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Federal Procedure – Diversity of Citizenship – Corporations

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body, the constitutional protection of his day in court. Under proper circumstances, personal constitutional guaranties may be made secondary to the preservation of our order.⁴⁶ The instant case raises a doubt as to the existence of such an emergency and by its result, perhaps, may provide some measure of gratification to that ideology which delights in pointing out defects in our system of government.

FEDERAL PROCEDURE — DIVERSITY OF CITIZENSHIP — CORPORATIONS

Plaintiff, a citizen of New Jersey sued the defendant, incorporated in both New York and New Jersey, in the federal district court of New Jersey. A motion to dismiss was granted by the district court and the plaintiff appealed. *Held*, judgment reversed. Incorporation in plaintiff's state in addition to New York does not defeat federal jurisdiction based on diversity. *Gavin v. Hudson & Manhattan R.R.*, 185 F.2d 104 (3d Cir. 1950).

The citizenship of the members of the early corporations determined the citizenship of those entities.¹ Today, a conclusive presumption exists that a corporation is a citizen of the state of its creation.² Under this presumption, a problem of federal diversity jurisdiction is raised with respect to those corporations chartered in more than one state.³

Apparently the best method of determination of corporate citizenship in states other than the one of original creation is by examination of the corporate history. When incorporated in the manner followed by any entity, as if incorporated for the first time, it is a citizen of that state.⁴ A corporation forced to incorporate as a condition for doing business in the state (domestication) is for limited purposes a citizen of that state excluding diversity jurisdiction.⁵ The corporation which registers in the state without any pretense at incorporation is for all purposes an alien.⁶

The facts surrounding a merger or consolidation are often so complicated that it is difficult to determine whether the company is incorporated, domesticated, or licensed. Consolidation results in a new corporation com-

46. *Schenck v. United States*, *supra* note 35; *Gitlow v. New York*, *supra* note 35.

1. *Bank of the United States v. Devaux*, 5 Cranch 61 (U.S. 1809) (citizenship of the persons composing the corporation determines the citizenship of the corporation).

2. *Louisville, Cincinnati, & C. R.R. v. Letson*, 2 How. 497 (U.S. 1884) (citizenship of the members is immaterial).

3. 28 U.S.C. § 1441(a) (Supp. 1950).

4. *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270 (U.S. 1871). (A corporation could "only be brought into court as a citizen of that state [the second state], whatever its status or citizenship may be elsewhere.")

5. *Southern Ry. v. Allison*, 190 U.S. 326 (1903); *Evans, The Removal of Causes*, 33 Va. L. Rev. 445, 459 (1947).

6. *Martin's Adm'r v. Baltimore & Ohio R.R.*, 151 U.S. 673 (1894); *Pennsylvania R.R. v. St. Louis, Alton, & T.H. R.R.*, 118 U.S. 290 (1886).

posed of two or more dissolved ones.⁷ Merger leaves one corporation alive, simply absorbing those dissolved.⁸ An example of a close situation one may encounter is a combination, followed by the granting and acceptance of a charter of "consolidation and merger."⁹ In this situation one particular jurisdiction¹⁰ interpreted the charter as an enabling act and found a merger, not a consolidation, because they looked to the contracts of reorganization which indicated the intent to merge. As the surviving corporation was foreign to the jurisdiction, the court retained the case, but had it held that there was a consolidation it could have found that the new corporation succeeded to the charter rights of the defunct one and in this suit to have lost the privilege of diversity.

A second, and confusing, situation arises when individuals incorporate under the same name in two or more states. Following this they acquire a new charter in each state permitting consolidation.¹¹ Jurisdiction due to diversity of citizenship would then depend upon which corporate entity was being sued and where.¹²

The third situation involves the purchase of the assets only of one corporation by a foreign corporation. The purchaser does not incorporate in the seller's state nor does the seller become defunct, but the plaintiff, who is aware of the true owner and operator, sues the out of state corporation and alleges it as a corporation of the seller's state, demanding diversity federal jurisdiction.¹³

Many cases do not go into the corporate history and assume that the litigant is a full-fledged corporation. Whether by assumption or conclusion that the litigant is a corporation of two or more states, the cases are legion which lay down the following general rule. A multi-state corporation is a citizen in the state of the forum, therefore, if suit is brought by or against a corporation in the adversary's state and it is one of the states of incorporation there is no diversity.¹⁴

The court in the instant case does not think that combination by merger or consolidation is important¹⁵ but takes judicial notice of a consolidation without saying more.¹⁶ Cases are cited which are contra to the

7. *Lee v. Atlantic Coast Line Ry.*, 150 Fed. 775 (4th Cir. 1906) (these terms are often confused or used interchangeably).

8. *Id.*

9. *Lee v. Atlantic Coast Line Ry.*, *supra* note 7.

10. Circuit Court of S.C., *supra* note 7.

11. *Nashua & Lowell R.R. v. Boston & Lowell R.R.*, 136 U.S. 356 (1890).

12. *Cf. Goodwin v. New York, N.H. & H. R.R.*, 124 Fed. 358, 362-366 (1st Cir. 1903).

13. *St. Louis & San Francisco Ry. v. James*, 161 U.S. 545 (1896).

14. *Patch v. Wabash R.R.*, 207 U.S. 277 (1907); *Boston & M. R.R. v. Hurd*, 108 Fed. 116 (1st Cir. 1901), *cert. denied*, 184 U.S. 700 (1902); *Allegheny County v. Cleveland & P. Ry.*, 51 Pa. 228 (1865).

15. 185 F.2d 104, 106 n.7.

16. *Id.* at 105, n.1.

court's position¹⁷ including Supreme Court decisions,¹⁸ yet the court denies that there is any Supreme Court authority in point.¹⁹ Of those cases cited as being contra to this position, *Pennsylvania R.R. v. St. Louis, Alton & T. H. R.R.*²⁰ is anomalous in holding that the plaintiff was not a corporation of the second state but only licensed therein, which fact indicates the necessity of examining the corporate history. In such a situation Judge Goodrich, himself, states that there would be no problem.²¹ Again, he says that the Supreme Court has not considered the problem since 1912,²² although, in fact, the Supreme Court denied certiorari in 1936.²³

The rationale of the court's opposition to the general rules seems to lie in the statement that the plaintiff need only cross over into New York in order to get federal diversity jurisdiction. This appears unnecessary in view of the fact that there is actually only one operating road regardless of the number of charters it possesses.²⁴ The writer believes this idea is fundamental to the court's decision and indicates its desire to have the majority rule reversed. Judge Kaufman arrived at the same result in New York in 1950.²⁵ If this case is appealed it will surely be reversed under the great weight of authority unless it and the New York case represent a new trend.

TAXATION—A TRUST RES AS A MEMBER OF A PARTNERSHIP

Plaintiff, member of a partnership, created a trust for the benefit of his son and daughter from a portion of his share of the partnership. The indenture of trust named plaintiff and two others as trustees and provided that, as to the trustees and beneficiaries, a trust and not a partnership was created. The indenture further provided that the trustees should not be personally liable as partners in the firm. The plaintiff seeks a refund of federal income taxes alleging that the trust res created is a valid member of the partnership for federal income tax purposes. *Held*, a trust res cannot be a member of a partnership for federal income tax purposes. *Hanson v. Birmingham*, 92 F. Supp. 33 (N.D. Iowa 1950).

A membership of a partnership at Common Law must meet the following essential requirements: (1) the ability to contract,¹ (2) the assumption

17. *Id.* at 105, n.4.

18. *Ibid.*

19. *Id.* at 107.

20. 118 U.S. 290 (1886).

21. 185 F.2d 104, 107.

22. *Ibid.*

23. *Town of Bethel v. Atlantic Coast Line R.R.* 81 F.2d 60 (4th Cir. 1936), cert. denied, 298 U.S. 682 (1936).

24. 185 F.2d 104, 105.

25. *Lucas v. New York Central R.R.*, 88 F. Supp. 536 (S.D.N.Y. 1950).

1. *Kasch v. Comm'r*, 63 F.2d 466 (5th Cir. 1933), cert. denied, 290 U.S. 644 (1933).