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SERVICE OF PROCESS—FEDERAL RULES OF CIVIL PROCEDURE—Service of Process in Italy on Alien Corporate Defendant Permitted in a Federal Antitrust Action—*Hoffman Motors Corp. v. Alfa Romeo S.p.A.**

Plaintiff, an American automobile distributor, brought suit in a federal court in the Southern District of New York against Alfa Romeo S.p.A., an Italian corporation, for violation of the Robinson-Patman[1] and Auto Dealers' Acts.[2] Service of process was made personally on defendant's general manager in Italy by an Italian attorney appointed for that purpose by the district court, and by registered mail as prescribed by the New York statute for extraterritorial service.[3] Defendant moved to dismiss for lack of personal jurisdiction as to the Robinson-Patman claim on the ground that section 12 of the Clayton Act limits the territorial reach of process under the antitrust laws to the United States.[4] Dismissal was also

* 244 F. Supp. 70 (S.D.N.Y. 1965) [hereinafter cited as principal case].

1. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

2. 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1964). Defendant's American subsidiary and one of its officers were also parties. Other claims were made which are not of immediate interest.

3. N.Y. CIV. PRAC. LAW §§ 302, 311, 313. For a discussion of the expansive treatment of this statute by the New York state courts, see Note, 51 CORNELL L.Q. 377 (1966). See *id.* at 378, for a partial list of other state long-arm statutes.

4. Clayton Act § 12, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1964), provides in part:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The term "antitrust laws" as defined in § 1 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 12 (1964), includes the Sherman Act, 26 Stat. 209 (1890),

sought of both the Robinson-Patman and the Auto Dealers' Act claims on the ground that Rule 4 of the Federal Rules of Civil Procedure does not authorize service to be made pursuant to state long-arm statutes in antitrust cases.[5] *Held,* motion denied. Service of process in a Robinson-Patman Act claim on a party residing outside the United States is authorized by section 12 of the Clayton Act, and, alternatively, such service is permitted by Rule 4(e) to be made pursuant to a state long-arm statute. Personal jurisdiction in an Auto Dealers' Act claim may also be acquired under Rule 4(e) when service is made in the manner prescribed in a state statute.

The court's holding as to the territorial reach of process under section 12 of the Clayton Act is an effort to clarify a problem created by dicta in previous cases which had interpreted that section as permitting service to be made only in a judicial district of the United States.[6] This interpretation had been made notwithstanding the language of the section which provides that all process may be served on a corporate defendant "wherever it may be found."[7] In concluding that no reason could be advanced for limiting the statute in such a manner,[8] the court has not only given effect to the letter of section 12, but it has also, through its interpretation, brought section 12 into line with other similarly worded provisions

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as amended, 15 U.S.C. §§ 1-8 (1964), parts of the Wilson Tariff Act, 28 Stat. 570 (1894), as amended, 15 U.S.C. §§ 8-9, 11 (1964), an act amending the Wilson Tariff Act, 37 Stat. 667 (1913), as amended, 15 U.S.C. § 9 (1964), and the Clayton Act itself which was amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964). See Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).

The Auto Dealers' Act, 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1964), is not included within the term "antitrust laws" and, hence, is not subject to the service of process provisions of section 12 of the Clayton Act. See Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960).

5. FED. R. CIV. P. 4(e) provides:

> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

6. In United States v. Scophony Corp., 333 U.S. 795, 817 (1948) the court said that "process could not be issued to run for such corporations to the foreign countries of which they are 'inhabitants'." See also Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927).

7. See note 4 *supra.*

8. Principal case at 79-80.

which have been held to authorize service of process outside the United States.[9]

The more important aspect of the principal case, however, revolves around the court's use of Rule 4, first, as an alternative ground to section 12 to uphold personal jurisdiction on the Robinson-Patman Act claims, and, second, as a ground for sustaining service on the Auto Dealers' Act claim. In both instances the court relied on the fact that service was made pursuant to a state long-arm statute. Since Rule 4(e) permits service in the manner prescribed by such a statute, jurisdiction was sustained. The use of the state service of process procedure in the principal case was made possible by the 1963 Amendments to the Federal Rules, which amendments were promulgated in part to clarify how state long-arm statutes may be used for obtaining extraterritorial service of process in federal courts.[10] Rule 4(d)(7), which had earlier been held to authorize extraterritorial service under non-resident motorist and long-arm statutes,[11] was amended so as to clearly limit its prescription of the manner of service to persons within the forum state.[12] Rule 4(e), which had permitted extraterritorial service only as prescribed by a federal statute authorizing extraterritorial service,[13] was amended to allow service in the manner and under the cirmumstances outlined in either a relevant federal or state statute or rule.[14] Rule 4(f) had permitted service to be made only within

9. See SEC v. Briggs, 234 F. Supp. 618 (N.D. Ohio 1964), interpreting the service provisions of the Securities Act, 48 Stat. 86 (1933), as amended, 15 U.S.C. § 77(v)(a) (1964), and the Securities Exchange Act, 48 Stat. 902 (1934), as amended, 15 U.S.C. § 78(aa) (1964), to allow process to run outside the United States. See also H.R. REP. No. 85, 73d Cong., 1st Sess. 25 (1933).

10. See Metropolitan Sanitary Dist. of Greater Chicago v. General Elec. Co., 35 F.R.D. 131, 133-34 (N.D. Ill. 1964).

11. Initially, Rule 4(d)(7) was used to effect service on non-resident defendants through the Secretary of State of the forum when there was a non-resident motorist statute in effect. See, *e.g.*, Giffin v. Ensign, 234 F.2d 307 (3d Cir. 1956), 70 HARV. L. REV. 729 (1957). *But see* McCoy v. Siler, 205 F.2d 498 (3d Cir.) (concurring opinion), *cert. denied*, 346 U.S. 872 (1953). Later the Rule was also used to allow service pursuant to a more general long-arm statute which permitted service directly on a defendant outside the forum state. See, *e.g.*, Kappus v. Western Hills Oil, Inc., 24 F.R.D. 123 (E.D. Wis. 1959). See also 2 MOORE, FEDERAL PRACTICE ¶ 4.19 (1965) [hereinafter cited as MOORE]; Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 619-22 (1964).

12. See ADVISORY COMMITTEE NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1963), reproduced in 3A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 119, 120 (Wright ed. 1965 Supp.) [hereinafter cited as ADVISORY COMMITTEE]. The Advisory Committee cites 2 MOORE ¶ 4.32 for this proposition.

13. See generally 2 MOORE ¶ 4.32(1).

14. For the effect of the 1963 amendments on FED. R. CIV. P. 4(e), see generally 2 MOORE ¶ 4.32(2). It seems clear that Rule 4(e) now replaces former Rule 4(d)(7) in dealing with extraterritorial process. See 2 MOORE ¶ 4.31, at 1220; Kaplan, *supra* note 11, at 621. For the text of present Rule 4(e), see note 5 *supra*.

the forum state, with the exception that extraterritorial service could be made if specifically authorized by a federal statute. This exception was broadened so as to allow process to be served outside the state if authorized either by a United States statute or the Federal Rules,[15] thus permitting service in the manner prescribed in state statutes or rules as authorized in Rule 4(e). In sum, the amendments gave to the party seeking to make service an option of proceeding under either federal or state procedures where both were applicable.[16]

Defendant in the principal case, however, argued that Rule 4(e) allows extraterritorial service pursuant to state long-arm statutes only in cases where federal and state courts have concurrent jurisdiction. This argument was based on the language permitting such service only "under the circumstances" prescribed in the state statute. Since one of the circumstances of applicability, it was argued, was that the type of action being brought must be cognizable in the state court, service in a case of peculiarly federal cognizance could not be made "under the circumstances" provided in the state statute.[17] This restrictive interpretation has not only been rejected by the courts which have interpreted Rule 4(e) since its amendment in 1963,[18] but it does not comport with the interpretations of other statutory phrases similar to "under the circumstances."[19] It appears, therefore, that Rule 4(e) deals only with the manner of service[20] and the amenability to service of a defend-

15. For a list of United States statutes covered by the exception of Rule 4(f), see 2 MOORE ¶ 4.42(1). The amendment of the first sentence of subdivision (f) was made "to assure the effectiveness of service outside the territorial limits of the state in all cases in which any of the rules authorize service beyond those boundaries." ADVISORY COMMITTEE 121.

16. See 2 MOORE ¶ 4.32(2), at 1235, where it is stated concerning the second sentence of Rule 4(e):

> It will be seen that this clause parallels the first sentence . . . and the rule now permits service to be made . . . under the circumstances and in the manner prescribed *either* by a federal statute or by a statute or rule of the state in which the district court is held.

The Advisory Committee's Notes state: "If the circumstances of a particular case satisfy the applicable State law . . . , the party seeking to make the service may proceed under the Federal or the State law, at his option." ADVISORY COMMITTEE 121.

17. Defendant's Reply Memorandum in Support of Its Motion for Relief Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Principal case.

18. United States v. Montreal Trust Co., 35 F.R.D. 131, 135-36 (N.D. Ill. 1964). The *Montreal Trust* case was reheard by the trial court which set aside service on other grounds. United States v. Montreal Trust Co., 235 F. Supp. 345 (S.D.N.Y. 1964). The order setting aside service was reversed and the cause remanded. United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966); see 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 182.1 n. 56.17 (Wright ed. 1965 Supp.) [hereinafter cited as BARRON & HOLTZOFF].

19. See, *e.g.*, Campbell v. Haverhill, 155 U.S. 610 (1895) (refusing to recognize the cognizability element in a statute providing that state statutes could be used "in cases where they apply").

20. United States v. Montreal Trust Co., 35 F.R.D. 216, 219 (S.D.N.Y. 1964), *rev'd on other grounds*, 358 F.2d 239 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966); United

ant[21] who is subject to the jurisdiction of the court. In no way does it involve subject matter jurisdiction.

While it ultimately reached the correct decision in sustaining jurisdiction, the court's treatment of the personal jurisdiction issue is subject to criticism, for it never indicates the statutory basis upon which the defendant was found to be subject to the jurisdiction of the court. When service is to be made in a federal question case, there must be some federal statute which prescribes the basis for personal jurisdiction so that service on a person is authorized. Proper bases for venue were found in section 12 of the Clayton Act and in section 2 of the Auto Dealers' Act.[22] But instead of attributing to these sections the capacity to serve as jurisdictional foundations, the court seemingly indicated that it was Rule 4(e) which constituted the requisite base.[23] However, since the Federal Rules prescribe only the manner of service and the reach of process and do not and cannot provide the jurisdictional base, it appears that if the statutes themselves were not at least in part jurisdictional, there would be no basis for the assertion of personal jurisdiction over the defendant in the principal case.

Thus, although the manner of service is subject to the plaintiff's option, there is only one statute which could provide a basis for jurisdiction—the Clayton Act. In order to sustain jurisdiction under the Clayton Act, however, it is necessary to say that although section 12 reads like a venue statute,[24] it may also be interpreted as a basis for personal jurisdiction. Such an interpretation is plausible in light of the last clause of the section which permits service to be made wherever the defendant may be found. By placing the venue and service provisions in the same section, Congress has, according to some courts,[25] afforded a basis for and a means of acquiring personal jurisdiction.

Indus. Corp. v. Nuclear Corp. of America, 237 F. Supp. 971, 981 (D. Del. 1964); 1 BARRON & HOLTZOFF § 182.1.

21. United States v. Montreal Trust Co., *supra* note 20, at 219; 1 BARRON & HOLTZOFF § 182.1.

22. Principal case at 75-77.

23. Principal case at 80. This conclusion is derived from the fact that the court held that service pursuant to the New York long-arm statute under the Rule was adequate to sustain jurisdiction over the defendants even if section 12 was not.

24. For the text of § 12, see note 4 *supra*.

25. In United States v. Scophony Corp., 333 U.S. 795 (1948) the court distinguished between the functions of each of the two clauses of section 12.

> Although difference of that sort [inability to serve process in all districts where venue is proper] may appear to be generally incongruous, since ordinarily it would seem that susceptibility to suit in a district should be accompanied by amenability to process there, such things are for Congress' determination as matters of policy relating to the scope and correlation, or lack of it, of venue and service provisions.

Id. at 809 n.21. Thus, it would seem that the *Scophony* Court equated the venue provision of § 12 with susceptibility to suit. However, the Court also seems to realize that

Since section 12 of the Clayton Act does not apply to Auto Dealers' Act claims,[26] personal jurisdiction must be based on some provision within the latter act itself. However, the provisions of the Auto Dealers' Act are somewhat more troublesome than those of the Clayton Act. Section 2 of the Auto Dealers' Act, like the first clause of section 12, appears at a cursory reading to be a venue provision.[27] Unlike section 12, however, section 2 contains no provision for service of process from which combination a Congressional intent to provide a jurisdictional base could be distilled. Nevertheless, it would seem that the very passage of the Auto Dealers' Act evidences an intent that parties bringing actions under the Act would be able to obtain jurisdiction over the defendants charged with violations so as to be able to prosecute claims. The most reasonable interpretation of section 2, therefore, is that it alone, like section 12, serves as the jurisdictional base of the statute.[28] Once a basis for personal jurisdiction is established, the plaintiff may proceed under Rule 4(e) to serve process in the manner and under the circumstances prescribed in a state long-arm statute—the ultimate result in the principal case.

The lack of a service provision in the Auto Dealers' Act also illustrates a major problem in the implementation of Rule 4(e), that is, the possibility that service procedures on claims under the Act will not be uniform throughout the United States. The existence of liberal service provisions in such statutes as the Clayton Act and the Securities Exchange Act[29] allows a plaintiff to serve

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the venue provision of § 12 can only serve as a basis for quasi-jurisdiction when it says: "But there can be no question of the existence of 'jurisdiction,' in the sense of venue under section 12 . . . ." *Id.* at 810. Thus, the Court implicitly assigns to the venue provision of § 12 the task of serving as a jurisdictional base, in the absence of a true jurisdictional provision. Section 12 was also spoken of as a jurisdictional base in Northern Ky. Tel. Co. v. Southern Bell Tel. & Tel. Co., 54 F.2d 107, 108 (E.D. Ky. 1931) (transaction of business in the district of venue gave the court jurisdiction of the action). See also United States v. National City Lines, Inc., 334 U.S. 573 (1948).

26. Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960); see note 4 *supra*.

27. Auto Dealers' Act § 2, 70 Stat. 1125 (1956). 15 U.S.C. § 1222 (1964), provides in part:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy . . . .

28. The court in the principal case found venue proper because defendant was doing business and had an agent in the state. Principal case at 73. Jurisdiction would be sustained on the same grounds. If the defendant had had no agent, the fact that he systematically did business within the state might have been a sufficient basis for the exercise of jurisdiction, as it has been held that a corporation is found in a state if it does business within that state. Raul Int'l Corp. v. Nu-Era Gear Corp., 28 F.R.D. 368, 371 (S.D.N.Y. 1961).

29. See note 9 *supra*.

process outside the forum state pursuant to the first sentence of Rule 4(e) which permits service in the manner prescribed by the statutes which authorize extraterritorial service or the Federal Rules. However, section 2 of the Auto Dealers' Act, unlike section 12 of the Clayton Act, does not specifically authorize extraterritorial service. Thus, the provisions of the first sentence of Rule 4(e) are not relevant. In the absence of statutory authorization, a plaintiff will be forced to rely on the second sentence of Rule 4(e) which permits service to be made in the manner prescribed by a state long-arm statute if, indeed, one exists.[30] If a plaintiff should fail to lay venue in a state which has a long-arm statute, he will be compelled to adhere to the territorial limitations of Rule 4(f)—the boundaries of the state in which the district court is sitting. Thus, if the defendant is not physically present in the state where the action is brought, the action will in effect be barred.[31] Such a result, conflicting as it does with the idea that federally created rights should be administered on a uniform basis,[32] is highly undesirable. One way to avoid this anomaly is to interpret provisions similar to section 2 as impliedly authorizing extraterritorial service. However, in light of the rule that service is territorial unless Congress has specifically provided otherwise,[33] such an interpretation, regardless of its logic and obvious appeal, would at best be an act of judicial legislation. While it may well be that for the sake of achieving uniform results courts will interpret section 2 as authorizing extraterritorial service of process even in the absence of language to that effect, it would seem that if Rule 4(e) is to remain in force, Congress should enact a service provision prescribing the permissible extent of process for causes of action arising under

30. FED. R. CIV. P. 4(i), which prescribes manner of service in a foreign country, may be invoked whenever the federal or state law referred to in Rule 4(e) permits service outside the United States. Again, however, Rule 4(i) could not be used in absence of a federal statute authorizing extraterritorial service unless there existed an appropriate state long-arm statute.

31. See Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960).

32. See Comment, *Use of State Statutes by Federal District Courts in Extraterritorial Service of Process*, 27 U. CHI. L. REV. 751, 757 (1960). The author discusses the possibility of variance from state to state in the enforcement of "federally-created rights" under former Rule 4(d)(7). See text accompanying notes 11 & 12 *supra*. This variance is viewed as being similar to the situation which existed under the Conformity Act, 17 Stat. 197 (1872), which provided that federal practice should conform as closely as possible to state procedure. The result under the act was general confusion and lack of uniformity among the various districts. It was to ameliorate this type of situation and to create a single procedural standard that the Federal Rules were promulgated.

33. Georgia v. Pennsylvania R.R., 324 U.S. 439, 467 (1945); Robertson v. Railroad Labor Board, 268 U.S. 619, 622-23 (1925). In Schnabel v. Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1960), the court noted that since the Auto Dealers' Act did not authorize extraterritorial service, the territorial limits of Rule 4(f) were applicable.

every federal statute. This would insure equal treatment for all persons suing on federal causes of action in any district court.[34] While Congress may decide that a general service provision is not appropriate, certainly something should be done with statutes such as the Auto Dealers' Act so as to insure that the federal interest evidenced by the passage of such legislation is protected by uniform application of the law.

34. For an example of a possible federal long-arm statute applicable to all cases see ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1314(c) (Tent. Draft No. 3, 1965):

> In civil actions in which jurisdiction is founded on section 1311 of this title [substantial federal interest of claim as basis of jurisdiction], service of process upon any defendant not found in the state where the action is brought may be made in any district where such defendant may be found.