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Federal Courts--Diversity Jurisdiction by Assignment--Improper or Collusive.

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may be admissible, within proper limits, by analogy to rules governing the keeping of books and records generally. *Cline v. Evans*, 127 W. Va. 113, 31 S.E.2d. 681 (1944). In the later case of *Keller v. Wonn*, 140 W. Va. 860, 87 S.E.2d. 453 (1955), the court, without spelling out a rule applicable to all entries in hospital records, was of the opinion that routine entries and perhaps ordinary diagnostic findings, based upon objective data and not presenting a question of obvious difficult interpretation, should be admitted. For a comparison of the existing West Virginia law and the provisions of the Uniform Act, see 60 W. VA. L. REV. 321, 328 (1958).

The conclusions of the majority of the court in principal case seem to be in accord with the present day liberal construction of the shop-book rule. The West Virginia Supreme Court has taken steps in this direction but it would appear that the adoption of the Uniform Business Records as Evidence Act would greatly clarify this area of admissibility of evidence.

Eugene Triplett Hague, Jr.

**Federal Courts—Diversity Jurisdiction by Assignment—
Improper or Collusive.**

P was sole stockholder of an insolvent corporation. The corporation assigned to *P* all claims which the corporation had or might have against *D*. In consideration thereof, *P* had paid, or orally agreed to pay, a substantial part of the corporation's indebtedness. The corporation and *D* were of like citizenship while *P* was a citizen of another state. The assignment was made for the purpose of gaining admission to the federal court on diversity. The trial court held that it did have jurisdiction, but certified the question to the circuit court as one where there was "substantial grounds for difference of opinion". *Held*, affirmed. The assignment was not "improper or collusive" within the meaning of 62 Stat. 935 (1948), 28 U.S.C. § 1359 (1958), because *P* had paid, or agreed to pay, the debts of an insolvent corporation as consideration for the assignment. Until the time of the challenged assignment *P* was not the sole owner of the claim against *D* and was not the real party in interest. *Bradbury v. Dennis*, 310 F.2d 73 (10th Cir. 1962).

As the instant case is another example of an assignment that is not "collusive or improper", even though it was made for the

purpose of obtaining diversity jurisdiction, the question arises as to what is considered collusive? From the instant case it would seem that so long as there is consideration given, the assignment would meet the standard of a "proper" assignment, irrespective of the reason for it.

The assignee clause was first enacted in the original Judiciary Act of 1789. The history of the clause shows that its purpose and effect at the time of its enactment was to prevent the conferring of jurisdiction on the federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist. *Sowell v. Federal Reserve Bank*, 268 U.S. 449 (1925). Thus, under the original assignee clause if a citizen of one state had a claim against another, who was also a citizen of that same state, he could not transfer that claim to a citizen of another state in order to obtain diversity of citizenship. The purpose of the assignee clause was to prevent, by mere colorable assignment to a non-resident, easy access to the federal courts on the basis of diversity of citizenship where this access would not have been available to the assignor. *Joseph Miele Const. Co. v. City of Niagara Falls*, 21 F. Supp. 442 (W.D. N.Y. 1937). The court in the *Joseph Miele Const. Co.* case was referring to the assignee clause as it existed until its repeal in 1948. However, at this time, the federal courts would grant jurisdiction even though the subject matter of the suit had been transferred for the purpose of giving jurisdiction, providing there had been a bona fide sale and transfer by which the transferee became the real owner and thereby the party to the suit. *Barney v. Baltimore*, 73 U.S. 280 (1868). Where a chose in action was transferred to a non-resident for value, the interest of the assignor entirely ceasing, the fact that one of the purposes of the transfer was to create a diversity of citizenship so as to bring the case within the jurisdiction of the federal courts did not render the transaction collusive. *Cross v. Allen*, 141 U.S. 528 (1891).

The assignee clause did not refer to suits upon new and original contracts and promises, but referred rather to suits upon assigned choses in actions. While the term "chose in action" is one of all inclusive meaning and in one sense embraces all rights of action, to give such a comprehensive meaning to the term would have given the assignee clause a far wider scope than was necessary to achieve its objective. *Brown v. Flecher*, 235 U.S. 589 (1915). Thus a transfer of a property interest did not give rise to a "chose in ac-

tion" as this term was used in this statute. *Peterson v. Sucro*, 93 F.2d 878 (4th Cir. 1938).

As the assignee clause dealt with the bona fide assignee there has been much litigation to determine the assignments which should or should not be within the purview of the clause. Thus the courts have thought it advisable to limit the term "chose in action" and exclude from its scope (1) an implied in law duty or promise, and (2) a transfer of a property interest, and to exclude an assignment by operation of law from the coverage of the clause. H. R. Rep. No. 308, 80th Cong., 2nd Sess. (1948).

Until the repeal of the assignee clause by the Judicial Code and Judiciary Revision Act of 1948, the assignee clause restricted, sometimes severely, federal jurisdiction based upon diversity and alienage. 3 MOORE, FEDERAL PRACTICE ¶ 17.06 (2d ed. 1948). The assignee clause said that, in addition to looking to the citizenship of the assignee, the real party in interest, the court must also look to the citizenship of his assignor. In other words, in order for the assignee-plaintiff to bring his action in federal court his assignor must also have had the right to do so. Thus, in cases coming within the restriction of the clause there must have been jurisdiction to support the assignee's case and a showing that there would have been jurisdiction if the assignor had brought the action rather than the assignee. 36 Stat. 1091 (1911), 28 U.S.C. § 41 (1) (1940).

Since the adoption of the *Erie* doctrine, requiring the federal court to apply the same substantive law that is applied by the highest state court in which it sits, the most obvious reason for obtaining federal jurisdiction, that is, for a different rule of law, has been removed. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Nevertheless, there are still inducements to carry litigation to the federal courts. These inducements could involve the application of different procedure rules which would give the plaintiff a substantial advantage, a more liberal jury selected over a wider area, or the speed in which a particular court may resolve a case.

The assignee clause was omitted when the Federal Judicial Code was revised in 1948. Judiciary and Judicial Procedure Act of 1948, 62 Stat. 992. The difficulty encountered in construing the clause had engendered criticism of that provision. See note, 35 ILL. L. REV. 569 (1941). The 1948 change made it possible for the assignee to resort to the federal courts without regard to the citizenship of his assignor. However, a limitation remains in that an

assignee may not be "improperly or collusively" joined or made a party in order to obtain federal jurisdiction. The assignee must have a real party interest in the claim before he may obtain federal jurisdiction. But, since it has long been held that where there is an actual sale and transfer of the subject matter of the suit, the fact that it was made for the purpose of giving jurisdiction to the federal court is immaterial, the question arises as to what is "collusive"? See *Lehigh Min. & Mfg. Co. v. Kelly*, 106 U.S. 327 (1895).

The code in 62 Stat. 935 (1948), 28 U.S.C. § 1359 (1958), states that, "a district court shall not have jurisdiction of a civil action in which any party by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of the court". It would seem that the federal courts have been very liberal in allowing claims to be transferred. It was held in a recent case that the fact the party plaintiff had been solicited to bring the suit, and had been indemnified against liability for costs and fees was not enough to make a case collusive so as to deprive the federal court of jurisdiction. *Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co.* 204 F. Supp. 83, (D. Conn. 1962).

The federal courts in their definitions of "collusively" and "improperly" have given the words a very narrow interpretation. It has been stated that the term "collusion" indicates a secret agreement and co-operation for a fraudulent purpose, but the use of a state statute to obtain diversity of jurisdiction even though the object might be a high verdict in a federal court is not "collusive" within the meaning of the section. *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3rd Cir. 1959). The same court defined the word "improperly" as connoting impropriety, but said it was not intended to prohibit the creation of federal diversity jurisdiction where a resident administratrix in a death action resigned and a non-resident administrator was appointed for the express purpose of creating diversity of citizenship between the parties and jurisdiction of the federal court. *Corabi v. Auto Racing, Inc.*, *supra*.

From these cases, it would seem that the phrase "improperly or collusively made or joined" is meaningless in light of the interpretation the courts have given it. Perhaps the Congress should eliminate the section altogether and allow admission into federal courts to any party who has a right to bring an action, or if Congress does not wish to do this it should rewrite the statute and define what it means by improper and collusive.

Earl Moss Curry, Jr.