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Corporations - Clayton Act - Service of Process on Alien Corporations Through Their Local Subsidiaries

George R. Haydon Jr.
University of Michigan Law School

CORPORATIONS—CLAYTON ACT—SERVICE OF PROCESS ON ALIEN CORPORATIONS THROUGH THEIR LOCAL SUBSIDIARIES—Two affiliated German corporations, one of which is the defendant, established a jointly owned subsidiary in New York. Three members of the subsidiary's five-man board of directors are officers or directors of the German parents, while a fourth is a former employee sent to this country to manage the subsidiary. The American company is devoted exclusively to the business of the German parents. It assists in the negotiation of contracts, although it has no power to bind the parents, advises with respect to patents, and makes infrequent sales and purchases. For these services, it receives a flat fee plus a five percent price differential on the sales and purchases made for the parents. Although the subsidiary's officers have appreciable freedom in day-to-day action, any expenditure which will increase its budget must be approved by the parent corporations. A subpoena, addressed to defendant in connection with a grand jury investigation of possible antitrust violations, was served on the assistant treasurer of the American subsidiary. On defendant's motion to quash service, *held,* denied. The subsidiary is the alter ego of the German parents; therefore, defendant is "found" in this country within section 12 of the Clayton Act.[1] *In re Siemens & Halske A. G., Berlin, Germany,* (S.D. N.Y. 1957) 155 F. Supp. 897.

The tests of liability of a parent corporation for the activities of a subsidiary are inapplicable to the question of jurisdiction over foreign parent corporations which employ local subsidiaries.[2] Where the separate

1 38 Stat. 736 (1914), 15 U.S.C. (1952) §22: ". . . 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."

2 Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925). See generally on service of process on foreign corporations through their local subsidiaries. BALLANTINE, CORPORATIONS, rev. ed., §140 (1946); 18 FLETCHER, CYC. CORP. §8773 (1955).

corporate existence of the local subsidiary is maintained, the foreign parent is not "doing business" in the jurisdiction. The result is not altered where the subsidiary is completely dominated by the parent in substantially the same manner as an unincorporated division of its business.[3] Contrary results have been reached where the subsidiary is evidenced only by bookkeeping entries.[4] In antitrust actions requiring construction of section 12 of the Clayton Act providing for service of process in any district where the corporation is an "inhabitant"[5] or may be "found," the cases evidence a more liberal attitude.[6] A corporation is "found" in any district where ". . . there is proof of continuous local activities. . . ."[7] Although the courts have indicated that this construction is equally applicable to domestic and alien corporations employing local subsidiaries,[8] different results have been reached. Thus, where alien parents employed local subsidiaries as advertising and promotional agencies[9] or to market their products,[10] the alien parents were "found" in this country. On the other hand, where subsidiaries of American parents have distributed the parent's motion pictures[11] or carried on a separate business[12] within the district, service as to the parents was

3 Cannon Mfg. Co. v. Cudahy Packing Co., note 2 supra; Hudson Minneapolis, Inc. v. Hudson Motor Car Co., (D.C. Minn. 1954) 124 F. Supp. 720; Berkman v. Ann Lewis Shops, Inc., (S.D. N.Y. 1956) 142 F. Supp. 417, affd. (2d Cir. 1957) 246 F. (2d) 44.

4 Mas v. Orange-Crush Co., (4th Cir. 1938) 99 F. (2d) 675. See also Industrial Research Corp. v. General Motors Corp., (N.D. Ohio 1928) 29 F. (2d) 623, criticized in BALLANTINE, CORPORATIONS, rev. ed., §140 (1946), and narrowly restricted to its facts in Hudson Minneapolis, Inc. v. Hudson Motor Car Co., note 3 supra; Bator v. Boosey & Hawkes, Ltd., (S.D. N.Y. 1948) 80 F. Supp. 294, holding an alien parent amenable to process.

5 See Winkler-Koch Engineering Co. v. Universal Oil Products Co., (S.D. N.Y. 1946) 70 F. Supp. 77, stating that a corporation is an inhabitant in the state of its incorporation.

6 United States v. Scophony Corp., 333 U.S. 795 (1948), cited in later decisions as authority for holding a parent "found" in the district where its subsidiary is present. A close reading of the case indicates that the decision was actually based on the alien parent's own activities within the district and not those of its subsidiary. See Terry Carpenter v. Ideal Cement Co., (D.C. Neb. 1954) 117 F. Supp. 441, explaining the decision in this manner, and applying the rule of Cannon Mfg. Co. v. Cudahy Packing Co., note 2 supra.

7 United States v. Watchmakers of Switzerland Information Center, (S.D. N.Y. 1955) 133 F. Supp. 40 at 43, reargument den. (S.D. N.Y. 1955) 134 F. Supp. 710.

8 United States v. Scophony Corp., (S.D. N.Y. 1946) 69 F. Supp. 666, revd. on other grounds 333 U.S. 795 (1948); United States v. DeBeers Consolidated Mines, Ltd., (S.D. N.Y. 1948) 1948-1949 CCH TRADE CAS. ¶62,248.

9 United States v. Watchmakers of Switzerland Information Center, note 7 supra.

10 United States v. United States Alkali Export Assn., Inc., (S.D. N.Y. 1946) 1946-1947 CCH TRADE CAS. ¶57,481, cited as controlling in United States v. Imperial Chemical Industries, Ltd., (S.D. N.Y. 1951) 100 F. Supp. 504; In re Electrical & Musical Industries, Ltd., (S.D. N.Y. 1957) 155 F. Supp. 892. For decisions deciding whether an alien corporation is "found" on the basis of its own acts where no subsidiary is involved, compare United States v. DeBeers Consolidated Mines, Ltd., note 8 supra, with In re Canadian International Paper Co., (S.D. N.Y. 1947) 72 F. Supp. 1013.

11 Mebco Realty Holding Co. v. Warner Bros. Pictures, (D.C. N.J. 1942) 45 F. Supp. 340. See also Lawlor v. National Screen Service Co., (E.D. Pa. 1950) 10 F.R.D. 123.

12 Terry Carpenter v. Ideal Cement Co., note 6 supra. Also, the question whether a foreign parent because of its local subsidiary "transacts business," a requirement less

held invalid. It is noteworthy that in these cases the domestic parent could have been served in the district where it was an "inhabitant."[13] But in the case of an alien corporation, jurisdiction can be obtained only by serving a local subsidiary since no provision is made for service outside of the country.[14] In the principal case, the court holds the subsidiary to be the alter ego of its alien parents, apparently relying entirely on stock ownership, common directors, and the fact that the subsidiary's only business was for the parents. Although some basis for the alter ego holding may have been furnished by the fact that the parents disregarded the subsidiary's corporate existence to the extent that they required all expenditures in excess of the subsidiary's budget to be approved, the court apparently placed little reliance on this factor in reaching its decision. As a matter of policy, the result in the principal case is desirable in that it provides an effective means for enforcing the antitrust laws. However, this departure from the standard applied outside the antitrust field finds no support in the statutory language. The existence of the subsidiary as a legal entity separate and distinct from the stockholder parent is, though perhaps formal, real and not a fiction.[15] Hence, it is the subsidiary and not the parent that is "found" within the district. To justify sustaining service on the parent through its local subsidiary where the separate corporate existence is maintained would require congressional action rather than what is in effect judicial legislation.[16]

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stringent than "found," within a district under the venue provision of the statute should be considered. See Waldron v. British Petroleum Co., (S.D. N.Y. 1957) 149 F. Supp. 830, holding that the parent is transacting business. But cf. Pfeiffer v. United Booking Office, Inc., (N.D. Ill. 1950) 93 F. Supp. 363; Winkler-Koch Engineering Co. v. Universal Oil Products Co., note 5 supra.

13 Note 5 supra.

14 For a discussion of enforcement of antitrust laws against alien corporations, see 43 GEO. L. J. 661 (1955).

15 Cannon Mfg. Co. v. Cudahy Packing Co., note 2 supra.

16 For a consideration of the possible constitutional question involved in holding the parent solely on the basis of its stock ownership in the subsidiary under the "minimum contacts" doctrine expressed in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), compare Steinway v. Majestic Amusement Co., (10th Cir. 1949) 179 F. (2d) 681, with Dam v. General Electric Co., (E.D. Wash. 1953) 111 F. Supp. 342.