

## THE OCCASION FOR THIS PAPER

In his address to the annual meeting of the Institute, May 20, 1959, the Chief Justice spoke first of the state of the business of the federal courts, of the changes made by the diversity statute of 1958, and of proposals pending in Congress further to restrict the jurisdiction. In that connection he said:

"The very breadth of these proposals points up the need for a full review of the diversity jurisdiction, conducted in the light of current judicial statistics and prevailing economic and social conditions.

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. To accomplish this may very well require further restrictions on diversity jurisdiction, but we must take care lest the State court systems become swamped with litigation heretofore handled in the courts of the United States and which the States have had every reason to assume would continue to be handled there.

This is more than a theoretical problem. It is a matter of great importance both to the State and the Federal courts. For this reason, I would hope--if there are not more urgent matters--that the American Law Institute would undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for assigning the jurisdiction of Federal and State courts. Such a study--if there is to be any further transfer of jurisdictions to the

States--should logically include the steps to be taken and the order in which they should be taken to enable the State judicial system to meet any new and unanticipated caseload.

Such a study is necessarily of a long-range nature and, lest there be some misunderstanding, the undertaking can have no effect towards lessening the immediate need for new judgeships."

At the invitation of the Director I have spent some time considering what action the Institute should take in response to this invitation. In this connection I have talked to a few people, corresponded with a somewhat larger number, and had a look at some of the literature, including some of the statistics.

This paper states my recommendations, and the reasons for them. Little of it is original; most of the ideas are taken from the published work of others, or from conversations or correspondence with them. I am sure that these most helpful people will understand why, in this private paper, intended only to help the Director and the Council frame a program, I have not stopped the argument to state the sources of the various ideas.

#### RECOMMENDATIONS: SUMMARY

My recommendations for Institute action are:

I. That the Institute, if appropriate financing can be obtained, undertake a study of the sort suggested by the Chief Justice, namely, one seeking to define "in the light of modern conditions, the appropriate bases for assigning the jurisdiction of federal and state courts."

II. That the study be organized in the manner customary with the Institute, that is, with a Reporter, Advisory Committee and so on, and that its results come on for examination in the usual way, through the Council and the Annual Meeting of the Institute.

III. That the main problem of the study be not: What cases can the Federal Courts get rid of?, but, what cases should they handle? To that end let the study cover both federal question and diversity jurisdiction.

IV. That the study center on the jurisdiction of the United States District Courts in civil cases, including however not only jurisdiction proper but also venue, removal, the territorial limits of effective service of process, and anything else, in either Title 28, U.S.C., the related statutes, or the cases, which has substantial bearing on the division of responsibility and duty between the Federal and State Courts in civil cases.

V. That within the federal question jurisdiction the study seek to clarify obscurities, to examine existing restrictions, and to form a judgment as to whether the latter are now justified.

VI. That within the diversity jurisdiction the study seek to form judgments as to whether the historic reasons for the jurisdiction still exist, what are the present reasons for it, and whether they are valid, and to identify those particular kinds of diversity cases which, for any reason, it is essential that the Federal courts retain at all events.

VII. That, while federal-state allocation is the major problem of the study, the Reporter and his advisers, consulting first with the Director, have authority if he approves to examine, within reason,

and report on, other parts of Title 28, the related statutes, or the cases which in their judgment need re-examination.

VIII. That, with reference to State court systems, the study seek to maintain liaison with the principal agencies concerned with State court problems, and, if any major shift of jurisdiction from Federal to State courts is proposed, that it seek to indicate the places where the major new loads will be thrown on State Courts, and the approximate size of those new loads, and suggest, if deemed wise, a waiting period between the enactment of any Act of Congress and its effective date, to enable States to act.

The reasons for these recommendations follow.

#### REASONS FOR THE RECOMMENDATIONS

##### I

#### Why the Study? And Why by the Institute?

The problem posed by the Chief Justice is of course as old as government under the Constitution. It has been met in various ways by various Congresses, beginning with the Judiciary Act of 1789.

The main reason for a further study now is well expressed in one sentence in the address of the Chief Justice:

"Nearly 50 per cent of all the civil cases in the Federal Courts are subject to undue delay--that is, delay from one to five years between the date of filing and the time of trial."

This is true, the Chief Justice further said "despite the fact that the district judges are carrying heavier and heavier work loads and are terminating more cases, on the average, than ever before."

Clearly reexamination of the workloads is in order.

That the Institute should be asked to undertake the job seems wholly natural. The problem is serious, it is national in scope, the subject is complex and technical, solution will require devoted work, over a considerable period, by competent people who have no axes to grind.

I recommend that the Institute undertake the job.

## II

### Organization of the Study

My recommendation on this point, I think, explains itself.

Something is said in X below on the probable duration of the study, and so on expense.

One thing should be said about the expected product of the study. The center of the study is the Statutes, and its main product may well be proposals for amendment of parts of Title 28 and the related laws. But another product may be brief Restatements of Court doctrine, with or without suggestions for revision. The Reporter and his advisers should have freedom to proceed in either way, or both.

## III

### Why study federal question jurisdiction? Why not just diversity?

If the purpose of this study is to find out what cases the Federal courts can get rid of, then the thing to study is the diversity jurisdiction. Only there are we likely to find any large group of cases which could decently be transferred. But the mere transfer of a group of cases from the overburdened Federal system to 50 State systems (some of them also overburdened) will not necessarily, nor

probably, advance the administration of justice, unless there is some other reason for it.

The more appropriate question is that posed by the Chief Justice: What are for "each system, those cases most appropriate in the light of the basic principles of federalism." Or, from the point of view of the Federal system: What are the cases that the Federal courts should be authorized to handle? When we know that we shall know better what they should release.

Put in that way there is no escape from a good look at the federal question jurisdiction.

There is no escape either from a good look at the doctrine, other than jurisdiction proper, which in fact distribute responsibility and power between courts of the two systems. For example:

Many cases, arising under the Federal Constitution, laws, or treaties, and thus within the federal judicial power, depend for their decision in part upon State law. In which court shall they be tried?

As to State taxes, the rate orders of state public utility commissions, and cases seeking to enjoin state statutes, the Congress some years back enacted in effect that Court review should be conducted in State courts (28 USC 1341, 1342 and 2284 (5)). More recently the Supreme Court has reached a similar result in other sorts of cases, by requiring or permitting District Judges to "abstain" until the State courts have decided the State questions. (Railroad Commission of Texas vs. Pullman Co., 312 U S 496 (1941), and the four cases decided June 8, 1959: Harrison v. N.A.A.C.P., 79 Sup. Ct. 1025; Martin v. Creasy, 79 Sup. Ct. 1034; County of Allegheny v. Frank Mashuda Co., 79 Sup. Ct. 1060; Louisiana Power and Light Co. v. City of Thibodaux, 79 Sup.

Ct. 1070.) In all these cases, whether the District Judge awaits the State court action or whether he retires entirely, it may happen that the whole case, including any federal question, is tried and decided in the State Court. The only recourse, when that happens, of the party claiming federal rights to any federal tribunal is the ultimate one, to the Supreme Court of the United States itself, on appeal or certiorari. Our study might well ask: within what limits is this right?

#### IV

Why center on the District Courts? Why on civil cases?

And why not just on jurisdiction proper?

The existing congestion and delay are almost wholly in the District Courts, and so are most of the questions that have been raised about the jurisdiction. The study therefore naturally centers there. When questions about other courts emerge, they can be studied in their turn.

The recommendation that the study center upon civil cases is made in order to put some reasonable limits to our effort.

Jurisdiction in a Federal court "of all offenses against the laws of the United States" (18 USC 3231) now seems so natural and proper that it is most unlikely that any shift of jurisdiction to State Courts is indicated. But there remain, on the criminal law side, plenty of challenging Federal-State issues. These include, for instance: (1) Federal habeas corpus for State prisoners, (2) Federal and State prosecutions, one following the other, of the same persons for two crimes included in the same event, (3) the ever-present issue of the proper substantive coverage of the Federal criminal code. Is it right,

for instance, that the United States punish the interstate movement of stolen automobiles, for the purpose mainly of helping the States catch and convict the thieves?

All such issues, and any others on the criminal law side, I suggest that our present study should leave out. This is not because these issues lack importance, but simply in order to concentrate our present effort on what I think must be our major task, the heavy and increasing civil business of the District Courts.

Recommendation IV says also that the study should consider venue, removal, the territorial limits of effective service, and anything else that substantially affects the distribution of responsibility and power between State and Federal Courts, as well as jurisdiction proper. This is because particular restrictions, especially on venue and removal, seem in some situations to prevent the District Courts from taking cases that properly belong there. More is said about this under III above and under V below. Our subject is not just the technical rules of jurisdiction, but whatever actually determines which Courts have power to try which cases.

## V

### The Federal Question Jurisdiction

As we all know, the Congress was historically slow to vest general federal question jurisdiction in the Federal Courts. Not until 1875 were they given jurisdiction "of all suits of a civil nature--arising under the Constitution or laws of the United States---" (Act of March 3, 1875, §1, 18 Stat. 470). Whatever the reasons for this were, it seems quite clear that they no longer operate. No one I think now doubts that the civil cases that the Federal courts

should be authorized to handle include, as their most important item, those arising under the Federal constitution, laws and treaties. Only in those cases, since Erie R. R. v. Tompkins, do Federal judges make decisions with authority, while the judges in State Courts can only seek to follow. Surely the United States, as a government, owes litigants a duty to provide tribunals for the adjudication with authority of cases that arise under the Government's own laws.

If this premise is accepted the natural inquiry follows: why, then, are a considerable number of genuine federal question cases now excluded from the Federal trial courts?

Three examples of such exclusions follow:

(1) Jurisdictional amount.

This must now exceed \$10,000. (28 USC 1331, as amended 1958, 72 Stat. 415)

If a plaintiff is suing on a genuinely federal right, whether based on the Constitution, an Act of Congress, or a treaty, why should it matter, to the jurisdiction of a Federal Court, whether his case involves \$500 or \$50,000.00?

In very many cases, probably in most, it doesn't matter now, since several special sections permit actions to be brought without regard to jurisdictional amount. (28 USC 1333, 1334, 1337, 1338, 1339, 1343, etc.). But the general section (1331) requires \$10,000. Why?

(2) Venue.

Assume an action on a federal cause of action (whether under the Constitution, an Act of Congress, or a treaty) against two or more defendants, residents of different States.

Unless the case falls within one of the special venue sections (28 USC 1397, 1398, 1399, etc.) venue in any federal court will be improper, since the general rule is that actions may be brought only in a District in a State where all defendants reside. (28 USC 1391 (b), 1392, 1393). Of course venue may be waived, but the defendants are not bound to waive it, and if they make timely objection the result is that the case cannot be maintained in any Federal Court. (Remember, we are talking about cases upon genuinely Federal claims.)

This is particularly serious since, in the case supposed, the defendants being residents of different States, it may not be possible to make effective service on them all in the State court of any State. The case then either will go untried altogether, or be litigated in pieces, against one defendant in one State or Federal District and against others in another.

The question is legitimate whether this makes sense at all: whether the right of the plaintiff to bring his case to trial somewhere is not more important than the right of every defendant to be tried in his home State. If the answer is yes, revision both of the venue sections and of those governing the territorial limits of effective service are in order. (The sections about interpleader will be useful precedent. 28 USC 1397, 2361.)

As to the territorial limits of effective service: lawyers think of the place of service of summons as important because, in a State court, it may determine the power of that State to try that defendant's case at all. But Congress can make the summons of a Federal Court good anywhere in the United States, and in a few cases has done so. Much can be said for that as a general rule in federal question

cases. As long as the place of trial is controlled by the venue sections and all defendants have due notice, it really doesn't matter much where in the United States summons is served on a particular defendant.

The matter is of moment mainly in cases against several defendants, since if there is only one he must be sued where he resides (18 USC 1391 (b)) and can certainly be served there somehow. But where there are several defendants, and they reside in different States, the present rules need a new look.

(3) Removal for Federal defense.

Assume a citizen of Illinois sues another citizen of Illinois on a cause of action (statutory or common law, it doesn't matter) arising under the law of Illinois.

The case of course is brought in the State court.

The defendant answers, asserting a federal defense, for instance that what he did was done under direct authority of an Act of Congress, or that the Illinois law in question violates the Federal Constitution.

Assume further that the point made is substantial, and that if it is found good the defendant will prevail.

The defendant, in short, has asserted a substantial federal defense at the earliest time he could assert it, namely, in his answer. The case therefore is clearly one within the Federal judicial power under the Constitution, but since it was not, as brought, within the original jurisdiction of any District Court (since the plaintiff's cause of action was founded on State law, and there is no diversity) it may not be removed. (28 USC 1441). So, notwithstanding that the substantial question in the case is Federal, the trial must be in the

State Court, and the only Federal recourse is the ultimate one, to the Supreme Court of the United States on appeal or certiorari.

The study might well ask: Is it proper that defendants, asserting substantial federal defenses, must go to trial in the State courts, while plaintiffs, asserting Federal claims, may elect the Federal forum if they wish? If the answer is no, an amendment of the removal statute is in order. (Not, however, that what is here suggested, removal for a federal defense, is contrary in principle to the "abstention" doctrine (mentioned in III above) in all the sorts of cases to which that doctrine properly applies. This is another reason for a close look, on other than a case-by-case basis, at the proper limits of that doctrine).

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I have not tried, in this list of problems, to exhaust all the existing limitations on the Federal jurisdiction of truly Federal law cases. I hope what has been suggested is enough to show that the subject deserves study.

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Another very useful function that the Institute could serve, in the area of Federal question jurisdiction, is clarification of obscurities.

Title 28 and the related Statutes, although reviewed quite recently by Congress, are by no means clear laws. One cannot read the Federal Supplement on the Federal Reporter without being impressed with the enormous time and effort spent by federal judges at both levels,

not on the merits of the cases, but on questions going to the jurisdiction of the District courts. Those courts could handle much more business on the merits if somehow they could be saved from this vast labor upon doubtful points of jurisdiction.

Among the many troubling questions I list only four examples:

The "pendent" jurisdiction of "related claims" (28 USC 1338 (b)); Removal for separate and independent claim (28 USC 1441 (c)); Actions based on collective agreements under the National Labor Relations Act (Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955));

Seamen's actions for unseaworthiness, outside the Jones Act (Romero v. International Terminal Operating Co., 79 Sup. Ct. 468 (1959)).

Many others could be noted. No one can hope to solve them all or those which will arise hereafter. But the Institute is in a position, I believe, to help greatly to clarify the situation, both by suggested revisions of the statutes and by expositions of their meaning. That alone, if we can do it well, will justify our effort.

## VI

### The Diversity Jurisdiction

Here quite different problems are presented.

No federal question need be in the case at all, and decision depends quite generally on the State law. Federal Courts, including Courts of Appeal, therefore do not decide the cases with authority

(except of course as respects the parties): their decision, with all respect, amounts to an informed guess as to what the Supreme Court of the State would do. The United States, in short, is here furnishing to litigants a Federal tribunal for the trial of State cases, available in general at the demand of the plaintiff, or of the defendant sued away from his home State, whenever diversity and jurisdictional amount exist.

The question is legitimate whether under modern conditions and as a general proposition this is any longer necessary.

One original reason for the jurisdiction was no doubt a fear of local prejudice against non-residents. This was consistent with the provision of the first Judiciary Act, which limited the jurisdiction to suits brought by non-residents in the home State of the defendant. (Act of Sept. 24, 1789, Sec. '11, 1 Stat. 78). It is not consistent with the present venue provision in diversity cases (28 USC 1391 (a)), which permits the action at the residence of either party. Why a plaintiff, because of local prejudice against non-residents, should be allowed to choose the Federal court in the plaintiff's own home state is certainly not clear.

However that may be, many people now have doubts that prejudice against non-residents is any longer an adequate general reason for the jurisdiction. There is indeed much prejudice in our society, these people admit freely, and plenty of unpopular persons, organizations, and causes. But it seems to be particular persons, organizations and causes that are unpopular, whether resident or not, rather than non-residents as such. Our society, these people say, has become much too mobile to retain much prejudice against the

citizens of other states. This is especially true, these people say, as to corporation litigants. Corporations may be unpopular with juries, but the locally incorporated railroad is no more likely to be favored than the one whose incorporation and home office are in some other State.

To find out whether prejudice against non-residents exists in the United States to a degree sufficient to influence the course of justice would be a long and most expensive enterprise. And whatever the result, it seems quite clear that other arguments in favor of the jurisdiction have in time become more telling than the fear of any actual local prejudice against non-residents. Among these are: (1) the hope that it might help create a unified and federal commercial law (a hope now much weakened since Erie R. R. v. Tompkins); (2) the desire to encourage interstate transactions and relationships, and the sentiment of nationality in general; (3) the view that judges with life tenure can dispense more even-handed justice than those who face a re-election contest; (4) the fear that judges limited to federal question cases might feel themselves, or be felt by the bar and the community, to be too specialized; and (5) (as put by one of my correspondents) "the advantages, exemplifying the genius of American federalism, of the existence of alternative places of resort for the settlement of the same type of controversy."

The strength of these arguments, and of others that are made in favor of the jurisdiction and against it, must be a central question in our study. This is not the time or place to try to anticipate the general result that the Institute may reach. But it may be worth noting that the reasons counsel give for preferring one court system to the other, when the choice is open to them, bear a very slight relation to

the public reasons given for the jurisdiction or against it. Counsels' reasons in each case are quite properly particular and tactical. Among those expressed to me, in my very small sampling, are these:

That Federal juries commonly give higher verdicts;

That they are more conservative;

That they are drawn from a larger geographic area and so include both farm and city people;

That in the Courts of several States the verdict need not be unanimous;

That Federal pre-trial procedures (especially discovery) are more efficient;

That Federal trial judges have more control over the trial than is common in State courts;

That Federal appellate judges exercise less control over the size of verdicts than appellate courts in several States;

That removal to a federal court often changes the place of trial;

That a particular judge, in one system or the other, is regarded as more competent, hard working, or friendly to a particular kind of case or of defense than his opposite number in the other system;

That, in cases arousing great public interest, life tenure makes the Federal judge more independent;

That cases can be tried more quickly (or delayed longer by congestion) in one system than the other;

That the practice, in one system or the other, is familiar or the opposite;

And so on.

I am not sure what this means, for policy.

The problem, which court? as it presents itself to counsel in a given case, is of course quite different from that, whether to make available a Court or not, as it presents itself to Congress. And yet it seems to me that Congress and the Institute, in considering their question, need to have in mind the other reasons, honorable reasons, yet particular and tactical, which will in fact determine the uses that are made of the jurisdiction furnished.

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I now note some special matters which ought to be considered whichever way the general questions about the jurisdiction are decided.

(1) Interpleader and the like.

Some of the diversity jurisdiction is clearly essential to the administration of justice, in that it permits the adjudication of multi-party controversies in one court, when that might not be possible in the Courts of any State.

Assume, e.g. that John Doe's life is insured by a life insurance company incorporated in New York. Doe dies, leaving three claimants to the proceeds of the policy: Elizabeth, his widow, of Seattle; Jane, his daughter by a prior marriage, a resident of Dallas; and the X Bank of Chicago, a corporation of Illinois, which claims as assignee and creditor. The life insurance company is qualified in all of the States involved, and suable in each of them. It would be hard, in any court of any State, to secure personal jurisdiction of all of the three claimants, but since the United States is sovereign throughout

the country the process of a Federal court (Congress having so provided 28 USC 2361) can be served on all of them and the controversy settled in one place.

This kind of judicial power, probably not foreseen by the Constitutional Convention, is a most useful result of the diversity jurisdiction, and ought to be preserved whatever is done about diversity in general. There are more occasions for its use than the well known one of interpleader. (See, e.g. corporate and stockholders' actions against directors who reside in different States, which is not cured by 28 USC 1401, and all kinds of multi-party interstate transactions, where the parties live in different states). Its use is much restricted now by the restrictions upon venue and the reach of process, discussed above under the Federal Question jurisdiction (V, 2, above) and also by the principle of Strawbridge v. Curtis, 3 Cranch 267, that diversity must be complete between the adverse parties joined. Chief Justice Marshall's opinion in Strawbridge v. Curtis goes on the Act of Congress, not the Constitution, so the constitutional point is not certainly foreclosed.

Our study might well ask: Are there many multi-party controversies, involving persons resident and suable in different states, not readily within the power of any State court to determine as a whole, but which could be adjudicated as a unit in a Court of the United States? If so, can not such cases, when real and substantial diversity exists, be reasonably found to be within the federal judicial power, even though two of the parties, adverse to each other, are citizens of the same State? And what revisions of the statutes are needed to give the District Courts jurisdiction of such cases?

(2) Alien parties.

There may be in this country no more prejudice against Englishmen or Frenchmen or citizens of Mexico than there is against citizens of other States. Therefore if diversity jurisdiction were abolished between citizens of different States, it might seem right to end it also between citizens and foreigners.

I suggest that in the latter case a different consideration is controlling, namely the international reputation of the United States. It is important to that reputation not only that the courts in which foreigners must try their cases here be unprejudiced, but that it be apparent that the United States has done its best to make them so. Therefore, without in any way believing that prejudice against foreigners exists in fact to any significant degree in any Court of any of our States, the Institute I think might well propose that the diversity jurisdiction be retained for cases between aliens and citizens, whatever is recommended otherwise.

(3) Corporate parties.

The original device by which, for purposes of jurisdiction, corporations got the benefits and burdens of State citizenship was of course a fiction, and remains so. So is the Act of Congress by which national banks are "deemed citizens of the States in which they are respectively located." (28 USC 1348, second paragraph).

Persons who regard truth as always more important than policy will no doubt favor the abolition altogether of these fictions. But most lawyers are not so squeamish: we know that fictions have more than once contributed to justice. So the questions will be whether there are cases which ought to be within the Federal jurisdiction to which the fictions are essential.

To that question I believe the answer must be yes. Both in the interpleader cases ((1) above) and where an alien is part ((2) above) a corporation may be party. Therefore I hope the Institute will not advise the abolition of the fictions.

One good thing about a fiction is that it can be manipulated when justice or policy requires it. So, in 1958, Congress enacted that a corporation shall, for jurisdiction, "be deemed a citizen" not only of the State of its incorporation, but also "of the State where it has its principal place of business." (28 USC 1332, as amended, 72 Stat. 415).

In the nine months most nearly following this legislation (July 1, 1958-March 30, 1959) new private civil cases filed in the 86 District Courts having purely Federal jurisdiction were 20% fewer than in the like period the year before. If diversity cases only are included the decrease is 29.6 per cent. And if the Texas and Louisiana districts are excluded, because specially affected by other provisions of the same Act, the decrease in diversity cases filed is 23.7 per cent. (Figures from Quarterly Report of the Director of the Administrative Office of the United States Courts, Third Quarter, Fiscal year ending June 30, 1959, p. 8, supplemented, as to diversity cases separately, by Mr. Shafroth)

It therefore seems that the 1958 legislation has reduced the cases filed. But that the reduction is all due to the legislation is by no means clear. Employers' Liability Act and Jones Act cases, neither of course affected in any way by the Act of 1958, are down 22.3 and 22.9 per cent. (These last figures for 3rd quarter only, same report, p. 15).

If the Institute determines, as it may, that the handicaps of corporate parties before juries do not depend to a material degree on the State either of incorporation or of principal place of business of the corporation, but that nevertheless complete abolition of the "citizenship" of corporations is unwise, the proposal of Attorney General Mitchell, made some 30 years ago, deserves fresh consideration. That proposal, it will be remembered, was to treat diversity as absent whenever the corporate party was qualified or licensed to do business, either as a domestic or a foreign corporation, in the State of the other party's citizenship. (Note that the proposal was qualified or licensed, not "doing business" simply. Factual tests of jurisdiction should at least be definite in content, and provable without dispute).

(4) Personal Injury Cases.

One proposal often made for lightening the federal court case load is to eliminate from the diversity jurisdiction personal injury cases founded upon negligence, where no federal statute is involved. This would transfer out of the federal courts a substantial group of cases in which, typically, the law to be applied is that of the State where the accident occurred, and which are identical in other respects with cases which the State courts are trying every day.

The numbers of such cases in the District Courts in recent years are shown in the Annual Reports of the Director of the Administrative Office of the United States Courts. The most recent Report (1958, table C 2, p. 163) shows cases commenced as follows:

<u>Fiscal year 1957</u>	<u>Total</u>	<u>Removed from State Courts</u>
Personal injury, motor vehicle	8,654	2,198
Personal injury, other negligence	4,990	1,115
<u>Fiscal year 1958</u>		
Personal injury, motor vehicle	9,637	2,584
Personal injury, other negligence	5,568	1,445

(5) Choice of Law.

We all know that in most lawsuits one thing at least is clear: which sovereign's law applies. But we also know that there are many multi-state transactions in which that may be one of the hardest questions in the case. And we know that with 50 State Courts passing on such questions the prospect for uniformity in rules for choice of law is not encouraging.

The Institute's Restatement, Second, will be, we hope, a contribution to uniformity and reason in this area. But many lawyers have hoped also for some national rules, either laid down by Congress under the Full Faith and Credit clause or worked out in decisions of the federal courts, rules which, if they existed, many State courts might be glad to follow.

The hope for any "general law" of choice of law, to be worked out in cases under the diversity jurisdiction, was ended, for the time at least, by Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941). But since that opinion does not go directly upon Constitutional grounds, and since no Act of Congress was present, it seems worth while to ask two questions: (1) Is the objective of uniform national rules for choice of law desirable? (2) If so, could it still be approached via the diversity jurisdiction, with or without an authorizing Act of Congress?

VII

Why study anything except Federal-State Allocation

The Chief Justice's suggestion to the Institute was limited to "the appropriate bases for assigning the jurisdiction of Federal and State courts." But the Institute is of course free to go beyond that if it thinks it wise.

Some of the people I have talked to think that the Institute should reexamine the Federal Court system as a whole, that is all of USC Title 28 and the related laws, together with the cases under them, in some detail.

That proposal I do not now support. What I suggest is much more modest. The center of our study should be that defined by the Chief Justice. But any Reporter and Advisers worth their salt (and the Institute will not appoint any that aren't) can hardly make the study called for by that mission without coming upon matters, within the Federal system, that deserve rethinking and restatement on their own. When that occurs, I suggest they ought to talk with the Director, and go ahead if he approves, and that he should approve unless he thinks it will delay the study or overstrain the budget.

I cite a few examples:

(1) Can anything be done further to clarify the question when a party must resort to an administrative tribunal (or to grievance procedure under a collective contract, or to arbitration) and when he may bring action in a Court?

(2) Is there a sensible present reason why the orders of some administrative agencies are reviewable in Courts of Appeal, others by independent action in the District Court? A three-judge

District Court looks a lot like a Court of Appeals, and no doubt acts like one, but it has to be specially assembled, and that must be a nuisance for Chief Judges and expensive in terms of other busy judges' time. Is there any reason for it, except history and chance?

(3) One of my correspondents, Professor Henry Hart of the Harvard Law School, believes that a major subject of our study should be the kinds of remedies against official action of all kinds, both Federal and State, which the Federal court system should be implemented to provide.

Agreeing that that might be a study of great value, I see it as a very large order in itself, and related only obliquely to our present undertaking. I think therefore, if our Reporter and his advisers wanted to pursue it, the Director would probably advise that the matter needs new financing.

(4) The Federal Employers Liability Act, unlike most Workmen's Compensation Laws, bases liability on fault and does not limit damages. The length of trials under it, in both State and Federal courts, could be very greatly shortened by a change to workmen's compensation principles. Should this be recommended?

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Here, again, my examples are merely to suggest that there is useful work to be done. My suggestion is that the Reporter and his Advisers, when they come upon questions within the Federal system that they think need study and report, consult with the Director, and have authority to go ahead if he thinks wise.

VIII

How About A Study Of State Courts?

The Chief Justice, it will be remembered, said:

". . . we must take care lest the State court systems become swamped with litigation heretofore handled by the courts of the United States and which the States have had every reason to assume would continue to be handled there.

. . . . Such a study--if there is to be any further transfer of jurisdiction to the States--should logically include the steps to be taken and the order in which they should be taken to enable the State judicial systems to meet any new and unanticipated caseload."

There is no doubt that the point thus made is real. Many State trial courts in populous centers are congested now, and if there were a transfer from the federal system (as e.g. of tort cases, based on negligence, out of the diversity jurisdiction) the added burden would be serious.

Reliable and comparable figures on congestion and delay in State trial courts are hard to come by. But the Institute of Judicial Administration (40 Washington Square South, New York) has been collecting them for several years. Its latest Calendar Status Report, June 30, 1959, dealing with personal injury jury cases in State trial courts of general jurisdiction, reports the following average times, among others, in 1959, between "at issue" and trial:

	<u>Months</u>
Superior Court, Cook County, Illinois (Chicago)	52.9
Circuit Court, Cook County, Illinois (Chicago)	50.3
Supreme Court, Kings County, New York	21
Supreme Court, New York County, New York	24
Supreme Court, Queens County, New York	44
Supreme Court, Bronx County, New York	24
Court of Common Pleas, Cuyahoga County, Ohio (Cleveland)	20
Court of Common Pleas, Franklin County, Ohio (Cleveland)	18
But Hamilton County, Cincinnati, only	2
Superior Court, Los Angeles County, Calif.	15
Superior Court, San Francisco County, Calif.	14
Superior Court, Hartford County, Conn.	20.3
Superior Court, New Haven County, Conn.	24.6
Superior Court, Fairfield County, Conn. (Bridgeport)	24.4
Circuit Court, Wayne County, Michigan (Detroit)	16
Circuit Court, Jackson County, Mo. (Kansas City)	21
But Circuit Court, City of St. Louis only	5
District Court, Douglas County, Nebraska (Omaha)	20.3
Superior Court, Hillsboro County, N. H. (Manchester)	22
Superior and County Courts, Hudson County, N. J. (Jersey City)	15.5
Court of Common Pleas, Philadelphia County, Penna.	24
Court of Common Pleas, Allegheny County, Penna.	19
District Court, Harris County, Texas (Houston)	18
But Bexar County (San Antonio) only	3

Waiting times elsewhere, including many in large cities, are reported as shorter than those listed. In Minneapolis, according to the same report, the average time is 13 months, in Milwaukee 6.4 months, in Seattle 6.1 months, in Norfolk 2 months, in Salt Lake City 1 month. Clearly States differ very much, and counties in the same State, in the success that courts have had in keeping up with present calendars.

The impact of any transfer from the federal jurisdiction would also differ very much from one District to another. In Wyoming, for example, if all the private civil cases commenced in the U. S. District Court in the year ending June 30, 1958 had been commenced in the State courts instead, the increase in the State courts' total caseload would have been 49 cases. In the Southern District of New York

the corresponding figure was 5,764. (Both figures from the Annual Report for 1958 of the Director of the Administrative Office of the United States Courts, table C 1). Other Districts run all the way between these two extremes.

It therefore seems quite clear that the Institute cannot give intelligent advice, to 50 States, as to how their very different problems should be handled. What we can and should do is, I think, to:

(1) Maintain appropriate liaison with the principal agencies which deal regularly with State court administration: The American Judicative Society and the Institute of Judicial Administration;

(2) In case a shift of jurisdiction to State courts is recommended, point out the size of the new load and the locations where it will be the largest; and

(3) If deemed wise, recommend a waiting period between any Act of Congress and its effective date, to enable States to act.

## IX

### How About the Federal Rules?

The Federal Rules of Civil Procedure are of course the responsibility of the Supreme Court itself, and of the Judicial Conference of the United States and its appropriate committees.

The Institute's study of jurisdiction will no doubt have bearing on certain of the Rules, and vice versa.

Our Reporter and Advisers therefore should maintain appropriate liaison with appropriate Rules Committees of the Judicial Conference. The same goes of course for the Committee on Jurisdiction and Venue.

X

About Finances

The needed financing I have not tried to estimate directly, since I have no experience on which to base a valid judgment.

I have, at the request of the Director, made the best estimate I can of the time which our financial estimate should cover.

That should, I think, be taken as 5 years, arrived at thus:

From the appointment of a Reporter to the first tentative submission to an annual meeting of the Institute, not less than 2 years.

For continuing consideration by the Reporter, the Advisers, the Council and the Institute, 3 years.

The bottle-neck that lengthens the last figure is not the Reporter and his Advisers, but the Council and, especially, the Institute itself. Institute meetings occur only once a year. Opinions in this field are strongly held by lawyers, they are not in agreement now, agreement will be slow to reach. We must assume, I think, three annual meetings for discussion before the Institute's position becomes firm.

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One thing will save the Institute a great deal of time and money: the statistical work about the Federal courts is done, and will be kept current. We are assured, both by inference from the Chief Justice's invitation and by Mr. Olney's direct statement to me, of the full co-operation of the Administrative Office of the United States Courts. This applies, in Mr. Olney's statement, not only to the data regularly gathered by that office but to other data, within reason, within their power to gather or collate at our request.

We need not ourselves make studies about State court case-loads either, whether we recommend a further transfer to State Courts or not. I am assured by the Associate Director of the Institute of Judicial Administration, Mr. Delmar Karlen, that their studies will be available to our Reporter and Advisers, as indeed they have already been made available to me. I am sure, without asking, that the same is true of anything in the control of the American Judicative Society.

All of which is respectfully submitted.

Charles Bunn

September 1959.