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Article 16

Venue - Proper Federal Forum for Unincorporated Associations

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This is clearly a waiver of its security interest in the collateral and the court rightly held so.

Clovis National Bank v. Thomas is relevant so far as it is applicable to the area of farm products and the Uniform Commercial Code. Beyond that, its importance diminishes. Since the Code does not specifically provide for waiver in a manner which can be uniformly decided by the adopting states, courts which have held that waiver is not determined by custom and usage will probably still decide along these same lines. This case still leaves the interpretation of what constitutes waiver to local courts; and the criteria to be applied will be local law. Therefore whether or not the states will split along their present lines still remains to be seen.

John Goryl

VENUE—PROPER FEDERAL FORUM FOR UNINCORPORATED ASSOCIATIONS

The Denver and Rio Grande Western Railroad Company sued the Brotherhood of Railroad Trainmen for breach of duty under the Railway Labor Act with respect to a strike. The United States District Court for the District of Colorado overruled the union's motion to dismiss the action for improper venue and awarded the railroad damages. The union appealed to the United States Court of Appeals for the Tenth Circuit where the decision was reversed, holding that the union could be sued only in the venue of its residence, and that its residence was not in Colorado. Certiorari was granted to the United States Supreme Court where it was ruled that the Court of Appeals improperly applied section 1391(b) of the United States Code,[1] thereby changing the venue requirements and abandoning the doctrine that an unincorporated association is not recognized as a citizen for venue and diversity purposes. *Denver and Rio Grande Railroad Co. v. Brotherhood of Railroad Trainmen,* 387 U.S. 485 (1967).

Section 1391(b) is the general venue statute governing transitory causes of action in the federal courts where jurisdiction does not depend solely on diversity of citizenship. Following its amendment in 1966, the section permits suit either in the district where all of the defendants reside or in the district where the cause of action arose. At the time this suit was brought, however, venue lay only at the defendant's residence, as had been the case since 1887. Thus, for almost eighty years, proper venue in federal question cases was

[1] 28 U.S.C. § 1391(b) reads as follows: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

limited to the district of the defendant's residence, whether the defendant was an individual, a corporation, or an unincorporated association, as in this instance. During all of this time, down to and including the 1966 amendment, Congress has not expressly defined the residence of an unincorporated association for purposes of the venue statute.

Before this Supreme Court decision, an unincorporated association was not recognized as a legal entity separate from its members with the same rights to venue and diversity as corporations. In 1948 Congress directed that a corporation could be sued in the judicial district "in which it is incorporated or licensed to do business, and such judicial district shall be regarded as the residence of such corporations for venue purposes." 28 U.S.C. section 1391(c). Thus the resolution of this issue was left to the Supreme Court. The purpose of this note is to ascertain the reason for this change and its implications for the future.

To effectively understand the concept of venue for unincorporated associations in federal jurisdiction, it is necessary to examine the history of this topic and of corporate venue. The earliest case in point is *Marshall v. Baltimore and Ohio Railroad*[2] decided in 1853. In *Marshall*, the plaintiff maintained that he was a citizen of Virginia and that the Baltimore and Ohio Railroad Co., the defendant, was a body corporate by an act of the General Assembly of Maryland. The defendant objected that this averment was insufficient to show federal jurisdiction over the case or controversy. The United States Supreme Court in overruling the defendant's objection presumed that all stockholders of a corporation are citizens of the state of incorporation and treated the corporation as a citizen of that state. Through this decision the Supreme Court sustained federal jurisdiction cases between a citizen of one state and a corporation of another state regardless of the actual citizenship of the corporation's stockholders. Thus, corporations became jural entities which could sue and be sued in the federal courts.

Thirty-six years later, however, in *Chapman v. Barney*,[3] the United States Supreme Court refused to extend to unincorporated associations the rule set forth in *Marshall*. The court held that a New York joint stock company was not a citizen of a state for purposes of federal diversity jurisdiction as it was incapable of possessing a corporate charter.[4] This decision provided the basis for the rule that unincorporated associations are not considered judicial

[2] 57 U.S. (16 How.) 314 (1853). This remained the law until 1958. See 28 U.S.C. § 1332 (1964).

[3] 129 U.S. 677 (1889). An earlier district court had taken judicial notice of the fact that under the laws of New York, joint stock associations were "corporations without the name," and held that an association of this type was a citizen of New York. Maltx v. American Express Co., 16 F. Cas. 566 (No. 9002) (C.C.E.D. Mich. 1876).

[4] 129 U.S. 677, 682 (1889).

persons and therefore the citizenship of their individual members is determinative of federal diversity.[5] Thus, the use of the federal courts was denied to an unincorporated association if even one of its members was a citizen of the same state as the other party to the suit.

In 1948 the general venue statute was redrafted as 28 U.S.C. section 1391, and subsection (c) was added. This subsection provided that corporations could be sued in any judicial district in which it was incorporated or licensed to do business or doing business. In 1962, before the Supreme Court had spoken on the matter, the Court of Appeals for the Second Circuit attempted to change the holding of *Chapman* by its decision in *Rutland Railroad Corp. v. Brotherhood of Locomotive Engineers.*[6] In this case three of the defendant brotherhoods had their headquarters in Cleveland, Ohio. The headquarters of the fourth brotherhood was located in Cedar Rapids, Iowa. The brotherhoods asserted that since they were unincorporated associations, the proper venue for an action against any one of them would be had only in the judicial district where their principal place of business was established. The majority, in deciding *Rutland*, held that for venue purposes the residence of an unincorporated association is assimilated to that of corporations, and includes all judicial districts in which an unincorporated entity is doing business as well as its principal place of business. The court based its decision on Judge Learned Hand's opinion in *Sperry Products Inc. v. Association of American Railroads.*[7] In that instance, Judge Hand stated that for venue purposes, as well as other procedural incidents, an unincorporated association should be considered a jural entity, and that the only practical approach to the procedural problems created by actions involving unincorporated associations was to assimilate their treatment to that accorded corporations. Thus the court extended the process of assimilation which Judge Hand advocated by incorporating the treatment of unincorporated associations for venue purposes with the expanded concept of corporation residence as set out in 28 U.S.C. section 1391(c). The court reasoned that if an unincorporated union was carrying on sufficient activities in a particular judicial district so that it was deemed to be doing business there, it would not usually suffer any undue harm if required to stand suit there.[8]

[5] Although *Chapman v. Barney* is most often cited for the general rule, its holding was initially ignored by the lower federal courts as resting upon bad pleading. *See* Andrew Bros. v. Youngstown Coke, 86 F. 585 (6th Cir. 1898). The "proper" leading case is Great So. Fire Proof Hotel v. Jones, 177 U.S. 449 (1900). *See* Comment, *Unions as Judicial Persons*, 66 YALE L.J. 712, 742-44 (1957).

[6] 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Although not mentioned by the Supreme Court in *Bouligny*, it was impliedly overruled when the Court decided that this was a matter for legislative consideration.

[7] 132 F.2d 408 (2d Cir. 1942).

[8] Rutland R.R. v. Brotherhood of Locomotive Eng'rs, *supra* note 6, at 29.

In 1964, the Court of Appeals for the Second Circuit again departed from *Chapman*, but used different grounds than in *Rutland*. *Mason v. American Express Co.*[9] was an appeal from a judgment of the District Court for the Southern District of New York, which dismissed a personal injury complaint against a joint stock association on the grounds that the defendant New York association could not be deemed a citizen for diversity purposes, and the requirement to complete diversity was therefore not met because some of the defendant's members were citizens of the plaintiff's state of citizenship. Here the Second Circuit rejected the *Chapman* rule and held that an unincorported joint stock association should be treated as a citizen of the state where it filed written articles of association and in which it had its principal place of business. The court based its decision on three factors. First, in the *Chapman* decision, which it rejected, the jurisdictional issue was raised by the court on its own motion and not by the appellant. Secondly, the court in *Chapman* stated flatly that the appellee joint stock company could not be a citizen of New York unless it be a corporation. The court made no effort to analyze the rationale of *Marshall v. Baltimore and Ohio Railroad* in order to determine whether the reasons for extending citizenship to a corporation might apply with equal force to a joint stock association.[10] Lastly, the court claimed that the Supreme Court opinion in *Puerto Rico v. Russell*[11] abandoned the artificial and mechanical rule in favor of a more flexible test of capacity for citizenship.[12] The reliance on *Russell* may have been misplaced since the Supreme Court, in sustaining diversity treatment of a Puerto Rican limited partnership, recognized an unincorporated association as a judicial person for diversity purposes based upon the civil law recognition in Puerto Rico of that type of organization as a legal entity separate from its members. The court found certain corporate-like characteristics compelling its decision.[13] The appellate court also argued that under New York law an unincorporated joint stock association, such as this defendant, is created pursuant to written articles of association, which must be filed like a certificate of incorporation as a public record. This reasoning enabled the appel-

[9] 334 F.2d 392 (2d Cir. 1964).

[10] *Id.* at 395.

[11] 288 U.S. 476 (1933).

[12] Mason v. American Express Co., *supra* note 9, at 393. *Cf.* Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948).

[13] Some of the attributes of the Puerto Rican association were its rights to "contract and own property and transact business, sue and be sued, in its own name and right," creation by articles of association on public record, endurance beyond the death of individual members, centralization of management, and absence of personal liability of members for the associations' acts and debts. Puerto Rico v. Russell, *supra* note 11, at 481-82.

late court to treat the defendant in *Mason*, the American Express Company, as a corporation for federal diversity purposes.[14]

One month after the Second Circuit's decision in *Mason*, the Court of Appeals for the Fourth Circuit upheld *Chapman* in *United Steelworkers of America v. Bouligny*,[15] thereby creating a conflict in the appellate courts. In *Bouligny* the plaintiff corporation sought damages in a North Carolina court for defamation alleged to have occurred during the course of the steelworkers' campaign to unionize the corporation's employees. The steelworkers, whose principal place of business purportedly was Pennsylvania, removed the case to the federal district court. The union asserted that for purposes of diversity jurisdiction it was a citizen of Pennsylvania, although some of its members were North Carolinians. The corporation sought to have the case remanded to the state courts relying on the *Chapman* principle that an unincorporated association's citizenship is that of each of its members. On appeal from an interlocutory order, the Court of Appeals for the Fourth Circuit reversed and directed the case to be remanded to the state courts. The appellate court used *Chapman* as precedent to support its decision, and found *Puerto Rico v. Russell* completely inapplicable by saying that the suit before the Supreme Court was simply one of interpretation of a Puerto Rican statute and not a question of constitutional diversity jurisdiction.[16] In interpreting the statute, the Supreme Court, by analogy to a common law corporation, held that the defendant, a civil law *sociedad*, had a domicile in

[14] The characteristics which the American Express Co. possessed which made it similar to a corporation were listed in the opinion of the district court: (1) The association did not dissolve or liquidate on the death of an associate as did a partnership; (2) The association could hold real property in the name of its president; (3) The powers of management could be concentrated in a few associates who formed a self-perpetuating managing body; and (4) The association could be sued without making all of its associates parties to the action. Mason v. American Express Co., 224 F. Supp. 288, 290 (S.D.N.Y. 1963). *Compare* note 13. But after finding this the district court held that the association differed from a corporation in a significant respect, individual shareholders could be held liable for the debts of the association, and therefore the Express Co. could not be treated as a corporation for purposes of federal jurisdiction. The Second Circuit found, however, the "theoretical liability of individual shareholders actually becoming operative . . . highly unlikely." Mason v. American Express Co., *supra* note 9, at 401.

[15] 336 F.2d 160 (4th Cir. 1964).

[16] The Court, by analogy to a common law corporation, held that the defendant, a civil law *sociedad*, had a domicile in Puerto Rico and thus could not claim the domicile of its individual members to acquire the non-resident status required by 39 Stat. 965 (1917), 48 U.S.C. § 863 (1958), which reads: "The United States District Court for the District of Puerto Rico shall . . . have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens . . . of a State, Territory, or District of the United States not domiciled in Puerto Rico." Clearly the case does not by any means hold that the *sociedad* was a citizen of Puerto Rico for purposes of diversity jurisdiction under article 111. *Supra* note 15, at 163. For a more complete discussion *see* 51 CORNELL L.Q. 827 (1966).

Puerto Rico and thus could not claim the domicile of its individual members to acquire non-resident status required by the Organic Act. The appellate court also reasoned that *Russell* was reversed by the 1958 amendment to the diversity statute which added 28 U.S.C. section 1332(c), which directed that corporations should be deemed citizens with dual citizenship, first in the state of incorporation and also in the state which was their principal place of business. Before the amendment the statute spoke only of citizens and not of corporations, therefore it was a question merely of interpretation. With the *Bouligny* decision a conflict was created in the appellate courts as to the validity of *Chapman* as the present law.

In 1965 certiorari to the United States Supreme Court was granted in *Bouligny*.[17] The Supreme Court upheld the law as established in *Chapman*, and settled the conflict existing in the appellate courts between the Second and Fourth Circuits. The Supreme Court was apparently sympathetic with those who would reverse *Chapman*, but believing this properly a matter for legislative consideration, felt they could not adequately or appropriately enunciate an alternative.[18] Mr. Justice Fortas speaking for the court stated the majority's position:

> Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument—merits stoutly attested by widespread support for the recognition of labor unions as judicial personalities.[19]

The Supreme Court in *Bouligny* could have abandoned *Chapman* if it had taken the stand that *Puerto Rico v. Russell* had breached the doctrinal wall of *Chapman*, and that step already taken, there was now no necessity for enlisting the assistance of Congress. However, the court did not feel that *Puerto Rico* furnished the precedent that was required,[20] since the problem which it presented was that of fitting an exotic creation of the civil law, the *sociedad en comandita* (limited partnership), into a federal scheme with which it was incompatible. The decision in the principal case, of course, indicates that the court did not wait for legislative action to give legal existence to unincorporated associations.

Prejudice is another factor which courts in the past have taken into consideration when deciding diversity cases. Originally, federal jurisdiction over controversies between citizens of different states[21] was considered necessary

[17] United Steelworkers v. Bouligny, 383 U.S. 145 (1965).

[18] *Id.* at 149.

[19] *Id.* at 153.

[20] *Id.* at 151.

[21] U.S. Const. art. III, § 2.

to protect out-of-state litigants from local prejudice in state courts.[22] It was always feared that a foreign litigant would be prejudiced by placing his case before a local and hostile jury, with unfamiliar and perhaps inadequate procedure.[23] Furthermore, impartial application of the law could not always be expected from judges whose method of appointment and tenure often placed them at the mercy of local politics.[24] Today some commentators argue that even if local prejudice existed in 1789, it exists no longer.[25] There are others, however, who feel that actual prejudice still exists and support the continuation of diversity jurisdiction.[26] Congress, by amending the diversity statute in 1958, giving corporations dual citizenship, appears to have accepted the latter view.[27] However, since Congress has chosen to remain silent rather than extend these privileges to unincorporated associations, the Supreme Court acted and rectified this situation.

The *Denver and Rio Grande Western Railroad* decision has finally made it clear that the United States Supreme Court no longer recognizes *Chapman* and that that decision is now inconsistent with the modern concepts and functions of diversity jurisdiction. In recognizing an unincorporated association as having a legal existence separate from its members, the court has opened the doors to the federal courts, where once they were closed if even one member of the association was a citizen of the same state as the opposing party. Conversely, the venue when unincorporated associations are now sued can be chosen with more certainty. It can now be said that substance governs form and this, coupled with the abandonment of the fiction of nonexistence of unincorporated associations, presages much more consistent judicial decisions in the future.

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[22] *See* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); ALI: STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 37-38 (tent. Draft No. 1, 1963); Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1932).

[23] *See* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

[24] Friendly, *supra* note 22, at 497.

[25] Since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requiring the federal courts to follow the substantive law of the forum state in diversity cases, it is no longer reasonable to continue diversity jurisdiction, as the state courts are much more competent to apply their own substantive law than are the federal courts.

[26] Moors & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Texas L. Rev. 1, 15-16 (1965).

[27] 28 U.S.C. § 1332 (1958).