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Walker Y. Worth Jr.

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of greater value than an equal share descending to the other children, the one so advanced was charged in the distribution of the personal estate of the parent with the excess in value over an equal share.⁴⁰

The Legislature has passed statutes which permit the clerk of the Superior Court to advance portions of a nonsane person's estate to certain of the latter's relatives, which must be accounted for at death.⁴¹

WM. WHITFIELD SMITH

Federal Jurisdiction—Diversity of Citizenship—Multiple Corporations

Plaintiff, a citizen of Massachusetts, brought a personal injury action in the federal district court for Massachusetts against defendant railroad corporation, alleging it to be incorporated under the laws of New York. Defendant was in fact a multiple corporation existing under the laws of New York, New Hampshire, and Massachusetts. The court of appeals, in affirming the dismissal of the action for lack of jurisdiction, held that for purposes of federal jurisdiction a multiple corporation must be regarded in each state of its incorporation as solely domesticated therein, and that there is no diversity of citizenship jurisdiction where such corporation is sued in one of the states of its incorporation by a citizen of that same state.¹

The district courts of the United States have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3000 and is between citizens of different states.² When the Supreme Court first considered the status of corporations in connection with the jurisdiction of the federal courts, it held that a corporation was not a citizen and that the citizenship of the stockholders would control.³ The Court later adopted the fiction that there is a conclusive presumption that all the stockholders of a corporation are citizens of the state of incorporation.⁴ Under this fiction,⁵ a corporation created under the laws

123 (1950). No North Carolina case has passed on the question of recovery from an heir of an excess of advancements over his whole distributive share in the estate. But cases outside of North Carolina are in accord in ruling that the heir cannot be required to refund the excess, but can only be excluded from participating in the division of the estate. See note, 46 A. L. R. 1428 (1927).

⁴⁰ Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948).

⁴¹ N. C. GEN. STAT. § 35-19 through § 35-29 (1943, recompiled 1950); Patrick v. Trust Co., 216 N. C. 525, 5 S. E. 2d 724 (1939).

¹ Seavey v. Boston & Maine R. R., 197 F. 2d 485 (1st Cir. 1952).

² 62 STAT. 930 (1948), 28 U. S. C. A. § 1332 (1949).

³ Bank of United States v. Deveaux, 5 Cranch 61 (U. S. 1809).

⁴ This doctrine was first announced in Louisville, C. & C. R. R. v. Letson, 2 How. 497 (U. S. 1844). It is forcefully stated in Muller v. Dows, 94 U. S. 444, 445 (1876), as follows: "For the purposes of jurisdiction it is conclusively presumed that all stockholders are citizens of the state which by its laws created the corporation."

⁵ The fiction has been severely criticized as judicial usurpation. McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225 (1943).

of one state is, for jurisdictional purposes, deemed a citizen of that state. Where, however, a corporation is actually incorporated in two or more states,⁶ there is a separate corporation in each such state despite the identity of officers, directors, and stockholders,⁷ and difficult problems of federal jurisdiction arise. Multiple incorporation should not be confused, however, with the mere licensing of a foreign corporation or the conferment of certain powers upon it by a second state.⁸ Under such circumstances, the corporation remains a citizen of the state of "original" incorporation, since, for purposes of federal jurisdiction, no new corporation is created in the licensing state.⁹

The problem to be considered here is: Where a multiple corporation incorporated in States *A* and *B* is suing or being sued in one of these states *by a citizen of one of these same states*,¹⁰ what citizenship is to be attributed to the multiple corporation, that of State *A* or of State *B*? This determination is a necessary factor in deciding (1) whether or not there is diversity of citizenship between the parties in a suit originally instituted in a federal court, and (2) whether or not a multiple corporation which is defendant in a suit commenced in a state court may remove the suit to federal court on the ground of diverse citizenship. This latter question is complicated by the existence of a federal statute¹¹ which grants the right of removal on the ground of diversity of citizenship only if none of the defendants is a citizen of the state in which suit is

⁶ Railroad corporations are almost the only companies which employ multiple incorporation. The reasons for the use of the device and the extent of its use in this field are discussed in *Multiple Incorporation as a Form of Railroad Organization*, 46 *YALE L. J.* 1370, 1371-76, 1382 (1937).

⁷ ". . . it is evident that by the general law railroad corporations created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; and that each one has its existence and its standing in the courts of the country, only by virtue of the legislation of the State by which it is created. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations." *Nashua & Lowell Ry. v. Boston & Lowell Ry.*, 136 U. S. 356, 382 (1890).

⁸ For a discussion of the problem of distinguishing between actual multiple incorporation and the mere recognition of or conferment of powers on the existing corporation (commonly called "domestication"), see *DOBIE, FEDERAL PROCEDURE* § 65 (1928); *Patch v. Wabash R. R.*, 207 U. S. 277 (1907); *Southern Ry. v. Allison*, 190 U. S. 326 (1903); *St. Louis & S. F. Ry. v. James*, 161 U. S. 545 (1896); *Pennsylvania R. R. v. St. Louis, A. & T. H. R. R.*, 118 U. S. 290 (1886); *Memphis & C. Ry. v. Alabama*, 107 U. S. 581 (1882).

⁹ In *Southern Ry. v. Allison*, 190 U. S. 326, 337 (1903) it is stated, "so it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation of a State in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State, yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the State in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship."

¹⁰ The peculiar problems considered in this note arise *only* under the fact situation outlined above.

¹¹ 62 *STAT.* 937 (1948), 28 U. S. C. A. § 1441 (1950).

brought. Apparently, however, this non-citizen requirement may be waived.¹²

Several Supreme Court cases have laid down the rule that where a multiple corporation is *defendant* in an action brought by a citizen of one of its states of incorporation such corporation is considered to be a citizen of the state where suit is brought when it is incorporated in that state.¹³ So, where suit is originally commenced in *federal court* in State *B* by a citizen of State *B* against a multiple corporation incorporated in State *A* and *B*, its citizenship under this rule is that of State *B*, and no diversity is present. The opposite result would follow if a suit involving the same parties had been commenced in federal court in State *A*. It would seem that under this rule, the defendant multiple corporation should never have removal on the ground of diversity (unless there is a waiver by plaintiff of the non-citizen requirement) of a suit commenced *in state court* in any of the states in which the corporation is incorporated. This conclusion follows from the fact that the corporation will always be a citizen of the state of suit;¹⁴ and, as pointed out above, there may be no diversity of citizenship in the first place.¹⁵ Five of the six circuits that have reviewed the problem have approved this "state of suit" rule.¹⁶ One of these, the fourth circuit, applied the

¹² *Monroe v. United Carbon Co.*, 196 F. 2d 455 (5th Cir. 1952), relying on *Baggs v. Martin*, 179 U. S. 206 (1900), holds that there is a waiver of the non-citizen requirement for removal [28 U. S. C. A. § 1441 (b)] if the plaintiff in the suit fails to make a motion to remand the case, and that the federal court to which it is removed may then treat the action as one originally brought in federal court.

¹³ *Muller v. Dows*, 94 U. S. 444 (1876), and *Chicago & N. W. R. R. v. Whitton*, 13 Wall. 270 (U. S. 1871), used this rule in determining the citizenship of the corporations there involved. *Patch v. Wabash R. R.*, 207 U. S. 277, 283 (1907), seems to have relied at least in part on this principle: "It [defendant multiple corporation] is alleged to have incurred a liability under the laws of the same state, and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere."

¹⁴ Although no case was found which clearly denied removal to a multiple corporation because of the non-citizen requirement of the removal statute, it is probable that *Patch v. Wabash R. R.*, 207 U. S. 277 (1907) reached this result. It would certainly seem that if a corporation is considered a citizen of the state of suit for diversity purposes, it will also be considered a citizen of that same state for purposes of removal and hence barred from removing in the above situation. *But cf.* *Lucas v. New York Central R. R.*, 88 F. Supp. 536 (S. D. N. Y. 1950), which did not concern removal as such, but in which the court incidentally mentioned that removal had been allowed from a state court to it in a situation where, for diversity purposes, the multiple corporation was considered a citizen of the state of suit. Perhaps the removal may be explained by waiver or even mistake.

¹⁵ See *e.g.*, *Memphis & Charleston Ry. v. Alabama*, 107 U. S. 581 (1883); *Case v. Atlantic & C. A. L. Ry.*, 225 Fed. 862 (W. D. S. C. 1915).

¹⁶ *Starke v. New York, C. & S. L. R. R.*, 180 F. 2d 569 (7th Cir. 1950); *Town of Bethel v. Atlantic Coast Line R. R.*, 81 F. 2d 60 (4th Cir. 1936); *Peterborough R. R. v. Boston & M. R. R.*, 239 Fed. 97 (1st Cir. 1917); *Lake Shore & M. S. Ry. v. Eder*, 174 Fed. 944 (6th Cir. 1909); *Missouri Pacific Ry. v. Meeh*, 69 Fed. 753 (8th Cir. 1895).

For other cases approving this rule, see *Murphy v. Hudson & M. R. R.*, 45 F. Supp. 720 (E. D. N. Y. 1942); *Muller v. Boston & M. R. R.*, 9 F. Supp. 802 (D. N. H. 1935); *Goodwin v. New York, N. H. & H. R. R.*, 124 Fed. 358 (D.

rule to the situation where the multiple corporation was plaintiff, and the Supreme Court denied certiorari.¹⁷

One Supreme Court case seemingly announced a second rule applicable when the multiple corporation is *plaintiff* in an action. Although the case has been differently interpreted,¹⁸ it seems to hold that a multiple corporation in a suit against a citizen of one of its states of incorporation may assume the citizenship of any of its charter states by alleging in its complaint the character in which it is suing.¹⁹ A recent decision from the third circuit held that where a multiple corporation is defendant in this type of suit, the plaintiff may, by allegation in the complaint, fix the citizenship of the defendant as that of any chosen state of incorporation.²⁰ The latter decision seems to be an outcry against the formality of the "state of suit" rule, which requires the plaintiff in a suit against a multiple corporation to go into a foreign state in order to maintain the suit in federal court.²¹ Assuming there is diversity, it would seem that under this rule removal should be allowed to the defendant multiple corporation (so far as the statutory non-citizen requirement is concerned) if the suit is brought in a state different from one in which citizenship is given defendant corporation by allegation of the plaintiff.²² Conversely, unless there is a waiver by plain-

Mass. 1903); *Baldwin v. Chicago & N. W. Ry.*, 86 Fed. 167 (W. D. Mich. 1898); *Paul v. Baltimore & O. & C. R. R.*, 44 Fed. 513 (C. C. D. Ind. 1890); *Stout v. Sioux City & Pac. R. R.*, 8 Fed. 794 (C. C. D. Neb. 1881).

¹⁷ *Town of Bethel v. Atlantic Coast Line R. R.*, 81 F. 2d 60 (4th Cir. 1936), *cert. denied*, 298 U. S. 682 (1936).

¹⁸ *Town of Bethel v. Atlantic Coast Line R. R.*, 81 F. 2d 60 (4th Cir. 1936) interpreted the *Nashua* case as holding that a plaintiff multiple corporation may fix its citizenship for purposes of federal jurisdiction by its allegation as to which entity is suing. This is believed to be the correct interpretation. In *Missouri Pacific Ry. v. Meeh*, 69 Fed. 753 (8th Cir. 1895), the court took the view that the case involved a suit by one entity (incorporated in New Hampshire) of the multiple corporation against the other entity (incorporated in Massachusetts), and that the decision is distinguishable on that ground. *Goodwin v. New York, N. H. & H. R. R.*, 124 Fed. 358 (C. C. D. Mass. 1903) disapproved the *Missouri Pacific* case and stated that the *Nashua* case did not even involve a multiple corporation, but rather a single corporation whose citizenship was diverse from the defendant's citizenship.

¹⁹ *Nashua & Lowell Ry. v. Boston & Lowell Ry.*, 136 U. S. 356 (1890).

²⁰ *Gavin v. Hudson & Manhattan R. R.*, 185 F. 2d 104 (3d Cir. 1950). Commented on in *Notes*, 3 ALA. L. REV. 397 (1951), 4 BAYLOR L. REV. 227 (1952), 20 *FORD. L. REV.* 203 (1951), 64 *HARV. L. REV.* 1009 (1951).

²¹ "Defendant [multiple corporation] says that these plaintiffs from New Jersey could sue the New York defendant corporation in New York or that a New Yorker could come over to New Jersey and sue the defendant as a New Jersey corporation. But, says defendant, it cannot be sued in a federal court in New York by a New Yorker or in New Jersey by a New Jerseyite. Such a rule if adopted may be an effective means of promoting additional passenger business for the Hudson & Manhattan [defendant railroad], but we think it would be pretty hard to explain its reasons to a layman." *Gavin v. Hudson & Manhattan R. R.*, 185 F. 2d 104, 105 (3d Cir. 1950).

²² If the multiple corporation is to be regarded as a citizen of a particular state under the "allegation" rule for purposes of the diversity issue, it seems that logical consistency would require the same citizenship (and that one alone) to be

tiff, it would seem that removal is not possible if the citizenship alleged is that of the state in which suit is brought.

Other cases have at least mentioned, and perhaps relied upon, a third possible rule applicable when the multiple corporation is defendant.²³ This rule is that the multiple corporation is considered a citizen of the state in which the cause of action arose when it is incorporated in that state. It can be inferred from these cases that the courts felt that the particular entity of the multiple corporation incorporated in the state where the cause of action arises is responsible therefor and is the proper defendant in the action. Considerable doubt as to whether this is a valid rule stems from the fact that none of these cases were decided solely on this factor, since in each case the suit was brought in the state of incorporation where the cause of action arose.²⁴ In addition, quite a few cases have expressly repudiated the rule.²⁵

As has probably been noted, the law dealing with the citizenship of multiple corporations is very uncertain. Although two Supreme Court cases applied the "state of suit" rule when the multiple corporation was

used in determining the removal issue. Thus, in the above hypothetical situation, the fact that the corporation is incorporated in the state of suit should not bar removal; instead, the corporation should be considered a citizen of the alleged state of incorporation (different from the state of suit), and hence removal should be allowed to it as a non-citizen of the state of suit.

²³ In *Memphis & Charleston Ry. v. Alabama*, 107 U. S. 581, 585 (1883), it is stated: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama . . ." [italics added]. In *Patch v. Wabash R. R.*, 207 U. S. 277, 283 (1907), the following language was used: "It [defendant corporation] is alleged to have incurred a liability under the laws of . . . [Illinois], and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere." [italics added]. This latter case seems to combine both the "state of suit" theory and the "state of cause of action" theory in its decision. See also *Missouri Pacific Ry. v. Meeh*, 69 Fed. 753 (8th Cir. 1895); *Winn v. Wabash R. R.*, 118 Fed. 55 (W. D. Mo. 1902).

²⁴ These decisions fail to express any view whatsoever on the situation where the cause of action arises in one state of incorporation and the suit is brought in another state.

²⁵ See *Smith v. New York, N. H. & H. R. R.*, 96 Fed. 504 (C. C. D. Mass. 1899), where it was held that the entities of a multiple corporation are jointly liable for a tort arising from any operation of the multiple corporation, wherever committed. In *Gavin v. Hudson & Manhattan R. R.*, 185 F. 2d 104, 106 (3d Cir. 1950), the court stated: "We think it does not matter in determining the place where the plaintiff may sue whether he was hurt by the defendant [multiple corporation] in New York or New Jersey. It is perfectly obvious that there is only one operating group and its employees work just as fully for one corporation as the other. It is little short of absurd to say that the New York corporation commits the New York torts, if any, and the New Jersey corporation the torts in New Jersey, if any." See also *Seavey v. Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952) (instant case); *Lake Shore & M. S. Ry. v. Eder*, 174 Fed. 944 (6th Cir. 1909); *Murphey v. Hudson & Manhattan R. R.*, 45 F. Supp. 720 (E. D. N. Y. 1942); *Muller v. Boston and M. R. R.*, 9 F. Supp. 802 (D. N. H. 1935); *Case v. Atlantic & C. A. L. Ry.*, 225 Fed. 862 (W. D. S. C. 1915); *Horne v. Boston & M. R. R.*, 18 Fed. 50 (D. N. H. 1883).

defendant,²⁶ the last Supreme Court consideration of this problem, *Patch v. Wabash R. R.*,²⁷ interjected uncertainty into the law. In holding the defendant multiple corporation to be a citizen of Illinois, the Court placed its decision on the dual factors that the cause of action arose in Illinois and that the suit was brought in that same state. In the situation where the multiple corporation is plaintiff, definitive Supreme Court authority is lacking, even though, as pointed out above, there is one case which apparently held the "allegation" rule proper in that situation.²⁸ Although several distinctions exist between the two rules which may differently affect the rights of the parties or the numbers of cases of this peculiar kind which will get into federal courts,²⁹ the preferability of one rule over the other does not seem to be the most pressing problem in this area of confused law. What is most needed is a clear set of rules from the Supreme Court so that party litigants may advisedly chart the course of the suit.

WALKER Y. WORTH, JR.

Negligence—FELA—Proximate Cause—Function of Jury

When an airhose on defendant's train burst, locking the brakes and stopping the train, plaintiff brakeman attempted to make repairs. He tapped on the coupling of the airhose with a wrench, knocking loose particles of dust and rust, some of which lodged in his left eye, causing loss of vision. Suit was brought under the Federal Employers' Liability Act¹ and the Federal Safety Appliance Act.² The jury found

²⁶ See n. 13 *supra*.

²⁷ 207 U. S. 277 (1907).

²⁸ See n. 19 *supra*.

²⁹ The differences noted are the following:

(1) The inability of the defendant multiple corporation to remove from a state court under the "state of suit" rule, absent any waiver by the plaintiff, as contrasted with the possibility of removal under the "allegation" rule in the particular situation where the citizenship given the multiple corporation by allegation of the plaintiff is different from the state of suit. It should be noted that this limitation is in no way harsh, since, under the assumed fact situation, the suit will always be in one of the states of incorporation of the defendant multiple corporation, and any claim of local prejudice would be without merit.

(2) The ritual of the "state of suit" rule which requires the plaintiff (who is a citizen of one of the states of incorporation of defendant multiple corporation) in a suit against a multiple corporation to go into a foreign state in order to maintain the suit in federal court on the ground of diversity of citizenship. This limitation and the former one illustrate the fact that the "state of suit" rule is less liberal than the "allegation" rule in allowing access to the federal courts in suits of this kind.

(3) The limitation of the "state of suit" rule which prevents the transfer of a suit from a federal court in one state of incorporation of the multiple corporation where there is diversity of citizenship to another charter state of which the adverse party is a citizen. The transfer is improper since it would cause diversity to cease and hence oust the jurisdiction of the federal courts. See *Lucas v. New York Central R. R.*, 88 F. Supp. 536 (S. D. N. Y. 1950).

¹ 35 STAT. 65 (1908), as amended; 45 U. S. C. § 51 *et seq.* (1946), which provides