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Federal Diversity Suits by American Citizens Domiciled Abroad

tioner would not have been prejudiced by failing to gain appellate review of the 1936 trial.

The court in the principal case considered the United States Supreme Court decision in *Dowd v. United States ex rel. Cook*[31] to be controlling. The *Cook* case held that action by Indiana State Prison officials similar to that in the principal case which had resulted in the obstruction of a prisoner's attempt to gain appellate review constituted a denial of equal protection as guaranteed by the fourteenth amendment. Since the United States Supreme Court mandate in the *Cook* case said that the defect could only be cured by full appellate review,[32] this court reasoned by analogy that the petitioner's motion for a new trial was filed only to perfect his right to appellate review[33] and that only such review would cure the original defect.

In the *Cook* case, prison officials thwarted the prisoner's attempt to file the requisite appeal papers following a refusal of his motion for a new trial. The language of the mandate was that since the prisoner had been denied his statutory right to file the appeal papers the only cure for this denial of equal protection was full appellate review. Hence, the analogy that the *Pierce* court drew from the *Cook* mandate would appear erroneous. A correct analogy would be that since the petitioner had been denied the right to file a motion for a new trial the only cure would be to allow him to file the motion. Since he was allowed to file the motion in 1949, it is submitted that the defect of denial of equal protection was cured when the motion was granted.

By following this court's literal interpretation of the *Cook* mandate, the court which granted the motion for a new trial should have denied the motion so that the petitioner could prosecute an appeal. It is anomalous to say that a court has erred by failing to make an erroneous ruling.

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FEDERAL DIVERSITY SUITS BY AMERICAN CITIZENS DOMICILED ABROAD

A citizen of the United States domiciled outside the United States cannot bring an action in a federal court under the diversity of citizen-

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[31]340 U.S. 206 (1951).

[32]Id. at 209.

[33]"Subsequent to the Walker decision, commencing January 3, 1949, the petitioner... filed various pleadings intended to perfect the record for the purposes of an appeal and not for the purpose of having their Belated Motion for New Trial granted...." 193 F. Supp. at 398.

ship jurisdiction. This rule was recently applied in *Pemberton v. Colonna*,[1] decided by the Court of Appeals for the Third Circuit. The plaintiff had resided in Pennsylvania from 1927 to 1950 at which time she, with her husband, had moved to Mexico, where they lived under tourist cards. Upon the death of her husband, the plaintiff chose to remain in Mexico but maintained her business and voting connections in Pennsylvania. In 1959 the plaintiff commenced suit against the defendant, a citizen of Pennsylvania, in the Federal District Court for that state. The district court found that no diversity of citizenship was alleged and refused jurisdiction.[2] On appeal the Court of Appeals held that since the plaintiff was domiciled in Mexico,[3] she had no standing to bring a diversity action, as she was not a citizen of a different state than that of the defendant. The court relied on Title 28, section 1332(a)(1) of the United States Code which provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
> (1) citizens of different states. . . ."[4]

The court upheld the district court's finding that the plaintiff was not a citizen of any state of the United States but was an American citizen without state citizenship.[5] The court further said that as the plaintiff lived in Mexico only as a domiciliary, she could not maintain a diversity action as a citizen of a foreign state under section 1332(a)(2), which provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter . . . is between—
> (2) citizens of a state, and foreign states or citizens or subjects thereof. . . ."[6]

The result of this decision is to preclude American citizens domiciled abroad from instituting diversity actions in the federal courts. The matter is made worse by the fact that under this view aliens have greater rights of access to American federal courts than United States citizens domiciled abroad. This hardly seems proper under a rational constitutional scheme.

The diversity of citizenship jurisdiction will be analyzed from the historical standpoint in order to clarify the reasons behind the

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[1]290 F.2d 220 (3d Cir. 1961).
[2]Pemberton v. Colonna, 189 F. Supp. 430 (E.D. Pa. 1960).
[3]290 F.2d at 221. See also 189 F.Supp. at 431.
[4]72 Stat. 415, 28 U.S.C. § 1332(a)(1) (1958).
[5]290 F.2d at 221.
[6]72 Stat. 415, 28 U.S.C. § 1332(a)(2) (1958).

Pemberton decision and an effort will be made to propose a satisfactory solution to the problem. The diversity of citizenship jurisdiction is, of course, found in the Constitution.[7] The Constitution provides for a "supreme Court,"[8] but it is the only federal judicial forum required by the document. Congress is given the power to establish inferior federal courts as it may see fit.[9] The scope of the diversity jurisdiction was first defined in the Judiciary Act of 1789[10] and has remained relatively limited even to the present day, because of the statutory jurisdictional amount limitation.[11] Section 11 of the Act of 1789 repeats the substance of the language of the Constitution adding a jurisdictional amount[12] and placing this jurisdiction in the circuit courts, then the federal trial courts.[13] The first act did not define the word citizen so this determination devolved to the courts. The Constitution gives Congress the power to enact "an uniform Rule of Naturalization."[14] However, the First Congress in its first session did not exercise the power. The first naturalization act defining United States citizenship was not enacted until March 26, 1790,[15] nearly two months after the Supreme Court had first convened on February 2, 1790.[16] Originally, then, the only source for a definition of citizenship was to be found in state law. All states in one form or another[17] had separate

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[7]U.S. Const. art. III, § 2.

[8]U.S. Const. art. III, § 1.

[9]Ibid. and art. I, § 8.

[10]1 Stat. 73.

[11]See 1 Stat. 78 (jurisdictional amount $500), and 72 Stat. 415, 28 U.S. C. § 1332(a) (1958) (jurisdictional amount now $10,000).

[12]1 Stat. 78.

[13]Ibid.

[14]U.S. Const. art. 1 § 8, cl. 4.

[15]1 Stat. 103. This provision remained in the naturalization acts for twelve years, see 1 Stat. 415, 2 Stat. 155.

[16]The Minutes of the Supreme Court of the United States 1789-1806, 5 Am. J. Leg. Hist. 67, 69 (1961).

[17]Zephaniah Swift gives the following description at the naturalization laws of Connecticut:

> "Our law considers persons residing here in a threefold light; foreigners who are born in some foreign dominion: those who are inhabitants of some other state of the union: and those who are inhabitants of this state.
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> "No foreigners can gain a legal settlement in any town in this state, unless he be admitted by a major vote of the inhabitants of such town, or by the consent of the civil authority and selectmen, or shall be appointed to, and execute some public office. In any of these ways our law authorizes foreigners to obtain legal settlements.
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> "No person who is an inhabitant of one of the other of the United States, can gain a legal settlement in any town in this state, unless he be admitted by the major vote of the inhabitants, or by the consent of the civil

naturalization procedures, varying from general enabling acts[18] to special acts of the legislature.[19] Virginia had one of the more comprehensive general acts. An Act of 1786 sets forth the persons deemed to be citizens of the commonwealth and the steps necessary to become naturalized citizens of the state in the following manner:

> "That all free persons, born within the territory of this commonwealth, all persons, not being natives, who have obtained a right to citizenship under the act, intitled "An act declaring who shall be deemed citizens of this commonwealth;" and also all children wheresoever born, whose fathers or mothers are, or were, citizens at the time of the birth of such children, shall be deemed citizens of this commonwealth, until they relinquish that character, in manner herein after-mentioned; and that all persons, other than alien enemies, who shall migrate into this state, and shall before some court of record, give satisfactory

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authority and selectmen, or be appointed to and execute some public office, or unless he shall be possessed in his own right in fee, or a real estate to the value of one hundred pounds during his continuance therein. No time of residence shall gain a legal settlement.

"An inhabitant of one town may gain a legal settlement in another, by vote of the inhabitants, by consent of the civil authority and selectmen, by being appointed and executing some public office, or acquiring in his own right in fee, a real estate to the value of thirty pounds." 1 Swift, A System of Laws of the State of Connecticut, 167-68 (1795).

[18]Five states had general naturalization acts during all or part of the period. See Watkins, Digest of Ga. Laws 1732-1800, 430, 522, 538 (1800); 1 Kilty, Laws of Md. ch. 6, 1779; Dallas, Laws of Pa., 676-78 (1793); 4 S.C. Stat. 600 (act of 1784); 12 Hening, Va. Stat, at L. 261 (act of 1786). The Virginia statute, quoted in the text, is typical except for the provision for voluntary expatriation from state citizenship which is not found in any of the other state laws of this period.

[19]Massachusetts, New Hampshire, New Jersey, New York and Rhode Island naturalized persons by special legislative acts in individual cases. 1 Crosskey, Politics and the Constitution, 487, note 37 (1953), contains a compilation of citations to these special acts. North Carolina used the more informal practice of legislative resolution. Id. at 487, note 38. Delaware does not appear to have had either general or special acts during this time. Id. at 488.

In certain cases the Virginia general assembly would confer citizenship in the commonwealth on a person by special act. The following is an example: "An act for the naturalization of the Marquis De La Fayette.

> "I. WHEREAS the Marquis De La Fayette is eminently distinguished, by early and signal exertions in defense of American liberty: And whereas this illustrious nobleman continues to afford testimonies of unceasing affection to this state, and the general assembly being solicitous to bestow the most decisive mark of regard which a republic can give:
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> "II. Be it enacted, That the Marquis De La Fayette be henceforth deemed and considered a citizen of this state, and that he shall enjoy all the rights, privileges, and immunities, thereunto belonging." 12 Hening, Va. Stat. at L. 30 (act of 1785). Query, since La Fayette did not renounce his French citizenship, what would be his status in a federal court during the period in which there was no federal naturalization act?

> proof by oath (or being quakers or menonites, by affirmation) that they intend to reside therein, and also take the legal oath or affirmation, for giving assurance of fidelity to the commonwealth (which oaths or affirmations the clerk of court shall enter on record...."[20]

One of the more unusual sections of this statute was a proviso for expatriation from citizenship in the commonwealth:

> "That whensoever any citizen of this commonwealth shall, by deed in writing, under his hand and seal, executed in the presence of and subscribed by three witnesses, and by them, proved in the general court or the court wherein he resides, or by open verbal declaration made in either of said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen."[21]

If Congress had never adopted a uniform rule, such statutes of naturalization would have been the only method to determine citizenship for purposes of diversity of citizenship jurisdiction in federal courts.

In 1790 the first federal naturalization act was passed by Congress,[22] which spelled out necessary procedures to be followed to become a citizen of the United States, and added the following proviso:

> "That no person heretofore proscribed by any State, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed."[23]

Collett v. Collett[24] was the first case[25] to present the question of what constitutes state citizenship for diversity of citizenship purposes. It was decided in the Circuit Court for the District of Pennsylvania in 1792. The case was tried on the equity side of the court, the complainant alleging he was a British subject and that the respondent

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[20]12 Hening, Va. Stat. at L. 261-62. The 1786 act also contained a proscription clause designed to prevent the migration to or the granting of citizenship to certain "undesirable" elements. Id. at 263.

[21]12 Hening, Va. Stat. at L. 263. To the effect that a person could not expatriate himself without his government's consent, see Williams' case, 29 Fed. Cas. 1331 (No. 17708) (C.C.D. Conn. 1799).

[22]1 Stat. 103.

[23]Id. at 104.

[24]2 U.S. (2 Dall.) 294 (C.C.D. Pa. 1792).

[25]As an historical note, the Collett case was not only the first case on this subject, but it was also the first case on the appellate docket of the Supreme Court. The case is not reported in the Supreme Court reports as it was removed from the docket by counsel. See National Archives, Microcopy No. 214, Roll 1; Case Papers of the Supreme Court of the United States, Case 1.

was a citizen of Pennsylvania. The respondent filed a plea to the jurisdiction contending the complainant was a naturalized citizen of Pennsylvania. The plea was upheld and the court dismissed the action intimating that it felt state naturalization was sufficient to constitute both federal and state citizenship. Therefore, the complainant, being a citizen of Pennsylvania, could not bring a diversity action.[26] The court in regard to the power of the states to naturalize persons as opposed to the federal power stated:

> "The true reason for investing *Congress* with power of naturalization has been assigned at the Bar: —It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship."[27]

The first appearance of the concept of domicile as a determinative of citizenship is found in argument in the second case of *Bingham v. Cabot*.[28] Dexter in this argument declares that:

> "... on the principle of the constitution, a citizen of the *United States*, is to be considered ... a citizen of that state, in which he has his house and family, is a permanent inhabitant, and is, in short, domiciliated...."[29]

Although the argument did not prevail at this time, it was utilized by Chief Justice Marshall on circuit in *Prentiss v. Barton*.[30] Marshall first stated:

> "Accordingly the universal understanding and practice of America is, that a citizen of the United States residing permanently in any state, is a citizen of that state."[31]

In deciding that domicile was the proper test, he continued:

> "In the sense of the constitution and of the judicial act, he who is incorporated with the body of the state, by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state, in which his domicile is placed."[32]

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[26]2 U.S. (2 Dall.) at 296.

[27]Ibid. See note 23 supra. The proscription clause in the first naturalization act substantiates this reasoning.

[28]3 U.S. (3 Dall.) 382 (1798). This case appeared before the Supreme Court in 1795, and was reversed without the problem of jurisdiction being considered. 3 U.S. (3 Dall.) 19 (1795). On the second appeal this case "and many others in the same predicament were, accordingly, struck off the docket" for defective allegations of diversity of citizenship. 3 U.S. (3 Dall.) 382, 383 (1798).

[29]3 U.S. (3 Dall.) at 383.

[30]19 Fed. Cas. 1276 (No. 11384) (C.C.D. Va. 1819).

[31]Ibid.

[32]Id. at 1277.

Marshall thus relied on the domicile of the party as the controlling factor in making his determination of diversity of citizenship in this case.[33]

The first case to appear on facts analogous to those in the *Pemberton* case was *Prentiss v. Brennan*[34] decided in 1851 in the Circuit Court for the Northern District of New York. The plaintiff, who had lived in Canada for many years, alleged that he was a citizen of New York and that the defendant was a British subject. The defendant pleaded that the plaintiff had taken an oath of allegiance to the sovereign of Great Britain. This plea was upheld, but the court in dictum added that the plaintiff's:

> "[R]esidence and domicil are in the province of Canada, and not in this state; and hence, though for some purposes he may still be regarded as a citizen of the United States, he is not a citizen of the state of New-York which is essential to give jurisdiction....
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> "A person may be a citizen of the United States, and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned."[35]

In light of the facts of the case it would seem the court would have been correct in deciding the case on the ground that two aliens may not maintain a diversity action in a federal court.[36] From the foregoing it appears that the meaning of the diversity of citizenship jurisdiction in 1789 was not understood in the later times. It appeared that in 1789 a person was either a citizen of a state of the United States or he would not be a citizen. The effect of a singular federal citizenship as the first hurdle of diversity of citizenship jurisdiction was not contemplated at that time. The later cases exhibit a misunderstanding of the historical concept which has led to the *Pemberton* dilemma.[37]

The rationale by which an American citizen domiciled abroad can be given access to the federal courts is that for diversity purposes state citizenship, as determined by a person's domicile, is not lost until

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[33]Ibid.

[34]19 Fed. Cas. 1278 (No. 11385) (C.C.N.D.N.Y. 1851).

[35]Id. at 1279.

[36]Montalet v. Murray, 8 U.S. (4 Cranch.) 46 (1807); Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800).

[37]See Wittmeyer Trucking Co. v. Fess Transp. Ltd., 191 F. Supp. 802 (W.D. N.Y. 1961); McClanahan v. Galloway, 127 F. Supp. 929 (N.D. Cal. 1955); Hammerstein v. Lyne, 200 Fed. 165 (W.D. Mo. 1912). Cf. Pannill v. Roanoke Times Co., 252 Fed. 910 (W.D. Va. 1918). See also Baker v. Keck, 13 F. Supp. 486 (E.D. Ill. 1936); Cooper v. Galbraith, 6 Fed. Cas. 472 (No. 3193) (C.C.D. Pa. 1819).

either: citizenship in another state is acquired, or until American citizenship is abandoned. An analogy for this approach is to be found in the English cases applying the *renvoi*, a conflict of laws doctrine well established in England.[38] The case of *In re O'Keefe*[39] illustrates the point. A woman of British nationality died domiciled in Italy leaving personal property in England. Under what law should her English personal estate be administered? The English court applied the *renvoi* doctrine to distribute the estate. The English conflict of laws rule is that personal property or movables, in conflict of laws terminology, are distributed by the whole law of the domicile of the decedent at the time of death. The court held that under English law the decedent was domiciled in Italy. Therefore, the court looked to the Italian law, including its conflict of laws rules. It found that under Italian law movables are distributed by the internal law of nationality, since Italy does not follow the *renvoi* doctrine. Consequently an Italian court would distribute the decedent's personal property in Italy by the law of her nationality which was British. But there is no British law of descents and distributions, the constituent parts of the British Empire or Commonwealth each having its own individual laws of descents and distributions. This is the same as in the United States where the states have such laws, there being no nationwide law on the subject. Thus it was necessary to connect this deceased British national to some political subdivision of the British Empire. To do this, the court looked for the place she was last domiciled in the empire before changing her domicile to Italy.[40] The court went back over one hundred years to place the decedent's domicile in Ireland. Her father had been domiciled in Ireland, so that was her domicile of origin. This Irish domicile of origin had not been changed until she acquired a domicile of choice in Italy.

If this approach were used, every American citizen would have a state citizenship for diversity of citizenship purposes.[41] The preferable

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[38]In re Annesley, [1926] ch. 692. See also In re Askew, [1930] 2 Ch. 259.

[39][1940] Ch. 124.

[40]The decedent was born in India in 1863; her father was born in Ireland in 1835. During her life, the decedent had been to Ireland but once for a short time, and had lived at various places in England, France and Spain until 1890, when she moved to Italy, living there until she died, intestate and unmarried, in 1937. [1940] Ch. 125-26.

[41]It would not be necessary to attribute this citizenship to the person for other purposes such as taxation, divorce, etc., any more than is done by the English courts. This is brought out in the O'Keefe case as the country of the decedent's domicile of origin no longer existed—it had become the independent state of Eire—and the law in that country was such that she was not considered a citizen.