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# Federal Procedure - Venue - Right of Alien Under Diversity of Citizenship Clause of 28 U.S.C. § 1391 (a)

Richard M. Adams
*University of Michigan Law School*

FEDERAL PROCEDURE—VENUE—RIGHT OF ALIEN UNDER DIVERSITY OF CITIZENSHIP CLAUSE OF 28 U.S.C. § 1391 (a)—Plaintiff, a citizen of France and resident of New York City, sought a declaratory judgment and restraining order against several defendants residing in different states. On the theory that a suit involving a citizen of France and citizens of the United States constituted "diversity of citizenship" under 28 U.S.C. § 1391 (a), and therefore could be brought where all of the plaintiffs or all of the defendants resided, the action was laid in the federal district court of New York where the plaintiff resided. Defendant moved for dismissal on the ground that this was "alienage," not "diversity of citizenship" as intended under the code, and consequently the suit could not be brought in the district of the plaintiff's residence. *Held,* motion sustained. By the words "diversity of citizenship" the legislature did not intend to change the old rule that aliens could sue only in the judicial district where all of the defendants resided. Because all of the defendants did not reside in the same district, several would have to be dropped or the case dismissed. *Du Roure v. Alvord,* (D.C. N.Y. 1954) 120 F. Supp. 166.

Prior to the 1948 revision of the Judicial Code, the basic venue provision which had stood virtually unchanged for 61 years read in part: ". . . where the jurisdiction is founded only on the fact the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant. . . ."[1] Under this provision it was clearly

[1] This provision was first enacted on March 3, 1887. 24 Stat. L. 552, c. 373, §1 (1887).

decided that suits involving aliens and citizens of this country, generally referred to as alienage jurisdiction, would not be accorded the venue privileges of diversity cases. If the action was against an alien, venue could be laid in any district where valid service could be made.[2] Where the alien was the plaintiff, the action had to be brought in the district where all the defendants resided, unless right of venue was waived.[3] However, in the 1948 revision of the code the words "diversity of citizenship" were substituted for "citizens of different States."[4] Though the phrase "diversity of citizenship" had frequently been used by the courts in referring to the old provision,[5] this seems to be the first time the words actually have appeared in a venue provision of the federal code. By employing this phrase did the legislature intend to broaden the former venue provision so as to include aliens, or is the old rule or discrimination to remain unchanged? On the surface the answer appears to lie in section 1332 of the revised code. This provision is headed by the catchline "Diversity of citizenship; amount in controversy" and includes among the cases in which the district court has jurisdiction suits between "citizens of a State, and foreign states or citizens or subjects thereof."[6] The language of this section has led such a noted scholar as Professor Moore to conclude that "diversity of citizenship" was broadened under the 1948 revision to include alienage jurisdiction, and therefore alien plaintiffs could qualify under the special venue provision of section 1391(a).[7] This conclusion seems almost inevitable except for one pitfall. The statute which gave birth to the 1948 revision also provides: "No inference of a legislative construction is to be drawn . . . by reason of the catchlines used in such title."[8] In deleting the catchline the value of section 1332 in interpreting "diversity of citizenship" is destroyed. All that remains is an enumeration of instances, including alienage, wherein the district court has jurisdiction, which alone is meaningless for venue purposes. The only other ground that would indicate what the legislature intended is a reviser's note to section 1391 and its treatment of the word "reside." Part (a) of this section provides that if the action is one based solely on diversity of citizenship, the suit may be brought "where all plaintiffs or defendants reside."[9] Under the usual defini-

[2] In re Hohorst, 150 U.S. 653, 14 S.Ct. 221 (1893); Bator v. Boosey & Hawkes, (D.C. N.Y. 1948) 80 F. Supp. 294.

[3] Galveston, Harrisburg and San Antonio Railway Co. v. Gonzales, 151 U.S. 496, 14 S.Ct. 401 (1894); Keating v. Pennsylvania Co., (D.C. Ohio 1917) 245 F. 155.

[4] Section 1391(a) reads: "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C. (1952) §1391(a).

[5] 13 WORDS AND PHRASES, Diverse Citizenship, p. 56 (1940), gives several decisions using the old term "diverse citizenship." For a number of later cases using "diversity of citizenship" see 13 WORDS AND PHRASES, Cumulative Pocket Supp., p. 13 (1954).

[6] 28 U.S.C. (1952) §1332.

[7] MOORE, COMMENTARY ON U.S. JUDICIAL CODE 190 (1949).

[8] This is easy to overlook inasmuch as it is in the enacting statute but not in the main body of the code itself. 62 Stat. L. 991, §33 (1948), 28 U.S.C.A., Miscellaneous Provisions, p. 339 (1950).

[9] Note 4 supra.

tion of "reside" an alien could be as much a resident as anyone else.[10] But the legal connotation of this word may vary according to the particular statute in which it is used.[11] Its technical meaning in this section of the code, as suggested by the reviser's note, throws additional light on the interpretation of the rest of the provision. The reviser's note states: "Word 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'reside' are synonymous."[12] Because of the peculiar wording of the provision prior to 1948, the courts had held that an alien was not an "inhabitant" for the purposes of the venue provision of the judicial code.[13] This reasoning would not have any bearing on the new wording in the 1948 version except for the reviser's note. By making "resident" synonymous with "inhabitant" as it stood in the old provision, it would follow that an alien can not "reside" in a judicial district within the meaning of section 1391 (a). If an alien cannot be considered a resident under this clause, then alienage jurisdiction can hardly be included within the meaning of "diversity of citizenship." This was the line of reasoning followed by the court in concluding that the old rule requiring aliens to bring suit in the judicial district where all the defendants reside still stands despite the rephrasing of the 1948 revision.[14] Professor Moore, a consultant on the 1948 revision, states an almost identical hypothetical in his *Commentary on the U.S. Judicial Code* and comes out with the opposite result.[15] Though Moore does not say how he reached his conclusion, it appears to be based on the catchline of section 1332. He also makes reference to the reviser's note to section 1391,[16] but fails to recognize its significance in relation

[10] Bouvier defines residence as "personal presence in a fixed and permanent abode." 3 BOUVIER, LAW DICTIONARY, 8th ed., p. 2920 (1914). Equally broad, Black gives as one definition "living or dwelling in a certain place permanently or for a considerable length of time." BLACK'S LAW DICTIONARY, 3d ed., 1543 (1933).

[11] In re Jones, 341 Pa. 329, 19 A. (2d) 280 (1941); McGrath v. Stevenson, 194 Wash. 160, 77 P. (2d) 608 (1938).

[12] The words "whereof he is an inhabitant" in what was formerly 28 U.S.C. §112 refer to the place where the action is brought if not based on diversity. Thus the corresponding provision in the 1948 revision would be part (b) of section 1391 which provides if not based on diversity the action must be brought "only in the judicial district where all defendants reside." 28 U.S.C. (1952) §1391(b). But inasmuch as the word "reside" is also used in part (a) referring to diversity jurisdiction, it seems reasonable to assume that it has the same meaning in one part as it has in the other.

[13] The first part of the old venue provision was worded as follows: "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." 24 Stat. L. 552, c. 373, §1 (1887). If "inhabitant" as used here included aliens and an alien was traveling in the United States, yet was not an inhabitant of any judicial district, the citizen would have no place to bring the suit. By this interpretation the courts of the United States would have been open to suits by aliens against citizens, but not to actions by citizens against aliens. To avoid this bizarre result it was early decided that "inhabitant" did not include aliens. In re Hohorst, note 2 supra.

[14] See also Stamatiou v. Miller, (D.C. Pa. 1949) 88 F. Supp. 556, for another decision following the old rule in excluding aliens after the 1948 revision.

[15] MOORE, COMMENTARY ON U.S. JUDICIAL CODE 192 (1949).

[16] Ibid., footnote.

to the problem of alien residence. Between the two interpretations it would seem that the court stands on the firmer ground in avoiding the catchline of section 1332.[17] Inasmuch as Congress has expressly discriminated against alien defendants in part (d) of section 1391,[18] it is not unreasonable to conclude that it intended the same treatment when the alien is the plaintiff. Perhaps the real reason for the change in language of section 1391 (a), if not to include aliens, was to extend the venue privileges of this section to citizens of the territories and the District of Columbia. Part (b) of section 1332 clearly indicates that the citizens of the territories and the District of Columbia are to be on par with the citizens of the 48 states in diversity jurisdiction.[19] By using the phrase "diversity of citizenship" they would be afforded equal venue treatment, whereas under the old provision they would not.

*Richard M. Adams*

[17] It is interesting to note that Judge Dimock cites Moore in support of one point in his decision, principal case at 169, yet completely ignores the fact that this same author in another volume ends up with a directly contrary conclusion.

[18] "An alien may be sued in any district." 28 U.S.C. (1952) §1391(d).

[19] In giving the district court jurisdiction of controversies involving citizens of different states, Congress defined the word "states" to include the territories and the District of Columbia. 28 U.S.C. (1952) §1332(b).