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FEDERAL DIVERSITY JURISDICTION—A REBUTTAL

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As a practicing lawyer I used to writhe in my seat so often at hearing an eloquent opponent have the last word with the jury that a chance to add a few more words is an appreciated privilege. I will try to make them very brief indeed.

In the first place—and I may have been remiss in not emphasizing this at the outset—when you have issues in a case wholly dependent upon state law, which under *Erie R.R. v. Tompkins*[1] the federal courts must guess at, as a basic precept of federalism we feel that a case where the state judges have the last word as to what is the state law ought to be decided in the state court unless there is some good reason to have it elsewhere.

It is true, invoking George Washington and James Madison, that from the beginnings of this Republic federal diversity jurisdiction has been provided mostly on a concurrent basis; but when one looks at all of the discussions as to why diversity jurisdiction was originally provided, he does not find that that jurisdiction was provided from any thought of the desirability of giving the local man, as opposed to the foreigner, a federal forum because it was better or fairer, or for any other reason.

Mr. Frank's examples admittedly have a beguiling sound. The last one, which he said was the most important moneywise, involved an Arizona corporation as the plaintiff. Surely the Arizona plaintiff can sue in the eastern federal court where the records are, which is the convenient forum by his standards. From the point of view of the eastern corporation that would like to remove for the sake of transfer, there is an increasing and growing development of the doctrine of forum non conveniens. In the case of foreign origins, therefore, the state court may very well allow a dismissal and force the suit to be brought in a convenient forum elsewhere. An eastern corporation sued in Arizona could still remove and seek transfer unless these events arose out of the activities of a local establishment as defined. On his facts it appears as though this was unlikely to be true.

In the accretion case, he had Arizona plaintiffs, who on this approach could not bring the case in federal court, and defendants, some of whom were from Arizona and others from Cali-

1. 304 U.S. 64 (1938).

fornia. Under our removal proposals any one of those California defendants could remove.

As to the case of the Illinois corporation against the Arizona resident, where some of the events in suit arose out of the local activities and some did not, it is true that a situation may arise where you will either have to proceed in the state court with all cases together or you will have to separate them.

These situations, however, his first example, that of the Arizona resident suing the national insurance company with a local establishment in Arizona, is exactly the case which we think doubly ought not to go into the federal court. It arises out of state created rights, and I see no reason why the Arizona citizen or the national insurance company should be able to take that case into the federal court in Arizona instead of to the state court.

Abraham Lincoln was also mentioned, and Mr. Frank has written about Lincoln as a lawyer. I think, however, that Mr. Lincoln was a good enough lawyer to do well anywhere, and while I was glad to see Mr. Lincoln brought in to show that Mr. Frank does not take the narrow Fourth Circuit approach and confine himself to those days of 175 years ago, it does not seem to me that the nature of Mr. Lincoln's practice, even added to Washington and Madison, indicates precisely what ought to be done today.

Finally, Mr. Frank initially admits in effect that I am right; that we were not destroying diversity jurisdiction. However, he thereafter uses such humorous words as gutting, slashing, even junking in reference to diversity, and I repeat that under our proposals that is just not so. You will still have the man from outside the state of Virginia who gets involved in an automobile accident in Virginia, and he will still be able to remove that case to the federal court if he so desires. It is only the local Virginian who cannot say that he would rather have the federal court, and I stand on my position that he should not.

With what we have left in federal jurisdiction, it makes little difference exactly where the proportions are; but the notion that our proposals will create a specialized bar is unfounded. No one is happier about the Federal Rules than I. In fact, I drafted rules based upon the federal rules for the state of Maine; but I submit that it is patently incorrect to say that the merit or demerit of these proposals will somehow mean the flourishing or the failure of reforms of procedure in state courts based upon the federal rules.