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A Corporation's Principal Place of Business for Purposes of Diversity Jurisdiction

Recent federal legislation provides that a corporation is now a citizen of the state where it has its "principal place of business." The author of this Note discusses the scope of this phrase as it will probably be applied by the courts. He concludes that the purpose of Congress to reduce the number of diversity cases will be best effectuated if a "most gross income" test is used as the controlling factor in determining the "actual place of operations" of a corporation and, thus, its "principal place of business."

The diversity jurisdiction of the federal courts extends to cases and controversies "between citizens of different states. . . ." Historically, the term "citizen," as used by the Constitution, did not include corporations. However, the federal courts eventually developed a fiction by which they deemed a corporation, for purposes of diversity jurisdiction, to be a citizen of the state in which it was incorporated. Recently, Congress broadened this concept of corporate citizenship by amending the Judicial Code to provide that a corporation is "deemed a citizen of any state by which it has been

2. See Hope Ins. Co. v. Boardman, 9 U.S. (5 Cranch) 57, 61 (1809) ("a body corporate as such cannot be a citizen, within the meaning of the constitution. . . ."); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) ("a corporation . . . is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States. . . .") The court held in Deveaux, however, that since all the stockholders of the plaintiff bank had citizenship diverse from that of the defendant, the suit could be brought in the federal court in the name of the corporation.
3. After the Supreme Court held in Bank of the United States v. Deveaux, supra note 2, that a corporation was not a "citizen" within the meaning of the Judicial Code of 1789, the Court held in 1844, without reversing Deveaux, that a corporation was deemed a citizen of the state in which it was incorporated, regardless of the citizenship of its stockholders. Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497 (1844). In an effort to harmonize these two decisions, the Court later held that the stockholders of the corporation were conclusively presumed to be citizens of the state in which the corporation was incorporated, and therefore, that the corporation was to be considered a citizen of the state in which it was incorporated. Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314, 319 (1854). The cases are reviewed in St. Louis & S.F. Ry. v. James, 161 U.S. 545 (1896). For a thorough discussion of this area, see McGovney, A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts, 56 Harv. L. Rev. 853, 863–83 (1943).
incorporated and of the state where it has its principal place of business."  

This Note will 1) examine the congressional purpose in adopting the phrase "principal place of business"; 2) analyze the two tests—"home office" and "actual place of operations"—which will probably be used to determine the location of a corporation's principal

4. 28 U.S.C. § 1332(c) (1958). (Emphasis added.) Other significant changes are set out below. 28 U.S.C. § 1331 (1958) now reads:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1332 (1958) now reads:

(a) The district courts shall have original jurisdiction of all civil actions wherein 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;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1445(c) (1958) was added:

(c) A civil action in any State court arising under the workmen's compensation law of such state may not be removed to any district court of the United States.

Because a corporation is now a citizen of both the state of its incorporation and the state where it has its principal place of business, many corporations are likely to have two citizenships. Under the law prior to the amendment, a similar situation arose when the corporation was incorporated in more than one state. These multistate corporations were treated, however, as citizens only of the state in which the suit was brought, if they were incorporated in that state. See, e.g., Jacobson v. New York, N.H. & H.R.R., 206 F.2d 153 (1st Cir. 1952), aff'd per curiam, 347 U.S. 909 (1953). Thus, if a business incorporated in states A and B were sued in state A by a citizen of state A, no diversity existed since the corporation was deemed to be a citizen of state A —the state in which the suit was brought. See id. However, if the corporation was sued in state A by a citizen of state B, there was diversity, even though the corporation was also incorporated in state B. See, e.g., Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270 (1871). However, if the suit were brought by a citizen of either state A or B in a third state, C, diversity did not exist. In such a case the courts applied the doctrine of Strawbridge v. Curtiss, 1 U.S. (3 Cranch) 267 (1806), which required complete diversity—that the citizenship of all the plaintiffs had to be diverse from that of all the defendants. See Walker v. New York, N.H. & H.R.R., 127 F. Supp. 366 (S.D.N.Y. 1955); Baltimore & O.R.R. v. Thompson, 8 F.R.D. 96 (E.D. Mo. 1948). In two cases decided since the amendment, district courts have refused to apply the "state of suit" rule to multistate corporations
place of business; and 3) consider which is the more satisfactory test, consistent with the congressional purpose and the practical needs of litigants.

I. CONGRESSIONAL PURPOSE

The primary purpose of Congress in broadening the concept of corporate citizenship was to reduce the workload in the federal district courts. Since 1941, the number of private civil cases in the situation where a corporation has a dual citizenship because it is incorporated in one state and has a principal place of business in another. Instead, the respective courts used the doctrine of Strawbridge to declare that in any case where a citizen of one of the states in which the corporation is deemed a citizen sues, or is sued by, the corporation, diversity does not exist. Harker v. Kopp, 172 F. Supp. 180 (W.D. Ill. 1959); Jaconski v. McCloskey, 167 F. Supp. 537 (E.D. Pa. 1958). Jaconski is discussed in 27 Geo. Wash. L. Rev. 592 (1959); 4 Vill. L. Rev. 451 (1959). For a full treatment of this subject see Comment, 58 Colum. L. Rev. 1287, 1294-99 (1958).

For other recent comments on the amendment, see Cowen, Federal Jurisdiction Amended, 55 Va. L. Rev. 971 (1958); Friedenthal, New Limitations on Federal Jurisdiction, 11 Stan. L. Rev. 213 (1959); Note, 46 Calif. L. Rev. 881 (1958); Note, 8 Clev.-Mar. L. Rev. 361 (1959); Note, 53 St. John's L. Rev. 179 (1958); Comment, 58 Colum. L. Rev. 1287 (1958); Comment, 72 Harv. L. Rev. 451 (1958); Comment, 55 Nw. U.L. Rev. 637 (1958); Comment, 33 Tul. L. Rev. 167 (1958); Comment, 13 U. Miami L. Rev. 68 (1958).

According to Congress, the increase in the amount-in-controversy requirement would result in a 38.2% decrease in the number of contract cases, and an estimated 10% in the tort cases. See 1958 S. Rep. 5. The anticipated decrease in diversity cases affected by the change in corporate citizenship in various districts ranged from 3.6% to 23.5%. See id. at 14.

The provision for costs in § 1331(b) and § 1332(b) was inserted to make the $10,000 limitation a forceful one and to prevent inflated claims. 1958 S. Rep. 5. But note the difference in language of the sections. Section 1332(b) applies only to the "plaintiff who files the case originally in the Federal courts. . . ." while § 1331(b) does not contain a similar restriction, and thus could be applied in the case where the defendant removes the case to the federal court. There is some evidence that this was merely a legislative oversight. See Comment, 58 Colum. L. Rev. 1287, 1291, n.31 (1958); Comment, 72 Harv. L. Rev. 391, 392 (1958).

The provision forbidding the removal of suits based on state workmen's compensation statutes was inserted because:
The removal of workmen's compensation cases from the State courts to the Federal courts adds to the already overburdened docket of the Federal courts, the congestion in some of which is now most deplorable. . . . When [these
filed in the federal district courts has increased 75 per cent. However, the number of cases based on diversity of citizenship has increased 290 per cent in the same period. Approximately 60 per cent of all diversity cases involved corporations. By enlarging the scope of corporate citizenship Congress attempted to close the federal judicial doors, in some situations, to the parties who were most often involved in diversity litigation.

The heavy influx of diversity cases involving corporations stemmed from the fact that, prior to the amendment, a corporation was deemed a citizen only of the state in which it was incorporated. Because a corporation often does not incorporate in a state for the purpose of doing business there—but rather for reasons such as convenience, more advantageous tax laws, or more liberal corporation statutes—suits involving the corporation are not as likely to be removed to the Federal court the venue provisions of State statute[s] cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of trial in Federal court.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total diversity cases commenced</th>
<th>Total cases</th>
<th>Percentage of diversity cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>13,124</td>
<td>7,520</td>
<td>57.3</td>
</tr>
<tr>
<td>1951</td>
<td>13,474</td>
<td>7,999</td>
<td>59.4</td>
</tr>
<tr>
<td>1955</td>
<td>19,121</td>
<td>11,054</td>
<td>57.8</td>
</tr>
<tr>
<td>1956</td>
<td>20,524</td>
<td>11,881</td>
<td>57.9</td>
</tr>
</tbody>
</table>

When this table is compared to the material cited note 8 supra, it appears that of the 12,782 cases in which a corporation was a party in 1956, 11,881 of them involved a nonresident corporation doing business in that state.


11. For example, the incorporators of a corporation may find it more convenient to incorporate in the state in which they reside, even though they intend that the corporation conduct all its business in another state.


13. For example, Delaware has liberal corporation statutes. Congress believed this fact to be a "matter of common knowledge." Ibid. See generally CORPORATION TRUST CO., WHY CORPORATIONS LEAVE HOME (1929).

In a hearing before the House Committee of the Judiciary in 1932 on a proposal
arise in the state of incorporation as they are in the state or states where the corporation has contact with the public.\footnote{This Note takes the position that the number of suits involving the corporation varies with the amount of contact the corporation has with the public in a given state. It is in the state where the corporation has its most employees and agents that torts are likely to be committed. It is in the state where the physical assets of the corporation are concentrated that physical defects in the plant and equipment will result in injuries to third persons. It is in the states where the corporation purchases its raw materials and sells its finished product that opportunities for contract and warranty actions will arise.\superscript{14}} The practical result under the prior rule very often was that a corporation and a citizen of the state in which the corporation conducted its business were treated as citizens of different states.\footnote{When sued in a court of the state in which it is incorporated, the corporation cannot remove the case to the federal court. See 28 U.S.C. § 1441 (1958), which provides in part: (b) Any civil action of which the district courts have original jurisdiction founded on a claim arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be 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. Thus a corporation cannot invoke diversity when it is sued in the state in which it is incorporated, even though the plaintiff is not a citizen of that state. However, a corporation can bring the suit in the federal court in the state where it is incorporated if the defendant is a citizen of a different state.\superscript{17}} Thus, the corporation was able to invoke diversity jurisdiction in all cases except when suit was brought against it in the state where it was incorporated,\footnote{Of course, no diversity exists when the suit is between the corporation and a citizen of the state in which the corporation is incorporated, no matter where the suit is brought.\superscript{17}} or when it sued, or was sued by, a citizen of the state of its incorporation.\footnote{This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State. . . . This circumstance can be hardly considered fair because it gives the privilege of a choice of courts to a local corporation simply because it has a}

A secondary reason for adopting the amendment was to obviate the unfairness caused by the situation where a corporation with a foreign charter was able to invoke diversity while a similar corporation with a local charter, or an individual citizen, was denied an equal opportunity to gain access to the federal courts.\footnote{This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State. . . . This circumstance can be hardly considered fair because it gives the privilege of a choice of courts to a local corporation simply because it has a}
Congress aimed the phrase "principal place of business" primarily at the smaller corporation, whose business was centered in one state, but which was incorporated in another state.\(^1\) The purpose of directing the phrase at these local corporations with foreign charters was two-fold. First, a substantial reduction in the number of cases based on diversity could be achieved.\(^2\) Second, their advantage of superior access to the federal courts would be eliminated.\(^2\) These results could be accomplished without the danger of subjecting these corporations to the proverbial prejudice of local courts and juries exhibited toward citizens of other states—which diversity was historically designed to prevent\(^2\) —since local corporations

\[\text{chart from another state, an advantage which another local corporation that obtained its charter in the home State does not have. . . .}\]

It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen. Also, see id. at 17-21; 1957 Hearings 11-14.

Most writers on the subject have declared that there may be definite advantages in litigating in the federal courts. These are usually listed as 1) to obtain a court differently constituted than the state court; 2) federal judges are appointed and have life tenure, which differs from the practices in many states; 3) the federal courts require a unanimous verdict; 4) a federal jury is drawn in a different manner than a state court jury; 5) federal jurisdiction permits a suit in a court where distance may be a disadvantage to the other party. See, e.g., Warren, Corporations and Diversity Jurisdiction, 19 VA. L. Rev. 661, 687 (1933); 1958 S. REP. 18-21.

Before Erie R.R. v. Tompkins, 304 U.S. 64 (1938), it was often possible for a corporation to obtain a result different than under applicable state law by removing the case to the federal court or by invoking federal jurisdiction initially. For the most flagrant example of this, see Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928). See also Irvine Co. v. Bond, 74 Fed. 849 (S.D. Cal. 1896). See generally Howlett, Creating a Diversity of Citizenship to Obtain Federal Jurisdiction, 1 Rocky Mt. L. Rev. 108 (1928). Thus, not only was it desirable to invoke federal jurisdiction from a procedural standpoint—substantive results sometimes depended upon the existence of diversity.


20. Since it was difficult to collect statistics of the location of a corporation's principal place of business, no very indicative figures were available. Nonetheless, from the information Congress had on hand, they believed "that a small but substantial number of cases will be affected." 1958 S. REP. 14. The information consisted of surveys taken by clerks of five district courts, and showed that the percentage of decrease varied from 3.6% in the southern district of Texas to 23.5% in the western district of Michigan. ibid.

See note 5 supra for more recent indications of the effectiveness of the amendment.

21. Ibid. Since the amendment is designed to treat a local corporation with a foreign charter as a citizen in the state where it conducts its business, its access to the federal courts will be the same as if it received a charter from that state.

22. See 1958 S. REP. 4, where the Senate Committee states:

The underlying purpose of diversity of citizenship legislation (which incidentally goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789) is to provide a separate forum for out-of-State citizens against the prejudice of local courts and local juries by making available to them the benefits and safeguards of the Federal courts. Whatever the effectiveness of this rule, it was never intended to extend to
with foreign charters are not likely to be treated any differently from local corporations with local charters.\textsuperscript{23}

Congress believed, however, that while local corporations with foreign charters were not open to local prejudice, nationwide corporations were subject to such prejudice, and to deny these corporations access to the federal courts would work a hardship upon them.\textsuperscript{24} Thus, the phrase was not intended to "eliminate from diversity ... those corporations which do business over a large number of states, such as railroads and insurance companies whose businesses are not localized in one particular state."\textsuperscript{25} However, Congress did intend that even these corporations are to be deprived of diversity in the one state where they carry on their principal business.\textsuperscript{26}

Although Congress had been considering the problem of corpora-

local corporations which, because of a legal fiction, are considered citizens of another State.


When the ordinary man who does business with a corporation rarely knows where it is formed, can one maintain seriously that there is prejudice against the corporation in every state except that one whose law gave it being? \textit{Ibid.} Ball then goes on to show that the prejudice against a corporation, if any, is economic in nature, rather than geographic. See \textit{id.} at 361.

24. 1958 S. REP. 18, See 1957 Hearings 11-14. In reply to the proposal that diversity should be abolished altogether, the Judicial Conference formulated the following argument which answers Ball's attack on diversity:

It has been argued by those who would abolish the Federal diversity jurisdiction that in our modern highly integrated society there no longer exists the prejudice of the courts of one state against the parties who are citizens of other States, which was one of the basic reasons for the establishment of the diversity jurisdiction when the Federal courts were first created. Although from the nature of the problem, there can be no objective evidence as to the truth of this assertion, there is a great bulk of expert opinion from those who litigate in the courts that local prejudice continues to exist, and that the Federal courts are in truth a strong protection against it.

1958 S. REP. 18.

The “great bulk of expert opinion” referred to probably came from the Congressional hearings held in 1932 and 1933 on a bill which declared a corporation to be a citizen of every state in which it did business. See S. REP. No. 530, 72d Cong., 1st Sess. (1932); Hearings on Limiting the Jurisdiction of the Federal Courts Before the House Committee on the Judiciary on H.R. 10,594 and H.R. 11,508, 72d Cong., 1st Sess., ser. 12 (1932); Hearings Before the Senate Subcommittee of the Committee of the Judiciary on S. 937 and S. 939, 72d Cong., 1st Sess. (1932).


26. “Even . . . [those corporations which do business over a large area] would be regarded as a citizen of that one of the States in which was located its principal place of business.” \textit{Ibid.}
tions and diversity for many years, no acceptable proposal had been presented until the Judicial Conference suggested the phrase "principal place of business" as a means of limiting the use by corporations of diversity jurisdiction. Initially, the Judicial Conference proposed that a corporation should be declared a citizen of the state from which it derived fifty per cent of its gross income. This proposal, if adopted, would have succeeded in excluding only local corporations with foreign charters from diversity jurisdiction. The proposal would not have excluded a large nationwide corporation; it is doubtful whether such a corporation would do fifty per cent of its business in any one state. However, the phrase "principal place of business" was intended to exclude such a corporation in one state. The Judicial Conference rejected the fifty per cent requirement in 1952 in favor of the phrase "principal place of business" because this provides a simpler and more practical formula than our original suggestions which would have foreclosed the jurisdiction in States where more than half of the corporate gross income is received. Our present proposal to rest the matter upon the principal place of business of the corporation has precedent in the jurisdiction provisions of the Bankruptcy Act . . . and so provides a more familiar criteria, while at the same time preserving the purpose of our previous recommendations to prevent frauds and abuses of the Federal jurisdiction by corporations which are primarily local in character.

Congress adopted the proposal of the Judicial Conference, emphasizing the availability of precedents which had interpreted the phrase "principal place of business" in the context of the Bankruptcy

27. For example, in 1932, a bill making a corporation a citizen of every state in which it did business was proposed and rejected. See Comment, 31 Minn. L. Rev. 54 (1932); 1957 Hearings 10-11, where twenty-four such bills are listed.

28. The Judicial Conference is a council of judges called by the Chief Justice of the United States pursuant to 28 U.S.C. § 331 (1958). The Conference's Committee of Jurisdiction and Venue was largely responsible for suggesting the changes made by the amendment.

29. The proposal, dated March 12, 1951, provided:
For the purpose of this section and of section 1441 of this title a corporation shall be deemed a citizen of any State by which it has been incorporated. For these purposes it shall also be deemed a citizen of a State from business transacted within which it derived more than half of its gross income during the fiscal year last preceding the commencement of the action, if it is brought under this section, or preceding the filing of the petition for removal under section 1446. 1958 S. Rep. 26.

30. See note 26 supra.

31. 1958 S. Rep. 31. This action was taken in September of 1951 upon a suggestion of the judges of the Tenth Circuit, and the Committee of Jurisdiction and Venue amended its initial recommendations to read as the amendment currently reads. See id. at 30–31.
Act. Since Congress apparently believed that the cases decided under the Bankruptcy Act would furnish adequate tests for determining a corporation's principal place of business, a careful examination of these tests is necessary.

II. TESTS FOR DETERMINING A CORPORATION'S PRINCIPAL PLACE OF BUSINESS

Under section 11 of the Bankruptcy Act, a corporation may be adjudicated a bankrupt in the district where its "principal place of business" was located for the preceding six months. For purposes of the Bankruptcy Act, the courts have used two tests to determine where the principal place of business of the corporation is located. Some courts hold that the principal place of business is where the "home office" is established, while others hold that it is the location of the "actual place of operations."

A. DESCRIPTION OF THE TESTS

Home office test

In determining the location of a corporation's home office, the factors considered as significant are the location of the managing offices, the place where the stockholders live or regularly meet, the place from which the financial affairs of the corporation are centered or controlled, and the location of the record, stock, or minute books of the corporation. The courts have not considered as significant the amount or nature of the business which the company does in a particular state.

32. The proposal to rest the test of jurisdiction upon the 'principal place of business' of a corporation has ample precedent in the decisions of our courts and in Federal statute[s] such as the provisions of the Bankruptcy Act. There is thus provided sufficient criteria to guide courts in future litigation under the bill.


34. See, e.g., Shearin v. Cortz Oil Co., 92 F.2d 855 (5th Cir. 1937); Burdick v. Dillon, 144 Fed. 737 (1st Cir. 1908); In re Portex Oil Co., 30 F. Supp. 198 (D. Ore. 1939); In re R. H. Pennington & Co., 228 Fed. 388 (W.D. Ky. 1915).

35. See, e.g., Dryden v. Ranger Refining & Pipe Line Co., 280 Fed. 257 (5th Cir. 1929); Continental Coal Corp. v. Rozelle Bros., 242 Fed. 249 (6th Cir. 1917); Home Powder Co. v. Geis, 204 Fed. 568 (8th Cir. 1913); In re Tygarts River Coal Co., 203 Fed. 178 (N.D.W.Va. 1913).

36. See, e.g., Shearin v. Cortz Oil Co., 92 F.2d 855 (5th Cir. 1937) (main office where the officers worked and the directors met held to be corporation's principal place of business).

37. See 1 COLLIER, BANKRUPTCY § 2.19(2) (14th ed. 1956).

38. See Burdick v. Dillon, 144 Fed. 737 (1st Cir. 1908); In re Portex Oil Co., 30 F. Supp. 198 (D. Ore. 1939).

39. See Shearin v. Cortz Oil Co., 92 F.2d 855 (5th Cir. 1937); 1 COLLIER, BANKRUPTCY § 2.19(1) (14th ed. 1956).

40. See cases cited note 34 supra.
The home office must be more than the mere nominal office sometimes required by the laws of the incorporating state; it must be the place from which the direction and destiny of the business enterprise are controlled. For example, in Burdick v. Dillon the corporation was in the business of quarrying slate. It had quarries and a slate mill in New York and Vermont but "supreme direction and control" were exercised from an office located in Boston, where the officers and directors lived and met, and where the great bulk of the sales were transacted. The court held that the principal place of business of the corporation was in Massachusetts and not in one of the other two states where the actual quarrying and milling operations were conducted.

Actual place of operations

The courts which use the test of actual place of operations emphasize the location of the mines, factories, or other production facilities or activities of the corporation. In Dryden v. Ranger Refining & Pipe Line Co., the bankrupt was a Delaware corporation engaged in the business of producing, transporting and selling crude oil. The managing offices of the corporation, along with some of the oil wells and other physical assets of the company were located in Kansas City, Missouri. The court held that the principal place of business of the corporation was not in Missouri, but rather in Texas, because the property owned by the corporation in Texas was worth five times as much as that located in Missouri; the production of gas and oil was ten times as great, and the gross revenue was four-and-one-half times as large. In In re Tygarts River Coal Co. the home office
of the corporation was in Philadelphia. Its principal asset was a coal mine in West Virginia. The court held that the corporation's principal place of business was in West Virginia stating that the managing office was merely "incidental to and dependent on the . . . mining operation. . . ." 48

In the bankruptcy cases where the corporation had carried on more than one activity in more than one state, 49 the courts inserted a preliminary step before they applied the test of actual place of operations. The court first determined which of the activities of the corporation was its primary one, and then determined where that primary activity was located. 50 For example, in In re DeSoto Crude Oil Co., 51 the corporation was engaged in the business of operating a pipeline in Texas and selling oil in Louisiana. The court concluded that the primary business of the corporation was selling oil, not operating a pipeline. Since the business of selling oil was concentrated in Louisiana, the actual place of operations was held to be in that state. 52

B. Analysis of the Tests

**Home office test**

The home office test will effectively exclude most local corporations with foreign charters from diversity jurisdiction. This is so because the home office of such a corporation is likely to be located in the same state as where it has its primary contacts with the public 53 — the state where most suits involving the corporation are filed. 48. Id. at 180. The court recognized however, that "some of the federal courts have construed this phrase 'principal place of business' to be the place where its chief officers reside and maintain an office. . . ." Ibid.

49. See notes 51-52 infra.

50. A similar approach was sometimes used by a court which was deciding whether to adopt the home office test or the actual place of operations test. See In re Tygarts River Coal Co., 203 Fed. 178, 180 (N.D.W.Va. 1913).

51. 35 F. Supp. 1 (W.D. La. 1940).

52. A similar case was Matter of Devonian Spring Co., 272 Fed. 527 (N.D. Ohio 1920). In this case the bankrupt was incorporated in Ohio and the charter named an Ohio city as its principal place of business. The business of the corporation was the welling and bottling of artesian well water, and was centered in Ohio. However, an officer of the corporation sold the water primarily in Kentucky. The court treated the activity of selling as separate from the welling and bottling operation, and held that the primary activity of the corporation was bottling water. Selling was merely incidental. Since the business of bottling was located in Ohio, the principal place of business of the corporation was in that state. This case has been cited as adopting the home office test. See 1 COLLIER, BANKRUPTCY § 2.19(2) n.8 (14th ed. 1956).

The recital of the location of the corporation's principal place of business in the charter is not controlling, although it places the burden of proof on the challenger to show that the principal place of business is in a state other than that which is recited in the charter. See id.

53. A local corporation which conducts most of its business in one state would have little reason for conducting that business from a foreign home office far removed from the business activities of the corporation.
likely to arise. For example, a large department store located in Minnesota might be incorporated in Delaware, but it would do most of its business in Minnesota. If the corporation were deemed a citizen of Minnesota, because its home office was located there, the purpose of Congress would be accomplished since the corporation would be effectively excluded from diversity jurisdiction, thereby reducing to some extent the number of cases in the federal courts.

In most cases it would be as easy to determine the location of the home office of a large nationwide corporation, such as a large railroad or an insurance company, as it would be to determine the home office of a local corporation. However, if the home office test is used to determine the principal place of business of a nationwide corporation, it is unlikely that the number of diversity cases will be decreased to the extent hoped for by Congress. There is not necessarily a relationship between the location of the home office of such a corporation and the place where the most suits are likely to arise.

For example, suppose that an insurance company which sells crop insurance has its home office in Ohio. Most suits involving the corporation are likely to arise in the agricultural states of the Midwest. Hence, to apply the home office test to such a corporation would not serve to substantially decrease the opportunities of such a corporation to invoke diversity jurisdiction.

The application of the home office test to a nationwide corporation is even less satisfactory when, because of the corporation's management structure, the location of the corporation's home office cannot be ascertained with certainty. For example, suppose that a corporation, which is engaged in the general activity of processing grain, has separate divisions located in different states which manufacture flour, breakfast cereal, and livestock feed. The activities of the separate divisions are not coordinated from any readily identifiable home office. If the home office test were applied, the managing...
office of the most important activity would probably be selected as the home office.\textsuperscript{59} However, it might be difficult to prove initially the location of the most important activity of the corporation, and even if this could be established, there is no certainty that the state where the selected office is located will be the place where the corporation has its primary contacts with the public.

**Actual place of operations test**

The actual place of operations test, like the home office test, would effectively prevent the invoking of diversity jurisdiction by the local corporation with a foreign charter, since the place of actual operations is where such a corporation has its primary contacts with the public. Moreover, the actual place of operations test would effectively accomplish the congressional purpose even though the home office of a local corporation happened to be in another state; the actual place of operations of a corporation has a direct relation to the state where the most suits involving the corporation are likely to arise.

The actual place of operations test, like the home office test, would exclude a large nationwide corporation from diversity in one state.\textsuperscript{60} However, unlike the home office test, the actual place of operations test would most likely exclude such a corporation from diversity in the state where most suits involving it would probably arise, since it would eliminate the corporation from the state where it has its primary contacts with the public.\textsuperscript{61}

It would appear therefore, that the test of actual place of operations is the more satisfactory one for determining a corporation's principal place of business, since it will result in the greatest reduction in the number of diversity suits. However, there is a serious drawback to applying the test to large nationwide corporations because it may discourage some litigants from justifiably resorting to the federal courts. By amending the Judicial Code to provide that a corporation is a citizen of its principal place of business, Congress did not intend to discourage litigants from invoking diversity in any case where the citizenship of the parties is actually diverse\textsuperscript{62} under the standards set out by Congress. But, the actual place of operations test may have such an effect because of the problems involved in proving that diversity exists.

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\textsuperscript{60} See text accompanying notes 53 & 54 supra.
\textsuperscript{61} See text accompanying notes 55 & 56 supra.
The party who asserts that federal jurisdiction exists has the burden of production and the burden of persuasion. The mere allegation in the complaint or in the petition for removal that diversity exists is sufficient to confer jurisdiction on the court initially. However, if this allegation is challenged by a motion to dismiss on the ground of lack of jurisdiction, the asserting party must convince the court of the existence of diversity. Even if the allegation is not challenged, the court may, on its own motion, dismiss for lack of jurisdiction at any stage in the proceedings if the record does not show that diversity exists. Prior to the amendment, even though the allegation of the corporation's citizenship was challenged, the fact issue was easily resolved because it only entailed a determination of where the corporation was incorporated. However, if the actual place of operations test is used, the fact issue that is presented if the allegation of jurisdiction is challenged is not so easily resolved. It would entail the proving of several factors, each of which requires the accumulation of a substantial amount of evidence.


Although the above cases did not distinguish between the burden of first production and the ultimate burden of persuasion, it is likely that the asserting party has both. Since the mere allegation in the complaint that diversity exists is enough to confer jurisdiction on the court, a party has probably met the burden of first production by alleging in the complaint that diversity exists. See note 64 infra. For a general discussion of the burden of production and the burden of persuasion see McCormick, Evidence § 306-07 (1954).

64. See, e.g., Gordon v. Third Nat'l Bank, 144 U.S. 97 (1892).

65. See Fed. R. Civ. P. 12(b), which provides in part: "the following defenses may at the option of the pleader be made by motion; (1) lack of jurisdiction over the subject matter. . . ."

66. See Fed. R. Civ. P. 12(h), which provides in part: "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action."

The action may be dismissed even at the appellate court level. The most obvious case where this occurred was in McNutt v. General Motors Acceptance Corp., 298 U.S. 127 (1936), where the issue of jurisdiction had never been considered by the seven lower courts which heard the case. The Supreme Court dismissed for lack of jurisdiction on their own motion.


68. Fed. R. Civ. P. 84 provides: "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."

When an allegation such as the one set out above was challenged, a certified copy of the corporation's charter would suffice to end the controversy. It is likely that under the amendment, the complaint should now include an allegation of the corporation's principal place of business.

69. See text accompanying notes 45-52 supra. Also, since the federal courts are not bound by decisions in other circuits, and since the principle of res judicata would not be applicable, a corporation or its opponent may be able to claim that the
For example, suppose the court considered a controlling factor in determining a corporation's actual place of operations to be the value of the physical assets of the corporation. First, the party will have to determine the various locations of the assets, which may be widely scattered throughout the country. Second, he must have satisfactory evidence to establish their value. If the nationwide corporation is the asserting party it would probably have most of the relevant information available from its business records. However, the problem faced by the corporation's adversary would be much more difficult. None of this information would be readily available to the adversary because the only source of such information is likely to be the corporation itself. If the corporation refuses to furnish the information voluntarily, the only practical alternative is resort to the federal discovery procedures. But discovery is not entirely satisfactory. The information sought is likely to be lengthy and complex, and would not add anything to the substantive cause of action. Hence, its utility might not be commensurate with the cost of discovering it. Therefore, the party would have to weigh the difficulty and expense of proving the existence of diversity against the advantages to be gained from entering the federal courts.

location of the corporation's principal place of business is elsewhere than established in a prior suit. Thus, it might be possible for a corporation to invoke diversity in a state in one case, while in another case, brought in the same state, the court could deny jurisdiction to the corporation. One solution to this problem might be to shift the burden of going forward with the evidence and the burden of persuasion to the party who objects to the location of a corporation's principal place of business which has been established in prior litigation involving the corporation.

70. There is no indication in the cases decided under the Bankruptcy Act what the proper measure of the value of the physical assets should be.

71. The books of a corporation are generally not open to the public, unless, of course, the adversary is a stockholder of the corporation. See, e.g., MINN. STAT. § 301.34(2)(5) (1957), which provides that "every shareholder . . . shall have the right to examine . . . the . . . books of account . . . and to make extracts therefrom."

72. See FED. R. CIV. P. 26(a) which provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes." FED. R. CIV. P. 34 (production and inspection of books, etc.).

Rule 26(b) provides for the scope of discovery, and states that any party may be "examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."


74. The taxation of the expenses of taking depositions as costs is a matter within the court's discretion under FED. R. CIV. P. 54(d). See Harris v. Twentieth Century-Fox Film Corp., 139 F.2d 571 (2d Cir. 1943). In practice, however, the party will probably not be fully compensated for the time and expense which discovery actually costs him.
Moreover, when a party attempts to enter the federal courts on the grounds of diversity, his opponent, as a dilatory tactic, may challenge the allegation. Whether or not the challenge is well-founded, it will necessarily take time to hear and decide the jurisdictional issue. Because of the substantial amount of information necessary to prove that diversity exists, considerable delay may ensue. This delay may serve only to harass the plaintiff, or it may harm his substantive cause of action if time is vital to the issues involved.

Also, a defendant may use the threat of challenging the allegation of jurisdiction as an effective bargaining weapon completely apart from the merits of the action. When the plaintiff is confronted with this difficult factual issue at the onset of the lawsuit, his bargaining position is less advantageous than it would otherwise be since he would have to expend considerable time and money to avoid a dismissal on jurisdictional grounds.

The requirement of proving the existence of diversity is likely to create an unfair advantage, favoring the corporate over the noncorporate litigant. The noncorporate litigant must expend time and money to secure the necessary proof. The corporation need not do this, since it has the necessary information readily available. Also, the corporation is more likely to be able to bear any expense and inconvenience involved in proving the issue. The practical result is that, even though diversity may actually exist, a noncorporate litigant will be deterred from invoking federal jurisdiction while the corporation will be able to enter the federal court if it wishes.

However, in any case where the burden of proof presents a genuine problem the unfairness occasioned by the necessity of proving the existence of diversity can be avoided. This can be done by adopting as the controlling factor in the actual place of operations test the determination of the state from which the corporation derives most of its gross income. The figures which would establish the state from which the corporation derives the most gross income would be readily available, since modern corporate accounting practices allocate income among the several states for the purposes of state income tax and other business reasons. Although it would

75. The original proposal of the Committee of Jurisdiction and Venue of the Judicial Conference was that the citizenship of the corporation be determined by reference to the state from which the corporation derived 50% of its gross income. See note 29 supra. In rejecting the proposal, there was no suggestion that it was not workable. See text accompanying note 31 supra.

76. In discussing the "50% gross income" test, the Committee of Jurisdiction and Venue stated in their report to Congress:

Difficulties of proof on this score will be rare, and in the rare cases where the line is close, the modern recordkeeping methods of most corporations, based as they are upon allocations of income among the States for State income tax
seem somewhat artificial to select any one state as the actual place of operations of a large corporation whose business is scattered somewhat uniformly over a great number of states, there is at least a strong possibility that the state from which the corporation derives its most gross income will be the state in which it has the greatest contact with the public.

However, most gross income should not be used as the sole criterion in determining a corporation's actual place of operations in all cases since, in some circumstances, other factors may more accurately portray where most suits involving the corporation would be likely to arise. For example, if a corporation has its production facilities concentrated in one state, but carries on its sales or other business activities nationwide, the state from which it derives its most gross income may not be the state where most suits involving it are likely to arise. An illustration of such a corporation would be a tobacco company, which concentrates its production in North Carolina, although its cigarettes are sold throughout the country. Such a corporation is likely to derive most of its gross income from a heavily populated state such as New York; however, most suits involving the corporation are likely to arise in North Carolina where most of the employees are concentrated and the physical assets of the corporation are located. In this situation it would not be necessary to use most gross income as a controlling factor to solve the problem of proof, since it is likely that the state where the physical assets of the corporation are located—the actual place of operations—will be easily ascertainable, and the problem of proof thus a minor one. To the extent that this location cannot be easily ascertained, the most gross income criterion would assume proportionately greater importance in determining the state of actual place of operations.

Conclusion

The most satisfactory method for determining the principal place of business of a corporation is the actual place of operations test since it focuses on the state where the corporation has its primary contacts with the public and thus on the state where the greatest number of suits involving the corporation will probably arise. By declaring a corporation to be a citizen of that state, the greatest decrease in the number of diversity cases can be achieved. Most gross income would be desirable as the controlling factor in all cases, except those in which this criterion clearly would not accurately reflect the state where most suits involving the corporation

purposes, will provide ready means for establishing the basis of Federal jurisdiction.
will arise. If this is done, the purpose of Congress will be effectuated since the number of diversity cases will be substantially reduced, yet litigants will not be discouraged from justifiably resorting to the federal courts.