Michigan Law Review

Volume 34 | Issue 7

1936

CONFLICT OF LAWS-JURISDICTION OVER NONRESIDENT CARRIERS AS LIMITED BY DOCTRINE OF UNREASONABLE BURDEN ON INTERSTATE COMMERCE

COMMENTS

CONFLICT OF LAWS—JURISDICTION OVER NONRESIDENT CARRIERS AS LIMITED BY DOCTRINE OF UNREASONABLE BURDEN ON INTERSTATE COMMERCE—There is little question today but that a foreign corporation may be subject to suit and a personal judgment in a state where it is doing business if service has been had upon a proper agent of the corporation, designated by law or otherwise.[1] There may be consider-

[1] See Fead, "Jurisdiction Over Foreign Corporations," 24 MICH. L. REV. 633 at 637-642 (1926). Also, Farrier, "Jurisdiction Over Foreign Corporations," 17 MINN. L. REV. 270 at 286-289 (1933). In the latter article the author concludes, "Thus it may be said that if the foreign corporation is doing business in the state and reasonable notice is provided, the state may authorize any judgment it sees fit subject only to the interstate commerce clause of the constitution."

Annotations on this subject may be found in 46 A. L. R. 570 (1927) and 95 A. L. R. 1478 (1935). The second annotation follows Gloeser v. Dollar S. S. Lines, 192 Minn. 376, 256 N. W. 666 (1934). In this case (at 381-382), the Minnesota court, which has had this and similar problems before it many times, says:

"There are two requisites to local jurisdiction over a foreign corporation, where no property is seized or attached. It must be doing business in the state

able question as to what constitutes "doing business." [2] The fact that the business carried on by a corporation is wholly interstate in character will not prevent that corporation from being subject to service in the same manner as though it were doing intrastate business as well.[3] It also seems clear that under state attachment statutes the property of a foreign corporation engaged in interstate commerce may be subject to attachment, whether this property consists of traffic balances due from other carriers, rolling stock, or property used in connection with a soliciting office, without creating a necessarily unreasonable burden upon interstate commerce.[4] However, in *Davis v. Farmers' Co-Operative Equity Co.*,[5] a statute construed to authorize suit by a nonresident plaintiff against a foreign railroad corporation with a soliciting agent but no line in the state of suit on a cause of action not originating in the state

> or district [of such a nature as to warrant the inference that the corporation has subjected itself to the local jurisdiction] and it must be present there by an authorized officer or agent. . . . Where jurisdiction is acquired by a state court by attachment or garnishment of property of defendant in the state, to the extent of the property impounded, or [where valid personal service has been made as noted above], the question then is not strictly one of initial jurisdiction, but is whether the prosecution of the suit is such an unreasonable interference with interstate commerce that the state court has no right to proceed and should not be permitted to proceed therein."

This latter question is that dealt with in Davis v. Farmers' Co-Operative Equity Co., 262 U. S. 312, 43 S. Ct. 556 (1923).

[2] For example, maintaining an office for a general passenger and freight agent entitled to settle claims may be doing business. St. Louis Southwestern Ry. v. Alexander, 227 U. S. 218, 33 S. Ct. 245 (1913). Whereas the employment of an agent "to solicit and procure passengers and freight" has been held not to constitute doing business in the sense that liability to service is incurred. Green v. Chicago, B. & Q. Ry., 205 U. S. 530, 27 S. Ct. 595 (1907).

[3] International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944 (1913).

[4] As to rolling stock, see Davis v. Cleveland, C. C. & St. Louis R. R., 217 U. S. 157, 30 S. Ct. 463 (1910), where attachment was allowed. It appears that such attachment is forbidden only if it directly interferes with interstate shipments. To the effect that under some circumstances attachment or garnishment for the purpose of suit may create an unreasonable burden on interstate commerce, see Atchison, T. & S. F. R. R. v. Wells, 265 U. S. 101, 44 S. Ct. 469 (1924). "Nor can this [prohibition against burdening interstate commerce] be evaded merely by attaching the property of the non-resident railroad corporation." Denver & Rio Grande Western R. R. v. Terte, 284 U. S. 284 at 287, 52 S. Ct. 152 (1932). The garnishment of traffic balances due from connecting carriers is ordinarily held proper and not an unreasonable burden on interstate commerce even where this res is the sole basis for jurisdiction and no personal service could have been made on defendant corporation. St. Louis, B. & M. R. R. v. Taylor, 266 U. S. 200, 45 S. Ct. 47 (1924); Rosenblet v. Pere Marquette Ry.. 162 Minn. 55, 202 N. W. 56 (1925); Cressey v. Erie R. R., 278 Mass. 284, 180 N. E. 160 (1932); and International Milling Co. v. Columbia Transportation Co., 189 Minn. 507, 250 N. W. 186 (1933), reversed in 292 U. S. 511, 54 S. Ct. 797 (1934). See also 85 A. L. R. 1395 (1933).

[5] 262 U. S. 312, 43 S. Ct. 556 (1923).

and not arising from a transaction within the state was held to create an unreasonable burden on interstate commerce and to be invalid. The doctrine laid down in the *Davis* case has resulted in much judicial interpretation.[6] The scope of that doctrine forms the subject matter of this inquiry.

If the commerce clause forbade any interference with interstate commerce, many of the difficult problems connected with the *Davis* case would never have arisen. Any degree of burden would have been sufficient to invoke the application of the doctrine. But state action may affect interstate commerce [7] and only unreasonable burdens upon such commerce are unconstitutional.[8] That we are not sure of the ground covered by the *Davis* case and those cases which have followed or distinguished it, seems due to a confusion as to the nature of the doctrine [9] and the proper mode of applying it. The courts have made little or no

[6] Especially as the Court took the opportunity to say (262 U. S. 312): "It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, or if the plaintiff was, when it arose, a resident of the state."

[7] Davis v. Cleveland, C. C. & St. L. Ry., 217 U. S. 157 at 179, 30 S. Ct. 463 (1910) quoting The Winnebago, 205 U. S. 354 at 362-363, 27 S. Ct. 354 (1907): "The State may pass laws enforcing the rights of its citizens which affect interstate commerce, but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress." That every law which affects interstate commerce will not be a regulation in the constitutional sense, see Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217, 28 S. Ct. 638 (1908). Clearly enough, a state may not *directly* burden the prosecution of interstate commerce in any manner. International Text-Book Co. v. Pigg, 217 U. S. 91, 30 S. Ct. 481 (1910), and Baldwin v. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497 (1935). The opinions in the cases falling within the Davis case doctrine do not discuss the question of whether the burden is direct or indirect on which, as Justice Holmes has said, so many "nice distinctions" have been made, but refer to its reasonableness instead. The inference to be drawn is that the burden imposed in the Davis case was of the indirect variety.

[8] Erving v. Chicago & N. W. R. R., 171 Minn. 87 at 94, 214 N. W. 12 (1927): "Commerce, like every person and industry, must carry burdens. It is only unreasonable burdens that are intolerable."

[9] Foster, "Place of Trial in Civil Actions," 43 HARV. L. REV. 1217 at 1234-1235 (1930), points out (1) that the doctrine cannot be based on jurisdiction of the subject matter because it cannot be waived even by express submission [see 42 HARV. L. REV. 1062 at 1067, note 25 (1929)]; (2) that it is not an objection to jurisdiction of the person because this would not depend on the residence of the plaintiff or the place of origin of the claim; (3) that it is not based on the physical power concept of jurisdiction inasmuch as it may prevent the entertaining of the case despite the fact that traffic balances have been garnisheed or rolling stock attached; (4) yet it cannot be said that it is a mere procedural requirement like that requiring suit in the district of residence of plaintiff or defendant in diversity cases because a default judgment may be set aside where the rule has been ignored, indicating that the defect is jurisdictional. He concludes, "the only way to gloss over its somewhat monstrous character is to dignify it with the appellation *sui generis*."

effort to get at the actual facts which would show how much of a physical burden the plaintiff and the defendant would be called upon to bear.[10] Consequently, they have not had the proper data with which to approach the question of unreasonableness. The result has been that, having determined the amount of the burden by an assumption, they have been driven to arbitrary methods of determining unreasonableness. The problem must be dealt with in two parts: first, it should be decided what the *actual physical* burden on the defendant and plaintiff will be, and second, it must be decided whether the burden on defendant is unreasonable. In answering the second question, the decisions do not make it clear (1) whether defendant's burden alone is to be looked to,[11] or (2) whether defendant's burden is to be weighed in relation to plaintiff's burden.[12] Even where the size of the burden is arrived at by investigation, however, the problem is not easy of solution. If the first of the two alternatives suggested is followed, the question will be whether the burden on defendant is reasonable in view of the public's interest in efficient transportation. If the second is chosen, the plaintiff's interest and convenience in being allowed to sue

[10] In Davis v. Farmers' Co-Operative Equity Co., 262 U. S. 312 at 315, 43 S. Ct. 556 (1923), the Court finds its facts by way of judicial notice, remarking, "that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation and causes directly and indirectly heavy expenses to the carriers,—these are matters of common knowledge." Some such assumptions as to efficiency and expense must be made if the courts will not examine the facts. If they will not inquire as to what, if any, employees must be obtained as witnesses, they cannot possibly know that any inefficiency will occur since they cannot know that any men will be obliged to leave their duties or that if they do, the service will suffer. Nor can expense be postulated without a consideration of the facts of the individual case. In Hoffman v. Foraker, 274 U. S. 21, 47 S. Ct. 485 (1927), the defendant had alleged that at least eleven of its employees were material witnesses and would have to be transported to Missouri from Kansas. The Court held that there was no unreasonable burden in view of numerous other factors but did not reject the factual test of burden. In Denver & R. G. W. R. R. v. Terte, 284 U. S. 284, 52 S. Ct. 152 (1932), the Court refused to retain jurisdiction over the suit against the Denver and Rio Grande Railroad though plaintiff urged that the state of suit was the state where all his witnesses were located. The Court refused to decline jurisdiction of the suit against the Santa Fe though its witnesses were in Colorado and the suit in Missouri. It went further and said, "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state or refuse jurisdiction according to the relative inconvenience of the parties." This position is approved in International Milling Co. v. Columbia Transportation Co., 292 U. S. 511, 54 S. Ct. 797 (1934).

[11] Denver & R. G. W. R. R. v. Terte, 284 U. S. 284, 52 S. Ct. 152 (1932), noted in 32 COL. L. REV. 541 (1932).

[12] Cressey v. Erie R. R., 278 Mass. 284, 180 N. E. 160 (1932). See discussion of this case and the Terte case in 45 HARV. L. REV. 1263 (1932).

in the courts of his domicil will also be thrown into the scales against the public interest.[13]

The rejection in the case of *Denver & Rio Grand Western R. R. v. Terte* [14] of the number of witnesses required by the parties and the difficulty of getting them to the place of trial as a test in determining the physical extent of the burden on interstate commerce raises the question of what criteria the courts can use to measure the amount of the burden. It should be noted that, though the *Terte* case does not say in so many words that *expense* in getting such witnesses will not be gone into, it seems a fair inference from what is said that, if the question of what witnesses are required is taboo, the question of the *cost* of bringing them into the state and of filling their places while away from their jobs for appearance in court will not be examined. If the court refuses to consider plaintiff's convenience and rejects the tests of availability of witnesses and cost generally incident to getting witnesses to and keeping them in court, there is not a little difficulty about saying what facts will determine the amount of the burden.[15] The only factor which suggests itself is the inefficiency resulting in the operation of the railroad line due to the absence of its workmen and officials, but if there is any flexibility in the market for railroad labor, the railroads will be able to maintain the desired efficiency by keeping a somewhat larger group of men in reserve for the contingency. Only in extreme cases, therefore, will a court be able to say that the efficiency of the railroad actually suffers. In most cases the burden will be a monetary one which, though perhaps not direct, is at least an indirect cost of getting witnesses. The *Terte* case, therefore, leaves in a very unsatisfactory state the question of what facts will be looked to in deciding whether there is *some* degree of burden. The recent judicial approval of the attitude of this case seems unfortunate.

If the court has somehow managed to get over the hurdle set up by refusing to look into the facts to learn whether there is any burden or not and has concluded *a priori* that there is a burden of some sort, it must logically proceed to the question of whether the burden is unreasonable. The character of defendant's business has, if we may judge

[13] Cressey v. Erie R. R., 278 Mass. 284, 180 N. E. 160 (1932), and see Farrier, "Suits Against Foreign Corporations as a Burden on Interstate Commerce," 17 MINN. L. REV. 381 at 395 (1933).

[14] 284 U. S. 284, 52 S. Ct. 152 (1932). See note 10, supra.

[15] Farrier, "Suits Against Foreign Corporations as a Burden on Interstate Commerce," 17 MINN. L. REV. 381 at 401 (1933), suggests: "The question as to whether the suit is a burden on interstate commerce depends primarily upon the availability of witnesses." The same article (at 401, note 51) points out, "What other factors operate to make the unreasonable burden upon interstate commerce . . . the court does not mention."

from the decisions, a bearing on this point. Logically, there would appear to be no reason why all corporations doing interstate business should not be able to urge the unreasonableness of the burden on interstate commerce under fact situations similar to those in the *Davis* case.[16] Actually, the doctrine of that case has been limited to cases involving common carriers. It may be that the public character of the carrier which has made it peculiarly the object of regulation in the public interest has also had an effect upon the courts in leading them to entertain the objection to jurisdiction based on the burden on interstate commerce. A possible explanation of the absence of cases dealing with the availability of this objection to the ordinary private industrial corporation may lie in the fact that, as the public interest in having the defendant free from interference becomes less clear, the interest of plaintiff in being allowed to sue on transitory causes of action wherever he can find the defendant acquires increasing importance.[17] The cases give no real clue to what might be said if this question were fairly presented to the courts.

On the weight to be given to each of the factors mentioned in the *Davis* case as bearing upon the unreasonableness of the burden the courts have had more to say. These factors are: (1) the place where the cause of action arose, (2) the location of the transaction out of

[16] 42 HARV. L. REV. 131 (1928) makes this suggestion in discussing Winslow Lumber Co. v. Hines Lumber Co., 125 Ore. 63, 266 P. 248 (1928). In this case plaintiff was a foreign corporation doing no business in Oregon and defendant likewise did no business in Oregon except to buy lumber through an agent to be sent out of the state. The agent's orders were subject to approval of defendant's Chicago office. The cause of action arose outside the state. It was held that the court had jurisdiction. The court, however, does not appear to have considered the possible application of the Davis case. It merely says that the action is a transitory one and defendant is subject to service as doing business within the state. See a similar suggestion in 17 MINN. L. REV. 381 at 395 (1932). Most of the cases applying the doctrine of the Davis case involve railroads. In Iron City Produce Co. v. American Ry. Express Co., 22 Ohio App. 165, 153 N. E. 316 (1926), the court negatives a supposition that it might be extending the doctrine in remarking that "express companies are carriers engaged in interstate commerce." In two other cases defendant has been engaged in shipping: Louisville & N. R. R. v. Deutsche Dampfschiffarts-Gesellschaft, (D. C. Ala. 1930) 43 F. (2d) 651, noted in 31 COL. L. REV. 323 (1931), where it should be noted that foreign as well as interstate commerce was involved, and International Milling Co. v. Columbia Transportation Co., 292 U. S. 511, 54 S. Ct. 797 (1934). But in Addyston Pipe and Steel Co. v. United States, 175 U. S. 211 at 241, 20 S. Ct. 96 (1899), the Court says, "interstate commerce . . . includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." Under such a definition the Davis case might well have applied to much industry not engaged in the business of the common carrier. And see Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347 (1876).

[17] Farrier, "Suits Against Foreign Corporations as a Burden on Interstate Commerce," 17 MINN. L. REV. 381 at 395 (1933).

which the cause of action arose, (3) the location and extent of defendant's business in the state of suit, (4) the place of the defendant's incorporation, and (5) the place of the plaintiff's residence.

We may consider first the questions raised in connection with the origin of the cause of action within or without the state of suit, and then the related questions as to the effect of the location of the transaction out of which the cause of action arose. It has been recently argued that there is no unreasonable burden on interstate commerce if the cause of action arises in the state of suit.[18] This would mean that even the case where plaintiff was a nonresident and defendant a corporation neither operating a line in the state nor doing business there in other respects would be treated as not subject to the application of the *Davis* case, and any burden as per se reasonable. It seems impossible to accept such a conclusion other than as a mere unverified assumption. If we suppose a case where the plaintiff is a nonresident of Ohio and defendant is not doing business there so as to be subject to personal service, though a debt due to defendant is available for attachment, and if, at the same time, we assume that the cause of action arises from a shipment of goods to Ohio and the negligence causing injury occurred there, we have a case in most respects similar to *St. Louis, B. & M. Ry. v. Taylor*.[19] In that case it was held that the burden was a reasonable one, but it was different from the supposed case in one important essential, the residence of plaintiff. As we shall have occasion to point out later, this is "a fact of high significance." It is not at all clear but that the absence of this fact might have brought an opposite result. The seriousness of the burden and the possibility of its unreasonableness is only made more apparent if we add the assumption that plaintiff and defendant are both residents of Oregon and evidence and witnesses can, for some reason, only be obtained by importing them from that state. Obviously, *a priori* reasoning can give us no answer as to the unreasonableness of a particular burden.[20] It may, however, be true in

[18] Ibid., at 396 suggesting: "The present concern is with those cases which involve some burden. This will eliminate those cases in which the cause of action arose in the state where the suit is being brought. The question is essentially one of when to deny jurisdiction when the cause of action is foreign."

[19] 266 U. S. 200, 45 S. Ct. 47 (1924).

[20] The fact that the cause of action accrued outside the state may have an effect upon the question of whether service has been validly made, the implication of some of the cases being that service, good where the cause of action is local, may not be good where the cause of action is foreign. See 30 A. L. R. 255 (1924) and 96 A. L. R. 366 (1935). The great weight of authority favors the view that the fact that the cause of action is foreign will not ordinarily prevent effective service on a defendant. The question as to what effect the location of the cause of action shall have regarding the burden on interstate commerce is not answered, however, by adherence to either the majority or minority rule, as these go rather to the subject of due process than to burden on interstate commerce.

a majority of cases that a cause of action arising within the state of suit will be accompanied in the fact picture by an availability of witnesses or other facts which will mean small loss in efficiency and expense to the railroads. It is true, too, that the court in the *Davis* case, holding the Minnesota statute invalid, makes one of its objections the fact that "jurisdiction is not limited to suits arising out of business transacted in Minnesota" and is asserted wherever the cause of action has arisen. But this is far from saying that no unreasonable burden could exist if jurisdiction had been so limited.[21] The cases do not in any instance put the reasonableness of the burden solely upon the fact that the cause of action arose within the state of suit. The most that can be said is that it is frequently mentioned as a factor in the court's consideration.[22] An argument by analogy can be made to the cases involving the effect of service of process where the cause of action is foreign[23]: while the fact that the cause of action arose outside the state will not of itself mean that an unreasonable burden has been placed on interstate commerce, whatever burden on interstate commerce exists may more easily be found unreasonable than if the cause of action had arisen within the state.[24]

The question of where the transaction occurred out of which the cause of action arose has been mentioned in several cases.[25] We do not

[21] Davis v. Farmers' Co-Operative Equity Co., 262 U. S. 312, 43 S. Ct. 556 (1923).

[22] Davis v. Farmers' Co-Operative Equity Co., 262 U. S. 312, 43 S. Ct. 556 (1923); St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200, 45 S. Ct. 47 (1924). The court in the Davis case does not close the door upon statutory attempts to take jurisdiction of foreign causes of action *except upon the facts of that particular case.*

[23] See note 20, supra.

[24] There is not only a distinction to be made where the cause of action is local in the sense of having originated in the state as compared with a foreign cause of action but also between a local action as distinguished from a transitory cause of action. The Davis case seems to assume that a transitory cause of action will be the basis for the application of the rule laid down, but this is nowhere definitely expressed. We might suppose, therefore, that the doctrine would be available to defeat jurisdiction in an *ejectment* action brought against defendant. The result would be so plainly inequitable that the court would doubtless reject the suggestion.

[25] In Maverick Mills v. Davis, (D. C. Mass. 1923) 294 F. 404, the fact that the transaction out of which the cause of action arose involved a shipment of goods into Massachusetts helped to lead the court to the conclusion that no unreasonable burden existed. Since the plaintiff was a resident of Massachusetts, it is not clear how important the place of the transaction from which the cause of action arose was in the decision. Iron City Produce Co. v. American Ry. Express Co., 22 Ohio App. 165 at 171-172, 153 N. E. 316 (1926), mentions this factor, but in summing up the reasons for the decision the court fails to include it. The Minnesota decision in International Milling Co. v. Columbia Transportation Co., 189 Minn. 507, 250 N. W. 186 (1933), also refers to the place where the transaction occurred out of which the cause of action arose in the opinions of both majority and minority. It would seem that the courts

have a case, however, where the transaction from which the cause of action arose was in the state of suit but where the cause of action arose outside the state, defendant having no line in the state and plaintiff being a nonresident. It is difficult to say, therefore, that the bare fact that the shipment, injury to which produced the cause of action, was destined for the state of suit will be enough to afford a basis for taking jurisdiction. In some respects it seems to be a weaker factor than that of the place where the cause of action arose, since the latter may well represent the place where inconvenience to the railroad will be smallest, whereas the location of the transaction from which the cause of action arose may have no connection with the factor of inconvenience, e.g. a contract made in Michigan for the delivery of goods from Florida to Texas or a shipment of goods to California, injury occurring in Nevada.

Some of the courts have placed great emphasis upon the fact that the defendant was operating a line in the state at the time the cause of action accrued.[26] The Minnesota cases have not gone so far as to say

look upon the factor as subordinate to the "place where the cause of action arose." If the latter is not in the state, it may be that the plaintiff can successfully urge the former. What is meant by "place where the transaction occurred from which the cause of action arose" is somewhat uncertain. It may mean the place where the contract was entered into or it may mean the place where the performance of the contract occurred. The Davis case appears to refer to the place of origin of the contract; the Maverick and Taylor cases seem to refer to the place of performance of the contract.

[26] There has been quite a line of such cases in Minnesota. See especially Erving v. Chicago & N. W. Ry., 171 Minn. 87, 214 N. W. 12 (1927); Kobbe v. Chicago & N. W. Ry., 173 Minn. 79, 216 N. W. 543 (1927); Gegere v. Chicago & N. W. Ry., 175 Minn. 96, 220 N. W. 429 (1928); Boright v. Chicago, R. I. & P. Ry., 180 Minn. 52 at 56, 230 N. W. 457 (1930). See 34 COL. L. REV. 1135 (1934) and dissenting opinion of Judge Loring in International Milling Co. v. Columbia Transportation Co., 189 Minn. 507 at 515, 250 N. W. 186 (1933), where it is said, "If any logical deduction can be drawn from the various cases, it seems to be that the operation of a railroad within the state where jurisdiction is sought is the important and controlling consideration." In this case there was a considerable question as to whether defendant was really doing business in the state. The Supreme Court of Minnesota applied the Davis case and held that there was no jurisdiction here because, among other reasons, "Defendant has no office or agent in Minnesota and does no business here except for the occasional discharge of an interstate cargo at Duluth." The Supreme Court of the United States took quite a different view of the fact situation. That Court saw defendant navigating the waters over which Minnesota had jurisdiction "not merely occasionally, but by long continued practice." Defendant "brought its property into that state, not fortuitously or by a rare accident, but in furtherance of a systematic course of business." The two courts do not appear to disagree in principle. It is probable that if the Minnesota court had seen the facts as the federal court saw them, it would have felt that it was only following previous Minnesota decisions in upholding the jurisdiction taken. The federal decision does not stand for as strong a position as the Minnesota courts have taken because it makes much of another factor, the residence of the plaintiff. In Harris v. American Ry. Express Co., (App. D. C. 1926) 12 F. (2d) 487, facts were similar to those in the Davis case but defendant was doing busi-

flatly that in *no* case would there be an unreasonable burden on interstate commerce if defendant were operating a line in the state, but they have consistently held, in situations where the only basis for jurisdiction was the existence of defendant's line within the state, that the court had jurisdiction.[27] On the other hand, it is clear that the burden is not unreasonable merely because the defendant has no line in the state.[28] Generally, it may be said that the existence of a line in the state of suit goes a long way toward establishing the reasonableness of whatever burden the suit creates. But reasoning such as that of the Minnesota court in *Erving v. Chicago & N. W. Ry.*[29] goes much too far. It will hardly do to say, "We may assume that a railroad company is well equipped to properly protect itself in litigation throughout its entire system, and so long as it is not required to go beyond its own territory, i.e., the states reached by its own tracks or rolling stock, to defend in such actions it should be held that such suits are not an undue burden to commerce." This kind of reasoning assumes the answer to the very problem in question, which is whether in a particular case the railroad is in a position to protect itself without putting an intolerable burden upon interstate commerce.

ness in the state of suit. *Held*, that the Davis case did not apply and the court had jurisdiction. Objecting to the use of this fact as a criterion of unreasonableness, 18 CAL. L. REV. 311 at 313 (1930).

[27] Foster, "Place of Trial in Civil Actions," 43 HARV. L. REV. 1217 at 1233 (1930), points out, "In all the cases where the defendant succeeded in dismissing the suit, it had no line of railroad within the state, and apparently its local business was exclusively interstate in character. Whether the doctrine will apply to carriers also engaged in intrastate commerce or at all to other corporations remains undecided." Also see Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 COL. L. REV. 1 at 24, note 110 (1929), in criticism of the view expressed in the Minnesota cases. In the case of Guerin Mills v. Barrett, 254 N. Y. 380 at 385, 173 N. E. 553 (1930), the New York Court of Appeals denied plaintiff the right to recover on a Rhode Island judgment obtained by a resident of that state against a corporate defendant which had withdrawn from the state and revoked the agency required by state law after the cause of action arose. The transaction from which the cause of action arose occurred and the cause of action itself may have arisen in Rhode Island. It was held that the statute requiring the creation of an irrevocable agency for accepting service as though defendant were a resident was unconstitutional as an unreasonable burden on interstate commerce because it did not discriminate between causes of action which were based on local business and those which were based on interstate business. The court reached this conclusion on the hypothesis that "The Supreme Court has held that in respect to interstate commerce a non-resident corporation is not subject to suit, even though process be served on one who is a true agent, unless the cause of action grows out of the business transacted within the territory of the forum," citing the Davis case and Michigan Central R. R. v. Mix, 278 U. S. 492, 49 S. Ct. 207 (1929). Certainly no such bald rule as this can be read out of the cases cited. See 44 HARV. L. REV. 644 (1931) and 31 COL. L. REV. 317 (1931).

[28] St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200, 45 S. Ct. 47 (1924); Cressey v. Erie R. R., 278 Mass. 284, 180 N. E. 160 (1932).

[29] 171 Minn. 87 at 94, 214 N. W. 12 (1927).

Where defendant is not only operating a line within the state of suit but is also incorporated in that state, the case is a strong one for the plaintiff. *Hoffman v. Foraker*[30] presents this precise situation, plaintiff in this case being a nonresident and the cause of action being foreign. The Court points out that the facts of the *Davis* case are supplemented by the fact that "the railroad is not a foreign corporation; it is sued in the State of its incorporation. It is sued in a state in which it owns and operates a railroad. It is sued in a county in which it has an agent and a usual place of business. It is sued in a state in which it carries on doubtless intrastate as well as interstate business." The Court concludes that under these circumstances the corporation must submit to the needs "of orderly, effective administration of justice although thereby interstate commerce is incidentally burdened." If the numerical order of these considerations means anything, the place of incorporation is of paramount importance. There is, however, no indication whether, if this were the only fact distinguishing the case from the *Davis* case, the result might have been different. Historically, a domestic corporation has always been subject to suit on a transitory cause of action at its place of residence. For purposes of venue it is deemed to have a residence at some place in the state of its incorporation.[31] This may perhaps explain why a court would be very reluctant to forbid a suit against a corporation in the state of its incorporation even though the burden on interstate commerce might, in the absence of this fact, appear unreasonable. It has also been suggested that the corporation cannot complain, because it was free to incorporate somewhere else in the first place.[32] Such an argument could hardly be maintained without some historical bulwark. It is uncertain whether the rule allowing suit in the state of incorporation on a transitory cause of action would prevail in a suit where defendant had no line in the state, where the cause of action and the transaction from which it arose were foreign, and where plaintiff was a nonresident. Given a sufficiently glaring instance of hardship on and inconvenience to defendant, the older rule might well be overridden.

Finally, there is the effect of plaintiff's residence on the reasonableness of the burden on interstate commerce. The *Davis* case left the point undecided.[33] The cases of *Michigan Central R. R. v. Mix*[34]

[30] 274 U. S. 21 at 22, 47 S. Ct. 485 (1927).

[31] 8 FLETCHER, CYCLOPEDIA CORPORATIONS, c. 48 (1931), and 9 ibid. c. 51, § 4372.

[32] Farrier, "Suits Against Foreign Corporations As a Burden on Interstate Commerce," 17 MINN. L. REV. 381 at 395 (1933).

[33] Supra, note 6.

[34] 278 U. S. 492, 49 S. Ct. 207 (1929).

and *Denver & Rio Grande Western R. R. v. Terte*[35] add no more to the discussion than to indicate that where plaintiff has removed to the state of suit after the cause of action arose elsewhere, a burden which was unreasonable then will remain so despite the removal. Where the plaintiff is a resident of the state of suit *and some additional factor is added*, a court may well say no unreasonable burden exists. Thus in *St. Louis, B. & M. Ry. v. Taylor*[36] the added facts that the shipment was to the state of suit and the cause of action may have arisen there were enough to prevent a dismissal of the action. And in *Maverick Mills v. Davis*[37] the facts that defendant was soliciting business in the state and that the shipment of goods was to a point in Massachusetts were sufficient to avoid the charge of unreasonable burden. There is some authority to the effect that the residence of the plaintiff in the state of suit will alone be controlling. The Massachusetts court in *Cressey v. Erie R. R.*[38] and a federal district court in *Griffin v. Seaboard Air Line Ry.*[39] decided to this effect. In the *Griffin* case defendant was soliciting business in the state, but, though the court takes notice of this fact, it admits that the case is only distinguished from the *Davis* case in that the residence of the plaintiff was in the state of suit. In the *Cressey* case the court accepts as true the defendant's allegations that "To try the case in this Commonwealth would necessarily entail the absence from their duties of employees of the defendant and of connecting carriers for prolonged periods, whereas, if the case were tried in the jurisdiction where the cause of action arose or where the defendant has a usual place of business, it would be no hardship on the defendant, nor interfere with the efficiency and operation of its railroad."[40] Nevertheless the court finds the burden reasonable though neither the cause of action nor the transaction from which it arose nor the defendant's

[35] 284 U. S. 284, 52 S. Ct. 152 (1932).

[36] 266 U. S. 200, 45 S. Ct. 47 (1924).

[37] (D. C. Mass. 1923) 294 F. 404.

[38] 278 Mass. 284, 180 N. E. 160 (1932). In Thurman v. Chicago, M. & St. P. Ry., 254 Mass. 569, 151 N. E. 63 (1925), plaintiff was a resident as in the Cressey case, and other facts were similar except that personal service was attempted. The court refused plaintiff the right to sue but on the ground that "no sufficient service was made to acquire jurisdiction over the defendant," defendant being present and doing business in the state only to the extent of soliciting interstate freight and passenger traffic. In the Cressey case due process requirements were not violated by garnishment of traffic balances. The court was forced, therefore, to declare itself on the doctrine of the Davis case.

[39] (D. C. Mo. 1928) 28 F. (2d) 998. The court says (at 999), "it is by no means clear that it is an unreasonable burden to require a railway corporation to defend in a state in which it does maintain a commercial agency and in which the plaintiff does reside." The "commercial agency" was only a soliciting agency such as defendant maintained in the Davis case.

[40] Cressey v. Erie R. R., 278 Mass. 284 at 285, 180 N. E. 160 (1932).

business activities have any connection with Massachusetts. In view of these cases, a conclusion that residence is not a factor of prime importance is of doubtful validity. The United States Supreme Court has not gone as far as either of the two cases just mentioned but in *International Milling Co. v. Columbia Transportation Co.*[41] the Court makes a special point of the fact that plaintiff, though a Delaware corporation, is suing in the state of its business activities and "In a very real and practical sense, it is a resident of the forum." It is, therefore, no "impertinent intruder." The Court adds, "In saying this we do not hold that the residence of the suitor will fix the proper forum without reference to other considerations, such as the nature of the business of the corporation to be sued. *Denver & Rio Grande Western R. R. Co. v. Terte* . . . is opposed to such a holding. Residence, however, even though not controlling, is a fact of high significance." [42] It certainly cannot be said from a study of the cases that "according to these holdings the residence of the plaintiff in itself is immaterial as to the question of burden on interstate commerce, in spite of the intimations to the contrary." [43] But the remarks of the Supreme Court put a restraining hand on the adoption of the contrary extreme followed by the Massachusetts court in the *Cressey* case.

The several questions bearing on the matter of reasonableness of the burden on interstate commerce which were left open by the *Davis* case must be answered by saying that no one of the factors discussed there is absolutely controlling. The writer believes that this is a sound development of the latter of two parts into which the *Davis* case doctrine should be split. In applying the doctrine there ought to be a purely *factual* approach to the question of *burden*: an inquiry into the number of witnesses to be brought from a distance, the possibility of

[41] 292 U. S. 511, 54 S. Ct. 797 (1933).

[42] 292 U. S. 511 at 519-520, 54 S. Ct. 797 (1933). Justice Cardozo appears to err in saying that the Terte case denies that residence of the plaintiff may be controlling. The case does not determine this point but only that residence acquired in the state of suit *after the cause of action arose* is not controlling.

[43] Farrier, "Suits Against Foreign Corporations as a Burden on Interstate Commerce," 17 MINN. L. REV. 381 at 389 (1933). See 18 MINN. L. REV. 69 (1933) and 19 MINN. L. REV. 115 (1934) urging the acceptance of a rule which would make the burden always reasonable if plaintiff were a bona fide resident of the state when the cause of action arose. These notes cite Johnston v. Atlantic Coast Line R. R., 128 Misc. 82, 217 N. Y. S. 758 (1926), as sustaining this proposition, in addition to the Cressey and Griffin cases. The Johnston case involved a suit in New York by a New York resident against a corporation which "maintains a New York office for the transaction of its financial business" and is, therefore, not an authority for the position assumed. See 20 VA. L. REV. 374 (1934); also 17 CAL. L. REV. 396 at 399-401 (1929). To the effect that the *non*residence of the plaintiff will not make the burden *un*reasonable, see Erving v. Chicago & N. W. Ry., 171 Minn. 87 at 93-94, 214 N. W. 12 (1927).

being able to get such witnesses to come, the cost of bringing them to the trial if they can be obtained, the inefficiency which will actually result, and the difficulties of obtaining evidentiary matter. Whether that burden is *unreasonable* must be a matter of *judicial approximation.* The questions of "How great is the burden?" and "Is it unreasonable?" should be distinguished. The one may be objectively determined. The other must be largely a subjective matter of weighing numerous conflicting equities. Unfortunately the courts have not clearly distinguished between these two questions but have tended to lump them as one. It is easy to err either in assuming that the second can be answered before the first has been, or that an answer to the first is of itself an answer to the second. It is even easier, having decided that there is a burden, to determine the question of unreasonableness by a formula as Massachusetts and Minnesota would appear to do, i.e. by whether plaintiff is a resident or defendant operates a line in the state of suit. In view of these difficulties it is plain that the decisions cannot be looked upon as charting a well-defined course which can be easily projected into predictions for the future. Nor is it entirely desirable that this should be otherwise. A flexible rule may be of more ultimate value than an exact one.[44] Yet it must not be forgotten that the lawyer with a case involving suit against a foreign corporation engaged in interstate commerce is faced with the concrete problem of where to sue. To shroud the answer to that problem in such obscurity as the cases have done must mean that many cases will run upon the rock of lack of jurisdiction for want of adequate guiding principles. This means waste of the lawyer's time and the client's money. The courts can go considerably farther in defining the points on which jurisdiction or want of it will depend than they have done without causing a flexible instrument to petrify. J. B. M.

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[44] Foster, "Place of Trial in Civil Actions," 43 HARV. L. REV. 1217 at 1222 (1930) and Farrier, "Suits Against Foreign Corporations as a Burden on Interstate Commerce," 17 MINN. L. REV. 381 at 402 (1933). The latter article sums up the situation thus, "the courts are not inclined to go into these matters [the actual facts], and as long as they are not so inclined courts will vary in their views as to which is the more important, the burden upon interstate commerce, or the right of the plaintiff, and especially a resident plaintiff, to control the place of trial. No doubt there is a burden on interstate commerce in any suit upon a foreign cause of action, but the arguments that the residence of the plaintiff or the doing of business by the defendant reduces this burden until it is not unreasonable are unanswerable since they are predicated upon a different philosophy."