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Proposed Revision of the Jurisdiction of the Federal District Courts

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PROPOSED REVISION OF THE JURISDICTION OF THE FEDERAL DISTRICT COURTS

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At the suggestion of Mr. Chief Justice Earl Warren, the American Law Institute studied the allocation of cases between the federal and the state court systems.[1] A basic assumption of this study was that a rational division could be made between cases that should be tried in federal courts and those that should be tried in state courts. The recommendations of the Institute, which are presented as amendments to Title 28 of the United States Code, were published in 1969.[2] The publication also contains a discussion of the recommendations and the memoranda on various phases of federal jurisdiction that were prepared for the members of the Institute.

The recommendations in regard to diversity of citizenship and federal question jurisdiction are found in separate chapters which contain the amount requirements,[3] the venue provisions,[4] the grounds for removal[5] and the rules for the transfer of actions from one federal district to another for each of these heads of jurisdiction.[6] There is no chapter on venue or grounds for the removal of actions, but there is a chapter on removal procedure.[7] Another chapter contains recommendations in regard to the raising of jurisdictional issues and the tolling of the statutes of limitations for actions that are improperly brought in a court, either federal or state, that does not have jurisdiction to hear them.[8] Other chapters contain

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1. *See* STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1 (1969) [hereinafter cited in text and footnotes as ALI STUDY].
2. *Id.*
3. *Id.* at § 1301.
4. *Id.* at §§ 1303-06, 1314-15, 1318 (Admiralty) and 1326.
5. *Id.* at §§ 1304 and 1312.
6. *Id.* at §§ 1306.
7. *Id.* at §§ 1381-84 and 1386.
8. *Id.* at §§ 1311-15 and 1316-19 (Admiralty). *See also id.* at § 1386.

recommendations in regard to admiralty and maritime jurisdiction,[9] actions where the United States is a party,[10] abstention by the federal courts,[11] enjoining actions in state courts,[12] three-judge federal courts[13] and actions where the defendants are so dispersed that they are beyond the reach of any state judicial system.[14]

In 1971, Senator Burdick introduced a bill in the United States Senate that would amend Title 28 of the United States Code in accordance with the Institute's recommendations.[15] Hearings on this bill were held by the *Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary* during the fall of 1971 and the spring of 1972.[16] In 1973, Senator Burdick reintroduced his bill,[17] but several sections differ from the Institute's recommendations. Because the Judicial Conference recommended the elimination of three-judge district courts,[18] the 1973 bill provides that three-judge courts are required only for actions that challenge the constitutionality of the apportionment of congressmen or of statewide legislative bodies.[19] Also, the recommendation in regard to actions where defendants are so dispersed that they are beyond the reach of any state judicial system was omitted on the ground that the enactment of broad long-arm statutes by most states has reduced the need for such legislation.[20]

Diversity of Citizenship Jurisdiction

Diversity of citizenship jurisdiction has long been the subject of controversy. Due to different philosophies as to the purpose of diversity jurisdiction, some writers would expand it, others would

9. *Id.* at §§ 1316-19.
10. *Id.* at §§ 1321-27.
11. *Id.* at § 1371.
12. *Id.* at § 1372.
13. *See generally id.* at §§ 1371-76.
14. *See generally id.* at §§ 2371-76. Sections 1316-19, 1321-27, 1371-76 and 2371-76 are not within the scope of this article.
15. S. 1876, 92d Cong., 1st Sess. (1971).
16. *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1 (1971) and 2d Sess., pt. 2 (1972).
17. S. 1876, 93d Cong., 1st Sess. (1973).
18. 1970 U.S. Jud. Conf. Proceedings 78.
19. S. 1876, 93d Cong., 1st Sess. § 1374 (1973).
20. 119 Cong. Rec. No. 78 at S9617 (daily ed. May 23, 1973).

contract it and a few would even abolish it.[21] Thus, it is not surprising that the Institute's recommendations on this subject are controversial. Little can be added to what has already been written except to point out that the increased number of cases that are brought in federal courts requires some action.[22] If the solution is a reduction in the number of actions that can be brought in the federal courts, the reduction should be in diversity rather than in federal question cases. The Institute's recommendations would reduce the number of diversity cases within the original jurisdiction of the federal courts, but the proposals for simplifying and clarifying the law in regard to the removal of actions would increase the number of diversity cases that could be removed.[23] Also, the recommendations would increase the number of federal question cases within the original and removal jurisdiction of the federal courts.

The Institute does not recommend any change in the statute which authorizes federal courts to hear diversity of citizenship cases,[24] and it retains the present law in regard to the citizenship of corporations.[25] It recommends, however, that where the law of the state in which an action is brought permits a partnership or an unincorporated association to sue or be sued as an entity, the partnership or unincorporated association shall be deemed to be a citizen of the state or foreign state where it has its principal place of business.[26] Thus, diversity of citizenship jurisdiction would exist although there is not complete diversity between all partners or all members of the association and the adverse party.

Another recommendation provides that an executor or an ad-

21. *E.g.*, Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968); Moore and Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964).

22. In the last ten years filings in the district courts have increased 62 per cent, and the number of trials has increased 80 per cent. Cromley, *Schoolmaster for the Judiciary*, Sunday Oklahoman, Orbit Magazine 8, 9 (Aug. 12, 1973). *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15 (1973).

23. ALI STUDY at 144-45.

24. *Id.* at § 1301(a). In S. 1876, 93d Cong. the amount requirement was increased to $15,000 because the value of the dollar has decreased almost a third since 1958. *Staff Memo. on S. 1876, Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (May, 1973).

25. ALI STUDY § 1301(b)(1). However, the word "any" preceeding the word "State" in 28 U.S.C. § 1332(c) is changed to "every" and the phrase "foreign state" has been added.

26. ALI STUDY § 1301(b)(2) and accompanying commentary at 114.

ministrator of the estate of a deceased person, or a person who is appointed pursuant to a statute to bring suit because of the death of a decedent, shall be deemed to be a citizen of the same state as the decedent; but this proposal would not apply where a statute authorizes a designated person, such as a widow or a child, to bring suit.[27] This is a desirable recommendation because it prevents persons from frustrating the adverse party's right to have his action tried in a federal court by appointing a nondiverse representative.[28] Further, where the citizenship of a representative is different from that of the adverse party, the court does not have to determine if the representative was appointed to create diversity of citizenship or if there was some other valid reason for his appointment.[29]

A significant change would be made by section 1302(a) which prohibits a plaintiff from bringing an action on the ground of diversity of citizenship in a federal court in the state of which he is a citizen. This recommendation is based on the proposition that the federal courts should be available to out-of-state litigants who may be prejudiced if they assert their claims in a state court. On the other hand, in-state litigants should have no reason to fear any local prejudice if they bring an action in a court of their own state although they may wish to sue in a federal court because they prefer federal procedure or because their case may be tried sooner at the federal level.

This restriction is desirable, but the recommendation makes it jurisdictional and not waivable. It is stated that this merely extends the present law, which prohibits a defendant who is a citizen of the state where an action is brought from removing it to a federal court, to include plaintiffs.[30] However, the present restriction is not jurisdictional; it is waived if the removal by a defendant who is a citizen of the state where the action is brought is not raised before the action is tried on its merits.[31] This is desirable because nothing is

27. *Id.* at § 1301(b)(4) and accompanying commentary at 118.

28. *See* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931).

29. *See* McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968).

30. ALI STUDY § 1302(a), note at 14.

31. Hadley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435 (6th Cir. 1924); Diaz v. Montaner y Lizama, 248 F. Supp. 153 (D.P.R. 1965). *See* Grubbs v. General Elec. Credit Corp., 405 U.S. 699 (1972). Section 1386(a) of the recommendations, which provides that jurisdictional questions cannot be raised after the commencement of a trial on the merits, would not make the result reached under the proposed law the same as the result reached

gained by dismissing an action for lack of jurisdiction after it has been tried. It is too late at this point to save the court's time for the disposition of other actions.

In addition, the Institute recommends that corporations, partnerships, unincorporated associations and sole proprietorships that have maintained a local establishment in a state for more than two years be prohibited from invoking the jurisdiction of a federal court in that state on the ground of diversity of citizenship, either originally or by removal, on any claim that arose out of the activities of the local establishment.[32] If the Institute were treating corporations and other entities that have conducted activities within a state for more than two years as if they were citizens of that state, the proposal would be more defensible, but this proposal is not so simple or logical.[33] Although it applies to entities that are "organized or operated primarily for the purpose of conducting a trade, investment, or other business enterprise,"[34] entities that engage only in buying activities, rather than selling activities, are not within its scope.[35] Moreover, the restriction applies only to actions that arise out of the activities of the local establishment. If a cause of action arose out of activity in another state, the entity can assert its claim in a federal court in a state where it has a local establishment. This distinction is difficult to understand. If prejudice against the entity does not exist where a claim arose out of activity of the local establishment, it is difficult to imagine that local prejudice would exist where a claim arises out of activities in another state.

The commentary to the local establishment proposal states that "[w]hen an enterprise has for a substantial period maintained a place of business visibly competing with local enterprises," a juror

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under the present removal statute because subdivision (2) of section 1386(a) provides that a jurisdictional defect is not waived where a party did not know the facts and could not have discovered them in time to present them to the court whereas this is irrelevant under the present statute.

32. ALI STUDY § 1302(b).

33. "A more arbitrary set of rules could scarcely be devised." Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 47 (1968).

34. ALI STUDY § 1302(b) ¶ 3.

35. *Id.* at 126-27. It has been suggested that it might have been desirable to include entities that engage in widespread buying in a state within this provision. *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 139 (1971) (statement of Richard H. Field).

is not likely to think of it as a foreign enterprise.[36] However, where an out-of-state entity competes with local businesses, a juror may be more hostile toward it than he would be toward other out-of-state litigants. It is also stated that out-of-state entities that have maintained a local establishment

> have become participants in the general life of the state and have as much reason and opportunity to try to influence the development of its legal system as domestic business organizations. Whether in fact they do so or not, they are properly held to have accepted the hazards of that state's system as it exists.[37]

This suggests that the entity is prevented from invoking the jurisdiction of a federal court where it maintains a local establishment in spite of the existence of local prejudice. Moreover, this proposal does not result in foreign and domestic entities receiving the same treatment because the Institute would prohibit a domestic entity from resorting to a federal court on the ground of diversity of citizenship in a state of which it is a citizen to enforce claims that arise out of activities in other states.

Even assuming that the local establishment recommendation represents a rational restriction on the jurisdiction of the federal courts, it should not be adopted because it contains so many provisions and exceptions that extensive threshold litigation over jurisdiction is inevitable. One authority has written:

> I fear also that the provisions about businesses with a "local establishment", though rationally defensible, are so complex that in this instance rationality should have been sacrificed in favor of clarity and efficiency of judicial administration.[38]

Diversity jurisdiction is an imprecise instrument which is not available to all litigants who are the victims of prejudice and is available

36. ALI STUDY § 1302(b) and accompanying commentary at 126.

37. *Id.* at 109.

38. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 204 (1969). *Accord, Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 219, 235 and 247 (1971) (statements of Howard Frick, Alfred Pelaez and John E. Kennedy).

to some who are not the victims of prejudice.[39] Therefore, an attempt to make it more precise by imposing limitations and exceptions to the limitations is an exercise in futility.

If this recommendation had provided that no corporation or other entity can invoke the jurisdiction of a district court in any district in any state where it has been licensed to do business or has been doing business for more than two years, it would be fairer and easier to apply. If such a provision were approved, the clause that makes a corporation a citizen of the state where it has its principal place of business could be deleted.[40] Such a result would be desirable because this requirement has increased threshold litigation.

Another recommendation prohibits a person who has had a principal place of business or employment in a state for more than two years from invoking the diversity of citizenship jurisdiction of a federal court in that state either originally or by removal.[41] This has been referred to as the "commuter" provision. It does not distinguish between causes of action that arise out of the commuter's activities within the state where he has his place of business and those arising elsewhere. If such a distinction is appropriate where an out-of-state corporation or other entity has a local establishment, it would appear to be appropriate here. Even this simple provision breeds litigation and one writer states that it does not affect enough litigants to make it worthwhile.[42]

One of the Institute's recommendations makes a small dent in the rule that separate causes of action asserted by different plaintiffs must independently satisfy the jurisdictional requirements. It provides that where an action is within the diversity of citizenship jurisdiction of the federal courts jurisdiction shall extend to any claim that is asserted by any member of the plaintiff's family living in the same household and that arises out of the transaction or occurrence that is the subject of the action.[43] This proposal either

39. *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 120 (1971) (statement of Richard H. Field).

40. *See* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 37-38, 48 (1968).

41. ALI STUDY § 1302(c).

42. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 151 (1973).

43. ALI STUDY § 1301(e). Professor Moore states that this is a proposal breeding litigation because "there would be haggling over who was a member of the family." *Hearings on*

goes too far or not far enough. If it is desirable to litigate separate claims that arise out of the same transaction or occurrence in one action where only one of the claims satisfies the jurisdictional requirements, the reason for limiting this proposal to members of the same family is not clear. If a wife sues for damages for injuries caused by the alleged negligence of a defendant, her husband should be able to join his claim for damages for loss of consortium although it does not satisfy the amount requirement. However, this proposal is not limited to derivative claims.[44] Thus, if the husband's automobile is damaged in the same collision, he can join his claim with his wife's so that the separate claims would not have to be litigated in two different forums.[45] The same reasoning indicates that if the wife borrows a neighbor's automobile which is damaged in the same collision, the neighbor should be allowed to assert his claim in the wife's action. Joinder of these claims would not impose a great burden on the federal courts because they involve common questions of law and fact whereas requiring separate suits in different courts would impose a great burden on the litigants, the witnesses and the court system as a whole. Consequently, where a claim meets the jurisdictional requirements, other persons whose claims arise out of the same transaction or occurrence should be allowed to join as plaintiffs without regard to the amount of their claim provided diversity of citizenship exists. Such a provision would be consistent with *Strawbridge v. Curtiss,*[46] although some writers would reject the rule in this case. In one article it is suggested that

> a simple jurisdictional statute is needed that will implement the Federal Rules. Thus, with claims and parties procedurally qualified for joinder, if there is federal jurisdiction to support one claim, that should end the jurisdiction problems.[47]

S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 1, at 193 (1971). *See* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 297 (1969).

44. Derivative claims refers to claims for damages that are asserted by a spouse or a parent that arise out of injuries to the other party to the marriage or to a child whether or not the state law requires the claim to be joined with that of the injured party or gives any effect to a judgment on one claim in an action on the other.

45. *Hearings on S. 1876 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 149 (1971) (statement of Richard H. Field).

46. 7 U.S. (3 Cranch) 267 (1806).

47. Moore and Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet*

Although not suggested by the American Law Institute, the jurisdiction of the federal courts to hear counterclaims should be expanded. Thus, where a federal court has jurisdiction of an action for the recovery of a money judgment, the defendant should be allowed to assert a claim for the recovery of money without satisfying the jurisdictional requirements despite the fact that his claim does not arise out of the transaction or occurrence that is the basis of the plaintiff's claim. No time will be saved by the court or the witnesses by trying these claims in one suit, but their joinder will prevent the plaintiff from enforcing his judgment and disposing of the money received before the defendant obtains a judgment on his claim in another action.

The desirability of allowing a defendant to assert an unrelated claim for the recovery of money in an action in which the plaintiff seeks to recover a money judgment has long been recognized in equity, and over two hundred and fifty years ago statutes authorized set-offs in actions at law.[48] Originally, a defendant could set-off only certain types of claims, but modern statutes have expanded the claims that can be asserted as a set-off.[49] In 1938 the Federal Rules of Civil Procedure authorized defendants to plead any unrelated claim as a counterclaim against the plaintiff,[50] but the beneficial effect of this rule has been limited by the requirement that the claim must independently satisfy the diversity and amount requirements.[51]

It has been suggested that a defendant may assert an unrelated claim against the plaintiff to reduce the plaintiff's recovery but that the defendant cannot obtain an affirmative judgment.[52] But, if a court has jurisdiction to hear an unrelated counterclaim to reduce the plaintiff's recovery, permitting the court to grant a judgment for

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the Needs of a Complex Society, 1 FLA. S.U.L. REV. 1, 7 (1973). *See* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 18 (1968). This rule does not apply to actions that are removed to a federal court. 28 U.S.C. § 1441(c) (1970).

48. C. CLARK, CODE PLEADING 635 (2d ed. 1947).

49. *E.g.*, OKLA. STAT. tit. 12, § 324 (1971), which permits a defendant to assert a claim for a money judgment in an action where the plaintiff is seeking to recover a money judgment although the claims are for unliquidated tort damages.

50. FED. R. CIV. P. 13(b).

51. Counterclaims that arise out of the transaction or occurrence that is the basis of the plaintiff's action are within the ancillary jurisdiction of the federal courts. *E.g.*, Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

52. 3 J. MOORE, FEDERAL PRACTICE ¶ 13.19[1] (2d ed. 1972).

the defendant where his claim is for a larger sum than the plaintiff's would not impose any significant additional burden on the federal courts and would result in a more efficient administration of justice.[53] Moreover, the view that a court can have jurisdiction over a claim for only certain purposes, such as to reduce the plaintiff's recovery, is questionable. This change should be made in both the diversity of citizenship and the federal question sections of the Judicial Code.

Removal of Actions

Revision of the statutes which authorize the removal of actions is necessary because there are numerous areas where the law is not clear and the cases are in conflict. One judge stated "[t]hat there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them."[54] The existing law governing the removal of actions on the grounds of diversity of citizenship and federal question, and the recommendations in regard to the removal of diversity actions will be discussed, but the primary discussion of the recommendations in regard to the removal of federal question cases will be found in the next section.

Single Defendant

Under the present law, a defendant cannot remove an action from a state court to a federal court on the ground of diversity of citizenship if he is a citizen of the state where the action is brought,[55] but this limitation is waived if no objection to the removal is raised before trial.[56] The Institute would continue this limitation as a juris-

53. *See* United States v. Heyward-Robinson Co., Inc., 430 F.2d 1077, 1087 (2d Cir. 1970) (concurring opinion). *See* Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 31-34 (1963); Green, *Federal Jurisdiction Over Counterclaims*, 48 Nw. U.L. Rev. 271 (1953).

54. Hagerla v. Mississippi River Power Co., 202 F. 771, 773 (S.D. Iowa 1912). This statement was quoted with approval in Bradley v. Halliburton Oil Well Cementing Co., 100 F. Supp. 913, 915 (E.D. Okla. 1951).

55. 28 U.S.C. § 1441(b)(1970).

56. Monroe v. United Carbon Co., 196 F.2d 455 (5th Cir. 1952); Donohue v. Warner Bros. Pictures, Inc., 194 F.2d 6 (10th Cir. 1952). *See* Grubbs v. General Elec. Credit Corp., 405 U.S. 699 (1972).

Other statutory requirements are waived where not promptly raised. Mackay v. Unita Development Co., 229 U.S. 173 (1938) (amount in controversy where a counterclaim exceeds the statutory requirement); Weeks v. Fidelity & Cas. Co., 218 F.2d 503 (5th Cir. 1955) (time

dictional requirement.[57] As indicated earlier, making this restriction jurisdictional is undesirable.

Another recommendation prevents a corporation from removing an action that is brought in a state where it has maintained a local establishment for two years if the claim arose out of the activities of that establishment. Furthermore, the Institute would prevent an individual from removing an action that is brought in a state where he has maintained his principal place of business or employment for two years.[58] These restrictions are undesirable because they encourage litigation.

Counterclaims

Under the present law a plaintiff cannot remove an action though a counterclaim is asserted against him,[59] but the Institute would change this rule for both diversity of citizenship and federal question cases. The diversity of citizenship chapter provides that a plaintiff can remove a counterclaim that is asserted against him where he could have removed the claim if it had been asserted against him as a defendant. If the counterclaim arose out of the same transaction or occurrence as the plaintiff's claim, the whole action shall be removed.[60]

Most cases do not allow a defendant to remove an action on the basis of a counterclaim, whether permissive or compulsory, which he asserts,[61] but this is another rule that the Institute would change for both diversity of citizenship and federal question cases. In the diversity chapter it is recommended that a defendant be allowed to remove an action, although the amount claimed by the plaintiff does not satisfy the statutory requirement, where the defendant will

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to remove); Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6 (10th Cir. 1952) (all defendants must join in removal); Green v. Zuck, 133 F. Supp. 436 (S.D.N.Y. 1955) (time to remove). A defendant may cure certain defects after the time to remove the action has expired. *E.g.*, Covington v. Indemnity Ins. Co., 251 F.2d 930 (5th Cir. 1958) (file copies of process, pleadings and orders); Henelopen Hotel Corp. v. Aetna Ins. Co., 213 F. Supp. 320 (D. Del. 1963) (verify removal petition). *See* Riehl v. National Mutual Ins. Co., 374 F.2d 739 (7th Cir. 1967); Kramer v. Jarvis, 81 F. Supp. 360 (D. Neb. 1948) (failure to file bond can be waived but not cured).

57. ALI STUDY § 1302(a), n.19.
58. *Id.* at § 1304(a) (incorporating § 1302).
59. Shamrock Oil Corp. v. Sheets, 313 U.S. 100 (1941).
60. ALI STUDY § 1304(c).
61. Barnes v. Parker, 126 F. Supp. 649 (W.D. Mo. 1954).

assert a counterclaim arising out of the transaction or occurrence that is the basis of the plaintiff's claim and the matter in controversy in the counterclaim exceeds the sum or value of $15,000.[62]

Multiple Defendants

The present statute provides that all defendants must join in removing an action.[63] This has been a troublesome requirement, particularly in diversity actions, because a plaintiff may join a person whose citizenship is the same as the plaintiff's or who is a citizen of the state where the action is brought to prevent removal. If the plaintiff has a substantial claim against a defendant, his joinder is not fraudulent although the plaintiff does not intend to enforce a judgment against him or he is judgment proof, which is often the situation when an employee is joined as a co-defendant with his employer and the only reason for joining him was to prevent the removal of the action.[64] However, where the plaintiff does not have a valid claim against a defendant whose joinder prevents removal, the other defendant can remove the action and show by depositions, answers to interrogatories and other evidentiary type materials that the plaintiff does not have a substantial claim against the co-defendant.[65] This is frequently referred to as fraudulent joinder, but the removing party does not have to prove any actual fraud on the plaintiff's part.[66]

Where a plaintiff fails to state a claim against a defendant whose joinder prevents the removal of the action, the other defendant can remove it at once,[67] but the plaintiff can amend his pleading in the federal court.[68] Therefore, the action should be removed

62. ALI STUDY § 1304(d). The recommendation was for $10,000, but this was raised to $15,000 in the 1973 bill. S. 1876, 93d Cong., 1st Sess. § 1304(d) (1973).

63. 28 U.S.C. § 1441(a) (1970).

64. Quinn v. Post, 262 F. Supp. 598 (S.D.N.Y. 1967).

65. *E.g.*, Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907).

66. *Id. Accord,* Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (10th Cir. 1964).

67. *E.g.*, Seigler v. American Surety Co., 151 F. Supp. 556 (N.D. Cal. 1957); Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D.S.C. 1955).

68. Chicago, R.I. & P.R.R. v. Schwyhart, 227 U.S. 184 (1913); Ingersoll v. Pearl Assur. Co., 153 F. Supp. 558 (N.D. Cal. 1957). In *Thiel v. Southern Pac. Co.*, 126 F.2d 710 (9th Cir. 1942), the court refused to allow the plaintiff to amend on the ground that jurisdiction of a federal court is based on the facts alleged at the time of removal and that the court cannot be deprived of jurisdiction by an amendment. This court failed to distinguish between an amendment that changes the allegations, such as reducing the amount claimed, and an amendment that perfects defective allegations.

only if it can be shown that the plaintiff has no substantial claim against the other defendant. Moreover, a defendant should not wait until the state court holds that the petition does not state a claim against his co-defendant before removing an action.[69] Since he could have removed it earlier by showing that the plaintiff did not have a substantial claim against the other defendant, removal time may have expired. In addition, dismissal of a party by a trial court does not make an action removable because it is not a final order.

If a plaintiff dismisses his claim against a defendant whose joinder prevents its removal, the other defendant can remove it;[70] however, if the trial has started, he must act at once.[71] A different result is reached where a court sustains a demurrer to the petition or grants a motion for a directed verdict that is asserted by the party whose joinder prevented removal. The action is not immediately removable because the decision of the trial court may be reversed on appeal; but when the order becomes final, the other defendant can remove the action.[72]

Will the death of a party whose joinder prevented the removal of an action permit it to be removed? Cases have gone both ways on this issue.[73]

Where a defendant who is not a citizen of the state where the action is brought has not been served with process, another defendant can immediately remove the action, but where the non-served defendant is a citizen of the state where the action is brought, another defendant cannot remove it until the plaintiff dismisses or abandons his claim against the non-served defendant.[74] However, a few cases[75] hold that a defendant who is not a citizen of the state where the action is brought can remove an action before defendants

69. *Contra*, Platt v. Illinois Cent. Rd., 305 F.2d 136 (5th Cir. 1962).

70. Powers v. Chesapeake & O. Ry., 169 U.S. 92 (1898).

71. Waldron v. Skelly Oil Co., 101 F. Supp. 425 (E.D. Mo. 1951).

72. Note, *Federal Practice: Removal After Resident Defendant Is Involuntarily Dismissed*, 17 OKLA. L. REV. 336 (1964).

73. Rick v. Headrick, 167 F. Supp. 491 (W.D. Mo. 1958) (deny removal); Bradley v. Halliburton Oil Well Cementing Co., 100 F. Supp. 913 (E.D. Okla. 1951) (grant removal).

74. *E.g.*, Fidelity & Cas. Co. v. Safeway Steel Scaffolds Co., 191 F. Supp. 220 (N.D. Ala. 1961). These cases rely on Pullman Co. v. Jenkins, 305 U.S. 534 (1939), although it was decided before the statute was amended in 1948. *See* Note, *Several Defendants with Service Upon One*, 7 OKLA. L.J. 457 (1954).

75. Duff v. Aetna Cas. & Sur. Co., 287 F. Supp. 13 (N.D. Okla. 1968); Robertson v. Nye, 275 F. Supp. 497 (W.D. Okla. 1967).

who are citizens of that state are served because the statute provides that the action is removable "only if none of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought."[76] This is the better view. Where an action is removed on the ground that it arises under the Constitution, laws and treaties of the United States the citizenship of a non-served party is unimportant.[77] Also, most courts hold that a party who is not served does not have to join in the removal petition.[78]

Section 1441(c) permits a defendant to remove an action "[w]henever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action."[79] The lower federal courts have not agreed as to what constitutes a separate and independent claim or cause of action, and the only Supreme Court case dealing with the question, *American Fire & Casualty Co. v. Finn,*[80] holds that an action does not contain a separate and independent claim where a plaintiff is entitled to only one recovery for a single wrong arising from an interlocked series of transactions although the plaintiff sues the defendants in the alternative and he could have sued them in separate actions. Perhaps a separate and independent claim or cause of action exists if a recovery from one defendant does not bar the plaintiff from recovering from another defendant.[81]

The Institute's recommendation avoids these problems by permitting a defendant who could have removed an action if he were the only defendant to remove the entire action to the district court.[82] Where jurisdiction is based on diversity of citizenship, the federal

76. 28 U.S.C. § 1441(b) (1970) (emphasis added).

77. S. E. Overton Co. v. International Brotherhood, 115 F. Supp. 764, 772 (W.D. Mich. 1953).

78. Nelson v. Peter Kiewit Sons' Co., 130 F. Supp. 59 (D.N.J. 1955). A few courts hold that all named defendants must join in the removal petition. Rodriguez v. Union Oil Co., 121 F. Supp. 824 (S.D. Cal. 1954).

79. 28 U.S.C. § 1441(c) (1970). This language was used in 1948 to prevent the confusion that was caused by the language in the prior statute.

80. 341 U.S. 6 (1951).

81. *E.g.*, Evangelical Lutheran Church v. Stanolind O. & G. Co., 251 F.2d 412 (8th Cir. 1958); Baltimore Gas & Elect. Co. v. U.S.F. & G., 159 F. Supp. 738 (D. Md. 1958) (separate but pro-rata liability under separate contracts). *See* Northside I. & M. Co., Inc. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973) (where plaintiffs assert separate claims).

82. ALI STUDY §§ 1304(b) (diversity of citizenship), 1312(a)(1) (federal question).

court may remand all matters that, considered separately, are not within its jurisdiction.[83] Where jurisdiction is based on a federal question, the federal court shall remand all claims that do not arise under the Constitution, laws or treaties of the United States or are not within the pendent jurisdiction of the federal court.[84]

Although this recommendation would increase the number of cases that can be removed, it is desirable because it simplifies and clarifies the law in regard to removal. Moreover, permitting one defendant to remove an action that is brought against several defendants would enable an out-of-state defendant to avoid local prejudice by removing the action to a federal court where a co-defendant is a citizen of the state where the action is brought.[85]

Third-Party Claims

The present law in regard to the removal of actions by third-party defendants is in a state of confusion. Many courts hold that a third-party defendant cannot remove an action although he could have removed the third-party claim if it were a separate action. These courts hold that section 1441(c)[86] does not authorize the removal because the third-party claim was not joined with the original claim by the plaintiff.[87] However, other courts permit a third-party defendant to remove an action where the original and the third-party claims involve different issues and facts, but the original claim will be remanded to the state court.[88] One case allowed a third-party claim to be removed after the state court separated the original and the third-party claims for trial.[89] Section 1304(b) of the Study resolves part of this confusion by specifically authorizing a third-party defendant to remove an action where he could have removed the third-party claim on the ground of diversity of citizen-

83. *Id.* at § 1304(b).

84. *Id.* at § 1313(b).

85. *Id.* at 144.

86. 28 U.S.C. § 1441(c) (1970).

87. *E.g.*, Greater N.Y. Mutual Ins. Co. v. Anchor Construction Co., Inc., 326 F. Supp. 245 (E.D. Pa. 1971); Tuyagda Aluminum Products Corp. v. Hull Dobbs 65th Inf. Ford, Inc., 313 F. Supp. 774 (D.P.R. 1970).

88. *E.g.*, Ted Lokey R.E. Co. v. Gentry, 336 F. Supp. 741 (N.D. Tex. 1972) (removed as separate contracts in each claim); First Nat. Bank & Tr. Co. v. Port Lavaca Vending Mach., Inc., 334 F. Supp. 375 (S.D. Tex. 1971) (not removed as same issues and evidence in both claims).

89. Central of Georgia R.R. v. Riegel Textile Corp., 426 F.2d 935 (5th Cir. 1970).

ship if it were the only claim being litigated, but the court may remand all matters that are not within its original jurisdiction. If such a remand is ordered, the court must remand the rest of the action on the request of the removing party. However, there is no similar provision for removal where the claim asserted against the third-party defendant arose under the Constitution, laws or treaties of the United States.[90] The Commentary to section 1312(a) states why a third-party plaintiff should not be allowed to remove an action where the third-party petition asserts a federal question, but it does not indicate why a third-party defendant should not be allowed to remove the action.[91] Since a third-party defendant should be able to remove an action where the third-party petition asserts a federal question, the phrase "or third-party defendant" should be added to subdivisions (1) and (2) of section 1312(a). Also, subdivision (2) should be changed to permit a third-party plaintiff to remove an action where a right arising under the Constitution, laws and treaties of the United States is asserted as a defense to his third-party claim. These changes would make this section consistent with other recommendations in regard to federal question jurisdiction.

As discussed previously, section 1304(c) permits a plaintiff to remove an action when a counterclaim is asserted against him which he could have removed on the ground of diversity of citizenship if he had been sued as a defendant. This subsection should be expanded to permit a third-party plaintiff to remove an action under the same condition. Section 1312(a)(3) permits a third-party plaintiff to remove an action if a counterclaim which asserts a claim arising under the Constitution, laws and treaties of the United States is asserted against him by the third-party defendant. Also, this section permits a third-party defendant who asserts a counterclaim that is compulsory under state law and that asserts a claim arising under the Constitution, laws or treaties of the United States to remove the action.[92]

Cross-Claims

The present cases hold that a defendant against whom a cross-

90. *Compare* ALI STUDY § 1304(b) *with* § 1312(a).

91. ALI STUDY at 197.

92. The original recommendation would not permit this, but the bill that was introduced in the Senate in 1973 substituted the word "party" for "defendant" in § 1312(a)(3). S. 1876, 93d Cong., 1st Sess. § 1312(a)(3) (1973).

claim is asserted cannot remove the action although as between the two defendants the statutory requirements for removal are satisfied. This result is reached on the ground that the cross-claim is not a separate and independent claim or cause of action.[93] Sections 1304(b) (diversity of citizenship) and 1312(a)(1) (federal question) appear to change this rule because they provide that any defendant against whom a claim is asserted which he could have removed if sued alone or which could have been the basis of an action in a federal court can remove the action. These sections do not state that the claim must be asserted by the plaintiff, and section 1304(b) states that the claim may be asserted by any party. Permitting the action to be removed is desirable because it is difficult to distinguish between a claim asserted against a third-party defendant and a claim asserted against a co-defendant. However, the limitation imposed in the second sentence of section 1304(b) should apply to defendants against whom a cross-claim is asserted.

FEDERAL QUESTION JURISDICTION

The Institute's proposals make several significant changes in the jurisdiction of federal courts over actions that arise under the Constitution, laws and treaties of the United States. Section 1311(a) provides that

> the district courts shall have original jurisdiction without regard to amount in controversy of all civil actions, including those for a declaratory judgment, in which the initial pleading sets forth a substantial claim arising under the Constitution, laws, or treaties of the United States.[94]

Thus, this recommendation deletes the amount in controversy requirement, and it includes the requirement that the federal question must appear from the essential allegations of the complaint. Also, it rejects the rule in *Skelly Oil Co. v. Phillips Petroleum Co.*[95] that the federal courts do not have jurisdiction of an action for declaratory relief where the plaintiff could have brought an action for coercive relief unless the federal courts have jurisdiction of the action

93. Verschell v. Fireman's Fund Ins. Co., 257 F. Supp. 153 (S.D.N.Y. 1966); Sequoyah Feed & Supply Co. v. Patterson, 101 F. Supp. 680 (W.D. Ark. 1951).

94. ALI STUDY § 1311(a).

95. 339 U.S. 667 (1950). *See also* ALI STUDY at 170.

for coercive relief. Another recommendation provides for nationwide service of process in federal question cases.[96]

The removal recommendation permits a single defendant to remove an action to a federal court where the plaintiff's claim arose under the Constitution, laws or treaties of the United States regardless of the amount in controversy. Also, it permits either party to remove an action where the amount in controversy exceeds $15,000 and the defendant asserts a defense arising under the Constitution, laws or treaties of the United States.[97] The desirability of providing a federal forum for such actions is not questioned, but the amount requirement is imposed to prevent the federal courts from being overburdened by the removal of such actions.[98] This restriction is undesirable where the defense arises under a federal statute because the federal courts should construe federal statutes to avoid a restrictive construction by a state court. Even where a defense arises under the Constitution of the United States an amount requirement is undesirable although it may be necessary to restrict the number of actions that can be removed.

Another recommendation permits a party against whom a counterclaim is asserted to remove the action if the counterclaim sets forth a claim arising under the Constitution, laws and treaties of the United States. Also, the party asserting the counterclaim can remove the action if the counterclaim is compulsory under state law.[99] This recommendation permits removal by third-party plaintiffs and third-party defendants as well as by original plaintiffs and defendants.

At the present time, removal jurisdiction is deemed to be derivative so that an action can be removed only if the state court has subject matter jurisdiction. Thus, an action within the exclusive jurisdiction of the federal courts cannot be removed from a state court to a federal court.[100] This is inconsistent with the efficient

96. ALI STUDY § 1314(d).

97. *Id.* at § 1312(a). The amount in the recommendation was $10,000, but this was increased to $15,000 in the 1973 Senate bill. S. 1876, 93d Cong., 1st Sess. § 1312(a)(2) (1973).

98. *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., pt. 2, at 734-40 (1972) (statement of Judge Henry J. Friendly).

99. ALI STUDY § 1312(a)(3). The 1973 Senate bill substituted the word "party" for the word "defendant." S. 1876, 93d Cong., 1st Sess. (1973).

100. *E.g.*, General Investment Co. v. Lake Shore & M.S. Ry., 260 U.S. 261 (1922).

administration of justice, and it is not required by either the Constitution or the Judicial Code. Section 1312(d) of the recommendations rejects this rule. Instead, it provides that an action which is within the exclusive jurisdiction of the federal courts can be removed to a federal court by any party. This is a desirable recommendation. However, it should be amended to permit a party who has removed an action to a federal court on the ground that it is within its exclusive jurisdiction to appeal from an order that remands the action to the state court. Section 1312(d) also provides that a federal court shall have jurisdiction of an action that is improperly filed therein where the defendant asserts a defense or a counterclaim that would have permitted the action to be removed to the federal court.

REMOVAL PROCEDURE

The Institute's recommendations make only minor changes in the procedure for removing actions. They provide that the removal petition shall state the grounds for removal, rather than the facts, which entitle the defendant to remove the action and that the petition must be certified in accordance with Rule 11 of the Rules of Civil Procedure[101] rather than being verified. Further, the Institute would not require a removal bond.[102]

Some decisions hold that a defect in the jurisdictional allegations in a removal petition can be amended after the time to remove an action has run but that an omission cannot be cured. Moreover, they hold that the failure to allege a party's citizenship, although his place of residence is alleged, or the failure to allege a corporation's principal place of business, although its state of incorporation is alleged, are omissions which cannot be corrected after the removal time has expired.[103] Several later cases have rejected this strict construction of the right to amend a removal petition.[104] Also, the commentary to Section 1381(a) rejects the strict view by indicating that

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Fraser, *Some Problems in Federal Question Jurisdiction,* 49 MICH. L. REV. 73, 84 (1950).

101. FED. R. CIV. P. 11.

102. *Compare* 28 U.S.C. § 1446(a) and (d) (1970) *with* ALI STUDY § 1381(a) and accompanying commentary at 338-39.

103. *See* Note, *Federal Jurisdiction and Practice: Amending Pleading to Include Allegation of Principal Place of Business,* 13 OKLA. L. REV. 73 (1960).

104. *E.g.,* Luehers v. Utah Home Fire Ins. Co., 450 F.2d 452 (9th Cir. 1971). *See* Kinney v. Columbia Savings & Loan Ass'n, 191 U.S. 78 (1903).

requiring a party to state the grounds for removal makes it easier for courts to allow an amendment.[105] However, the recommendations do not appear to affect the rule that a defendant cannot change his ground for removal after the time to remove the action has expired.[106]

The present law[107] provides that notice of the removal of an action shall be given to adverse parties whereas section 1381(b) of the recommendations provides that notice shall be given to all parties to the action. Both the present law and the recommendation require the removing party to file a copy of the removal petition with the clerk of the state court. The present law provides that this must be done promptly after the filing of the removal petition in the federal court and that the filing of the copy with the clerk of the state court "shall effect the removal." However, the provision that the removing party must act promptly was not included in section 1381(c). Instead, section 1382(f) of the recommendations provides that the notice does not have to be given to the adverse parties and the copy does not have to be filed with the clerk of the state court within the time for filing the removal petition although "the removal is not effective until [such steps] have been taken"[108] and the action may be remanded if they are unduly delayed.[109] Thus, the recommendation does not encourage prompt action although it imposes a penalty for being dilatory.

The statement in the present law that the filing of a copy of the removal petition with the clerk of the state court "shall effect the removal" has been a source of confusion. Some cases hold that the federal court has jurisdiction from the time the removal petition is filed with it, some hold that the state court has jurisdiction until a copy of the removal petition is filed with it and some hold that both courts have jurisdiction until a copy of the petition is filed with the state court.[110] Since the recommendation uses such similar language it may not resolve this conflict. The commentary states that the state court should not lose jurisdiction of an action until it has been

105. ALI STUDY at 340-41.
106. Alvey v. Sears, Roebuck & Co., 162 F. Supp. 786 (W.D. Mo. 1958).
107. 28 U.S.C. § 1446(e) (1970).
108. ALI STUDY at 357.
109. *Id.* at 355.
110. *Id.* at 356-57.

given notice of the removal,[111] but this statement is not inconsistent with the view that both courts have jurisdiction until the state court is notified of the removal. Prompt action by the removing party would minimize this problem. Therefore, section 1381(b) should be changed to provide that either before or promptly after the filing of the removal petition notice should be given to all parties to the action and a copy of the petition filed with the clerk of the state court.[112]

The Judicial Code provides:

> [I]f the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may be first ascertained that the case is one which is or has become removable.[113]

The phrase "amended pleading, motion, order, or other paper" is needed in those cases where a plaintiff dismisses a party without amending his pleading as long as all defendants must join in the removal,[114] but it has been misused in some cases. For instance, several cases have allowed a defendant to remove an action after he has taken a deposition which reveals that the action was initially removable.[115] Since the recommendations permit one of several defendants to remove an action, the words "motion, order, or other paper" are properly omitted. Thus, a late removal would be allowed only where there is an amended pleading from which it may be ascertained that a nonremovable case has become removable.[116] This section permits the amending party to remove within thirty days after the service of the original pleading. However, it should be revised to prevent him from removing the action after the trial has commenced.

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111. *Id.* at 357.

112. *See also id.* at § 1382(f), which should also be made part of § 1381(b).

113. 28 U.S.C. § 1446(b) (1970).

114. *E.g.*, Jong v. General Motors Corp., 359 F. Supp. 223 (N.D. Cal. 1973).

115. *E.g.*, Fisher v. United Airlines, Inc., 218 F. Supp. 223 (S.D.N.Y. 1963) (parties are of diverse citizenship); Fuqua v. Gulf, C. & S.F. Ry., 206 F. Supp. 814 (E.D. Okla. 1962) (plaintiff has no substantial claim against co-defendant). *See* Note, *Federal Jurisdiction and Practice: Timeliness and Removal*, 16 OKLA. L. REV. 215 (1963).

116. ALI STUDY § 1382(c). This section permits the amending party to remove within thirty days after the service of the original pleading. However, it should be revised to prevent him from removing the action if the trial has commenced.

VENUE

Except for the provisions in regard to the venue of actions by and against corporations, the present venue statutes have not proved to be unsatisfactory. It is not clear whether the section in regard to corporations[117] applies where a corporation is a plaintiff or only where it is a defendant; however, most courts hold that it applies only to corporate defendants.[118] Also, this section indicates that where there is a corporate defendant, venue may be laid in any district in its state of incorporation and in any district in any state where it is licensed to do business; but some cases limit venue to the district where the corporation has a place of business.[119] The Institute proposes that for venue purposes a corporation shall be regarded as a resident of the district where it has its principal place of business and a resident of each district in its state of incorporation if its principal place of business is not there.[120]

The present law contains no provision in regard to the venue of actions by or against partnerships and other unincorporated associations although the Supreme Court has held that where an action arises under the laws of the United States a partnership can be sued wherever it is doing business.[121] The Institute has proposed that for venue purposes a partnership or an unincorporated association shall be regarded as a resident of the district where it has its principal place of business.[122]

Another proposal abolishes the rule that actions for trespass upon or harm to land must be brought where the land is located.[123] This change is desirable, but it should be extended to include actions for an injunction to prevent a threatened or continued trespass

117. 28 U.S.C. § 1391(c) (Cum. Supp. 1973).

118. C. WRIGHT, LAW OF FEDERAL COURTS 155-56 (2d ed. 1970).

119. Note, *Federal Practice: Venue in Actions Against Corporations*, 19 OKLA. L. REV. 197 (1966); C. WRIGHT, LAW OF FEDERAL COURTS 154 (2d ed. 1970).

120. Although found in different sections, the venue provision for corporations is the same for diversity and federal question cases. ALI STUDY §§ 1303(b) (diversity) and 1314(b) (federal question). Therefore, it is questionable if they should be in different sections. Research would be easier and the construction would be more uniform if only one section were involved.

121. Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen, 387 U.S. 556 (1967).

122. ALI STUDY §§ 1303(b) (diversity jurisdiction) and 1314(b) (federal question jurisdiction).

123. *Id.* at §§ 1303(c) (diversity jurisdiction) and 1314(c) (federal question jurisdiction).

or injury to land.

The Institute's recommendations in regard to the transfer of actions from one district to another are more involved than the provisions in the present law because three different rules have been proposed. Where jurisdiction is based on diversity of citizenship, and the defendant is the moving party, an action may be transferred to any district except one where any plaintiff and all defendants cannot invoke federal jurisdiction.[124] Where jurisdiction is based on diversity of citizenship and the plaintiff is the moving party, an action may be transferred to any district where venue would be proper and the defendants are amenable to process except a district where any plaintiff cannot invoke the jurisdiction of the federal court.[125] Where jurisdiction is based on the existence of a federal question, an action may be transferred to any other district.[126]

Foreclosure of Jurisdictional Issues

Section 1386(a) of the Institute's recommendations contains a novel but valuable proposal. It provides that after the commencement of the trial on the merits neither the court nor a party may question jurisdiction over the subject matter of the action except where the court defers a decision on jurisdiction, a party did not know and could not discover the jurisdictional facts earlier, the parties attempted to confer jurisdiction by collusion, the issue is raised on appeal by a party who has previously challenged the jurisdiction of the court or a consideration of the jurisdiction of the court is required by the Constitution.

At the present time an action may be dismissed for lack of jurisdiction over the subject matter after it has been tried on its merits even though the issue of jurisdiction was not raised before the trial. One of the leading illustrations of this wasteful procedure is *Louisville & Nashville Railroad v. Mottley*.[127] In this case the plaintiffs brought an action in a federal court to enforce a promise by the defendant railroad to issue passes, alleging that the railroad claimed that a federal act made it illegal to issue the passes. The question of jurisdiction was not raised in the trial court and a decree on the

124. *Id.* at § 1305.
125. *Id.* at § 1306.
126. *Id.* at § 1315.
127. 211 U.S. 149 (1908).

merits was rendered for the plaintiffs. The action was appealed to the United States Supreme Court which raised the question of jurisdiction on its own motion. Since the reference to the federal act was not one of the essential allegations of the complaint, the Court held that the trial court did not have jurisdiction of the action. Therefore, the action was reversed and remanded with instructions that it be dismissed. Thereafter, it was filed in a state court, and three years later it again reached the Supreme Court where it was heard on its merits. Section 1386(a) would prevent a repetition of the *Mottley* case.[128]

The desirability of section 1386(a) is reduced by its exceptions. One exception permits a party to question jurisdiction over the subject matter of the action after the trial on the merits where he did not know and could not discover the facts that affect jurisdiction before the trial. This is undesirable because the hardship that would be imposed on the courts, the witnesses and the jurors, if any, and the adverse party by retrying the case in a state court outweighs any hardship that might be imposed on a party by having his action tried in a federal court.[129] Moreover, the burden on the federal court is not reduced by retrying the action in a state court. For similar reasons the exception which permits an objection to the jurisdiction of the court to be reviewed on appeal is undesirable. The harm that would be caused by retrying the action in a state court would be great whereas it is doubtful that litigating the dispute in a federal court harmed the defendant. Moreover, dismissing the action after it has been tried on its merits would not benefit the federal court.

Although it may be desirable to provide that the matter in controversy must exceed a certain sum or value, the figure selected is arbitrary. For this reason, an exact determinaiton of the amount involved in an action is not necessary, and preventing an appellate court from reviewing a decision on this issue will not compromise the integrity of the federal judicial system. One authority has stated that

128. Section 1312(d), which provides that a district court has jurisdiction of an action that could have been removed to a federal court because a defense arising under the Constitution, laws or treaties of the United States is asserted would prevent a repetition of the *Mottley* case only if the amount in controversy exceeds $15,000.

129. "The doctrine of harmless error should apply to jurisdictional matters as it does to procedural matters." Moore and Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. S.U.L. REV. 1, 4 (1973).

> the jurisdictional amount requirement is really a housekeeping device to keep out petty cases and should not be a trap for the litigant to find out five years later when he gets to the U.S. Supreme Court that no jurisdiction exists.[130]

Similarly, after an action has been tried on its merits, the power of an appellate court to review a trial court's decision that either diversity of citizenship or federal question jurisdiction exists should be limited to determining if there is minimal diversity or if the action involves a federal question. Thus, if any two adverse parties are citizens of different states, or if either party asserted a substantial claim or defense arising under the Constitution, laws or treaties of the United States, the action should not be reversed for lack of subject matter jurisdiction.

Proposed section 1386(b) provides that if an action that was timely commenced in a federal court is dismissed for lack of jurisdiction over the subject matter, a new action may be brought in another court, regardless of that jurisdiction's statute of limitations, provided that the statute would not have barred the original action and the new action is brought within 30 days or such longer period as the new jurisdiction allows. Section 1386(c) contains a similar provision to cover cases which a state court dismisses on the ground that they are within the exclusive jurisdiction of the federal courts. Both of these recommendations fill gaps in the present law.[131]

CONCLUSION

The American Law Institute is to be commended for its scholarly study of the jurisdiction of the federal district courts. Whether or not its recommendations make a principled division of cases between the two judicial systems depends on a person's hypothesis as to the purpose of federal courts.

Several changes in the Institute's recommendations have been suggested because it is believed that an exact division of cases is not

130. *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 229 (1971) (statement of William Van Dercreek). The abolition of an amount requirement for diversity cases has been advocated. Moore and Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to meet the Needs of a Complex Society*, 1 FLA. S.U.L. REV. 1, 11 (1973).

131. Subsections (b) & (c) should be separate sections because their subject matter is unrelated to the provisions of subsection (a).

the only criterion,[132] but that the efficient administration of justice should also be considered. In an effort to achieve perfection, the requirements for federal jurisdiction should not contain so many limitations, and exceptions to those limitations, that extensive preliminary litigation is required. "In the interest of federalism, logic, and rationalization of the federal system, experts too often propose a scheme that is far too complicated to produce expeditious and just results."[133] Another authority has stated that "[i]f we must choose between a reasoned division of jurisdiction and a workable division of jurisdiction, I would choose the latter every time."[134] The local establishment recommendation is an illustration of a proposal which breeds litigation. However, the suggestion that minor changes should be made in several proposals should not detract from the value of this study. Revision of the jurisdiction of the federal district courts is necessary, and the American Law Institute's recommendations should be the basis of any legislation that is passed.

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132. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 187 (1969).

133. Moore and Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. S.U.L. REV. 1, 2 (1973).

134. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 207 (1969). The Institute recognizes the importance of avoiding threshold litigation, but it indicates that a clear statement of the law will have this effect. ALI STUDY at 128. However, the application of a clearly stated rule to the facts can cause threshold litigation.