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FEDERAL COURTS-VENUE-CONSTRUCTION OF SECTIONS 51 AND 52 OF JUDICIAL CODE

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FEDERAL COURTS—VENUE—CONSTRUCTION OF SECTIONS 51 AND 52 OF JUDICIAL CODE—Petitioner, a resident and citizen of Mississippi, brought a negligence action based upon diversity of citizenship in the Federal District Court for the Eastern District of Louisiana, joining as defendants Highways Insurance Underwriters, a Texas corporation qualified to do business in Louisiana, and respondents, Reich Brothers Construction Co., a partnership, and its individual members, residents of the Western District of Louisiana. Respondent, Reich Brothers, moved to dismiss on the ground of improper venue under sections 51 and 52 of the Judicial Code [1] which in effect provide that in diversity cases, suit shall be brought only in the district where either the plaintiff or

[1] 28 U.S.C. (1946) § 112 (Judicial Code § 51) reads in part: ". . . except as provided in 113-118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant. . . ."

28 U.S.C. (1946) § 113 (Judicial Code, § 52) reads in part: "When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshall of any other district in which any defendant resides. . . ."

defendant resides except where there are two or more defendants residing in different districts of the state, in which case suit may be brought in either district. Respondents claimed that Highways Insurance Underwriters was not a resident of the Eastern District within the terms of the code; and therefore, respondents could not properly be sued as co-defendants in that district. The district court dismissed as to respondents and upon petitioner's appeal to the circuit court the judgment of dismissal was affirmed.[2] On certiorari to the United States Supreme Court, *held*, affirmed. A foreign corporation which has qualified to do business and appointed a local agent to receive service of process in a state is not a "resident" of that state within the meaning of the federal venue statutes. *Suttle v. Reich Bros. Construction Co.*, 333 U.S. 163, 68 S.Ct. 587 (1948).

As early as 1839 in *Bank of Augusta v. Earle*,[3] the United States Supreme Court ruled that a corporation can be a resident only of the state which created it, and this ruling has been consistently reaffirmed.[4] In a decision shortly after the enactment of section 51 of the Judicial Code in substantially its present form,[5] the court applied this concept of "resident" to that section.[6] In several other early cases,[7] the court held that a defendant might waive the privileges conferred by the venue statutes.[8] The question whether the appointment of an agent for process by a foreign corporation under state statute constitutes a waiver has been variously treated,[9] but in *Neirbo v. Bethlehem Corporation*, the appointment was held to be a waiver of section 51 by the defendant.[10]

[2] Badger v. Reich Bros. Const. Co., (C.C.A. 5th, 1947) 161 F. (2d) 289.

[3] 13 Pet. (38 U.S.) 519 (1839).

[4] Shaw v. Quincy Mining Co., 145 U.S. 444, 12 S.Ct. 935 (1892); Southern Pacific Co. v. Denton, 146 U.S. 202, 13 S.Ct. 44 (1892); Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 66 S. Ct. 242 (1946) and cases cited.

[5] Shaw v. Quincy Mining Co., 145 U.S. 444, 12 S.Ct. 935 (1892).

[6] The court in the principal case points out in footnote 8 that section 52 of the Judicial Code merely qualifies section 51 and that there would be no reason to attribute a meaning to "residence" in section 51 different from that in section 52.

[7] Lafayette Insurance Co. v. French, 18 How. (59 U.S.) 404 (1856); Railroad v. Harris, 12 Wall. (79 U.S.) 65 (1870).

[8] The court in the principal case at page 167 states that Congress has a similar understanding of the term "residence" and cites special venue statutes enacted to make a corporation amenable to suit either in the state of incorporation or in states in which it is carrying on corporation activities which provide specifically that the venue of certain suits should be located not only in the district in which the corporation is a "resident" or "inhabitant" but also in districts in which it may be "found," in which it "transacts business," or in which it has an agent to receive process.

[9] Both before and after the enactment of provisions similar to sections 51 and 52, appointment of a local agent for process has been held to be a waiver of venue requirements. Before: Lafayette Ins. Co. v. French, 18 How. (59 U.S.) 404 (1856); Ex parte Schollenberger, 96 U.S. 369 (1877). After: Neirbo v. Bethlehem Corp., 308 U.S. 165, 60 S.Ct. 153 (1939); Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 66 S.Ct. 242 (1946). If the state statute violates the United States Constitution, the appointment of an agent under it is not a waiver. Southern Pacific Co. v. Denton, 146 U.S. 202, 13 S.Ct. 44 (1892).

[10] 308 U.S. 165, 60 S.Ct. 153 (1939).

Petitioner argued in the principal case that the Texas corporation by qualifying to do business and appointing an agent for process in Louisiana had acquired a residence there. The court indicated that while the Texas corporation had waived its rights under the venue statutes, it did not thereby become a resident. The gravamen of the *Neirbo* decision was that a foreign corporation by waiving its rights under the venue statutes, might be sued in a state and district not its residence—not that it acquired a residence by the waiver. That this distinction is important is aptly illustrated by the principal case in which the Texas corporation had waived the venue statutes as to itself, but did not thereby acquire a residence in the Eastern District of Louisiana so that the co-defendant, Reich Brothers might be sued there.

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