



3-1-1935

Diversity Jurisdiction

William Sternberg

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

William Sternberg, *Diversity Jurisdiction*, 10 Notre Dame L. Rev. 219 (1935).

Available at: <http://scholarship.law.nd.edu/ndlr/vol10/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTRE DAME LAWYER

A Quarterly Law Review

VOL. X

MARCH, 1935

NO. 3

DIVERSITY JURISDICTION

DURING the past twenty years there has been a great deal of controversy concerning the advisability of completely abolishing federal jurisdiction based on diversity of citizenship. Due to the fact that wealthy corporations sometimes abused this privilege, various attempts were made by the state legislatures to prevent the removal of cases to the federal courts, and in some instances they were successful, although the constitutionality of such statutes was attacked.¹ Typical of the state statutes preventing removal of cases to the federal courts was the Arkansas statute. According to this statute, if a corporation, when sued in a state court, removed the case to the federal court on the ground of diversity of citizenship, the corporation lost its license to do business in Arkansas. Hence, if it wanted to do business in Arkansas, it had to submit to the jurisdiction of the Arkansas courts. This was actually the statute involved in the famous *Terral* case² which came before the United States Supreme Court in 1922 and in which the court, overruling the earlier cases to the contrary, held the statute unconstitutional. It was squarely decided, Chief Justice Taft deliv-

¹ *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148 (1876); *Security Mutual L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013 (1905).

² *Terral v. Burke Const. Co.*, 257 U. S. 529 (1922).

ering the opinion, that the state legislature cannot constitutionally prevent any person from resorting to the federal courts when, under the congressional enactment, he would have a right to do so.

The natural result of this decision was of course a more rigorous attempt to change the congressional enactment, thus transferring the battleground from the state legislature to Congress. Many bills have been introduced in Congress from time to time whose purpose is materially to limit or totally abolish diversity jurisdiction. At the last Congress, Senator Norris introduced a bill providing for the amendment of the judicial code by simply striking out the provisions relating to suits between citizens of different states. Another bill limited the jurisdiction by denying the right of removal to a corporation doing business in the state where it is sued. Still another bill proposed to raise the jurisdictional amount from the present requirement of \$3,000 to \$10,000.⁸ Although the advocates of the proposed legislation did not succeed in the last Congress, their persistent and determined effort indicates that the matter will again be presented at the present session. It may therefore be interesting and helpful to consider the chief arguments for and against such legislation with a view to determining their validity.

The advocates of the change have of course the burden of establishing its desirability. Looking at the situation from the standpoint of those who advocate the change, we may, for the purpose of convenient discussion, divide their arguments into those which purport to answer the objections to the new legislation and those which purport to state its advantages.

⁸ Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?* 18 AM. BAR ASS'N. JOUR. 436, 499; 14 AM. BAR ASS'N. JOUR. 200.

1. ORIGINAL REASON

Perhaps the objection most frequently made is that the original reason for granting diversity jurisdiction still exists. What was this reason? "Why is it that a United States Court is given the duty of administering the law of another jurisdiction? Why did the states allow it? Why was it important that the United States should have it?" The question was thus stated long ago,⁴ without, however, answering it. It has sometimes been said that the real reason was the fear of the state legislatures. And it seems that statutes had been passed in a number of states in regard to paper money which placed the nonresident creditor somewhat at a disadvantage. Hence there was a desire to protect him against these unfair legal tender and stay laws of the states by giving him access to the federal courts.⁵ Thus, a recent writer, after discussing these statutes, concludes: "In summary we may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction."⁶ But, according to what this same writer concedes to be the "orthodox view,"⁷ the principal reason for inserting this clause in the constitution was based on what he calls the "local prejudice theory"⁸ which became famous by Chief Justice Marshall's elaboration of it in *The Bank of the United States v. Deveaux*,⁹—a case that came before him in 1809. He declared that, however true it may be that state tribunals will administer justice as impartially as those of the nation, yet it is also true that the constitution entertains apprehensions on this subject or views with indulgence the fears and apprehensions of nonresident suitors.¹⁰ Seven

⁴ Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311, 316.

⁵ Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 82; Johnson, *State Laws and Federal Courts*, 17 KY. L. JOUR. 355, 356.

⁶ Friendly, *Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496.

⁷ Friendly, *supra* note 6, at 501.

⁸ Friendly, *supra* note 6, at 509; Warren, *supra* note 5, at 83.

⁹ 5 Cranch 61 (1809).

¹⁰ *The Bank of the United States v. Deveaux*, 5 Cranch 61, 87 (1809).

years later Justice Story expressed the same view. Speaking for the Court in *Martin v. Hunter's Lessee*¹¹ he said that state prejudices, jealousies, interests and attachments might sometimes obstruct or control the administration of justice or be supposed to do so and for this reason the constitution enables the nonresident to have his case tried and determined in the federal court. To the student of constitutional history, it is not surprising that our forefathers should have entertained these apprehensions. The conflict of interest, strongly emphasized by intercolonial jealousy, had endangered the revolutionary cause and threatened to disrupt the constitutional convention. It was only natural that the constitution should emerge as a compromise of conflicting interests and fears.¹²

Now, the argument is made that this reason has long ago become obsolete and that there is no longer any appreciable danger of local prejudice in the state courts. The mobility of modern life, says Felix Frankfurter, perhaps the foremost champion of the change, has greatly weakened state attachments. Since the adoption of the constitution, this country has undergone such a radical economic transformation that practically all danger of discrimination against non-resident litigants has disappeared.¹³ He also points out that Congress has shown its confidence in the impartiality of the state courts in those very cases where local prejudice, if any exists, may be presumed to be strongest, cases against corporate defendants. The Employers' Liability Act of 1908 gave concurrent jurisdiction to state and federal courts of the cases arising under it. But Congress very soon checked the heavy flow of employer liability litigation which came to the federal courts by prohibiting the removal of such cases from the state courts.¹⁴

¹¹ 1 Wheat. 304 (1816).

¹² Collier, *A Plea Against Jurisdiction for Diversity of Citizenship*, 76 CENT. L. JOUR. 263, 264.

¹³ Frankfurter, *Distribution of Judicial Power Between United States and States Courts*, 13 CORN. L. QUAR. 499, 521.

¹⁴ Frankfurter, *supra* note 13, at 522.

There has, however, been a very vigorous dissent from this view, especially by the American Bar Association. Speaking on this subject before the Association in 1922, Chief Justice Taft said:

"I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against nonresidents is at an end. Litigants from the eastern part of the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a western or southern state court as in a federal court."¹⁵

The Committee on Jurisprudence and Law Reform of the American Bar Association is in perfect accord with Chief Justice Taft on this question. In its report to the Association at its meeting in 1928, the Committee makes this strong statement:

"A man would be blind to the conditions in different parts of this country who did not realize that attachments, prejudices and jealousies and differing social, economic and political views continue to influence . . . lawyers, judges and jurymen, when they are called upon to adjudicate upon the rights of citizens from distant states. It is not necessary to charge an unjust point of view in fellow-Americans living in different parts of the country. But that marked differences of outlook and opinion exist which influence both legislation and judicial proceedings, especially when the interests of nonresidents are involved, is undeniable."¹⁶

The law faculty of University of Chicago, giving their opinion as impartial observers, have supported this view.¹⁷ The courts, too, have pretty consistently continued to affirm this theory.¹⁸

¹⁵ Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 47 AM. BAR ASS'N. REP. 250, 258, 259.

¹⁶ 53 AM. BAR ASS'N. REP. 434; 14 AM. BAR ASS'N. JOUR. 267; 63 CONG. REC. 8079.

¹⁷ Comment, 31 MICH. L. REV. 59, 61.

¹⁸ *Dodge v. Woolsey*, 18 How. 331, 334 (1855); *Scott v. Sanford*, 19 How. 393, 580 (1856); *Burgess v. Seligman*, 107 U. S. 20, 34 (1882); *Langford v. Platte Iron Works*, 235 U. S. 461 (1915); *Anaconda Copper Mining Co. v. Butte Copper Co.*, 200 Fed. 808, 811 (D. C. Mont. 1912); *Barron Steamship Co. v. Kane*, 170 U. S. 100, 111 (1898); *Feister v. Hulick*, 228 Fed. 821 (D. C. E. D. Pa. 1916).

2. THE ECONOMIC ARGUMENT

Another objection against the proposed legislation is that it would discourage the investment of eastern capital in the western and southern sections of the country. In referring to the development in these sections of the country, the Committee on Jurisprudence and Law Reform of the American Bar Association has this to say:

"Investments have been made, not alone in the securities of the great systems of railroads, but in industrial projects having plants, works and mines in states other than those where the security holders reside. Billions of eastern capital have been invested in western banks, trust companies, and mortgage companies and have been loaned on farm mortgages, livestock and crops of all kinds. When nonresident investors learn that they must in an emergency depend on the state courts to protect their interests, the confidence which for generations has been based on the security afforded by the right to resort to the federal courts will be seriously impaired. And a serious blow will be directed at the financial structure which has been built up in a long course of years; and this blow will be reflected not only in the restriction of investments and loans, but also in the increase in the rate of interest, especially on farm mortgages."¹⁹

In a very widely quoted passage of his address to the Association, Chief Justice Taft expressed the same view:

"The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element—and I want to emphasize this because I don't think it is always thought of—no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with jurisdiction to hear diverse citizenship cases."²⁰

Now, personally, I am not in favor of abolishing diversity jurisdiction completely, but I must confess that this eco-

¹⁹ 69 CONG. REC. 8079; 53 AM. BAR ASS'N. REP. 435; 14 AM. BAR ASS'N. JOUR. 267.

²⁰ Taft, *supra* note 15, at 259; 14 AM. BAR ASS'N. JOUR. 200; Newlin, *Proposed Limitations Upon Our Federal Courts*, 15 AM. BAR ASS'N. JOUR. 401, 403; Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 AM. BAR ASS'N. JOUR. 433, 439.

nomic argument, in spite of the eminence of its sponsors, does not appeal to me very strongly. It seems clear, as Mr. Frankfurter has pointed out, that bankers and still less investors do not contemplate litigation for default when they make their loans. What rate they get depends on the money market and the credit of the borrowers. Moreover the argument leaves wholly out of account our economic transformation. With the "wide diffusion of securities throughout the country, customer ownership of utility stock, employee holdings in large corporations,"²¹ our economic situation has radically changed. The financing of southern and western development is being increasingly done by local capital. These changes are highly significant.

3. CONSTITUTIONALITY

A third objection to the proposed legislation is its alleged unconstitutionality. There does not seem to be much foundation for this argument, and yet it is made by so eminent a jurist as Gurney E. Newlin, President of the American Bar Association in 1929, and also by the Association's Committee on Jurisprudence and Law Reform.²² The lower federal courts came into existence and acquired their jurisdiction by an Act of Congress, which in turn received from the Constitution the power to create them and to confer on them a limited jurisdiction. Section 2, Article 3, of the Constitution, enumerates various classes of cases to which the federal judicial power shall extend and then expressly limits the original jurisdiction of the Supreme Court to cases affecting foreign officials and cases to which a state is a party. Where then is the original jurisdiction in the other enumerated cases? According to Section 1, the judicial power in these cases is to be vested in such inferior courts as Congress may ordain and establish. Now as a matter of strict construction, it might perhaps be argued that by these pro-

²¹ Frankfurter, *supra* note 13, at 522.

²² Newlin, *supra* note 20, at 404; Howland, *supra* note 3, at 503.

visions the Constitution vested the federal courts with jurisdiction in all the enumerated cases "in the same automatic fashion in which the Statute of Uses executed a use."²³ This argument was in fact made by counsel in the interesting case of *Turner v. Bank of North America*.²⁴

Closely allied to this theory was the view that the Constitution did not leave it within the discretion of Congress to withhold any part of the judicial power which it was authorized to confer on the federal courts. According to this view, the federal courts derive their power from Congress, not immediately from the Constitution, but that Congress was under a duty to confer full jurisdiction.

Although this latter view was supported by all the learning and influence of Justice Story,²⁵ it fared no better than the former view. Both have been disregarded and repudiated congressionally and judicially. The whole history of congressional legislation on this subject shows that in determining the scope of federal jurisdiction, Congress has always been guided, not by the mandate of the Constitution, but by considerations of policy and expediency. The Supreme Court has also repeatedly rejected the idea that it derives its jurisdiction immediately from the Constitution or that Congress lacks discretion in granting it. The "truth is," said Mr. Justice Chase, "that the disposal of the judicial power belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise. . . . Congress is not bound . . . to enlarge the jurisdiction . . . to every subject . . . which the constitution might warrant."²⁶ In a case decided in 1922,²⁷ Justice Sutherland went even further than this when he declared:

²³ Friendly, *supra* note 6, at 506.

²⁴ 4 Dall. 8 (1799).

²⁵ *Martin v. Hunter's Lessee*, *op. cit. supra* note 11, at 328; *White v. Fenner*, Fed. Cas. No. 17547 (1818).

²⁶ *Turner v. Bank of North America*, *op. cit. supra* note 24, at 10.

²⁷ *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922).

"The constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it . . . And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part. . ."

Even Chief Justice Taft, who was always strongly opposed to any restriction of federal jurisdiction, frankly admitted²⁸ that "taking away of fundamental jurisdiction from the federal courts is within the power of Congress . . ." So it seems fairly well-settled that the Constitution merely fixes the maximum of federal jurisdiction, not the minimum, and that consequently Congress may, within that maximum, restrict or enlarge the jurisdiction *ad libitum*.²⁹

4. ADVANTAGES OF THE FEDERAL COURT

There is a fourth objection to the proposed legislation. It is said that it would deprive many litigants of the advantage of a trial in the federal court and that this would be a serious loss in the administration of justice, because federal courts have a great advantage over state courts in the matter of composition and procedure. The point is made that an appointed judge is as a rule considerably superior to an elected judge for two reasons: First, because the person making the appointment usually gives much more consideration to the qualities that are desirable for judicial office, but which are of little consequence where the office is elective, since these qualities inherently lack popular appeal; and, Second, because a judge holding office for life, or during good behavior, is not hampered with periodical campaigns for reelection or with the necessity of keeping his political fences in repair. Furthermore, it is argued that not only is the federal judge a more capable man, but there is one rule of procedure which makes the federal court a

²⁸ Taft, *supra* note 15, at 259.

²⁹ *Kline v. Burke Construction Co.*, *op. cit. supra* note 27; *United States v. Haynes*, 29 Fed. 691, 696 (D. C. Mass. 1887); *Toledo Fence & Post Co. v. Lyons*, 290 Fed. 637, 644 (C. C. A. 6th, 1923); *Manley v. Olney*, 32 Fed. 708 (C. C. W. D. Mich. 1887); *Sheldon v. Sill*, 8 How. 235 (1845); *Stevenson v. Fain*, 195 U. S. 165 (1904); *Kentucky v. Powers*, 201 U. S. 1 (1906).

superior tribunal, and that is the rule which permits the court to comment on the evidence, a thing forbidden in most state courts.⁸⁰

In answer to this objection, it may be said in the first place that the desirability of having an appointive bench with power to comment on the evidence is far from settled. The very fact that this difference does exist between state and federal courts indicates that it is a debatable question. But even if we assume that it is desirable, then the conclusion is, not so much that the proposed legislation should be defeated, as that bills should be introduced in the state legislatures and constitutional amendments proposed, giving the state courts these alleged advantages.

With respect to the first class of arguments, it may, therefore, be said that out of the four objections which the opponents of the proposed legislation have raised, there is one, and only one, that has real merit, and that is that the original reason for diversity jurisdiction still exists.

If now we pass to the other class of arguments stating the advantages of the proposed change, we find that they resolve themselves into objections to diversity jurisdiction as it is exercised today.

1. CONGESTION OF THE FEDERAL DOCKET

One of these arguments is that something must be done to relieve the congestion of the federal court docket. That there is need of some new legislation, not only to relieve the present congestion, but to prevent it in the future, seems generally agreed. To what extent the abolition of diversity jurisdiction would bring this relief obviously depends on how much time the federal courts are now spending in trying cases that come to them because of diverse citizenship. On this point, we have no reliable statistics. Some authorities

⁸⁰ Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 UNIV. PA. L. REV. 179, 183.

estimate that the federal courts spend one-third of their time in that way; others place it as low as five per cent.⁸¹ But even if we accept the higher estimate, there are other and simpler ways of relieving the congestion; either by increasing the number of judges or by curtailing their jurisdiction. Congress has in fact at various times adopted both of these methods. The Judicial Code of 1911 raised the jurisdictional amount to \$3,000 and denied jurisdiction based on the assignment of a chose in action, unless the jurisdiction existed before the assignment.⁸² It prohibited the federal courts from enjoining any action in the state courts,⁸³ also, it prohibited the removal of cases arising under the Federal Employers Liability Act.⁸⁴ Other restrictions were created by judicial construction. In a very early case,⁸⁵ where there were several plaintiffs and several defendants, the rule was laid down that even though there was diversity of citizenship between some of the plaintiffs and some of the defendants, the case could not be removed, if there was one plaintiff and one defendant who were citizens of the same state. It is also well-settled that the District of Columbia is not a "state" within the meaning of the constitutional provision and consequently residents of that jurisdiction cannot get into the federal court on the ground of diverse citizenship.⁸⁶ There is another suggestion for the relief of congestion in the federal courts, made in a joint statement by the members of the University of Chicago Law Faculty in November, 1932, which is interesting because of what has happened since then. That learned body suggested⁸⁷ that the conges-

⁸¹ Frankfurter, *supra* note 13, at 523; Newlin, *supra* note 20, at 404; Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 UNIV. PA. L. REV. 1097; Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 364.

⁸² 36 STAT. 1091 (1911).

⁸³ 36 STAT. 1162 (1911).

⁸⁴ 36 STAT. 291 (1910).

⁸⁵ *Strawbridge v. Curtiss*, 3 Cranch 267 (1806).

⁸⁶ *Hepburn and Dundas v. Ellzey*, 2 Cranch 445 (1805). See, also, *The Corporation of New Orleans v. Winter*, 1 Wheat. 91 (1816).

⁸⁷ Comment, 31 MICH. L. REV. 59, 63.

tion might be considerably relieved by repealing the Eighteenth Amendment.

Hence, the answer to this argument is that while the proposed legislation would no doubt relieve the congestion to some extent, the same result can be more easily accomplished without abolishing diversity jurisdiction.

2. THE UNFAIRNESS OF DIVERSITY JURISDICTION

It has sometimes been argued that diversity jurisdiction works unfairly. This is an argument made by the Senate Judiciary Committee in recommending the passage of the Norris bill at the last Congress³⁸ and also by Mr. Frankfurter.³⁹ A resident of a state, when suing another resident of the same state must sue in the state court, whereas a non-resident suing the same defendant, has his choice between the federal court and the state court, even when there is no federal question involved. But the answer made by the Committee on Jurisprudence and Law Reform of the American Bar Association seems complete. Such choice or privilege is not in any way unfair or objectionable since it is entirely reciprocal. When a person is sued in the courts of his own state, if the nonresident plaintiff has no objection to that jurisdiction, he should have none.⁴⁰ Furthermore, as has been pointed out by both Judge Parker⁴¹ and Professor Yntema,⁴² this choice or privilege is due, not to the jurisdictional provision, but to the removal statute. Obviously, the remedy for any unfair discrimination is to amend the removal statute, so as to give the resident the right to remove the case.

3. PROPERTY RIGHTS AND HUMAN RIGHTS

Another argument against diversity jurisdiction is that "it makes property rights more valuable than human

³⁸ 69 CONG. REC. 8079.

³⁹ Frankfurter, *supra* note 13, at 524.

⁴⁰ 14 AM. BAR ASS'N. JOUR. 267; Parker, *supra* note 20, at 438.

⁴¹ Parker, *supra* note 20, at 438.

⁴² Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 AM. BAR ASS'N. JOUR. 71, 73.

rights,"⁴³ because criminal actions are not removable; that is, if he is sued in action which merely involves his property rights, he can remove the case to the federal court, but if he is sued in an action involving his life and liberty, the case is not removable. This argument, which seems to be the original contribution of Senator Norris to the discussion, is ingenious, but based upon the false assumption that the defendant in any case has a better chance of escaping liability in the federal court than in the state court and hence to deny the defendant a valuable "human right." Moreover, it ignores the fundamental distinction between civil and criminal actions. In civil suits only the rights of the plaintiff and defendant are directly involved, whereas in a criminal action, it is the right of the accused as against all the other citizens of the state. The state, in prosecuting the action and in seeking to determine whether the accused has violated its criminal law, acts in its sovereign capacity in behalf of all the people of the state. This is a sufficient reason for making a distinction between civil and criminal cases and amply justifies the constitutional provision of Article 3, requiring the trial of a criminal to be held in the state where the crime was committed.

4. UNIFORMITY

One of the strongest objections to diversity jurisdiction, as it is exercised today under the doctrine of *Swift v. Tyson*,⁴⁴ is that it creates the great confusion and conflict between the judicial tribunals authorized to declare the law of the state. According to the doctrine of this case, which has been adhered to since Justice Story laid it down in 1842, in any case in the federal court where the decision does not depend directly on the construction of a state statute, the court is free to declare what the law of the state is, irrespective

⁴³ Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 UNIV. PA. L. REV. 869, 878.

⁴⁴ 16 Pet. 1 (1842).

of state decisions. And this doctrine was expanded in the later, hardly less well-known case of *Gelpcke v. Dubuque*.⁴⁵ There it is held that if a state supreme court has rendered a decision construing a state statute, the court is bound by that decision; but if the state supreme court in a later case, overrules its previous decision, the federal court is not bound by the overruling decision, but is free to adhere to the case that has been overruled. Thus, we have the intolerable situation of having two courts in the same state, equally competent and authoritative, flatly contradicting each other as to what the law of the state is. Take, for instance, the very point involved in *Swift v. Tyson*—whether a precedent debt is valuable consideration, so that if a person takes a note in payment of a precedent debt, he can be regarded as a holder for value. According to the New York law, as expounded by the New York courts, it is not a valuable consideration; according to the New York law as expounded by the federal courts, it is a valuable consideration. But the most striking illustration of this anomalous situation is the more recent and interesting Kentucky *Taxicab* case,⁴⁶ in which, as one writer indignantly expresses it,⁴⁷ the proud State of Kentucky “saw the firm hand of the Supreme Court immolate the public policy of the state upon the altar of a misconceived and doubtful doctrine.” In that case a Kentucky taxicab company wished to make a contract with a railroad company, by which the railroad company would give it the exclusive privilege of maintaining a cab stand on the railway property. Now the Kentucky courts had repeatedly declared such contracts to be void as opposed to the public policy of the State; but the taxicab company thought that if it could get into a federal court, it would find a more favorable construction of the Kentucky law. The stockholders, therefore, dissolved the company and reincorporated in Tennessee. Then, as a Ten-

⁴⁵ 1 Wall. 175 (1863).

⁴⁶ *Black and White T. & T. Co. v. Brown and Yellow T. & T. Co.*, 276 U.S. 518 (1928).

⁴⁷ Johnson, *State Law and the Federal Courts*, 17 KY. L. JOUR. 355.

nessee corporation, they came back into Kentucky and made the desired contract with the railroad company. When the defendant interfered with the exclusive privilege granted by the contract, the taxicab company began injunction proceedings in the federal court which held, in direct contradiction to the decision of the Kentucky Court, that, under the Kentucky law, the contract was perfectly valid. And the decision was affirmed by the United States Supreme Court.

Now, it should be freely conceded that such a situation is highly undesirable and that there can never be uniformity of decision between state and federal court, as long as the rule of *Swift v. Tyson* prevails. But the simple answer to the problem is that the remedy lies in the abrogation of the rule, not in the abolition of diversity jurisdiction.

5. CORPORATE CITIZENSHIP

This taxicab case also very well illustrates the fifth objection to diversity jurisdiction, as it is exercised under the rule of corporate citizenship. Under that rule, a corporation is regarded as a citizen, not of the state where it does business, but of the state where it is incorporated.⁴⁸ This of course enables a corporation, when sued in a state where it actually does business, to remove the case to the federal court, simply because it is chartered in another state. "No single factor" says Mr. Charles Warren,⁴⁹ in referring to this rule, "has given rise to more friction and jealousy between state and federal courts, or to more state legislation conflicting with and repugnant to federal jurisdiction. . ." The case most frequently cited as illustrating the evil results of this rule is the already mentioned Kentucky *Taxicab* case.⁵⁰ But

⁴⁸ *The Louisville, Cincinnati & Charleston R. R. Co. v. Letson*, 2 How. 497 (1844); *Rundle v. The Delaware and Raritan Canal Co.*, 14 How. 80 (1852); *Marshall v. The Baltimore and Ohio Railroad Co.*, 16 How. 314 (1853); *The Lafayette Insurance Co. v. French*, 18 How. 404 (1855); *Covington Drawbridge Co. v. Shepherd*, 20 How. 227 (1857); *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black 286 (1861).

⁴⁹ Warren, *supra* note 5, at 90.

⁵⁰ *Op. cit. supra* note 46.

here again the answer is obvious. If this rule of the federal courts results in a great abuse of its jurisdiction, the remedy is to abolish the rule, not to destroy the jurisdiction. This was in fact the remedy recommended by President Hoover in his message to Congress in March, 1932, and given concrete form in the Mitchell Bill in the last Congress.⁵¹

There may be other arguments than these, but I think it will be found that the nine here enumerated are the most important. The purpose of this article was to state and briefly discuss the chief arguments for and against the proposed legislation and to make it clear that although evils do exist and reform is necessary, it can easily be accomplished without any such radical measure as the total abolition of diversity jurisdiction.

William Sternberg.

Creighton University, School of Law.

⁵¹ Ball, *supra* note 31, at 375.