Washington University Law Review

Volume 25 | Issue 2

January 1940

Federal Procedure—Foreign Corporations—Waiver of Venue by Consent

the heart of the problem. Conceptually, the mere incidence of a tax on the other government may be a burden on it, and this was the view of the earlier cases. Realistically, there would seem to be no burden unless the amount of the tax is unduly onerous.[10] Through the incidence[11] on the federal government of the taxes in question may be clear, their impeding and retarding effect on it is not as evident because it creates no onerous financial burden.[12] Therefore, the taxes in the instant case and the *Western Lithograph Co.* case[13] are to be invalidated, the decisions must rest on the basis of their incidence.[14] V. K.

FEDERAL PROCEDURE—FOREIGN CORPORATIONS—WAIVER OF VENUE BY CONSENT—[United States].—Citizens of New Jersey brought suit in a federal court in New York to restrain a Delaware corporation there doing business from carrying out a contract. Service was had upon an agent which the corporation had appointed according to a New York statute. Defendant appeared specially and moved to quash service because it was not a resident of the district. Plaintiffs appealed to the Supreme Court of the United States. *Held*,[1] judgment reversed. The appointment by a corporation of an agent as required by the New York statute constituted waiver of the venue provision of the Judicial Code.[2]

The history of foreign corporations in federal courts has been marked by changing attitudes. In 1789,[3] the original Judiciary Act was passed requiring suit to be brought in the district where defendant was an inhabitant or in which he could be found. In order to permit a corporation to sue, it was necessary for the Supreme Court in 1809[4] to decide that citizen-

10. This is the reasoning behind Mr. Justice Holmes's classic statement in Panhandle Oil Co. v. Mississippi (1938) 277 U. S. 218,223, that "The power to tax is not the power to destroy while this court sits." See also Mr. Justice Frankfurter's concurring opinion in Graves v. New York ex rel. O'Keefe (1939) 306 U. S. 466, 487.

11. "The settlement of the burden on the ultimate taxbearer is spoken of as the incidence of the tax." Lutz, *Public Finance* (2d ed. 1929) 317.

12. The lack of an actual financial burden may have been the basis for the decision in Graves v. New York ex rel. O'Keefe (1939) 306 U. S. 466. "In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government." 306 U. S. at 486, 487. See also Helvering v. Gerhardt (1938) 304 U. S. 405, 421, "When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural."

13. Western Lithograph Co. v. Board of Equalization (1938) 11 Cal. (2d) 156, 78 P. (2d) 731, cited supra, note 8.

14. Lack of incidence might have been the controlling consideration in the Graves case. "That the economic burden of a tax on salaries is passed on to the employer or that employees will accept a lower governmental salary because of its tax immunity, are formulas which have not won acceptance by economists and cannot be judicially assumed." 306 U. S. 466, 484, n. 4.

1. Neibro Co. v. Bethlehem Shipbuilding Corp. (1939) 60 S. Ct. 153.
2. Judicial Code (1888) 25 Stat. 433, 28 U. S. C. A. sec. 112.
3. (1789) 1 Stat. 78, c. 20, sec. 11.
4. Bank of the United States v. Deveaux (U. S. 1809) 5 Cranch 61.

ship of the members constituted the test for diversity jurisdiction. The basis of state legislative control was laid in 1839 when the Court declared that a corporation can have no legal existence outside the boundaries of the sovereignty creating it and may by an agent contract in another state only by the latter's permission.[5] Upon the fiction of consent evidenced by doing business, states enacted statutes designed to secure jurisdiction; Florida[6] passed the first of these statutes and a similar Maryland statute was upheld by a federal court in 1837.[7] Thereafter the Supreme Court accepted the principle of state jurisdiction over local activities of foreign corporations.

But with jurisdictional problems arose the related question of venue in diversity of citizenship suits in the federal courts. In 1877,[8] the Supreme Court in *Ex parte Schollenberger*, under the Act of 1875, held that state legislation and the appointment of an agent would authorize the corporation to be "found" within the district for the purpose of venue as well as jurisdiction. Then in 1887 and 1888 the present amended Judiciary Act was enacted,[9] eliminating the phrase "or in which he shall be found" and adding the clause, "only in the district of the residence of either of the plaintiff or the defendant."

Venue is a personal privilege which may be waived, and the question was presented as to whether certain acts constituted waiver.[10] In 1892 *Shaw v. Quincy Mining Co.*[11] held that within the meaning of the Act a corporation was an inhabitant only in the state of organization and could object to federal venue elsewhere. Then in *Southern Pacific Co. v. Denton*,[12] the Supreme Court passed upon a set of facts arising under a Texas statute, the validity of which was in question, and stated that even "if valid" that statute was not sufficient to waive the venue privilege. Due to the indefiniteness of the opinion as to the ground of that decision, it occasioned some confusion in later cases; most of the district courts held that appointment of an agent did not prevent raising of objection to venue.[13] The few decisions by the circuit courts of appeal were divided.[14]

---

5. Bank of Augusta v. Earle (U. S. 1839) 13 Pet. 519.

6. Florida, Act of Nov. 21, 1829, No. 8.

7. Warren Mfg. Co. v. Etna Ins. Co. (C. C. D. Conn. 1837) 2 Paine 501, Fed. Cas. No. 17,206.

8. (1877) 96 U. S. 369.

9. Judicial Code (1888) 25 Stat. 433, 28 U. S. C. A. sec. 112.

10. Seaboard Rice Milling Co. v. Chicago, R. I. & Pac. R. R. (1925) 270 U. S. 363; Dobie, Venue in Civil Cases in the United States District Court (1925) 35 Yale L. J. 129; Note (1939) 119 A. L. R. 676. Fletcher, *Cyclopedia Corporations* (Perm. ed. 1931) 190, sec. 4392.

11. (1891) 145 U. S. 444.

12. (1892) 146 U. S. 202. The Texas statute sought to deny foreign corporations access to the federal courts. It had been held unconstitutional by the state court also.

13. The following cases cited the Denton case for the insufficiency of the appointment of an agent to waive the venue privilege: Platt v. Massachusetts Real-Estate Co. (C. C. D. Mass. 1900) 103 Fed. 705; Hagstoz v. Mutual Life Ins. Co. (C. C. E. D. Pa. 1910) 179 Fed. 569; Beech-Nut Packing Co. v. P. Lorillard Co. (D. C. S. D. N. Y. 1921) 287 Fed. 271; Jones v. Consolidated Wagon & Machine Co. (D. C. D. Idaho 1929) 31 F.

That question the *Neibro* case[15] now answers, at least in part. It does not affect the principle that a corporation is an inhabitant only of its state of incorporation nor the rule that venue is a privilege under the Act. For jurisdictional purposes service must be upon an agent sufficiently representative to receive service of process.[16] But if the actual appointment of an agent, although under direction of a state statute, may be said to constitute a "real consent"[17] in relation to jurisdiction, so the majority of the Court held that that appointment may operate as consent in advance to waive the venue provision also. In reaching this result the majority interpreted as dictum that portion of the *Denton* case which said that compliance with the statute was not consent to waive the venue privilege.[18] The majority also distinguished *In re Keasby & Mattison Co.*,[19] cited by the dissent, upon the ground that there the designation of an agent as required by the state statute "which is the basis of consent had in fact not been made."

Several types of statutes have been enacted by the states.[20] One allows the corporation to appoint its own agent, filing his name with a state official.[21] Another designates a particular state official.[22] The appointment

---

(2d) 383; Thomas Kerfoot & Co. v. United Drug Co. (D. C. Del. 1930) 38 F. (2d) 671; Standard Stoker v. Lower (D. C. Md. 1931) 46 F. (2d) 678; Gray v. Reliance Life Ins. Co. (D. C. W. D. La. 1938) 24 F. Supp. 144; Hamilton Watch Co. v. George W. Borg Co. (D. C. N. D. Ill. 1939) 27 F. Supp. 215; Toulmin v. James Mfg. Co. (D. C. W. D. N. Y. 1939) 27 F. Supp. 512. Contra: Riddle v. N. Y., L. E. & W. R. R. (C. C. W. D. Pa. 1889) 39 Fed. 290; Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co. (C. C. Mass. 1890) 41 Fed. 833; Patten v. Dodge Mfg. Co. (D. C. Ind. 1928) 23 F. (2d) 852, approved (C. C. A. 7, 1932) 60 F. (2d) 676.

14. Insufficient to waive the venue privilege, McLean v. Mississippi (C. C. A. 5, 1938) 96 F. (2d) 741; Neibro Co. v. Bethlehem Shipbuilding Corp. (C. C. A. 2, 1939) 103 F. (2d) 765 (overruled by present case). Dodge Mfg. Co. v. Patten (C. C. A. 7, 1932) 60 F. (2d) 676, aff'g (D. C. Ind. 1928) 23 F. (2d) 852; Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (C. C. A. 10, 1938) 100 F. (2d) 770. Is it significant that all these Circuit Court of Appeals decisions were rendered after 1928?

15. Neibro Co. v. Bethlehem Shipbuilding Corp. (1939) 60 S. Ct. 153.

16. Mutual Life Ins. Co. v. Spratley (1898) 172 U. S. 602.

17. Bagdon v. Philadelphia and Reading Coal and Iron Co. (1916) 217 N. Y. 432, 436, 437, 111 N. E. 1075.

18. Neibro Co. v. Bethlehem Shipbuilding Corp. (1939) 60 S. Ct. 153.

19. (1895) 160 U. S. 221.

20. Nearly every state in the Union has passed some statute requiring a foreign corporation engaging in business within the state to appoint a statutory service agent upon whom process against the corporation may be served. But these vary as to provisions. See: Note (1933) 11 Tex. L. Rev. 226, for discussion of statutes and statutory citations.

21. Secretary of State shall require "a designation of a person upon whom process against the corporation may be served within the state." N. Y. Birdseye Cumming & Gilbert's Consol. Laws (1909) c. 28, sec. 16.

22. Under the amended statute in New York, the Secretary of State is the agent to be designated "upon whom all process in any action or proceedings against it may be served within the state." New York Thompson's Laws (1939) c. 28, sec. 210.

of the agent in the *Neibro* case was made under the old New York statute of the first type above. What effect will the *Neibro* case have when statutes of the latter type, as the present New York statute, come before the Court? Will the Court hold that designation of an official is sufficient consent to produce the "state of facts" necessary to give jurisdiction over an absent corporation? Or is this case the beginning of a recession from the heretofore consistent policy of limiting federal jurisdiction?[23]

W. K.

LABOR—STATE ANTI-INJUNCTION LAWS—LABOR DISPUTE—PICKETING BY OUTSIDE UNION—[Illinois].—Plaintiffs were the owner and all the employees of a beauty shop which the defendant union was picketing in an effort to unionize. There was no dispute between the employer and the employees; unionizing efforts on the premises, with which the employer did not interfere, failed completely. The picketing was accompanied by some minor acts of violence. *Held*, all picketing enjoined since no labor dispute existed under the Illinois Anti-Injunction Act, the disputants not standing in the relation of employer and employee.[1]

At the present time twenty-seven states, including Illinois, have Anti-Injunction Acts applicable to labor disputes.[2] In all cases arising under such acts, the determination of the existence of a labor dispute presents a difficult problem. Prior to 1939 fifteen states[3] had a definition of labor

---

23. E. g., amendments of the Judiciary Act have increased the jurisdictional amount from five hundred dollars to three thousand dollars, and the amendment of 1887-1888 curtailed jurisdiction by restricting the venue provision.

1. Swing v. A. F. of L. (1939) 372 Ill. 91, 22 N. E. (2d) 857.

2. Ariz. Rev. Code (1928) c. 92, sec. 4286; Cal. Labor Code (1937) sec. 921; Colo. Stats. Ann. (1935) c. 97, secs. 78; Conn. Gen. Stats. (1939 Supp.) sec. 1420 (e); Idaho Laws of 1939, c. 215; Ill. Rev. Stats. (1937) c. 48, sec. 2 (a); Ind. Burn's Stats. (1933) tit. 40, c. 5, sec. 504; Kan. Gen. Stats. (1935) c. 60, sec. 1104; La. Gen. Stats. (1939) c. 13, sec. 4379.5; Me. Laws of 1933, c. 261, sec. 1; Md. Code (1935 Supp.) art. 100, sec. 67; Mass. Gen. Laws (1932) c. 149, sec. 24, as amended by Acts of 1935, c. 407 as added by Acts of 1938, c. 345, sec. 2; Minn. Mason's Stats. (1927) sec. 4256, as amended by Minn. Mason's Stats. (1938 Supp.) sec. 4256, as amended by Laws of 1939, c. 440, sec. 11; Mont. Rev. Code (1935) sec. 9242; N. H. Pub. Laws (1926) c. 380, sec. 27, as amended by Laws of 1935, c. 46; N. J. Rev. Stats. (1937) tit. 2, c. 29, sec. 77; N. M. Laws of 1939, c. 195, sec. 1; N. Y. Thompson's Laws (1939) Civ. Prac. Act, sec. 876a; N. D. Laws of 1935, c. 247; Okla. Stats. (1931) c. 52, art. 4, sec. 10878; Ore. Code (1935 Supp.) tit. 49, sec. 1901; Pa. Laws of 1937, act. no. 308, as amended by Laws of 1939, act. no. 163; R. I. Laws of 1936, c. 2359, sec. 1; Utah Rev. Stats. (1939 Supp.) c. 49, sec. 2A; Wash. Rem. Rev. Stats. (1937) sec. 7612; Wis. Code (1937) sec. 103.53, as amended by Laws of 1939, c. 25; Wyo. Rev. Stats. (1934 Supp.) c. 63, sec. 201, as amended by Laws of 1937, c. 15. Missouri has no Anti-Injunction Act.

3. Colo., Conn., Idaho, Ind., La., Md., Mass., Minn., N. Y., N. D., Ore., Pa., Utah, Wash., Wis. Massachusetts omits clause, "whether or not disputants stand in the proximate relation of employer and employee."