Michigan Law Review

Volume 29 | Issue 2

1930

VENUE--WAIVER OF OBJECTION IN FEDERAL COURTS

VENUE—WAIVER OF OBJECTION IN FEDERAL COURTS.—The plaintiff, a fireman for the defendant railroad, was injured by a defective "chafing-block" while engaged in switching cars onto a siding, in order to permit an interstate train to pass. The injury took place in West Virginia, where the plaintiff was a resident. The defendant was incorporated under the laws of Maryland. Suit was brought in the federal court of the northern district of Ohio. The plaintiff based his right to recover on the Federal Employers' Liability Act, 45 U. S. C. A. sec. 51-59, and the Federal Boiler Inspection Act, 45 U. S. C. A. sec. 22 *et seq.* The defendant specially denied that when the plaintiff was

injured he was engaged in interstate commerce, and generally denied all other allegations. On appeal it was *held* that switching service of an intrastate train was too remote to be considered a part of interstate commerce and for that reason the case was dismissed for lack of "territorial jurisdiction." *Rice v. Baltimore and Ohio Railroad Co.* (C. C. A. 6th circuit 1930) 42 F. (2d) 387.

To establish liability under the Federal Employers' Liability Act it is necessary to show that the employee was engaged in interstate commerce. Such an action may be brought "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant is doing business." 45 U. S. C. A. sec. 56, 515. Under the Boiler Inspection Act the plaintiff need only show that his employer was a carrier doing interstate business. Suit under this act is to be brought in the district of the residence of the defendant. *Steidle v. Reading Co.* 24 F. (2d) 299. The principal case presents a rather novel situation. The declaration set up two grounds of recovery. The answer contained a special denial of one and a general plea to the merits of the other. It was held that by sustaining the special denial, the defendant was entitled to a dismissal of the entire action. While the plaintiff based his recovery on two grounds, the Federal Employers' Liability Act and the Boiler Inspection Act, the court took the position that recovery under the Boiler Inspection Act was incidental to and continued so long as recovery under the Federal Employers' Liability Act could be justified, and that it opened to the defendant the question of venue for the first time when the former failed. The court treated the case as an exception to the general rule, that matters of venue are waived by a failure of the defendant to raise the question or by a plea to the merits. The position of the court is doubtful. To hold that one ground of recovery is subordinate to another when each is based upon a separate statutory provision would make it difficult to justify either on reason or authority. Even if one were to admit the exception made by the court their holding is still open to criticism as the defendant did not raise the question of venue unless the special denial attacking the plaintiff's allegation of being engaged in interstate commerce can be treated as such. It was evident that it was not so considered by the attorney for the defendant. It is submitted that the results of the principal case are unsatisfactory. Conceding that no recovery could be had under the Federal Employers' Liability Act the plaintiff still presented a good cause of action under the Boiler Inspection Act, *Southern Railroad Co. v. United States,* 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72, as the defendant was admittedly engaged in interstate commerce. Diversity of citizenship was established. All the essential elements of a valid cause of action under the act were present. The only thing lacking was venue and this we believe was waived by the defendant's failure to raise it specially and by pleading to the merits. *Burnrite Coal Briquette Co. v. Riggs,* 274 U. S. 208, 211, 47 Sup. Ct. 578, 71 L. ed. 1002. 2 CYCLOPEDIA OF FEDERAL PROCEDURE, sec. 386, 381.