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Federal Procedure - Venue of Corporations - Inapplicability of 28 U.S.C. §1391 (c) to Removal Actions

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FEDERAL PROCEDURE—VENUE OF CORPORATIONS—INAPPLICABILITY OF 28 U.S.C. §1391(c) TO REMOVAL ACTIONS — Plaintiff, a resident of Florida, brought a libel action in a Florida court against the publisher of *Look*, an Iowa corporation. Defendant maintained no office in Florida, and sold its magazines to two independent wholesale companies for distribution to Florida retailers; it was on an agent of one of these wholesalers that process was originally served. However, defendant did employ a "circulation road man," who traveled throughout several states including Florida to check retail outlets for complaints and to see that proper displays were maintained. Defendant removed the action to the Federal District Court for the Southern District of Florida. That court issued an additional summons, which was served on the circulation road man, and quashed the original state court service.[1] The case was then dismissed on the

[1] 28 U.S.C. (Supp. V, 1952) §1448: "In all cases removed from any State court . . . in which one or more of the defendants has not been served with process . . . or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court."

ground that the court had no jurisdiction under 28 U.S.C. §1391(c),[2] since defendant was not doing business in the Southern District of Florida. The Court of Appeals for the Fifth Circuit affirmed.[3] But on certiorari, *held*, reversed. Section 1391(c) relates to venue, not jurisdiction, and is inapplicable to removal actions; under 28 U.S.C. §1441(a),[4] venue was properly laid in the Florida district court. Justices Burton, Black, and Jackson, dissenting in part, agreed as to venue but felt that the court should have decided whether or not defendant was doing business in Florida. The latter two urged an affirmative answer and emphasized in this respect the statutory codification of the doctrine of forum non conveniens contained in 28 U.S.C. §1404(a).[5] *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 73 S.Ct. 900 (1953).[6]

The proper venue of a removal action is the district court for the district which includes the place where the action in the state court is pending, irrespective of whether a corporate defendant is doing business in that district. This is a proposition so well established that the necessity for its reiteration by the Supreme Court seems rather surprising. The unmistakable language of section 1441(a), the writers,[7] and previous decisions of the Supreme Court[8] all are in accord on this point. Doubtless the error of the courts below is explained by the resemblance of the instant case, in which effective service first occurred after removal, to an original action. Nevertheless, whether or not defendant was "doing business" in Florida remained a crucial issue, not as to venue, but as to the ability of the court to assume jurisdiction over defendant.[9] In declining to decide this question, on the ground that defendant had failed to contend that the due process requirements for allowing the exercise of jurisdiction over a foreign corporation[10] had not been met, the majority appears to

[2] 28 U.S.C. (Supp. V, 1952) §1391(c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[3] Polizzi v. Cowles Magazines, Inc., (5th Cir. 1952) 197 F. (2d) 74.

[4] 28 U.S.C. (Supp. V, 1952) §1441(a): "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

[5] 28 U.S.C. (Supp. V, 1952) §1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[6] Petition for clarification of opinion denied 345 U.S. 988, 73 S.Ct. 1128 (1953). Justices Frankfurter and Douglas did not participate in the principal case.

[7] MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE 199 (1949); 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §101 (1950).

[8] Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653, 43 S.Ct. 230 (1923); General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., 260 U.S. 261, 43 S.Ct. 106 (1922).

[9] See 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §179 (1950).

[10] I.e., that it be "doing business" in the state within the meaning of the doctrine expressed in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154 (1945).

have been technically correct. Although no distinction is usually drawn between the statutory venue and the due process meaning of "doing business,"[11] these concepts do seem to be somewhat different, at least as applied to cases in which plaintiff's cause of action arises from an act of defendant committed in the state of the forum.[12] Yet the opinion of the court of appeals gives no indication that it recognized any such distinction; consequently, it is highly probable that that court's decision on remand will be unchanged. Thus as a practical matter there is probably an element of truth in Justice Black's remark that the result of the court's decision is that "the case goes back for reconsideration of the same old 'doing business' question that has been hanging fire for three years."[13]

Perhaps the most interesting aspect of the principal case is the minority's contention that the codification of the doctrine of forum non conveniens in section 1404(a) gave "an anachronistic flavor, a sort of irrelevance"[14] to defendant's argument that it was not doing business in Florida. The theory behind this statement appears to be that in determining the jurisdiction of a federal court over a foreign corporation[15] the same issues are presented under the *International Shoe Co.*[16] approach, with its emphasis on "balancing the inconveniences," as arise under a plea of forum non conveniens. Therefore, if there is a minimum physical corporate intrusion into the state on which to predicate jurisdiction, arguments as to the balance of the conveniences are to be considered as requests for transfer under section 1404(a) and not as attacks on the jurisdiction of the court. In reply, it might be said that the factors to be considered under the *International Shoe Co.* case are actually somewhat different from those involved in the forum non conveniens problem.[17] And, of course, under the minority's theory the question of what constitutes a sufficient physical intrusion would still have to be faced. Yet in application this approach would have at least one advantage—that of leaving to the sound discretion of the trial judge the often difficult decision as to the balance of the conveniences,[18]

[11] As representative of the many federal cases apparently failing to make this distinction see Consolidated Cosmetics v. D-A Pub. Co., (7th Cir. 1951) 186 F. (2d) 906.

[12] In this situation due process standards may well be somewhat less stringent than venue ones. See Joiner, "Let's Have Michigan Torts Decided in Michigan Courts," 31 MICH. ST. B.J. 5 (Jan. 1952). For an analysis of the confusion surrounding the question of the place of the liability-creating act in the principal case see Prosser, "Interstate Publication," 51 MICH. L. REV. 959 (1953).

[13] Principal case at 669.

[14] Id. at 670.

[15] A foreign corporation is not amenable to process even in a federal court unless it is "doing business" in the state in which the federal court is located. 2 MOORE, FEDERAL PRACTICE, 2d ed., §4.25 (1948).

[16] Note 10 supra.

[17] E.g., a matter such as the condition of the court's trial calendar is considered in making the forum non conveniens decision but not the due process one. See 51 MICH. L. REV. 298 (1952).

[18] Decisions under §1404(a), not being "final," are not appealable, but are usually subject to review through use of the extraordinary writs; however, the decision of the trial judge will not be disturbed unless an abuse of his discretion is found. Ford Motor Co. v. Ryan, (2d Cir. 1950) 182 F. (2d) 329, cert. den. 340 U.S. 851, 71 S.Ct. 79 (1950). But cf. All States Freight, Inc. v. Modarelli, (3d Cir. 1952) 196 F. (2d) 1010.

a matter regarding which the appellate courts are unable to lay down any definite standards. But whatever the merits of this theory as applied to cases in which the original jurisdiction of a federal court is in question, it would seem to be inapplicable to removal actions. Since federal removal jurisdiction is normally considered derivative, the problem in the removal cases is whether the state court had jurisdiction, and the federal forum non conveniens statute would seem to have little bearing on this issue.[19] Putting these procedural complexities to one side, however, it may be that the real significance of the minority's contention is simply that it is indicative of a growing judicial impatience toward jurisdictional defenses raised by corporations whose activities are in reality nation-wide in scope and effect.

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[19] Because of the necessity for subsequent service under 28 U.S.C. (Supp. V, 1952) §1448, it is not clear whether the jurisdiction of the federal court in the instant case could be considered original for present purposes.