A NOTE ON DIVERSITY JURISDICTION—IN REPLY TO PROFESSOR YNTEMA

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No one has been more eager than I for whatever light statistical studies may shed upon the operations of the federal judiciary. No one, therefore, more heartily welcomes the intensive inquiry undertaken by the Johns Hopkins Institute of Law into diversity jurisdiction, of which the scope and method have been adumbrated in the article by Messrs. Yntema and Jaffin in the May number of this Review.[1] The need for adequate judicial statistics has been urged with wearisome reiteration; at last the effort is beginning to tell. Through private scholarship, like Professor Yntema's, and through official effort, like that of the Conference of Senior Circuit Judges, the establishment of a system of judicial statistics comparable to the British now seems in a fair way to be realized.

But we have not been wholly without data on the actual workings of the present jurisdiction of the federal courts. I have been one of those who have urged legislation to remove some obvious abuses of diversity jurisdiction, on grounds of policy and to relieve the dockets of the federal courts. In the absence of authentic statistics as to the proportion of diversity litigation in the total load of the business of the federal courts, I have relied upon the opinion of the best experts, *i. e.,* federal judges, and on some statistics which show which way the wind is blowing. These data have puzzled Professor Yntema and he has challenged them.

Let me quote the whole paragraph, with its footnotes, from which Professor Yntema has extracted [2] some statements which give him difficulty:

> "Certainly the obvious abuses of diversity jurisdiction should be promptly removed by legislation—on plain grounds of policy, and to relieve the over-burdened federal dockets.

[1] Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869.

[2] *Ibid.* at 913.

> In the absence of an adequate system of federal judicial statistics, we are without an exact basis for analyzing the scope and nature of federal court business. That the diversity cases represent one of its heaviest items is common knowledge. According to the usual estimate, they constitute one-third of the business of the district courts. An examination of ten recent volumes of the Federal Reporter [122] shows that out of 3618 full opinions, 959, or 27 per cent., were written in cases arising solely out of diversity of citizenship. In 716 of these cases, or 80 per cent., a corporation was a party.[123] Corporate litigation then, is the key to diversity problems. For legal metaphysics about corporate 'citizenship' has produced a brood of incoherent legal fictions concerning the status of a corporation, defeated the domestic policies of states, and heavily encumbered the federal courts with controversies which, in any fair distribution of political power between the central government and the states, do not belong to the national courts." [3]

Professor Yntema counters on two items:

1. He measures what I have characterized as "the usual estimate" of district court business by manipulations of statistical trends drawn from the gross figures of cases filed in those courts, as given by the Attorney-General in his *Annual Reports*. But I invoked "the usual estimate" precisely because, as Professor Yntema well knows, we have no reliable bookkeeping on the point. The gross totals of the different items of business in the *Reports* of the Attorney-General are without substantial significance, for numerical units of "cases filed" are meaningless as an index to the burden which their disposition involves. The enormous recent increase in criminal prosecutions, particularly prohibition cases, tells very little about the judicial time consumed in their disposition. In many districts, the only function which the judges perform in these cases is the imposition of sentence. Being without figures, I fell back upon the estimates of those best qualified

"[122] 13-22 F. (2d) (1926-1927)."

"[123] I am indebted for these figures to the investigation of two of my students, Messrs. N. Jacobs and A. H. Feller, embodied in an unpublished paper entitled, *Proposed Limitations on the Diversity Jurisdiction of the Federal Courts.*"

[3] Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 523.

to estimate, namely, federal judges of wide experience. Those whom I consulted usually attributed diversity cases to about one-third of the district courts' time.[4] This rough judgment will of course be displaced whenever intensive studies as to the allocation of the time of the judges to different items of their business are available. But the statistics will have to be an analysis of judicial time and not merely a gross classification of the nature of the litigation, or, still more meaningless, uncritical totals of "cases filed" under the different heads of jurisdiction.

2. To indicate trends I gave the results of an examination of ten recent volumes of the *Federal Reporter,* deemed representative samples, showing "that out of 3618 full opinions, 959, or 27 per cent., were written in cases arising solely out of diversity of citizenship." [5] Professor Yntema is perplexed in that he finds only 11.2 per cent. of such cases in these volumes.[6] But he himself clears up the mystery by the total on which his 11.2 per cent. is based. He was dealing with 1445 cases; I talked about "3618 full opinions". He counted only cases in the district courts, while I used the number of "full opinions" in the *Federal Reporter.* Of course I included the opinions in the circuit courts of appeal in my count. To be sure, the cases in the circuit courts of appeal afford no direct statistical index to the volume of cases in the district courts. But I was—and am—concerned with relief to the "over-burdened federal dockets". The volume of opinions "in cases arising solely out of diversity of citizenship" is most relevant for insight into the time of all the federal judges that goes to diversity business. If Professor Yntema has any doubt that in several circuits the dockets of the circuit courts of appeal are over-burdened, let him read the Reports of the Conference of Senior Circuit Judges. Even if a circuit court of appeals clears its docket, it is no proof that it is not over-burdened. There is no better court of appeals than that for the Second Circuit, but I doubt whether anyone cognizant with the details of its labors will say that it is disposing of its business under conditions conducive to

[4] The figures of the president of the American Bar Association in 1928 were "between 20% and 30%" (1929) A. B. A. J. 401, 404.

[5] *Supra* note 3.

[6] Yntema and Jaffin, *op. cit. supra* note 1, at 919, (Table II).

the best exercise of its faculties. Opinion-writing and the process of which it is a culmination—argument, study and deliberation—are the most exacting aspects of the judicial office. If diversity litigation absorbs 27 per cent. of the opinions of the district and circuit judges as reported in ten volumes of the *Federal Reporter*,[7] that, I submit, is a relevant and important item in the present state of our knowledge regarding the time consumed by federal judges in diversity litigation. And I stick by my figures, for they were based upon the careful labor of two able young lawyers.

Inquiries such as those upon which Professor Yntema has entered should illumine many problems regarding diversity jurisdiction. They will put old problems in new perspective and reveal the importance of questions hitherto neglected. But there are issues of policy regarding some aspects of the present scope of diversity jurisdiction which are not subject to the arbitrament of arithmetic. Whether corporations doing business in the state of suit shall be restricted to the courts of that state; whether corporations shall be allowed to remove to defeat state policy;[8] whether devices like those revealed by the *Black and White Taxi Co.* case[9] shall be permitted; whether removal on the ground of separability of controversy should continue; whether there are "serious objections to having the rights of litigants in the same territory depend on whether they select a federal or a state court";[10] whether a constant increase in the federal bench makes for a dilution of its quality—are issues that are not amenable to statistical criteria. Those of us who are anxious to extract every possible aid from quantitative processes of judgment should be most zealous to recognize the proper limits of the sovereign power of statistics. These issues of policy involve judgment on matters about which men will differ. For myself, I remain impenitent in my conviction that the abuses of diversity jurisdiction should be promptly removed by legislation.

[7] 13-22 F. (2d) (1926-1927).

[8] See *e. g.*, David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 32 Sup. Ct. 711 (1912).

[9] Black and White Taxicab *etc.* Co. v. Brown and Yellow Taxicab *etc.* Co., 276 U. S. 518, 48 Sup. Ct. 404 (1928).

[10] Judge A. N. Hand in Cole v. Pennsylvania R. Co., 43 F. (2d) 953, 957 (C. C. A. 2d, 1930).