we are wrong, wrong, wrong with respect to diversity, and we, with equal sincerity, believe that we are right.

At the very outset let me emphasize what we are trying to do. This study emanated directly from a suggestion of the Chief Justice to the American Law Institute, and I think it is worth quoting one sentence from his remarks at that meeting when he said: "It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism."

It was on this premise that the Council of the American Law Institute voted to undertake this study and the Ford Foundation agreed to finance it. After extensive discussion carried on over three years, the American Law Institute did, in May of this year, give its approval to our diversity proposals.

I hasten to say that these proposals, far-reaching and controversial as they are, ought to be discussed objectively on their intrinsic merits. I do not say that you ought to approve them because the ALI has approved them, nor do I think you should reject them because of the names of distinguished judges, law

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1. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft No. 1, 1965).

teachers and laywers, of whom Mr. Frank is one, who oppose them.

This is not a matter, as I view it, of name dropping. What we are really concerned with is: Are we in making these proposals on sound ground or are we not?

The proposals will go next before the Judicial Conference and if they are approved will go presumably to Congress for consideration. In that forum the views of lawyers and judges such as yourselves will be of great weight, and therefore I ask you to consider objectively the pros and cons of each of our major proposals.

It is hard, I am sure, for a practicing lawyer to be truly objective about matters which relate so directly to the rights of his clients and in a sense to his own professional advantage or disadvantage. I practiced law for some years, and I certainly delighted in the opportunity of choice between a federal and a state court according to what seemed to me to be in the best interests of my client in the particular case. I am confident that my instinct would have been to oppose any significant curtailment of the freedom of choice. Ideally I suppose I would have liked to have my freedom of choice remain as great as it was and my opponent's cut down, and I have found this to be the reaction of some of the bar to these proposals. Some people like some proposals very much, because they see gain from the point of view of clients whom they habitually represent, and oppose others. Conversely some people like the others because they see advantages in them for the clients they typically represent.

What I am hoping to do and what I regard as our mandate from the American Law Institute is to try to put these matters on a basis of what is, objectively speaking, the proper function of federal courts vis-à-vis state courts in the diversity area.

As Professor Wright has indicated, the proposals which we are making with respect to federal question jurisdiction will add to the volume of cases in the federal court. We do not make the proposals for the sake of adding to the federal volume but because we think on balance they are cases that belong in the federal court.

Similarly, with respect to diversity, our proposals will clearly reduce the number of cases in the federal courts. We do not make them primarily in order to lighten the burden of the federal courts but rather because in our opinion the cases which we remove from federal jurisdiction as it now exists are cases which

on a rational and sensible reappraisal belong properly in the state court.

I will mention only a few of the major proposals. There are several which I will not even touch upon, because I think it would be more helpful if I went to the heart of the most far-reaching and most controversial of the proposals which we have made.

I might say I started out my first presentation at the American Law Institute with an illustration of something which I thought was so noncontroversial that it would effectively make the point that existing rules with respect to diversity jurisdiction were not perfect. I found immediately that I was wrong.

I still think, however, that this illustration is a typical case where gimmicks presently make it possible for cases to be in federal court which by no stretch of the imagination belong there. It is the case where a foreign administrator is named for a local decedent in a situation where the prospective defendant is a local citizen in order to get a case into the federal court because; as you all know, the present law looks to the citizenship of the administrator and not that of the decedent. It seemed to me, and still does, that this is simply an affront to any rational distribution of business between the federal and state courts.

It is equally an affront in my view when diversity jurisdiction is destroyed by the appointment of an administrator of the same citizenship as the adversary, when the decedent was of different citizenship, in order to prevent the case getting into the federal court; or even, as has been done in at least one state in the Fourth Circuit, the making of a fractional assignment of a small portion of a tort claim to a person of the same citizenship as the defendant in order to freeze the case in the state court.[2]

We would no longer permit any of these things, and it seems to me that the only argument against our position is that of a lawyer who likes to have the chance to choose his tribunal. I do not blame him for liking that as long as the law permits it. I do think, however, that the law should not permit it. I deplore the fact that in the Western District of Pennsylvania there have recently been thirty-four separate death cases involving the appointment of the same Ohio citizen as administrator of

2. See Heape v. Sullivan, 246 S.C. 218, 143 S.E.2d 366 (1965); Doremus v. Atlantic Coast Line R.R., 242 S.C. 123, 130 S.E.2d 370 (1963); Ridgeland Box Mfg. Co. v. Sinclair Ref. Co., 216 S.C. 20, 56 S.E.2d 585 (1949). See comment on Heape v. Sullivan at pp. 790-794 *infra*.

decedent Pennsylvanians as a device for getting into federal court. If you do not go along with me in wanting to change that, my task becomes increasingly hopeless.

Now I deal with the heart of the proposals, and that is the section whereby we would deprive the local plaintiff—the in-state plaintiff—from invoking federal jurisdiction on the basis of diversity because of the foreign citizenship of the defendant. Something approaching half of the original diversity actions—forty-five per cent as I recall it—in the last year were so brought.

It does not seem to us that any proper rationale of division of business between state and federal courts should allow the local citizen the good fortune of being able to choose a federal forum if he prefers it merely because his adversary comes from some other state. It is quite different from allowing the foreign adversary to invoke federal jurisdiction, and in our section 1302(a) we explicitly prohibit the local plaintiff from invoking federal jurisdiction.

To those of you who habitually represent plaintiffs in, for example, personal injury cases, it must come as a shock even to suggest that you be deprived of a choice which you always have had, and have tried to exercise, as I always did, in a particular case in the way best calculated to aid your client's cause.

The difference in location of trial, the difference in congestion of the calendar, the belief that in one or the other system you would get a bigger verdict from a jury, and so on—all of those reasons enter into the making of a choice, and I used to think I was very expert in deciding just which choice was the right one in a specific case.

I used before the American Law Institute an illustration which I will use again here because it comes from a part of the country where I practiced law. I am referring to Cape Cod in Massachusetts. Let us assume a plaintiff who lives on Cape Cod is injured because of an allegedly defective condition in a supermarket, and his damages might run over 10,000 dollars. If that supermarket was incorporated and has its principal place of business in Rhode Island, the Cape Cod plaintiff can choose between the state and the federal court. For the life of me I cannot see why that local plaintiff ought to have that choice. I do not think that he should be in a position to say: "Oh, but I can't get a fair deal in the courts of my own state. I want the protection of the federal judiciary in this case where my ad-

versary comes from outside the state." That is not really why he wants the federal court. He wants it for some of the reasons that I suggested earlier. In our proposals to the Institute we recommended, and the Institute has adopted, the proposition that the local plaintiff cannot invoke diversity jurisdiction.

Turning next to locally established corporations, you all know that today the foreign corporation, unless its place of business is in the state, can remove to the federal court or sue there as a plaintiff. We do not think that that is right in a situation where the corporation has so identified itself with the life of the state that it is not in any ordinary sense to be regarded as foreign to the state.

Continuing with my Cape Cod illustration, the plaintiff is again injured by a defect in a supermarket. First, let us suppose the company is incorporated in Massachusetts and has its headquarters in Boston, with a substantial supermarket on Cape Cod. Second, let us suppose the company is incorporated in Rhode Island and has its principal place of business in Providence, with a supermarket on Cape Cod as well. Either of these defendants would doubtless prefer to get his case into the federal court in Boston. I say this with feeling because I have represented Boston defendants in the state courts on Cape Cod, where anyone who does not come from the Cape is a foreigner, and I never won except occasionally by a directed verdict. I would have liked very much to have been able to get into the federal court, which of course I could have done had my client been from Rhode Island.

For the life of me, I cannot see why the Rhode Island corporation which has decided it is good business to operate a supermarket on Cape Cod should have the chance to go into the federal court in a controversy with a Cape Codder, when the Massachusetts corporation principally located in Boston does not and could not under the Constitution of the United States have that privilege.

In other words, it seems to be that such prejudice as there is in state courts today is not prejudice based upon the fact that a man comes from a different state. The man from the other side of the canal or from beyond the next row of hills is, in many of our parochial parts of the United States, equally a foreigner; and the local man is going to have an advantage. It is fair enough to let the genuine out-of-stater minimize that advantage by removing his case to the federal court, but I do not think

that the corporation with a local establishment should be allowed to do so.

Take, for example, the Safeway Store on one side of the street and the locally incorporated supermarket on the opposite side of the street. I do not believe that the customers—I surely do not believe that the jurors—think of the Safeway Store as a foreign corporation and the local supermarket as a native one, and that hence there is discrimination on the part of jurors against the foreigner because he is foreign. There may be some tendency to favor the poor individual against the corporation, but that is not a basis for federal jurisdiction.

To take a common example, and an unhappy one from the Massachusetts point of view, if one of our Massachusetts textile mills decides to establish a factory somewhere in the Fourth Circuit and still is a Massachusetts corporation, with its principal place of business still in Massachusetts, I do not see why it should have all of the many advantages which doing business in North Carolina or South Carolina gives it and at the same time be able to say when lawsuits come along: "Oh, but we are foreigners. The local law, yes; workmen's compensation and various other types of local law we abide by, but when we get into tort litigation, contract litigation, whatever it may be, don't forget we are still Massachusetts people and we claim the privileged sanctuary of the federal court."

We have attempted rather carefully to define the corporations or other business associations that we are covering. We provide a rather explicit set of definitions as to the type of activity which makes such a corporation, as we view it, sufficiently domesticated so that it should no longer have the advantage over its competitors of access to the federal courts, to the extent that it may be thought of as an advantage. That, again, is plainly controversial and I expect, in fact I know, that there will be some disagreement on that score.

One or two other matters I will touch upon lightly. We have provided that a partnership or unincorporated association shall be deemed a citizen of the state of its principal place of business so that one partner or one member of the group of same citizenship as the adversary would not defeat federal jurisdiction. We thought that in making this suggestion we were changing existing law and the Fourth Circuit thinks so too. The Second Circuit seems to think otherwise[3] and the Supreme Court has

3. Mason v. American Express Co., 334 F.2d 392 (2d Cir. 1964).

granted certiorari in a Fourth Circuit case.[4] In any event we think it is desirable that you look to the principal place of business of an unincorporated organization just as you do in respect to a corporation.

I will also mention another small increase in the diversity business which we have proposed, which again I think would not be very controversial. That is the common situation where you have in a motor vehicle tort case one plaintiff who is plainly within the diversity jurisdiction of the federal court on a personal injury claim of more than 10,000 dollars. Then you have a husband's claim for consequential damages or perhaps some trivial injuries of his own that no lawyer would have the nerve to assert involved 10,000 dollars. We say that whenever you have a case which is in the federal court on a legitimate diversity basis it should carry with it any claim of a member of the same family living within the same household which would otherwise fail of jurisdiction because of lack of jurisdictional amount.

There is further a provision which I will mention in passing which is not so important in the Fourth Circuit as in a few other circuits. This is the so-called "commuter provision" in which we treat a person as a citizen of the state to which he commutes. (That is the state in which he earns his living or has his principal place of business or employment.) We treat him as a citizen of that state, as well as being a citizen of the state where he sleeps. We do not see any difference, for example, in the right of access to the federal court between the man who commutes from Camden, New Jersey, to Philadelphia and the man who comes in from somewhere on the Main Line to Philadelphia. If he earns his living in the state, we think that he should take state court justice as he finds it.

Finally, and another extremely significant proposal: we propose that if a defendant who is sued alone could remove he still should be able to remove when he is joined with another defendant of the same citizenship as the plaintiff. This does entail the acceptance of the proposition, which we believe sound, that the case of *Strawbridge v. Curtiss*[5] requiring complete diversity is not constitutional doctrine. Passing that over, we think that the proposal is sound.

It is not uncommon today for the person who wants to remain in the state court to join a local defendant, the local engineer

4. Bouligny v. United Steelworkers, 336 F.2d 160 (4th Cir. 1964), *cert. granted*, 379 U.S. ___ (1965).

5. 7 U.S. (3 Cranch) 267 (1806).

joined with the foreign incorporated railroad, thus freezing the case in the state court. Often this works rough justice under today's law; but bearing in mind that we are sharply restricting the right of locally established corporate defendants to remove, we say that those corporations and those individuals which are truly foreign, which are truly out of state, should have the right to remove and should not have it subject to frustration by the joinder on the part of the plaintiff of some other defendant, whether, as it often is, for the express purpose of freezing the case in the state court or whether there are other perfectly legitimate reasons for wanting the other defendant joined.

If you are really looking to the right of access to the federal court based upon the traditional notions of the foreigner not being assured of a fair deal in the state court, the foreigner ought equally to have that privilege of removal whether or not someone else is joined with him who is a citizen of the state where the action is brought.

There are provisions involving expansion of diversity jurisdiction in the not very common situation where because of limitations by reason of citizenship or limitations of process there is no court today, state or federal, which can do adequate justice in a multiparty case where there are parties from different states who cannot be gathered together in a single forum. We provide that in a case where that situation exists diversity jurisdiction should be extended with nationwide process and venue where the events took place so that you will not have a complete frustration of justice when you have a good case but no available forum. That one so far has not met with opposition.

I now yield to my friend, Mr. John P. Frank. Please realize, however, that we are not destroying diversity jurisdiction, that we are leaving a lot of diversity jurisdiction intact and that the notion that we would be creating a federal bar which handles esoteric federal things only is the sheerest nonsense. What we are trying to do is on a rational basis bring additional cases into the federal court—cases that really belong there—and exclude from the federal court cases which do not belong there.