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Mickey A. Herrin

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limitation generally imposed by judicial interpretation. Although apparent Congressional intent should not be absolutely binding in the interpretation of enactments, such a clearly expressed and judicially accepted intent should not be ignored without explanation.

Various courts, including the one that decided Joseph, have denounced the desirability or intention of transforming every case in which a plaintiff can urge state discrimination into a federal action. That result seems inevitable, however, if the decisions in Joseph and Meredith are followed. It may not be desirable to allow this new source of cases into federal courts in situations where the state court is both available and effective, and is in fact often the court best suited to decide the case. Increasingly evident today is a desire to restrict federal jurisdiction. Many federal courts more readily abstain from hearing questions that could be decided on state law, and there are proposals to limit federal jurisdiction by statute. To needlessly expand the jurisdiction—and consequently the workloads—of the federal courts through an expanded interpretation of section 1983 seems undesirable.

Charles M. Brown, Jr.

Federal Jurisdiction—Manufactured Diversity Disassembled

In the recent case of McSparren v. Weist, the Court of Appeals for the Third Circuit, reversing its own prior decisions, held that the appointment of an out-of-state guardian of a minor for the purpose of creating diversity was an assignment improperly invoking jurisdiction under

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32 Cases cited notes 7-15 supra.
33 See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947).
34 402 F.2d at 369 & n.6.
36 Although the recent cases of Dombrowski v. Pfister, 380 U.S. 479 (1965), and Baggett v. Bullitt, 377 U.S. 360 (1964), have expanded the use of pendent jurisdiction by restricting the doctrine of abstention, the lower federal courts still abstain in many cases. See, e.g., Zwickler v. Koota, 261 F. Supp. 985 (1966), rev'd, 389 U.S. 241 (1967). It is a widely held belief that "state courts should be the primary source of interpretation and application of state law." Marden, Reshaping Diversity Jurisdiction, 54 A.B.A.J. 453, 455 (1968).
38 402 F.2d 867 (3d Cir. 1968).
section 1359 of Title 28 of the United States Code. In McSparren, a minor, a citizen of Pennsylvania, was injured in an automobile accident involving another Pennsylvania citizen. The accident occurred in the county where the minor resided with his mother. The Pennsylvania Orphans Court granted a petition for the appointment of an out-of-state guardian for the estate of the minor. Subsequently, this guardian instituted suit in the federal district court against the Pennsylvania driver. The district court granted the defendant's motion to dismiss for lack of diversity jurisdiction, and the court of appeals affirmed.

The manufacturing of diversity jurisdiction in the federal courts is hardly a new problem. In the original Judiciary Act of 1789 Congress enacted the "assignee clause" to prevent the manufacture of diversity jurisdiction through the assignment device. In Sowell v. Federal Reserve Bank, the Supreme Court stated that the history of the assignee clause "shows clearly that its purpose and effect, at the time of enactment, were to prevent the conferring of jurisdiction on the federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist . . . ." The assignee clause was replaced in 1948 by the present 28 U.S.C. § 1359, which denies the district court jurisdiction of any case in which "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Section 1359 was derived from former sections 41(1) and 80, and the focal words of section 80, "improperly or collusively," were incorporated into Section 1359 and were probably intended by Congress "to have the same meaning and connotation which had been given them at the time of incorporation into the Revised Code."

Despite the avowed purpose of these statutes, they have not posed any particular difficulty to those persons seeking to invoke federal jurisdiction.
by the manufacture of diversity. In the classic case of Black and White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., a Kentucky corporation wishing to bring suit in federal court upon a contract, void under Kentucky law, dissolved the Kentucky entity and reincorporated in Tennessee. The ostensible purpose of this action was to create diversity of citizenship. In upholding the jurisdiction of the federal court, the Supreme Court held that "the succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction." Subsequently, in Jaffe v. Philadelphia & Western Railroad, the third circuit upheld the manufacture of jurisdiction in a wrongful death action. The deceased was a resident of Pennsylvania, as was the defendant corporation. For the admitted purpose of bringing the suit in federal court, an out-of-state resident was appointed administratrix of the deceased's estate. In upholding federal jurisdiction, the court of appeals relied heavily upon Mecom v. Fitzsimmons Drilling Co., where it was stated:

To go behind the decree of the probate court would be collaterally to attack it, not for lack of jurisdiction of the subject-matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it.

In Mecom, however, the purpose of the appointment of an out-of-state administrator was to defeat diversity jurisdiction and to prevent the removal of the suit from the state court to the federal court. Although there is a federal policy against manufacturing federal jurisdiction, "there is no federal legislative policy against an avoidance of federal jurisdiction." Following the line of reasoning begun in Jaffe, the third circuit

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11 276 U.S. 518 (1928).
12 Id. at 524. But cf. Miller & Lux, Inc. v. East Side Canal & Irrig. Co., 211 U.S. 293 (1908), where the Court found no federal jurisdiction because, although a new corporation was formed in another state, the old corporation had not been dissolved.
13 180 F.2d 1010 (3d Cir. 1950). At the time suit was filed 28 U.S.C. § 80 (1940) was in effect. This provision was replaced in 1948. See 28 U.S.C. § 1332 (1964).
14 180 F.2d at 1011. The non-resident administratrix was a stenographer in the office of the widow's attorney.
15 284 U.S. 183 (1931).
16 Id. at 189.
17 Id. at 185.
18 3A J. Moore, Federal Practice ¶ 17.05 [2], at 152 (1968).
again approved the manufacture of federal jurisdiction in *Corabi v. Auto Racing, Inc.*, where the resident administratrix resigned to permit the appointment of a non-resident so that suit could be brought in federal court. The court held that section 1359 did not bar the action; there was no collusion involved and the action was not improperly brought in federal court since there was no impropriety or irregularity involved in the valid state court proceeding for the appointment of the out-of-state fiduciary.

The interpretation given section 1359 by the court in *Corabi* has made the case the "authoritative foundation for the maintenance of 'manufactured' diversity jurisdiction." For instance, in *County of Todd v. Loegering*, the court found nothing "improper" or "collusive" although the motive for the appointment of the out-of-state trustee was clearly to manufacture diversity. In fact, the court stated that "[t]hese are the usual expendients employed by counsel and client in matters of this kind."

The rationale of *Corabi* has also been applied by other circuits to the appointment of administrators and guardians. In *Lang v. Elm City Construction Co.*, the second circuit upheld jurisdiction although the original administratrix had resigned solely to permit the appointment of the non-resident administrator to obtain the requisite diversity. The Connecticut District Court, following the *Corabi* decision, stated that "[w]hile the decision of the Third Circuit in *Corabi* is not controlling on this Court, it is persuasive and will be followed, absent a decision on the question by the Supreme Court or the Second Circuit."

Another egregious example of the manufacture of jurisdiction was *City of Eufaula v. Pappas*, where the resident owners of land subject to condemnation proceedings quitclaimed their interests to a non-resident member of the family for consideration of one dollar. Again the only

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20 264 F.2d at 788.
21 McSparren v. Weist, 402 F.2d 867, 872 (3d Cir. 1968).
22 297 F.2d 470 (8th Cir. 1961).
23 *Id.* at 474.
24 Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962). At the time the appointment was made plaintiff and defendant were fellow Nebraska citizens; prior to filing suit, plaintiff moved to Kansas. The court upheld diversity jurisdiction.
26 217 F. Supp. 873 (D. Conn.), aff'd, 324 F.2d 235 (2d Cir. 1963) (per curiam).
27 217 F. Supp. at 877.
purpose of the transaction was to create diversity, and it was conceded that whatever sum was awarded would be divided among the grantors in proportion to the interest that they had conveyed. Under Alabama law the consideration of one dollar was sufficient to support the transfer and consequently the court upheld the federal jurisdiction, on a rationale similar to that in the Taxicab case. Perhaps this case goes even beyond the Taxicab case because of the simplicity of the transaction that created diversity—obviously it is more difficult to dissolve a corporation, complying with state laws, than to transfer an interest in property by quit-claim deed.

Corabi and the cases following the rationale of that decision have been criticized for their interpretation of section 1359. Recently, in Caribbean Mills, Inc. v. Kramer, the court did not allow the assignment of a claim from a Panama corporation to a Texas citizen when admittedly the purpose was to invoke federal jurisdiction and the only duty of the assignee was to collect the claim. In discussing Corabi, the court stated that "[b]y focusing on the literal meaning of the two words [improperly and collusively], the Court [in Corabi] virtually emasculated the statute . . . ." Similarly, the court in Ferrara v. Philadelphia Laboratories, Inc. dismissed for want of jurisdiction where the claims of the injured party were assigned to a non-resident trustee in order to invoke federal jurisdiction. The question whether the plaintiff was "improperly or collusively" made a party was held dependent upon whether the transfer was "real." The court set out several factors to be considered in determining whether or not the transaction was "real" and not "merely colorable" or "fictitious": (1) the transferor's retention of an interest in the subject matter, outcome or control of the litigation; (2) the mo-

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29 Id. at 750.
30 392 F.2d 387 (5th Cir. 1968); See 3A J. Moore, Federal Practice ¶ 17.05 [3-3] (1968); Cohen & Tate, Manufacturing Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety, 1 VILL. L. REV. 201 (1956).
31 392 F.2d at 393.

The defendants' challenge to jurisdiction under § 1359 is not overcome by demonstrating that the trust instruments . . . are valid and legally binding between the parties to it under state law. A 'valid' transfer . . . is not synonymous with a 'real' transfer in the sense that term is used to delineate jurisdictional limits under the statute.

Id. at 1008. See also Note, Appointment of Non-Resident Administrators to Create Federal Diversity Jurisdiction, 73 YALE L.J. 873 (1963).
tive or purpose of the transfer; \(^{35}\) (3) the transferor's solicitation of the plaintiff to bring suit, promising reimbursement for costs and expenses. \(^{36}\) Even cases in the third circuit following \textit{Corabi} admit that the decision "may seem inconsistent with the intention of the authors of our Constitution and may force the federal courts to decide difficult questions of state law that might well be avoided . . . ." \(^{37}\)

In light of this problem the American Law Institute has proposed two statutory changes that would severely curtail the manufacture of diversity jurisdiction. \(^{38}\) Proposed section 1301(b)(4) \(^{39}\) "is designed to prevent either the creation or the defeat of diversity jurisdiction by the appointment of a representative having a different citizenship from the infant, incompetent, or decedent he is appointed to represent." \(^{40}\) These representatives will be deemed citizens only of the same state as the person represented. "Although the major impetus for this subsection was the practice of manufacturing diversity in wrongful death cases, it applies in terms to an action of any type by an executor or administrator." \(^{41}\)

Another section of the proposed legislation "deals with appointments of other types of officers or individuals to such positions as receivers of debtors' estates, trustees, and the like, and makes the jurisdiction turn on the same test as is applicable to other business assignments—whether \textit{an object} of the appointment or transfer was creation of access to a federal forum." \(^{42}\)

The elimination of the manufactured diversity suits would apparently significantly reduce the case loads in the federal courts. For example, in a sample of cases from the Eastern District of Pennsylvania, it was determined that 20.5 per cent of the diversity suits were manufactured. \(^{43}\)

The general tenor of the ALI's proposals is to curtail federal jurisdiction, the justification being that the federal courts "should not be called

\(^{85}\) \textit{Id.} at 1011-12.

\(^{86}\) \textit{Id.} at 1013-15. \textit{Corabi} was distinguished on the grounds that there was an appointment of a non-resident administrator by a decree of a state court; in \textit{Ferrara}, there was a transfer to the non-resident directly from the beneficiaries of the litigation.


\(^{88}\) \textit{ALI Study of the Division of Jurisdiction Between State and Federal Courts}, pt. I (Official Draft 1965) [hereinafter cited as \textit{ALI Study}].

\(^{89}\) \textit{Id.} at 9.

\(^{90}\) \textit{Id.} at 61.

\(^{91}\) \textit{Id.} at 63.

\(^{92}\) \textit{Id.} at 102-03 (emphasis added).

\(^{93}\) \textit{Id.} at 175 n.7. More than 1,000 cases, filed between November 10, 1958 and July 7, 1959, were studied. \textit{Id.} 173 & n.3.
upon for the administration of state law... unless there is some special
reason for their intervention... ." Even those who would disagree
with the study as a whole would "favor a prohibition against the manu-
facture of diversity jurisdiction by the appointment of an out-of-state
personal representative or by a colorable assignment or otherwise."

In McSparren the court chose to reevaluate its prior interpretation of
section 1359, recognizing that "there would be no need for such legisla-
tion in 'manufactured' diversity cases but for the interpretation of section
1359 in our leading case of Corabi, and similar decisions." The court
determined that when the sole motive for the appointment of a non-
resident is to create diversity, it is "improper" under section 1359; there-
fore, a district court shall not have jurisdiction of the action. The Third
circuit's decision overruling Corabi and Jaffe conflicts with the view
that the motive for the appointment of non-residents is immaterial.

It has been argued that the holding in McSparren will result in the col-
lateral attack of valid state court proceedings. However, the appointment
of the guardian can stand for other purposes, even though the federal
court will not allow him to bring the suit on the basis of diversity.

There apparently, then, is little justification in allowing a manufactured
diversity suit to be brought in federal court. Historically, the basis for
the federal forum in diversity cases was fear of prejudicing the out-of-
state litigants. In those cases where diversity is manufactured, however,
the genuine parties are citizens of the same state, and the cause of action
is actually of a local nature. Therefore, the state courts would seem to
be the proper tribunal.

The ALI's proposed legislation furnishes a "bright line" objective test
for refusing federal jurisdiction. If the citizenship of the appointed repre-

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44 Id., Foreword at ix.
677 (1965); Moore & Weckstein, Diversity Jurisdiction: Past, Present, and Future,
46 Id., Foreword at ix.
47 In Corabi the court stated "[w]e cannot distinguish the facts of the Taxicab
Company case in any practical way from those of the case at bar." 264 F.2d at
787. It seems the words "collusive" and "improper" imply that the motive must be
determined.
48 Esposito v. Emory, 402 F.2d 878, 880 (3d Cir. 1968) (dissenting opinion).
49 Neither would the federal court's refusal to allow diversity jurisdiction im-
pugn in any way or collaterally attack the validity of the state court appointment."
3A J. Moore, Federal Practice ¶ 17.05 [3-3], at 165 (1968).
50 See ALI Study 47-56.
sentative is different from the citizenship of the infant, incompetent, or decedent, the citizenship of the one being represented automatically controls. Also, the rewording of the assignment clause to deprive the district court of jurisdiction over the parties whenever an object of the transaction is to invoke or to defeat federal jurisdiction is more stringent than the present statute. 52

Thus, in view of the increasing criticism and study of the concept of manufactured diversity jurisdiction, the result of McSparren v. Weist was not unexpected. Although McSparren is a move in the right direction, the decision leaves several questions unanswered. The court held where the sole purpose of the appointment of a foreign representative is to create diversity the action is "improper" and therefore "offends against § 1359."53 This leaves open to litigation the question whether the appointment has as its (1) sole purpose (2) its principal purpose or (3) one of its purposes the manufacture of diversity.54 Although barred by prior Supreme Court decisions,55 it seems that the better test would be to look to the citizenship of the deceased, minor, or incompetent for purposes of deciding jurisdiction.

Mickey A. Herrin

Federal Taxation—Unreasonable Corporate Accumulation and the "Any Purpose" Test

"It can be contended that every corporation, when organized, has as one of its purposes, the avoidance of surtax."1 Though this may be true

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52 Id. at 102. "Ordinarily, the absolute transfer of property for valuable consideration would negative any conclusion that an object of the transfer was to create diversity." Id. The proposed statute would certainly change the result in City of Eufaula.

53 402 F.2d at 876. Apparently the holding would not include the situation where the original administrator resigns, because in this instance someone must be appointed before the suit can be brought.

54 Amalgamated Clothing Workers v. Curlee Clothing Co., 19 F.2d 439 (8th Cir. 1927). A corporation's reincorporation in another state, though defective, was interpreted to be permanent. Acquiring federal jurisdiction was only one consideration, and probably a minor one, for the change. Federal jurisdiction was upheld. Id. at 440. If attorneys begin to choose as foreign representatives out-of-state relatives with a legitimate interest in the litigation, then the question would be squarely presented to the court.


1 Halperin, The Surtax on Corporations Improperly Accumulating Surplus, 18 Taxes 72, 76 (1940).