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CONCLUSION

The fundamental issue before the court in *Child* was simply whether dedication of a substantial amount of tax-exempt money to care for a cemetery was sufficiently beneficial to the public to warrant the governmental revenue loss which would result. The *Child* court, by requiring cemeteries to show that they relieve the burdens of poverty in order to be eligible for estate tax deductible bequests, has reached a conclusion which is neither analytically sound nor adequately supported by law. By failing to recognize that relief of governmental burdens constitutes the underlying rationale for granting tax benefits to charitable organizations, the court imposed an arbitrary "relief of poverty" requirement on cemetery associations. The preferred approach both under the case law and by analogy to the law of charitable trusts would have been to balance the general public benefit, or degree of relief of governmental burdens against the social disadvantage occasioned by the revenue loss associated with allowing the deductions.

JAMES C. KNOX

Federal Courts—Diversity Jurisdiction—*Vaughan v. Southern Railway Co.*¹

Eldon Swain, a resident of Virginia, was killed in North Carolina when struck by a train operated by Southern Railway, a Virginia corporation.² The decedent's mother, Marie Swain, also a citizen of Virginia, qualified under the law of that state³ as administratrix of the Swain estate for the purposes of bringing suit against Southern Railway for wrongful death.⁴ It was determined that the most convenient place for trial would be the state of North Carolina, where the accident occurred and where all potential witnesses resided.⁵ The law of that state, however, required the appointment of a North Carolina resident as ancillary administrator in wrongful death actions.⁶ The

¹ 542 F.2d 641 (4th Cir. 1976).

² *Id.* at 642.

³ VA. CODE § 64.1-116 (1973).

⁴ 542 F.2d at 642. There were no assets in the Swain estate other than the wrongful death action. *Id.*

⁵ *Id.*

⁶ *Id.* at 642-43. N.C. GEN. STAT. § 28-8 (1966) provides: "The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify . . . (2) Is a nonresident of this State . . ." (for current version of provision see N.C. GEN. STAT. § 28A-4-2 (Supp. 1975)). N.C. GEN. STAT. § 28-173 (1966) provides:

When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefore, the person or corporation that would have been so liable, . . . shall be liable to an action for damages, to be brought by the executor, administrator, or collector of the decedent;

plaintiff, Charles Vaughan, a North Carolina attorney, was therefore appointed resident ancillary administrator of the Swain estate for the purpose of bringing the wrongful death action.⁷

The action was brought in the United States District Court for the Eastern District of North Carolina under the diversity jurisdiction of the federal courts. Subsequently, the defendant filed a motion to dismiss the action for lack of jurisdiction.⁸ The motion was directed to the restrictive standards of 28 U.S.C. § 1359 which proscribes the joinder of parties for the purpose of creating federal jurisdiction.⁹ The district court, relying upon decisions of the Fourth Circuit which found section 1359 to prohibit the manufacture of diversity jurisdiction through the appointment of an administrator to prosecute a wrongful death claim,¹⁰ held that Vaughan's appointment was made for the purpose of invoking the power of the federal courts, and as such, constituted an improper creation of federal jurisdiction.¹¹ With no diversity of citizenship existing between the beneficiary and the defendant as required for federal jurisdiction by 28 U.S.C. § 1332(a)¹² the district court dismissed the action.¹³

On review, the United States Court of Appeals for the Fourth Circuit affirmed the decision below and HELD: because the beneficiary was the real party in interest to the wrongful death action, her citizenship would be determinative of federal diversity jurisdiction.¹⁴ Accordingly, since the beneficiary and the defendant were both citizens of Virginia, there was no diversity of citizenship upon which to

and this notwithstanding the death (emphasis supplied)
(for current version of provision see N.C. GEN. STAT. § 28A-18-2 (Supp. 1975)).

⁷ 542 F.2d at 642-43.

⁸ *Id.* at 643.

⁹ 28 U.S.C. § 1359 (1970). The statute provides: "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 such court." *Id.* See text at notes 49-63 *infra* for a discussion of the legislative history of the statute and of the judicial construction given to it.

¹⁰ These decisions were: *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974) (the appointment of a citizen of Georgia to bring a wrongful death action on behalf of a citizen of South Carolina in South Carolina was held to be for the sole purpose of creating federal diversity jurisdiction and thus in violation of section 1359); *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972) (under a North Carolina statute requiring the appointment of a resident administrator in wrongful death actions, the citizenship of the beneficiary was held to be determinative of federal diversity jurisdiction); *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969) (the appointment of a citizen of Georgia to bring a wrongful death action on behalf of a citizen of South Carolina in South Carolina was held to be for the sole purpose of creating federal diversity jurisdiction and thus in violation of section 1359).

¹¹ 542 F.2d at 643.

¹² 28 U.S.C. § 1332(a) (1970). The statute in part provides: "(a) 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; . . ." *Id.* See text at notes 21-27 *infra* for a discussion of the historical basis of diversity jurisdiction.

¹³ 542 F.2d at 643.

¹⁴ *Id.*

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justify the exercise of such jurisdiction and the controversy more properly belonged in the state courts of either Virginia or North Carolina.¹⁵

In arriving at this determination, the court of appeals based its holding upon a trilogy of decisions which addressed the issue of the improper creation of diversity jurisdiction through the appointment of an administrator.¹⁶ These decisions collectively yielded a standard of review that examined both the substantive stake of the administrator and the purpose of his appointment in evaluating an alleged improper creation of federal jurisdiction.¹⁷ While recognizing that the North Carolina action had been initiated in good faith, the court of appeals nonetheless concluded that the apparent diversity of citizenship was pretensive because the chosen administrator had no stake in the outcome of the controversy.¹⁸ As a result, the court of appeals concluded that while Vaughan's appointment was not solely for the purpose of creating diversity of citizenship, the subsequent attempt to put it to that use by bringing the action in federal court would be regarded presumptively as the substantial equivalent.¹⁹ With no genuine diversity of citizenship existing between the beneficiary and the defendant, the Fourth Circuit ruled that the district court lacked jurisdiction to entertain the action.²⁰

The basic issue presented to the Fourth Circuit in *Vaughan v. Southern Railway Co.* was whether the citizenship of the resident administrator or the citizenship of the beneficiary would control for

¹⁵ *Id.* at 644.

¹⁶ *Id.* at 643. These decisions were *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974) (see text at notes 111-128 *infra*), *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972) (see text at notes 86-110 *infra*), and *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969) (see text at notes 66-81 *infra*).

¹⁷ 542 F.2d at 644.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* The dissent written by Circuit Judge Butzner encompassed several of the criticisms that this casenote will direct at the ruling of the Fourth Circuit. The dissent framed the issue in the case as being whose citizenship—that of the fiduciary or that of the beneficiary—would be considered in determining diversity jurisdiction. *Id.* at 645. The dissent then acknowledged that federal law had traditionally used the citizenship of the administrator in determining diversity of citizenship. *Id.* Although the dissent pointed to two exceptions to this rule, it found that neither exception applied here. *Id.* The first exception, embodied in the proscription of 28 U.S.C. § 1359, was not applicable as the valid and substantial reasons, supporting the appointment, satisfied the requirements of section 1359. *Id.* at 646. The specific application of the statute by the majority was criticized because it dispensed with the necessity of proving collusion or impropriety in a violation. As such, the majority created a *per se* rule to deny jurisdiction by using the citizenship of the beneficiary to determine diversity jurisdiction. *Id.* The second exception, embodied in the doctrines of the supremacy clause, was not present in the case because the state statute requiring the appointment of a resident administrator did not offend the supremacy clause by defeating federal jurisdiction over the controversy. *Id.*; see text at notes 90-94 *infra*. Since the dissent viewed neither exception as being applicable, the traditional rule for the determination of diversity of citizenship arguably remained controlling. 542 F.2d at 645. Where these discussions and arguments are incorporated into this casenote they will be cited to the dissenting opinion by an appropriate footnote.

purposes of creating federal diversity jurisdiction over the wrongful death action. In resolving this issue, the court of appeals' task appeared to be clear: the court sought to formulate a rule of decision concerning the appointment of an administrator to create diversity jurisdiction that would be consistent both with precedent and with the policy of jurisdictional statutes. As a result of these efforts, however, the *Vaughan* court so expanded and manipulated the controlling statutory standard of section 1359 as to render it largely superfluous.

In order to place the *Vaughan* decision in its proper context, this casenote will first consider the purpose of diversity jurisdiction and the standards previously imposed under the pertinent jurisdictional statutes. It will then consider and analyze the Fourth Circuit's trilogy of diversity jurisdiction decisions preceding *Vaughan*. Next, the note will analyze and criticize the approach taken by the *Vaughan* court. Finally, this casenote will examine the most viable solution to the jurisdictional issue in controversy and will conclude that the reasoning and result of the Fourth Circuit is both inadequate and erroneous as it misapplies existing precedent and statutes.

I. BACKGROUND: DIVERSITY JURISDICTION AND WRONGFUL DEATH ACTIONS

The federal courts are, of course, courts of limited jurisdiction,²¹ constitutionally empowered to hear cases "between Citizens of different States."²² Congress has defined this diversity of citizenship jurisdiction in 28 U.S.C. § 1332(a), which provides:

(a) the district courts shall have original jurisdiction of all civil action 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;²³

As constitutionally and statutorily defined diversity jurisdiction is grounded in notions of federalism, its basic purpose being to provide out-of-state litigants with a forum free from local prejudices.²⁴ In order to guard against unjustified federal infringements upon state judicial authority, however, the federal courts have created a presumption in diversity cases that the action is beyond the jurisdiction of

²¹ *Kline v. Burke Const. Co.*, 260 U.S. 226, 233-34 (1922); *Gilchrist v. Strong*, 299 F. Supp. 804, 807 (W.D. Okla. 1969); see 6 C.A. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1557 at 717 (1971) [hereinafter cited as WRIGHT & MILLER].

²² U.S. CONST. art. III, § 2.

²³ 28 U.S.C. § 1332(a) (1970).

²⁴ *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring). As Justice Frankfurter explained,

The stuff of diversity jurisdiction is state litigation. The availability of federal tribunals for controversies concerning matters which in themselves are outside federal power and exclusively within state authority, is the essence of a jurisdiction solely resting on the fact that a plaintiff and a defendant are citizens of different States. The power of Congress to con-

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the federal courts,²⁵ and that statutes conferring such jurisdiction in derogation of the power of state courts are to be strictly construed.²⁶ The principle underlying this presumption is that primarily local controversies should be tried in the appropriate state forum whenever prejudice to any party with a substantial interest in the litigation is not threatened.²⁷

Rule 17(a) of the Federal Rules of Civil Procedure requires that every action be prosecuted in the name of the real party in interest.²⁸ Accordingly, in deciding whether diversity of citizenship exists, the black-letter rule is that the citizenship of the real party in interest is determinative.²⁹ The definition of real party in interest under Rule 17(a) is a question of federal procedure, and thus a matter of federal law.³⁰ However, under this federal definition, the focus of any inquiry into the real party in interest must be on the party legally entitled to prosecute the claim under the substantive law that the federal court will apply in the case;³¹ "the party who, by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery."³² As diversity actions litigate questions of state law,³³ the relevant substantive law to be consulted and applied in regards to the real party in interest must be state law.³⁴ Therefore, while the party legally entitled under state law to enforce the substantive right and the holder of the beneficial in-

fer such jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias.

Id. See also *Gilchrist v. Strong*, 299 F. Supp. 804, 807 (W.D. Okla. 1969); *WRIGHT & MILLER* *supra* note 21, § 1556 at 711; but see *Friendly, The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487-99 (1928).

²⁵ *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336-37 (1895); *Fifty Associates v. Prudential Ins. Co. of America*, 446 F.2d 1187, 1190 (9th Cir. 1970); *McSparran v. Weist*, 402 F.2d 867, 876 (3d Cir. 1968).

²⁶ *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *Gilchrist v. Strong*, 299 F. Supp. 804, 807 (W.D. Okla. 1969).

²⁷ *WRIGHT & MILLER*, *supra* note 21, § 1556 at 711.

²⁸ FED. R. CIV. P. 17(a). The Rule provides in pertinent part: "(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator . . . may sue in his own name without joining with him the party for whose benefit the action is brought; . . ." *Id.*

²⁹ *WRIGHT & MILLER*, *supra* note 21, § 1556 at 710.

³⁰ *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965).

³¹ *Peter v. Lines*, 275 F.2d 919, 928 (9th Cir. 1960); *Armour Pharmaceutical Co. v. Home Ins. Co.*, 60 F.R.D. 592, 594 (N.D. Ill. 1973); *Race v. Hay*, 28 F.R.D. 354, 355 (N.D. Ind. 1961); 3A MOORE, FEDERAL PRACTICE ¶ 17.02 at 53 (2d ed. 1974); C.A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 70 at 293 (2d ed. 1970). See *Jett v. Zink*, 362 F.2d 723, 726 (5th Cir. 1966); *Hertz v. Record Publishing Co. of Erie*, 219 F.2d 397, 399, 400 (3d Cir. 1955), *cert. denied*, 349 U.S. 912 (1955); 3A MOORE, FEDERAL PRACTICE ¶ 17.07 at 221-25 (2d ed. 1974); *Comment*, 47 N.Y.U.L. REV. 801, 805-06 (1972).

³² C.A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 70 at 293 (2d ed. 1970).

³³ *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954). See text at notes 21-27 *supra*.

³⁴ *Erie v. Tompkins*, 304 U.S. 64, 78, 94 (1938).

terest in the action are often the same, it is the former that characterizes the real party in interest for purposes of prosecuting any claim in the diversity jurisdiction of the federal courts. As an example of this possible dichotomy of interests, in North Carolina the beneficiary of a wrongful death action obviously holds the beneficial interest, but the substantive legal right to be enforced is given by statute to the administrator.³⁵

Reflecting these basic principles, Rule 17(a) specifies that administrators are parties who may sue in their own names without joining with them the party for whose benefit the action is brought.³⁶ Accordingly, the traditional black-letter rule in actions involving an appointed administrator is that the citizenship of the administrator is determinative for purposes of diversity jurisdiction.³⁷

Addressing the particular relevancy of this rule to actions for wrongful death the Supreme Court, in *Mecom v. Fitzsimmons Drilling Co.*,³⁸ held that under a statute granting a right to recover for wrongful death, the administrator was the real party in interest. As such, the citizenship of the administrator, rather than that of the beneficiary, was determinative of federal diversity jurisdiction.³⁹ In *Mecom*, the Court framed its holding in language descriptive of the administrator's duties under the facts and the requirements of state law,⁴⁰ thereby suggesting the existence of some minimal requirement of interest in the suit for the application of the decision's black-letter rule. However, in *Mecom* the administrator had an extremely tenuous and essentially artificial role in the action,⁴¹ and thus could not be considered anything more than a straw party designed to defeat diversity jurisdiction.⁴² Even so, the Court found that the motive behind the appointment⁴³ was immaterial,⁴⁴ and based its holding upon a reluctance to attack collaterally the lawful decree of the state probate court which appointed the administrator.⁴⁵

³⁵ N.C. GEN. STAT. § 28-173 (1966) (for current version of provision see N.C. GEN. STAT. § 28A-18-2 (Supp. 1975)). For text of § 28-173 see note 6 *supra*. See *Horney v. Meredith Swimming Pool Co.*, 267 N.C. 521, 523, 148 S.E.2d 554, 556 (1966).

³⁶ FED. R. CIV. P. 17(a). See note 28 *supra*.

³⁷ *Childress v. Emory*, 21 U.S. (8 Wheat.) 642, 669 (1823); see *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808).

³⁸ 284 U.S. 183 (1931).

³⁹ *Id.* at 186.

⁴⁰ *Id.* These duties under state law included the responsibility for the conduct of the suit, responsibility for distribution of its proceeds under the statute, and liability upon his official bond for failure in his fiduciary duty. *Id.*

⁴¹ *Id.* at 188. In *Mecom*, the administrator did not know the decedent or the beneficiary, consented to the appointment as a favor to the beneficiaries' attorney, did not sign his own bond, never appeared in Oklahoma, and immediately named the beneficiary as his agent in Oklahoma. *Id.*

⁴² *Id.*

⁴³ That motive involved the appointment of an administrator from the defendant's state to prevent removal to the federal district court. *Id.*

⁴⁴ *Id.* at 189.

⁴⁵ *Id.*

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Essentially, *Mecom* stated the accepted rule upon which diversity of citizenship was to be determined in wrongful death actions.⁴⁶ Nevertheless, the *Mecom* rule permitted the appointment of representatives who were chosen deliberately to defeat or to create diversity jurisdiction.⁴⁷ Therefore, to the extent that it permitted access to the federal courts through the mere pretense of diversity of citizenship, the *Mecom* rule ran counter to the general policy of viewing the federal courts as tribunals of limited jurisdiction whose subject matter principles should be applied with restraint.⁴⁸ Thus, in light of the constitutional and congressional policy of limiting the jurisdiction of the federal judiciary, the *Mecom* rule could not be allowed to stand as the unqualified standard for diversity jurisdiction.

Congress addressed itself to the problem of the deliberate creation of diversity jurisdiction in section 1359 of Title 28 of the United States Code. That section provides: "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 such court."⁴⁹ The Reviser's Note described the new statute's purpose to be the prevention of "the manufacture of Federal jurisdiction."⁵⁰ Initially, however, the federal courts failed to give a strict construction to section 1359 in accordance with this stated purpose. For example, following the passage of section 1359, the prevailing view among lower federal courts was that the appointment of a fiduciary, even if done expressly to create diversity jurisdiction, did not fall within the scope of the statute.⁵¹ The reasoning under this view held that the citizenship of the administrator controlled the determination of diversity jurisdiction as "there was no impropriety or irregularity involved in the perfectly valid proceeding in the state

⁴⁶ See WRIGHT & MILLER, *supra* note 21, § 1556 at 711-12.

⁴⁷ See *id.* § 1556 at 712-13.

⁴⁸ See *id.* § 1557 at 717. See text at notes 25-26 *supra*.

⁴⁹ 28 U.S.C. § 1359 (1970). Section 1359 has existed in its present form since the 1948 Revision of the Judicial Code. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 825 (1969). Prior to this revision the creation of diversity jurisdiction was governed by two statutes. The revision repealed § 11 of the Judiciary Act of 1789. 1 Stat. 79 (1789). That provision had read: "No district court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee, . . . unless such suit might have been prosecuted in such court . . . if no assignment had been made." The revision then amended ch. 137, § 5 of the Act of March 3, 1875. 18 Stat. 470 (1875). That provision had read:

[The district court will dismiss] at any time . . . [when] such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable . . .

This repeal and amendment produced the present section 1359. *Kramer*, 394 U.S. at 825-26.

⁵⁰ *Kramer*, 394 U.S. at 826.

⁵¹ *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 786-87 (3d Cir. 1959) (overruled by *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968); see WRIGHT & MILLER *supra* note 21, § 1557 at 717.

court for the appointment of the out-of-state fiduciary."⁵² This "validity under state law" standard permitted no inquiry into the motive behind the appointment,⁵³ and the terms "collusive" and "improper" were held to apply only to illegal agreements or understandings between the opposing parties.⁵⁴

This permissive standard under section 1359 was subsequently rejected by the Supreme Court in *Kramer v. Caribbean Mills, Inc.*,⁵⁵ a case involving the assignment of a foreign corporation's contract claim to an American attorney for the admitted purpose of making federal diversity jurisdiction available.⁵⁶ The Court framed the issue in the language of section 1359's prohibition,⁵⁷ emphasizing its purpose to prevent the manufacture of federal jurisdiction.⁵⁸ Recognizing and focusing upon the obvious purpose of the contrived, but legal transaction, Justice Harlan, writing for the majority of the Court, gutted the "validity under state law" argument and stated: "the existence of federal jurisdiction is a matter of federal, not state, law. . . . this very case demonstrates the ease with which a party may 'manufacture' federal jurisdiction by an assignment which meets the requirements of state law."⁵⁹ Consequently, the Court held that the assignment to create diversity jurisdiction was "improperly or collusively made" within the meaning of section 1359.⁶⁰ Simply, the agreement at issue in *Kramer*, whereby the assignee merely provided his name for use in the title of the action and agreed to return ninety-five per cent of any recovery to the assignor,⁶¹ did not in substance make the assignee the real party in interest of the contract claim. Therefore, any apparent diversity jurisdiction based upon his citizenship was artificial and created in violation of section 1359.

Thus, *Kramer*, in effect, enunciated a new, stricter standard for the application of section 1359, one conforming both with the federal judiciary's role as courts of limited jurisdiction and with the purpose of section 1359 to prevent the "manufacture of Federal jurisdiction."⁶² However, the Court specifically reserved the question of "whether, in

⁵² *McSparran v. Weist*, 402 F.2d 867, 872 (3d Cir. 1968). This case overruled *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959), the representative decision on the initial construction given to section 1359. *McSparran*, 402 F.2d at 876.

⁵³ *Mecom*, 284 U.S. at 189; *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 524 (1928).

⁵⁴ *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788 (3d Cir. 1959) (overruled by *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968)); *WRIGHT & MILLER supra* note 21, § 1557 at 719; see *Jansen v. Goos*, 302 F.2d 421, 425 (8th Cir. 1962).

⁵⁵ 394 U.S. 823 (1969).

⁵⁶ *Id.* at 824, 828.

⁵⁷ *Id.* at 825. The Court stated that the issue was: "[W]hether *Kramer* was 'improperly or collusively made' a party 'to invoke the jurisdiction' of the District Court, within the meaning of 28 U.S.C. § 1359." *Id.*

⁵⁸ *Id.* at 825-26; see note 49 and text at note 50 *supra*.

⁵⁹ 394 U.S. at 829.

⁶⁰ *Id.* at 827.

⁶¹ *Id.* at 828.

⁶² See *id.* at 828-29.

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cases in which suit is required to be brought by an administrator, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative 'improper' or 'collusive'.⁶³

The decision in *Kramer*, in conjunction with the decision in *Mecom*, formed the legal context for the Fourth Circuit's trilogy and established the conceptual battleground upon which the Fourth Circuit struggled in *Vaughan v. Southern Railway Co.* This context consists of two separate issues, one addressing the standard for determining whether diversity of citizenship exists among the parties under section 1332 (a) (the *Mecom* rule) and the other addressing the standard for determining whether there was collusion or impropriety in the creation of that diversity jurisdiction under section 1359 (the *Kramer* standard). A conceptual conflict appeared whereby the *Mecom* rule on its face permitted the precise "collusion/impropriety" in the creation of federal jurisdiction that the *Kramer* standard was specifically designed to prohibit. The specific jurisdictional directive of section 1359 was designed to limit and to control abuses in the invocation of the general jurisdictional grant of section 1332(a); to prohibit the manufacture of federal diversity jurisdiction.⁶⁴ Consequently, it was the Fourth Circuit's implicit goal in *Vaughan* to reconcile the potential conflict between the *Mecom* rule and the *Kramer* standard.⁶⁵ In so doing, its precise need was to construct a mode of decision that would determine, in a manner consistent with the policy and standard of section 1359, the existence of diversity of citizenship where an administrator is appointed to bring a wrongful death action.

II. THE FOURTH CIRCUIT TRILOGY

A. *Lester v. McFaddon*

The Fourth Circuit first broached the conceptual conflict between the section 1359 standard and the *Mecom* rule in *Lester v. McFaddon*.⁶⁶ In *Lester*, lawyers representing a South Carolinian decedent's estate secured the appointment of a Georgia lawyer as an administrator both for the purpose of bringing a wrongful death action under South Carolina law against a South Carolina citizen and for the purpose of placing that action within the diversity jurisdiction of the federal courts.⁶⁷

In confronting the issue of the standard to be applied under section 1359 to determine the propriety of diversity jurisdiction, the *Lester* court enunciated its desire not to "give the statute a reading which would frustrate the congressional intention to exclude from the diversity jurisdiction purely local controversies with no more than a con-

⁶³ *Id.* at 828 n.9.

⁶⁴ See note 49 and text at notes 50-62 *supra*.

⁶⁵ See 542 F.2d at 642, 644.

⁶⁶ 415 F.2d 1101 (4th Cir. 1969).

⁶⁷ *Id.* at 1103.

trived interstate appearance."⁶⁸ Accordingly, the *Lester* court held that the appointment for the purposes of creating apparent diversity of citizenship was an improper manufacture of jurisdiction within the meaning of section 1359.⁶⁹

To resolve the issue of the artificial creation of diversity jurisdiction in suits brought by personal representatives and to effectuate the congressional purpose of Section 1359, the *Lester* court explicitly adopted the reasoning advanced by the Third Circuit in *McSparran v. Weist*,⁷⁰ which accurately anticipated the Supreme Court's subsequent *Kramer* decision.⁷¹ According to the *McSparran* court, the standard of review under section 1359 involved the determination of whether the representative was a "nominal party."⁷² That court reasoned that if the representative had no stake in the litigation and was appointed solely for the purpose of creating diversity jurisdiction, he was not the real party in interest.⁷³ Relying on *McSparran*, the *Lester* court undertook a review both of the substantive role of the administrator in the litigation and of the motive for his appointment.⁷⁴ As to the substantive role of the administrator, the court determined that there was "no distinction between this situation and that of the assignee which

⁶⁸ *Id.* at 1104. See note 49 and text at note 50 *supra*. The court further announced its belief that the South Carolina probate decree was not under collateral attack in the federal court as the pertinent issue in the case was a federal question of jurisdiction, which would not affect the bringing of any suit in a proper state court. 415 F.2d at 1105.

⁶⁹ *Id.* at 1104.

⁷⁰ 402 F.2d 867 (3d Cir. 1968). *McSparran* involved the appointment of a non-resident guardian for the conceded purpose of creating diversity jurisdiction in a personal injury suit and held that the appointment offended the directive of section 1359. *Id.* at 868-76.

⁷¹ 415 F.2d at 1104. *McSparran* was decided immediately prior to and in anticipation of the Supreme Court decision in *Kramer*. *Id.* at 874 n.20.

⁷² 402 F.2d at 870-71.

⁷³ *Id.* at 874-75. The court reasoned, "Whether in an individual case diversity jurisdiction is 'manufactured' is, of course, a question of fact. Here 'manufactured' diversity is conceded, but in other cases where it is not conceded it will be for the district court to make the factual determination." *Id.* at 876. See generally *Groh v. Brooks*, 421 F.2d 589, 595 (3d Cir. 1970); *Ferrara v. Philadelphia Laboratories, Inc.*, 272 F. Supp. 1000, 1007 (D. Vt. 1967). In *Groh*, the Court delineated a set of factors for determining whether or not diversity of citizenship had been artificially created by the appointment of a personal representative:

[t]he district court may consider, *inter alia*, such factors as the identity of the representative and his relationship to the party represented; the scope of the representative's powers and duties; any special capacity or experience which the representative may possess with respect to the purpose of his appointment; whether there exists a non-diverse party, such as a parent in a suit for injuries to a child, who might more normally be expected to represent the interests involved; whether those seeking the appointment of the representative express any particular reasons for selecting an out-of-state person; and whether, apart from the appointment of an out-of-state representative, the suit is one wholly local in nature.

421 F.2d at 595.

⁷⁴ 415 F.2d at 1104-05.

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the Supreme Court considered [in *Kramer*]⁷⁵ Accordingly, the administrator in *Lester* was found to have no greater authority or duties than the assignee in *Kramer*⁷⁶ and as such, was judged to have no stake in the litigation.⁷⁷ Consequently, the administrator was termed a "nominal party" and the diversity jurisdiction based upon his citizenship was found to be ". . . pretensive . . . [and] improper within the meaning of section 1359."⁷⁸

The *Lester* court then looked to the motive of the appointment, justifying its inquiry on the basis and purpose of section 1359.⁷⁹ Simply, the court described the circumstances of the instant appointment and concluded that it was "an act as *voluntary* and *deliberate* as is that of an assignor in the *Kramer* situation."⁸⁰ Additionally, the court stated in a footnote that "[i]t is the lack of a stake in the outcome *coupled* with the *motive* to bring into a federal court a local action normally triable only in a state court which is the common thread of the cases holding actions collusively or improperly brought. . . ."⁸¹

Thus, it appears that, following *Lester*, the conceptual basis upon which diversity jurisdiction would be decided was clear: since the *Mecom* rule had never been repudiated by the Supreme Court,⁸² was based upon years of American judicial tradition,⁸³ and was bolstered by the procedural dictate of Rule 17(a),⁸⁴ this rule was substantially entrenched as the black-letter law for determining the existence of diversity of citizenship. *Kramer*, and more directly *Lester*, added another dimension to the analysis, however, by requiring that the strict standard of section 1359 be applied to determine whether or not the administrator was a "nominal party." In applying that standard, the court assessed the totality of the circumstances of the appointment

⁷⁵ *Id.* at 1105.

⁷⁶ *Id.* at 1103-05. Though, under state law an administrator was required to maintain the action, any recovery did not become part of the probate assets of the estate. As the estate contained no assets other than the action, administrative duties were limited to recovery. Also the administrator was procured by the lawyers handling the litigation and was hardly expected to exercise any effective supervision of their conduct of the litigation. *Id.*

⁷⁷ *Id.* at 1103.

⁷⁸ *Id.* at 1106.

⁷⁹ *Id.* at 1104-05. See text at notes 42-45, 49-54 *supra*. Indeed, it is difficult to see how motive could be entirely ignored in ascertaining the purpose for which the representative was selected in view of the language of section 1359. The very wording of section 1359 indicates that the "improper" or "collusive" making or joining of a party is fatal to the jurisdiction of the district court *only* if done to "invoke the jurisdiction of such court"—i.e. to create diversity of citizenship; the terms "collusive" and "improper" necessarily connote some purpose or motive to collude or to commit an impropriety.

⁸⁰ 415 F.2d at 1105 (emphasis supplied). The court may have referred to the motive element so obliquely because the substantive role of the administrator was so highly transparent under the facts that it excluded any arguably "proper" motive for the appointment other than the invocation of federal jurisdiction.

⁸¹ *Id.* at 1106 n.11 (emphasis supplied).

⁸² 542 F.2d at 645 (dissenting opinion). See note 20 *supra*.

⁸³ See text at note 37 *supra*.

⁸⁴ See text at note 36 *supra*.

through a two-pronged evaluation. The court first examined the substantive role of the administrator to see if he was merely a procedural real party in interest with no genuine "stake" in the litigation. Additionally, the court examined the motivation of the appointment to see if it was made "solely for the purpose" of creating diversity jurisdiction.

A deceptively simple process of decision was thus delineated by the case law: when an administrator was appointed to bring a wrongful death action in the federal court claiming diversity jurisdiction, the court would first apply the standard of *Lester/McSparran*. If under that standard the circumstances of the appointment were found to create artificial and pretensive diversity, the court would look to the citizenship of the beneficiary and dismiss if substantive diversity was lacking.⁸⁵ However, if under that standard the appointment passed review, then the court would apply the traditional *Mecom* rule, using the citizenship of the administrator to determine the existence of diversity of citizenship for federal jurisdictional purposes. In essence, a section 1332 (a) rule for the determination of diversity of citizenship would be applied only in accordance with the finding under section 1359.

B. *Miller v. Perry*

The Fourth Circuit severely complicated this process in its decision of *Miller v. Perry*.⁸⁶ In *Miller*, the father of a Florida youth killed in North Carolina, acting as the administrator of his son's estate, brought suit in the federal district court under the North Carolina Wrongful Death Act.⁸⁷ The action was dismissed as the father, a resident of Florida, could not qualify as the resident administrator required under North Carolina law.⁸⁸ The decedent's grandfather, a citizen of North Carolina, was then appointed resident ancillary administrator, and a second action was brought in the federal district court. This second action was then dismissed for want of diversity between the resident administrator and the North Carolina defendant.⁸⁹ On appeal, the Fourth Circuit held that under the particular facts of the case the citizenship of the beneficiaries would control for the purposes of federal diversity jurisdiction.⁹⁰

⁸⁵ 3A MOORE, FEDERAL PRACTICE, ¶17.04 at 112-14 (2d ed. 1974).

⁸⁶ 456 F.2d 63 (4th Cir. 1972). For a more extensive discussion of this case see *Fourth Circuit Review*, 30 WASH. & LEE L. REV. 247, 283 (1975).

⁸⁷ 456 F.2d at 63. See N.C. GEN. STAT. § 28-173, quoted at note 6 *supra* (for current version of provision see N.C. GEN. STAT. § 28A-18-2 (Supp. 1975)).

⁸⁸ 456 F.2d at 64.

⁸⁹ *Id.* On the basis of these facts, it was clear that the issue presented to the *Miller* court dealt solely with the question of the existence of diversity of citizenship under constitutional and statutory grants; no question under section 1359 was presented since North Carolina's resident administrator requirement worked in this case to defeat diversity of citizenship, rather than to create it improperly or collusively. See *id.* at 64.

⁹⁰ *Id.* at 67.

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The *Miller* court was confronted with a situation where out-of-state plaintiffs were, in effect, denied a federal forum by state law. This result obtained because the North Carolina requirement of a resident administrator transformed the potential diversity action into an action between a resident administrator and a resident defendant of non-diverse citizenship.⁹¹ As such, the statute defeated federal diversity jurisdiction over any wrongful death action where the estate of a non-resident decedent brought suit against a resident defendant.

Under these facts, the Fourth Circuit determined that if the *Mecom* rule, holding the citizenship of the administrator to be determinative of federal diversity jurisdiction, was constitutionally mandated, then its apparent conflict with the North Carolina statute would render the state statute invalid under the supremacy clause.⁹² In essence, the North Carolina statute could be fully recognized and survive a constitutional challenge only if the conflicting *Mecom* rule was not a "constitutional imperative."⁹³ Accordingly, in affirming the district court, the Fourth Circuit found the *Mecom* rule to be neither constitutionally nor inflexibly the criterion for the ultimate determination of diversity jurisdiction and, therefore, refused to apply the *Mecom* rule to the facts of the case.⁹⁴

Seeking to justify this initial determination that the court was neither constitutionally nor inflexibly bound by the *Mecom* rule, the Fourth Circuit read *Mecom* as articulating not only a black-letter rule, but also an implicit standard for application of that rule—namely, "that the personal representative was clothed with such responsibilities and authority that he, under federal standards was the real party in interest."⁹⁵ To bolster this reading, the court relied upon the series of decisions extending from *Kramer* as authority for a substantive review of the circumstances of the appointment. For example, the court stated that, "[w]e are obliged to read *Kramer* as injecting a new note of realism into the determination of diversity jurisdiction."⁹⁶ This reading of *Kramer*, however, failed to recognize that *Kramer's* "new note" and its power to examine the substance of the appointment pertained only to the section 1359 "substantive role—motive for the appointment" standard for determining the improper creation of diversity jurisdiction, and not to the determination of the existence of diversity of citizenship which was involved in *Mecom*. It would appear, then, that the *Miller* court clearly erred in failing to differentiate between

⁹¹ *Id.* at 64-65.

⁹² *Id.* at 64. See U.S. CONST. art. VI. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land"

⁹³ 456 F.2d at 65.

⁹⁴ See *id.* at 68.

⁹⁵ *Id.* at 65.

⁹⁶ *Id.* at 67.

these two separate, though closely related, issues.⁹⁷

While the *Miller* court's basic assessment of the *Mecom* rule as being neither constitutionally nor inflexibly mandated is reasonably defensible, it nonetheless represented an unnecessarily obscure course of decision in the case. In *Miller*, the Fourth Circuit was presented with at least three alternate courses of decision: affirming the district court's denial of jurisdiction by strictly following *Mecom*; reversing the district court by its selected abandonment of the *Mecom* rule; or reversing the district court by striking down the North Carolina statute as unconstitutional.⁹⁸ The first course was inadequate as it would have failed to resolve the supremacy clause issue, and would have allowed a state statutory requirement to deny federal jurisdiction in the case.⁹⁹ The second course would have preserved the North Carolina statute and would have granted jurisdiction in the case, but would have necessitated an abandonment of the *Mecom* rule.¹⁰⁰ The third course, however, would have resolved the supremacy clause issue and would have equitably granted jurisdiction in the case without the complications of changing jurisdictional rules. As such, this third course appears to have been the simplest and most logical means of resolving the controversy.¹⁰¹ While perhaps motivated by notions of federal judicial restraint and prudence,¹⁰² the *Miller* court's efforts to preserve the North Carolina statute by manipulating the meaning of the *Mecom* rule and section 1359 served primarily to excuse the court from the accepted dictates of the *Mecom* rule and to thereby justify the genesis of a new jurisdictional standard.

Having thus cast the *Mecom* rule aside, the *Miller* court formu-

⁹⁷ While the decisions in *Kramer*, *McSparran*, and *Lester* did indeed suggest that *Mecom* was not inflexible and was subject to section 1359 review, it was misleading and obscuring to declare, as the Fourth Circuit did in *Miller*, that the analysis of section 1359 in those decisions vitiated the *Mecom* rule even where no section 1359 issue was involved. See *id.*

⁹⁸ See *Fourth Circuit Review*, 30 WASH. & LEE L. REV. 247, 284-85 (1973).

⁹⁹ See text at notes 90-93 *supra*.

¹⁰⁰ See text at notes 92-94 *supra*.

¹⁰¹ See *Fourth Circuit Review*, 30 WASH. & LEE L. REV. 247, 293-94. This article states that only North Carolina, Georgia, Virginia, and West Virginia have such statutory requirements in a wrongful death action, so a decision declaring the North Carolina statute unconstitutional would have had only a very limited effect. *Id.* at 284-85 & n.20. It appears that the most persuasive argument in declaring the statute unconstitutional would have been based on supremacy clause grounds. The Supreme Court has rejected direct and indirect interference with federal jurisdiction by state law. *Mexican Cent. Ry. v. Pinkney*, 149 U.S. 194, 206-07 (1893); *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1871). There is also a possible equal protection challenge which asserts that the requirement of a resident administrator bears no rational relation to the state's putative interest. See *Comment*, 47 N.Y.U.L. REV. 801, 810 (1972); *Miller*, 456 F.2d at 65 n.5. In fact, North Carolina has recently reformed its laws for the administration of decedent's estates. Section 28-8, the resident administrator requirement, was repealed and a simpler requirement that non-resident administrators appoint a resident agent to facilitate the service of process was enacted in its place. N.C. GEN. STAT. § 28A-4-2(4) (Supp. 1975). The Wrongful Death Act itself was reenacted in substantially its previous form. N.C. GEN. STAT. § 28A-18-2 (Supp. 1975).

¹⁰² See 456 F.2d at 65.

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lated its own rule for determining diversity jurisdiction by summarily referring to North Carolina case law which considered the beneficiary to be the real party in interest.¹⁰³ However, this use of North Carolina law was not appropriate for several reasons.¹⁰⁴ First, the issue presented in *Miller* was one of federal procedure and jurisdiction and thus an exclusive matter of federal law.¹⁰⁵ As such, the forum state definition of the real party in interest as the possessor of the beneficial interest in an action was not applicable because it governed only that party's rights in state court.¹⁰⁶ If the court had desired to undertake a true "real party in interest" analysis in order to formulate a substitute for what it reasoned to be an inapplicable *Mecom* rule, it should have first looked at the federal law for a definition of the term. Under federal law the real party in interest is defined as the party, who under the substantive law, possesses the substantive legal right sought to be enforced, rather than the party with the beneficial interest in the action.¹⁰⁷ Under this federal analysis, the proper inquiry in *Miller* would have focused upon the substantive law, which in diversity cases is state law, to determine the party with the substantive legal right to be enforced.¹⁰⁸ Under the North Carolina wrongful death statute this right was given to the administrator.¹⁰⁹ Thus, in having selected to excuse itself from the dictates of *Mecom* and to abandon the accepted federal jurisdictional standard, the *Miller* court clearly erred in its reference to North Carolina case law as being material to the determination of diversity jurisdiction because that state law bore no reference to or foundation in the federal concepts of real party in interest that are traditionally determinative of federal diversity jurisdiction. Still, the Fourth Circuit chose to advance a new, poorly defined rule for diversity jurisdiction; one that was contrary on its face to the *Mecom* rule in that the citizenship of the beneficiary would be determinative of the existence of diversity of citizenship.¹¹⁰

C. *Bishop v. Hendricks*

The effects of *Miller* first appeared in *Bishop v. Hendricks*.¹¹¹ *Bishop* presented a fact situation similar to that in *Lester*. Decedent, beneficiaries, and defendant were all citizens of South Carolina. A

¹⁰³ *Id.* The court cited *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967), a complex case whose issue centered on a statute of limitations and conflict of laws problem, not the real party in interest concept. *Id.* at 431-32, 154 S.E.2d at 526-27.

¹⁰⁴ *Fourth Circuit Review*, 30 WASH. & LEE L. REV. 247, 291 (1973).

¹⁰⁵ See *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965).

¹⁰⁶ WRIGHT & MILLER *supra* note 21, § 1544 at 647-48.

¹⁰⁷ See C.A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 70 at 293. See text at notes 28-35 *supra*.

¹⁰⁸ See text at notes 31-34 *supra*.

¹⁰⁹ N.C. GEN. STAT. § 28-173 (1966) (for current version of provision see N.C. GEN. STAT. § 28A-18-2 (Supp. 1975)). For text of § 28-173 see note 6 *supra*.

¹¹⁰ 456 F.2d at 68.

¹¹¹ 495 F.2d 289 (4th Cir. 1974).

citizen of Georgia, who was related to the beneficiaries by marriage, was appointed administrator to bring a wrongful death action under South Carolina law in the federal court.¹¹² The district court, applying the *Miller* rule, dismissed the action for lack of jurisdiction.¹¹³ The Fourth Circuit subsequently affirmed, finding the administrator to be "a 'straw party' appointed . . . solely for the purposes of providing a nominal plaintiff for the maintenance of this action"¹¹⁴ and holding his appointment to be "manifestly an artificial creation of federal diversity and as such cannot support jurisdiction."¹¹⁵

The facts in *Bishop* presented a situation ideally suited for the conceptual process suggested by *Kramer* and *Lester* under section 1359.¹¹⁶ The decision, however, was couched in terms of the *Miller* decision. As such, the court appeared intent upon confusing the question of review under section 1359 with the separate question of whose citizenship would be determinative of diversity jurisdiction. Indeed, the court, explicitly rejecting the argument that the scope of *Miller* should be confined to its peculiar facts,¹¹⁷ framed the case as involving a single issue—"the choice between the old purely mechanical or 'ritualistic' rule [*Mecom*] . . . and . . . the more recent 'substantive real party in interest test' [*Miller*]."¹¹⁸ Through this confusion of issues, *Bishop* represented an attempt to reach a result under an application of the *Miller* rule that would reflect the policy and standards of section 1359.

In this attempt, the *Bishop* court implicitly subsumed the separate section 1359 "motive" and "stake" standard into the *Miller* rule.¹¹⁹ In *Bishop*, motive was a significant point of contention because the district court had specifically, but without explanation, judged the motives in the appointment to have been proper.¹²⁰ The Fourth Circuit, however, was not persuaded, and engaged in a more extensive review of motive than had been undertaken in previous decisions where the motive of the appointment was obviously or concedely for the purpose of creating diversity jurisdiction.¹²¹

In this review, the court clearly defined the requisite motive element as being a "purpose" to create federal jurisdiction.¹²² However, the court first assumed that the administrator was appointed solely for the purpose of creating federal diversity jurisdiction unless valid and substantial reasons supporting the appointment appeared in

¹¹² *Id.* at 290.

¹¹³ *Id.* at 291.

¹¹⁴ *Id.* at 296.

¹¹⁵ *Id.*

¹¹⁶ See text at notes 81-85 *supra*.

¹¹⁷ 495 F.2d at 291.

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 291-95.

¹²⁰ *Id.* at 297. The reasons for the appointment were the administrator's kinship by marriage and his purported superior business judgment. *Id.*

¹²¹ See *id.*

¹²² *Id.* at 293.

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the record.¹²³ The court then evaluated the reasons for the appointment to determine whether those reasons realistically established that the administrator sustained more than a nominal relationship to the litigation.¹²⁴ Consequently, the court eliminated sentiment and kinship,¹²⁵ or superior business judgment¹²⁶ as viable motives under section 1359. Finally, the court engaged in a substantive review of the administrator's role in the litigation. It examined the administrator's duties¹²⁷ and found that he had "failed to establish any substantive facts . . . that would give 'substance' to his representation or fix his status in the suit as different from nominal. Without any 'real [or] substantial interest in the outcome of the litigation' he possesses 'no stake in the litigation.'" ¹²⁸

The *Bishop* court's pronouncements were a precise application of the section 1359 standard as developed through *Kramer* and *Lester*. Under the totality of the circumstances, the motive of the appointment was judged to be "solely for the purpose" of creating federal jurisdiction ¹²⁹ and the administrator was judged to have "no stake" in the litigation.¹³⁰ However, the court purported to apply a construction of section 1359 "adopted and applied in *Miller*."¹³¹ As stated earlier,¹³² *Miller* addressed itself only to the issue of whose citizenship was to be determinative of diversity and did not consider section 1359. It would seem, then, that the court clearly believed that its application of the section 1359 standard was directed not to the issue of the improper creation of diversity jurisdiction, but rather to the ultimate determination of the diversity issue itself.¹³³ Thus, the section 1359 issue was subsumed into the section 1332(a) determination.

The Fourth Circuit's decision in *Bishop* thereby embodied a point of confusion in the development of jurisdictional standards. The court announced a decision under the *Miller* rule, but in fact it decided the jurisdictional question along the conceptual lines of section 1359 standards. This confusion was unnecessary to the specific result in the case because the administrator would have been disqualified under any independent application of the section 1359 standard. Nevertheless, this confused blending of standards became significant when the section 1359 standard of *Lester* would not have been sufficient in itself

¹²³ *Id.*

¹²⁴ *Id.* at 294.

¹²⁵ *Id.* at 293.

¹²⁶ *Id.* at 296.

¹²⁷ *Id.* at 295-96. The only relationship the administrator had to the action was the use of his name. No assets, other than the action, existed in the estate. The administrator made no contribution to the actual prosecution of the action, nor did he take any actual part in the employment of counsel. *Id.*

¹²⁸ *Id.* at 295.

¹²⁹ *Id.* at 296.

¹³⁰ *Id.* at 295.

¹³¹ *Id.* at 294.

¹³² See text at notes 86-110 *supra*.

¹³³ 495 F.2d at 294-95.

to dispose of a jurisdictional question over an appointment. This situation was precisely the one presented in *Vaughan v. Southern Railway Co.*

III. THE VAUGHAN APPROACH

It was upon this trilogy of decisions that the Fourth Circuit confronted the controversy in *Vaughan v. Southern Railway Co.*¹³⁴ In light of these cases, the court easily rejected the argument that *Mecom* was dispositive of the decision.¹³⁵ While presenting a new "twist" in its facts,¹³⁶ *Vaughan* presented a situation conceptually similar to that of *Lester* and *Bishop*. As such, the court was once again called upon to evaluate the effect of the appointment of an administrator of a wrongful death action upon the creation of federal diversity jurisdiction.

Under the Fourth Circuit's trilogy two alternate modes of decision appeared to be available to the court of appeals: the *Lester* approach or the *Bishop-Miller* approach. In the former approach, the section 1359 standard of review formed the primary issue in the jurisdictional controversy. Accordingly, a rule for the determination of diversity of citizenship was applied pursuant to the section 1359 finding.¹³⁷ In the latter approach, the rule for the determination of diversity of citizenship formed the single issue in the jurisdictional controversy, and the section 1359 standard for determining the improper creation of jurisdiction was subsumed into the application of the rule as a means of eliminating the appointed administrator from the consideration of diversity jurisdiction.¹³⁸ Under either approach, the section 1359 standard of review consisted of the dual elements of "stake" and "motive," which served to define the improper "nominal party." While the court in *Vaughan* correctly identified the dual elements of the section 1359 standard,¹³⁹ its treatment of that standard signalled a significant deviation from the approaches of either *Lester* or *Bishop-Miller*.

The *Vaughan* court limited itself initially to a purely cursory disposition of the "stake" element. The court of appeals simply concluded: "Vaughan has no stake in the outcome of the controversy."¹⁴⁰ However, this conclusion failed to consider the factual circumstances of the case. Arguably, a significant "stake" may have been made out in favor of *Vaughan* under North Carolina law.¹⁴¹ For example, a properly appointed administrator must exist for the wrongful death action

¹³⁴ 542 F.2d at 642.

¹³⁵ *Id.* at 644.

¹³⁶ Unlike *Lester* and *Bishop* the situs of the fatal accident was not in the state of residence of the decedent and the defendant. *Id.* at 642.

¹³⁷ See text at notes 81-85 *supra*.

¹³⁸ See text at notes 119-34 *supra*.

¹³⁹ 542 F.2d at 644.

¹⁴⁰ *Id.*

¹⁴¹ See text at notes 31-35, 68-81 *supra*.

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to be prosecuted,¹⁴² and he is considered the plaintiff in the action.¹⁴³ Furthermore, the administrator acts as trustee over the proceeds of the action and thereby holds legal title over them.¹⁴⁴ As such, the administrator must be regarded as having authority; he is not a mere figurehead.¹⁴⁵ The court of appeals failed to account for any of these characterizations of the substantive role of the administrator under North Carolina law.

Whereas both the *Lester* and *Bishop-Miller* approaches entailed a careful review of the administrator's substantive relationship to the controversy, the court in *Vaughan* was satisfied to rely solely upon its single conclusory statement.¹⁴⁶ This cursory disposition, in effect, suggested an implicit presumption that the administrator had no "stake", yet neither *Lester* nor *Bishop-Miller* was predicated on any such presumption, whether implicit or explicit. Thus, where the court of appeals should have undertaken a review of the administrator's substantive role in the controversy, accounting for the assessments of North Carolina law, it chose, in effect, to presume that role to be insignificant.

Directing itself to the issue of the "motive" element, the *Vaughan* court first recited the section 1359 standard and the truism that violation of that standard was not dependent upon an evil motive, but rather upon a "purpose of creating apparent diversity of citizenship."¹⁴⁷ The court of appeals found that the circumstances made the purity of the beneficiary's motive beyond question.¹⁴⁸ Indeed, valid strategic reasons supported the bringing of the action in North Carolina, and North Carolina law required the appointment.¹⁴⁹ Thus, the "motive" element as developed in both the *Lester* and the *Bishop-Miller* approaches was apparently satisfied as the appointment was motivated by factors other than simply the creation of federal jurisdiction.¹⁵⁰

However, the *Vaughan* court went further, and argued that while the appointment itself was in no way motivated by a purpose to create federal jurisdiction, the subsequent attempt to bring the action in federal court after the "innocent" creation of jurisdiction was the "sub-

¹⁴² *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 415, 196 S.E.2d 789, 803 (1973).

¹⁴³ See *Horney v. Meredith Swimming Pool Co.*, 267 N.C. 521, 523, 148 S.E.2d 554, 556 (1966).

¹⁴⁴ *In re Estate of Below*, 12 N.C. App. 657, 657-59, 184 S.E.2d 378, 378-81 (1971).

¹⁴⁵ *First Union Nat'l Bank of North Carolina v. Hackney*, 266 N.C. 17, 22, 145 S.E.2d 352, 357 (1965).

¹⁴⁶ 542 F.2d at 644. It must be acknowledged, as was the situation in *Bishop*, that there were no other assets in the estate besides the wrongful death action; thus only limited duties would be required until an actual recovery. *Id.* at 642.

¹⁴⁷ 542 F.2d at 644.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

stantial equivalent" of an unexplained improper purpose.¹⁵¹ Whereas the approaches of both *Lester* and *Bishop-Miller* described the only impropriety under section 1359 as an appointment for the purpose of creating federal jurisdiction, the *Vaughan* court suggested the formulation of a new concept. This new concept of impropriety pertained not to the appointment that joined the administrator to the wrongful death action, but rather pertained to the subsequent attempt, by a party whom the court had presumptively judged to be a "stakeless" administrator, to initiate the action in federal court. Where the court should have been satisfied under the preceding trilogy decisions with its evaluation of the motives for the appointment itself, it chose rather expansively to equate the actual attempt to initiate the action in federal court, by an administrator who was clearly not appointed for the purpose of creating diversity jurisdiction, to an improper purpose relating to the original appointment.

From this evaluation of the administrator and his appointment, the court of appeals insisted upon using the *Miller* rule to determine diversity of citizenship — "we conclude here, as in *Miller*, that we should look to the citizenship of the beneficiary in Virginia rather than that of the North Carolina administrator . . ."¹⁵² However, in so adopting the *Miller* rule, without a recognizable application of the accepted standard under section 1359, the court of appeals was in no way entirely consistent with the two alternate approaches for the analysis of the creation of diversity jurisdiction that were available under the previous, conceptually similar decisions of *Lester*, *Miller*, and *Bishop*.¹⁵³ Consequently, under the *Lester* approach, no valid application of section 1359 was undertaken by the court of appeals in accordance with which any rule for the determination of diversity of citizenship could be applied; under the *Bishop-Miller* approach, no valid application of section 1359, subsumed into the *Miller* rule for the determination of diversity of citizenship, was undertaken by the court of appeals as a means of eliminating the administrator from the consideration of jurisdiction. Simply, the *Vaughan* court did not apply the section 1359 standard, as defined in the trilogy decisions, that was essential under the approaches of either *Lester* or *Bishop-Miller* for the application of any rule for the determination of diversity of citizenship.

By its distorted application of section 1359, the Fourth Circuit looked directly to the citizenship of the beneficiary for the determination of the existence of diversity jurisdiction.¹⁵⁴ In effect, the court of appeals simply ignored the position of the administrator. As a result, the *Vaughan* court took the Fourth Circuit one step further from the original thrust of the *Mecom* and *Kramer* decisions. Like the *Miller* and

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See text at notes 137-39 *supra*.

¹⁵⁴ See 542 F.2d at 646 (dissenting opinion). See note 20 *supra*.

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Bishop courts, the *Vaughan* court saw the issue of the improper creation of federal diversity jurisdiction as involving one, not two, questions. However, unlike the preceding decisions interpreting section 1359, the *Vaughan* court failed adequately to consider the purpose of the appointment and the role of the administrator in the particular case.

By pursuing this one dimensional approach, while ignoring the requisite section 1359 analysis, the *Vaughan* court has completed a "circular" pattern of development. The decision law proceeded in definite increments: the rigid diversity of citizenship rule in *Mecom*; the injection and subsequent judicial disregard of section 1359; the exception placed upon the *Mecom* rule by the stricter section 1359 standard of *Kramer*; the application of this stricter standard in *Lester-McSparran*; the initial and obscured framing of a new diversity of citizenship rule under the circumstances of *Miller*; the confusion of *Bishop*, blending the *Miller* rule and the section 1359 standard; the analysis of *Vaughan* which applied a simple rule, but which ignored the section 1359 standard. *Vaughan*, thus, represents the final stage of this developmental cycle whereby a simple rule was adopted and applied—the citizenship of the beneficiary would be determinative of federal diversity jurisdiction.

This rule was spawned by the conceptual conflict between the inflexible application of the *Mecom* rule and the dictates of section 1359.¹⁵⁵ Yet, in seeking to reconcile this conceptual inconsistency, the *Vaughan* court opted for a rule that was as bare and inflexible as that in *Mecom*. The court of appeals' efforts refused any application of the statutory standards; section 1359 was utilized as neither an independent standard of review nor as a subsumed standard within the application of the rule. No determination of collusion or impropriety was made; little effort was made to determine the purpose of the appointment and the substantive position of the administrator. In the context of an administrator appointed to bring a wrongful death action, section 1359 was rendered superfluous and meaningless. The court of appeals, in effect, accomplished the gutting of section 1359; a bare, inflexible rule now controls.¹⁵⁶

Substantial criticism lies against the *Vaughan-Miller* rule itself. The rule was initially framed in *Miller* to avoid a constitutional conflict under the supremacy clause.¹⁵⁷ No such constitutional issue was presented in *Vaughan* and thus the *Miller* court's reason for abandoning the *Mecom* rule and for framing a substitute method of decision equitably to resolve its particular jurisdictional controversy did not exist.¹⁵⁸

Furthermore, as a conceptual matter, the particular facts of the case even absent the required joining of the administrator in North Carolina presented a situation similar to cases of genuine diversity of

¹⁵⁵ See text at notes 63-65 *supra*.

¹⁵⁶ 542 F.2d at 646 (dissenting opinion). See note 20 *supra*.

¹⁵⁷ See text at notes 90-94, 98-101 *supra*.

citizenship. Mrs. Swain and Southern Railway were of non-diverse citizenship, but Swain brought suit in another state. Thus, the case presented two non-citizens pursuing an action in a separate foreign forum state. Accordingly, the controversy was not one of purely local dimensions and the litigants, like those in an action between citizens of different states, faced the prospect of being drawn into a foreign forum subject to local attitudes and prejudices. In addition, the defendant was a railway corporation, and as such had substantial contact, influence, and business within the forum state. Therefore, Southern Railway was even something more than a mere "non-citizen" with no connection to the forum state; it was, in fact, alleged at first to have been a citizen of North Carolina.¹⁵⁹ Considering these facts, it is at least arguable that the case contained the same necessity for the federal protection of plaintiffs from the local prejudices of the forum state that forms the theoretical basis of diversity jurisdiction in more "traditional" fact situations.¹⁶⁰

The *Vaughan-Miller* rule also falls far short of achieving the simplicity and consistency desired in any jurisdictional rule. While problems may inhere in any process for the determination of diversity jurisdiction by the citizenship of a personal representative,¹⁶¹ the *Vaughan-Miller* rule created more problems than it solved. The federal courts demand complete diversity among parties.¹⁶² Thus, under *Vaughan-Miller*, a case with multiple beneficiaries would apparently be denied a federal forum if one of the beneficiaries was a citizen of the defendant's state. Regardless of the citizenship of the administrator, the decedent, or the beneficiaries, complete diversity of citizenship would be lacking as long as one of the beneficiaries and one of the defendants were of non-diverse citizenship.¹⁶³

Further questions arise as to the future application of the rule.¹⁶⁴ Would the rule apply to an executor appointed by the decedent? Would the rule apply when the administrator had powers and duties beyond those of *Vaughan* such that he would possess an undeniable

¹⁵⁸ 542 F.2d at 646 (dissenting opinion). See note 20 *supra*.

¹⁵⁹ 542 F.2d at 645 n.4.

¹⁶⁰ See text at notes 21-27 *supra*.

¹⁶¹ WRIGHT & MILLER *supra* note 21, § 1557 at 723.

¹⁶² *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

¹⁶³ The problems inherent in the rule were compounded, in its specific application to the facts of *Vaughan*, by the court of appeals' refusal to apply the rule prospectively. 542 F.2d at 644-45. Both *McSparran* and *Lester* applied their holdings prospectively. 402 F.2d at 876-77; 415 F.2d at 1106-08. Those courts departed from the Blackstonian view that judges only discover the law and that any previous inconsistent declaration was a nullity. 402 F.2d at 876-77; 415 F.2d at 1106. In *Vaughan*, the state statute of limitations barred the subsequent initiation of the dismissed action in the proper state forum; if federal jurisdiction was not granted, the claim could never be brought to trial. 542 F.2d at 645 n.4. Where the court so misdirected precedent and statute to give legitimacy to its chosen rule, it would have been appropriate for the court to avoid injustice in the case, which was untarnished by collusion or impropriety, by applying its decision prospectively. *Id.* at 647 (dissenting opinion). See note 20 *supra*.

¹⁶⁴ See 542 F.2d at 647 n.5 (dissenting opinion). See note 20 *supra*.

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"stake" in the litigation? If so, how substantial would these powers and duties have to be to define the requisite "stake"? Would creditors pressing preferred claims against an estate be considered beneficiaries within the meaning of the rule? How would jurisdiction be determined when the decedent's estate was the beneficiary under the wrongful death act? All these questions are posed by the *Vaughan-Miller* rule and offer areas ripe for complex future litigation. In addition, no language in the opinion appeared to limit the rule to administrators of wrongful death actions. Therefore, the rule would in theory appear to be applicable to all fiduciaries. As such, the confusion in formulating and applying the rule to administrators in wrongful death actions could be compounded many times over in all actions brought by fiduciaries who seek federal diversity jurisdiction.

The task of reconciling the conceptual conflicts between the standards of section 1359 and the traditional rule for the determination of diversity jurisdiction need not lead to such anomalous results as those dictated by the Fourth Circuit. For example, as the most viable reform in this area the American Law Institute's *Study of the Division of Jurisdiction between State and Federal Courts* proposed to attribute the citizenship of the decedent to the administrator authorized to bring a wrongful death action for the purpose of determining diversity of citizenship and federal jurisdiction.¹⁶⁵ The Institute's proposal would greatly simplify the determination of diversity jurisdiction in wrongful death actions involving an appointed administrator; the nature and purpose of the appointment would no longer bear upon the jurisdictional issues. Therefore, application of the section 1359 standard, in any form, would not be ignored, but rather would be functionally unnecessary. While the Institute's proposal would do much to reform this jurisdictional area, the *Vaughan-Miller* substitute did little to promote either the policies of diversity jurisdiction or the efficient administration of justice.

IV. CONCLUSION

Having confronted the conceptual conflicts presented by the creation of federal diversity jurisdiction through the appointment of an administrator in a wrongful death action, the Fourth Circuit in

¹⁶⁵ American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* § 1301 (b)(4) (Official Draft 1969); see generally, *Jurisdiction of Federal Courts*, 46 F.R.D. 141 (1969). The *Study* originated from a suggestion of Mr. Chief Justice Warren in a 1959 address to the Institute: "It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism." *Jurisdiction of Federal Courts*, 46 F.R.D. at 141. The *Study* reflected an eight year effort to make such a principled allocation of judicial business. *Id.* The *Lester* court acknowledged the existence of the Institute's proposal, 415 F.2d at 1106, and the *Miller* court specifically noted that its rule approached, without achieving, the purpose of the Institute's proposal. 456 F.2d at 68.

Vaughan v. Southern Railway Co. chose to adopt the new *Miller* rule holding that the citizenship of the beneficiary would be controlling for purposes of diversity jurisdiction. In this process the *Vaughan* court so distorted the section 1359 standard of review as defined by the Fourth Circuit's trilogy of diversity jurisdiction decisions that the application of the "stake" and "motive" elements of the standard was rendered largely unrecognizable. This application, in effect, served only to justify an essentially bare application of the *Miller* rule itself. Therefore, the Fourth Circuit's application of the *Miller* rule was built upon a questionable foundation. In addition, the rule itself, in light of its own inherent weaknesses and in comparison to the preferred reform proposal, possesses dubious future utility. Thus, in its barest elements the *Vaughan* decision represents the Fourth Circuit's indulgence in the final stages of a process of judicial rule-making. However, this process and the search for an alternate rule of decision in the jurisdictional controversy must be said to have ultimately foundered.

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Constitutional Law—Taxpayer's Fifth Amendment Privilege Against Self-Incrimination—*Fisher v. United States*.¹ In the consolidated case of *Fisher v. United States*,² the Supreme Court addressed the question of whether a taxpayer's fifth amendment privilege prevents enforcement of a documentary summons directed toward his attorney for the production of his accountant's workpapers which had been transferred to the attorney by the taxpayer.³ Faced with an investigation by the Internal Revenue Service (I.R.S.) for possible civil and criminal tax liability, the taxpayers in *United States v. Fisher*⁴ and *United States v. Kasmir*⁵ obtained certain documents from their accountants and transferred them to their attorneys.⁶ Shortly after the transfer, the I.R.S. served a summons on each of the attorneys to compel their production of the transferred documents.⁷ When the attorneys re-

¹ 425 U.S. 391 (1976). Two cases, *Fisher v. United States*, 500 F.2d 683 (3rd Cir. 1974), and *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974), were consolidated because of the identity of issues and the conflict between the courts of appeals' decisions.

² 425 U.S. 391 (1976).

³ *Id.* at 394.

⁴ 352 F. Supp. 731 (E.D. Pa. 1972), *aff'd*, 500 F.2d 683 (3rd Cir. 1974), *aff'd*, *sub nom.* *Fisher v. United States*, 425 U.S. 391 (1976).

⁵ 499 F.2d 444 (5th Cir. 1974), *rev'd* 425 U.S. 391 (1976). The district court opinion is unpublished.

⁶ 425 U.S. at 394. The documents transferred in *Kasmir* consisted of the accountant's workpapers, copies of correspondence between the accountant and the taxpayer, and copies of the taxpayer's tax returns for three years. In *Fisher*, the taxpayers transferred their accountant's analyses of their income and expenses, based upon information copied from the taxpayer's checks and deposit receipts. *Id.*

⁷ 26 U.S.C. § 7602 (1970) provides authority to summon books and records in the following language:

For the purpose of ascertaining the correctness of any return, mak-