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Federal Procedure -- Jurisdiction Conferred by Stipulation

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the unit. However, such confidential relationship between the spouses does not offer sufficient excuse to exempt them from conviction if they are guilty of the crime.[26]

The *Dege* case resolves the conflict which had existed between the circuits. It is submitted that the Court correctly took this opportunity to overrule a doctrine "that has parrot-like been repeated"[27] since the eighteenth century. Whether the state courts will follow this rule remains to be seen.

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FEDERAL PROCEDURE—JURISDICTION CONFERRED BY STIPULATION

The plaintiff, a citizen of Pennsylvania, brought a negligence action against the defendant corporation, a citizen of New York, in a federal district court in Pennsylvania. The defendant, by answer, challenged diversity jurisdiction because it was also incorporated under the laws of Pennsylvania. Subsequently, the parties stipulated to the jurisdiction of the court. After twenty-three months, during which time extensive discovery and pre-trial procedures were utilized and the statute of limitations had expired, the defendant moved to dismiss for lack of jurisdiction. The motion was granted and the plaintiff appealed. *Held*, reversed: the trial court abused its discretion by re-examining jurisdictional facts previously stipulated to by the parties. *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960).

The great weight of authority holds that jurisdiction of a federal court may not be conferred by agreement, consent or collusion of the parties.[1] Diversity jurisdiction is a fact which must exist at the time the jurisdiction of a federal court is invoked.[2] If at any time jurisdiction is challenged, the court is under a duty to proceed no further until the jurisdictional question

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26. See Williams, *The Legal Unity of Husband and Wife*, 10 MODERN L. REV. 16 (1947).

27. United States v. Dege, 80 Sup. Ct. 1589, 1591 (1960).

1. United States v. Griffin, 303 U.S. 226 (1938); Mitchell v. Maurer, 293 U.S. 237 (1934); Ayers v. Watson, 113 U.S. 594 (1885); People's Bank v. Calhoun, 102 U.S. 256 (1880); Orth v. Transit Inv. Corp., 132 F.2d 938 (3d Cir. 1942); Page v. Wright, 116 F.2d 449 (7th Cir. 1940), *cert. denied*, 312 U.S. 710 (1941); 1 MOORE, FEDERAL PRACTICE § 0.60, at 608 (2d ed. 1960). "Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause . . . ." Ayers v. Watson, *supra* at 598.

2. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); Birmingham Post Co. v. Brown, 217 F.2d 127 (5th Cir. 1954); Town of Lantana v. Hopper, 103 F.2d 118 (5th Cir. 1939).

is determined.[3] The parties may agree to the jurisdictional facts which sustain or defeat jurisdiction, either by admission in the pleadings or stipulation.[4] The courts will generally accept the allegations of diverse citizenship without formal proof.[5] However, if the defendant challenges the diversity allegations, either by motion or in his answer, the plaintiff must establish proof of diversity jurisdiction.[6] After the pleadings are closed the defendant may raise the issue of diversity jurisdiction by suggestion,[7] either subsequent to the answer but prior to trial,[8] during trial,[9] or after trial but before appeal.[10] In the event the defendant fails to challenge diversity, the court is not necessarily bound by the admissions or stipulations of the parties but may raise the issue sua sponte and require the party alleging jurisdiction to prove his allegations.[11]

Several recent decisions have created an exception to the established rule that the parties may suggest lack of jurisdiction at any time during the proceedings.[12] The exception becomes applicable when the trial court has made a special inquiry into, and has ruled upon the jurisdictional facts.[13]

3. Page v. Wright, 116 F.2d 449 (7th Cir. 1940), *cert. denied*, 312 U.S. 710 (1941); 2 MOORE, FEDERAL PRACTICE § 12.23, at 2330, n.14 (2d ed. 1948).

4. Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960); Harllee v. City of Gulfport, 120 F.2d 41 (5th Cir. 1941).

5. Gibbs v. Buck, 307 U.S. 66, 72 (1939); Republic Pictures Corp. v. Security-First Nat'l Bank, 197 F.2d 767 (9th Cir. 1952).

6. See cases cited note 2 *supra*.

7. FED. R. CIV. P. 12 (h) provides "that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

8. Parmelee v. Ackerman, 252 F.2d 721 (6th Cir. 1958); Farr v. Detroit Trust Co., 116 F.2d 807 (6th Cir. 1941).

9. Ambassador East, Inc. v. Orsatti, Inc., 155 F. Supp. 937 (E.D. Pa. 1957), *rev'd on other grounds*, 257 F.2d 79 (3d Cir. 1958).

10. Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954); Zank v. Landon, 205 F.2d 615 (9th Cir. 1953).

11. Mansfield, C. & L. M. Ry. v. Swan, 111 U.S. 379 (1884); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir. 1941).

12. A "suggestion" is neither a pleading nor a motion, and filing a "suggestion" does not relieve a party from pleading or moving the court under the Federal Rules of Civil Procedure. Rank v. United States, 16 F.R.D. 310 (S.D. Cal. 1954). See note 7 *supra*.

13. Young v. Handwork, 179 F.2d 70 (7th Cir. 1949). The defendants filed a motion to dismiss on several grounds, one of which was lack of diversity jurisdiction. The diversity issue presented a question of fact as to the residence of the deceased at the time of filing the petition for bankruptcy. The defendants filed an amended motion to dismiss, but failed to raise the issue and in open court admitted the facts in the plaintiff's complaint. Following determination by the court upon the merits, the defendants attempted to raise the issue once more, but the court denied leave to file the amendment, which action was affirmed by the Court of Appeals.

In the case of Price v. Greenway, 167 F.2d 196 (3d Cir. 1948), the trial court made a special inquiry into the jurisdictional facts when the defendant alleged that both parties resided in the same state. After an examination of many complicated facts, the court ruled that diverse citizenship did exist. A mistrial was declared later. At the second trial the court refused to re-examine jurisdictional facts which had been judicially determined in the prior proceedings. The Court of Appeals for the Third Circuit affirmed the ruling made by the trial court in the second action.

In the recent case of Klee v. Pittsburgh & W. Va. Ry., 22 F.R.D. 252 (W.D. Pa. 1958), the defendant admitted diversity in his answer. Four days before the statute of limitations would have run, the defendant moved to amend his answer to deny diversity. The court denied the motion on the ground that the defendant was attempting to file supplemental pleadings which the court may or may not permit according to the court's discretion.

In such cases the trial court must exercise its "discretion" to determine whether it will re-examine the facts as set forth by the special hearing and ruling.[14] The rationale for this exception is founded upon the general principle that a court will not relitigate issues once judicially determined unless the parties are able to introduce new evidence.[15] The result of the application of this exception is in keeping with the intent of the Federal Rules of Civil Procedure to determine speedily the rights of the litigants.[16]

The court in the instant case adopted the recent trend of permitting the trial court to exercise its discretion as to whether it will re-examine the jurisdictional facts once there has been a special inquiry to determine diversity jurisdiction. The trial court did not in fact make a special inquiry into the jurisdictional facts. However, the appellate court construed the stipulation by the parties to have eliminated the necessity for a special hearing. The effect of the stipulation was to amend the answer by striking the defense and admit the jurisdictional facts alleged in the complaint. Thus, the trial court's order as to jurisdiction was valid and binding on the parties.[17] The parties, as a matter of right, could not subsequently raise a question as to these jurisdictional facts.[18] However, the court could in its discretion re-examine the facts.[19] The Court of Appeals held that the trial court abused its discretion by such a re-examination some twenty-three months later. The court aptly pointed out that during this period the statute of limitations had expired on the claim.[20]

In the instant case one may question whether the trial court in its original ruling had made a special inquiry into the jurisdictional facts, since the court accepted only the stipulation of the parties. It would seem the court made such a special inquiry for the first time when the issue was raised at the pre-trial conference. However, the majority view among the federal

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14. The discretion the trial court may use flows from the disputed interpretation of the word "suggest" as used in Rule 12 (h) of the Federal Rules of Civil Procedure. The majority view maintains there is no discretion to be exercised as there is an absolute right to raise the defense at any time. United States v. Griffin, 303 U.S. 226 (1938); Page v. Wright, 116 F.2d 449 (7th Cir. 1940). The minority view maintains there is no absolute right unless there is strict compliance with Rule 12. Young v. Handwork, 179 F.2d 70 (7th Cir. 1949); Price v. Greenway, 167 F.2d 196 (3d Cir. 1948); Klee v. Pittsburgh & W. Va. Ry., 22 F.R.D. 252 (W.D. Pa. 1958); 2 MOORE, FEDERAL PRACTICE § 12.23, at 2330, 2331, n.14 (2d ed. 1948).

15. See note 13 *supra.*

16. FED. R. CIV. P. 1: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

17. Di Frischia v. New York Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960).

18. See note 13 *supra.*

19. Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir. 1941) (jurisdictional issues can be raised and the facts examined at any time by the court on its own motion).

20. The statute of limitations barred the plaintiff from bringing the action in a state court of Pennsylvania, PA. STAT. tit. 12, § 31 (1936). However, the brief for the appellee points out that the statute of limitations of the state where the cause of action accrued did not bar the action. Brief for Appellee, p. 10, Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960). See note 26 *infra.*

courts is still adverse to this decision.[21] A party is not precluded from raising the diversity issue, either in the pleadings or otherwise, by any form of laches, waiver or estoppel.[22] The minority position is well taken that there should be some point at which undisputed jurisdictional facts will be settled. However, when a party reasonably "suggests" to the court a lack of diversity, the action must be dismissed as the federal court is without power to act.[23]

The dicta in the instant case indicated that the appellate court may make an inquiry into jurisdiction if the trial court has not made a determination of the jurisdictional facts.[24] A trial court may make additional inquiries into jurisdiction if the parties can introduce evidence which was not available at the time of pleading.[25] The decision appears equitable, since the statute of limitations on the claim had expired.[26] However, it does not appear to conform with the Federal Rules of Civil Procedure,[27] nor with the current trend to reduce the work load of the federal courts. It is submitted that the result of the instant case is to give the trial judge discretion, under these facts, as to whether he will dismiss a diversity action, when in fact no such discretion formerly existed.

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FEDERAL COURTS—THE "SILVER PLATTER" DOCTRINE

The petitioners were convicted in a federal district court for intercepting and divulging telephone communications in violation of the Communications Act of 1934.[1] The evidence which led to their conviction had been obtained originally by state officers with a search warrant issued "upon information and belief" that one of the petitioners possessed obscene

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21. America Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Mitchell v. Maurer, 293 U.S. 237 (1934); Hospoder v. United States, 209 F.2d 427 (3d Cir. 1953); Orth v. Transit Inv. Corp., 132 F.2d 938 (3d Cir. 1942); Page v. Wright, 116 F.2d 449 (7th Cir. 1940); Bailey v. Texas Co., 47 F.2d 153 (2d Cir. 1931).

22. The Court of Appeals for the Third Circuit stated in an earlier decision: "It is axiomatic that jurisdiction may not be conferred or waived by the parties and that courts at every stage of the proceedings may and must examine into its existence." Hospoder v. United States, 209 F.2d 427, 429 (3d Cir. 1953).

23. See note 7 *supra*.

24. Di Frischia v. New York Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960).

25. Price v. Greenway, 167 F.2d 196 (3d Cir. 1948); Klee v. Pittsburgh & W. Va. Ry., 22 F.R.D. 252 (W.D. Pa. 1958).

26. It is of interest to note that if the dismissal by the trial court had been affirmed, the plaintiff could have brought the action in Ohio, where the cause of action accrued. Ohio has a statutory savings provision which tolls the statute of limitations in that state to permit a party to bring a new action within one year after his earlier action has been dismissed other than on the merits. OHIO REV. CODE ANN. § 2305.19 (Baldwin 1958).

27. See note 7 *supra*.

1. 48 Stat. 1100, 1103 (1934), 47 U.S.C. §§ 501, 605 (1958); 62 Stat. 701 (1948), 18 U.S.C. § 371 (1958).