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SERVICE OF PROCESS IN SUITS AGAINST DIRECTORS: A BARRIER TO JUSTICE

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Today an unwarranted situation exists in that directors of a corporation by a careful selection of states of domicile separate and distinct from the state of incorporation and each other may emasculate the right of their corporation, its stockholders, or their fellow directors to call them to account for their wrongdoings. This is true whether the suit be brought in the state courts or in the federal courts. That such a situation demands a remedy brooks no discussion. The questions are: "What remedy?" and "By whom?" An examination of the situation and the factors that bring it about should prove helpful in determining the answers.

For example, where the *X* corporation having ten directors is incorporated in New York, one of its directors must be a resident of New York, but the other nine directors may be residents of any number of other states. When the corporation, due to limitations on the service of process, is forced to bring a suit against the resident director alone, it may well be that he is not financially able to pay the judgment it obtains. In this event the corporation is under the necessity of instituting suits against the other directors in their respective states. Considerable hardship and expense is thus placed upon the corporation by its own directors.[1] Likewise, it is unfair that the New York director should be subjected to the burden of defending such a suit alone. In the event that judgment goes against him and he is innocent of personal wrongdoing, he must seek his reimbursement by multiple suits in distant jurisdictions.[2] On the other hand where he is a joint tortfeasor and resident in a state which unlike New York permits contribution, he is unable to take advantage of his substantive right but must also start multiple suits elsewhere. And equally important, this situation is an imposition upon the several courts to which resort is had. The

[1]When a stockholder sues, the situation is even worse. All that a director need do to escape any suit at all in the state courts is to reside in a state where the corporation cannot be served with process. There a motion to dismiss will, in almost every state, be granted because the corporation is an indispensable party defendant. Consult the Recommendation of the Law Revision Commission of the State of New York with reference to this problem and the study of Walter Pond, Esq., in support thereof, prepared under the direction of Professor John W. MacDonald, Executive Secretary and Director of Research. Report of Law Revision Commission for 1941, N. Y. Leg. Doc. (1941) No. 65 (I). And see Note (1941) 50 YALE L. J. 1261.

[2]Bohlen, *Contributions and Indemnity Between Tortfeasors* (1936) 21 CORNELL L. Q. 552, (1937) 22 CORNELL L. Q. 469 and Burris v. American Chicle Co., 120 F. (2d) 218 (C. C. A. 2d 1941).

expense of the conduct of such suits properly rests upon the court of the state in which the corporation is organized. It is, therefore, clearly desirable that some provision should be made for suit against corporate directors in the state or federal courts of the state in which the corporation is organized in order that all the directors may be made defendants in one court and that court enabled to make a final disposition of the litigation.

If this be so desirable, one may well inquire why it is not possible to bring such a suit today in the state or federal courts. The difficulty in the state courts is that process cannot be served beyond the state lines and the difficulty in the federal courts of the state of the corporation's domicile is the same. There is, however, this difference between the two. Under *Pennoyer v. Neff*,[3] there is a question of the constitutionality of the power of the state to permit the service of its process upon non-residents when they are without the state, while in the case of the federal courts there is no constitutional objection to the service of process any place in the United States.[4]

If we say that the remedy is to be furnished by the state, then the ideal solution is for each state to pass a statute providing that as a condition for taking office the director automatically designates the Secretary of State as his agent for the service of process. This agency should be limited to actions involving his relationship to the corporation, where the suit is brought against him by the corporation, a stockholder, trustee in bankruptcy, or receiver in the right of the corporation.

Such a statute finds its constitutional basis in the conditional theory suggested approvingly and farsightedly by Stephen Field in *Pennoyer v. Neff*, where he said:

> "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens toward a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. . . .
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> "Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer

[3] 95 U. S. 714, 24 L. ed. 565 (1877).
[4] 268 U. S. 619, 45 Sup. Ct. 621 (1924).

designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. . . . *Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law.*"[5]

Mr. Justice Field's suggestion has been adopted by the various states in enacting statutes conditioning the entry of foreign corporations, non-resident motorists, and individual citizens of other states for the purpose of doing business in the state by agent. And such statutes have been held constitutional,[6] provided that, in addition to service upon the designated agent, the statute requires that adequate notice of the pendency of the action be given the defendant and that he be given a reasonable opportunity to put in a defense.[7] In view of these authorities it does not appear likely that the Supreme Court would declare unconstitutional a state statute which provided that by becoming a director in one of the corporations of the state an individual thereby designates the secretary of state as his agent for the service of process in actions against him involving his relationship with the corporation.[8]

But constitutionality is not the only consideration. There are a number of reasons why a state may not wish to pioneer with such a statute.

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[5]95 U. S. 714, 734-6, 24 L. ed. 565 (1877) (italics added).

[6]Bagdon v. Philadelphia and Reading Coal and Iron Company, 217 N. Y. 432, 111 N. E. 1075 (1916), recently discussed by Mr. Justice Frankfurter in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 60 Sup. Ct. 153 (1939); Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1926); Henry L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 Sup. Ct. 553 (1934). Consult also, the Recommendation of the Law Revision Commission of the State of New York in respect of service on non-resident natural persons who do business in the state by agent (C. P. A. § 229b) and the supporting study. Report of the Law Revision Commission for 1940, Leg. Doc. (1940) No. 65 (D) 105; and see Note on Section 229b *infra* at page 119.

[7]Wuchter v. Pizzuti, 276 U. S. 13, 48 Sup. Ct. 259 (1927).

[8]Judging by its most recent decision, the Supreme Court of the United States, is prepared to tackle procedural problems courageously and decide them on the basis of what is most desirable under modern conditions and quite independently of outmoded rules of law. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 Sup. Ct. 153 (1939); Adam v. Saenger, 303 U. S. 59, 58 Sup. Ct. 454 (1937); Hansberry v. Lee, 311 U. S. 32, 61 Sup. Ct. 115 (1940), (1941) 26 CORNELL L. Q. 317. In this last case Mr. Justice Stone declared, "With proper regard for divergent local institutions and interests . . . this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." 311 U. S. 32 at 42 (1940).

In the first place it can be argued that the present situation permits directors some escape from the dreaded strike suit.[9] The obvious answer is that two wrongs do not make a right. Furthermore, there is no telling that a suit is a strike suit until the court has heard the case on its merits. Certainly not *every* suit by a corporation or a stockholder, trustee in bankruptcy, or receiver in the right of the corporation, can be called a strike suit. And, as we have seen, the present law places an unfair burden upon the particular director sued. Is a suit by such a director against his fellow directors for reimbursement a strike suit?

Second, it can be contended that such a statute would chill the sale of corporate charters by the state. The only reply we can make to this argument is that a state should be more interested in protecting its citizens from wrong than in collecting revenue. This is doubtless true in a large state such as New York. But a small state such as Delaware is less likely to be persuaded to legislative action when a large part of its income is derived from the sale of corporate charters and but a small part from the taxation of foreign corporations doing business there.

Last, it can be pointed out that where a state pioneers with this legislation, foreign stockholders and creditors of its corporations will be able to obtain relief in its courts whereas its own citizens, as stockholders or creditors of foreign corporations, will not be able to obtain reciprocal relief in the courts of a foreign state. Looking at the matter broadly we can only deplore this objection as selfish and provincial. Looking at it narrowly from the point of view of an individual state we can sympathize. Our federal system inevitably causes states to be reluctant to pass beneficial legislation when other states do not.

Whatever may be our views as to the theoretical soundness of either the second or last objections, as a practical matter they are bound to be so appealing to a state legislature as to insure the defeat of our suggested statute. And thus, since states have failed to act in this situation and since there is little likelihood that left to themselves they will do so, it becomes the obligation of the national government to remedy the difficulty.

There is no question about the power of Congress to provide that in an action against individual defendants in a particular federal district court

[9]In the federal courts Rule 23 of the Federal Rules of Civil Procedure offers protection against strike suits and a great many states require that stockholders' suits in their courts meet the same requirements. In addition many proposals have been made to substitute a different procedure entirely for the stockholders' suit. Consider especially, Washington, *Stockholders Derivative Suits: The Company's Role and a Suggestion* (1940) 25 CORNELL L. Q. 361. For a complete collection of similar proposals and an excellent analysis see the forthcoming study of stockholders' suits by the Law Revision Commission, N. Y. Leg. Doc. (1941) No. 65 (I).

that court's process may be served any place in the United States. As Mr. Justice Brandeis said in *Robertson v. Railroad Labor Board:*

> "Congress has power . . . to provide that the process of every district court shall run into every part of the United States. Toland v. Sprague, 12 Pat. 300, 328; United States v. Union Pacific R. R. Co., 98 U. S. 569, 604."[10]

Without doubt the general rule is that service of process in the federal court is confined to the district. To quote again from Mr. Justice Brandeis in the Robertson case:

> "In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, *Harkness v. Hyde,* 98 U. S. 476; *Ex parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland v. Sprague,* 12 Pet. 300, 330. Such was the general rule established by the Judiciary Act of September 24, 1789, c. 20, § 11, 1 Stat. 73, 79, in accordance with the practice at the common law. *Piquet v. Swan,* 5 Mason, 35, 39 *et seq.* And such has been the general rule ever since."[11]

But it is to be ohserved that the limitation of service of process to the districts has not been a question of power but of policy. Whenever Congress has felt that there was good reason to permit the service of process elsewhere it has by special enactment done so. Three outstanding examples of the exercise of this power of Congress are the Interpleader Act,[12] the Securities and Exchange Act,[13] and the 1936 amendment to the federal venue statute.[14] And in addition to these statutes there are many others.[15]

Under the powers conferred upon it by the enabling act of June 19, 1934,[16] the Supreme Court of the United States, in Rule 4 (f) of the Federal Rules of Civil Procedure, provided:

> "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and,

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[10] 268 U. S. 619, 622, 45 Sup. Ct. 621 (1924).
[11] 268 U. S. at 622-3.
[12] 49 STAT. 1096 (1936), 28 U. S. C. § 41 (26) (Supp. 1940).
[13] 48 STAT. 86, § 22 (a) (1933), 15 U. S. C. § 77 (v) (a) (1941) and 48 STAT. 84, pendence Shares Corporation, 311 U. S. 282, 61 Sup. Ct. 229 (1940); Cohen v. Saddle- § 12 (1933), 15 U. S. C. § 77 (*l*) (1941); and see in this connection Deckert v. Indemire, 26 F. Supp. 27 (D. Mass. 1939).
[14] 49 STAT. 1213 (1936), 28 U. S. C. § 112 (Supp. 1940).
[15] Consult the Commentary, 5 FED. RULES SERV. 4 F. 22, for a complete collection.
[16] 48 STAT. 1064 (1934), 28 U. S. C. §§ 723 (b), 723 (c).

when a statute of the United States so provides, beyond the territorial limits of that state."

—and this despite the fact that the Advisory Committee in a preliminary draft called the attention of the court to the fact that "Some members of the bar question the power of the court to make this extension."[17] Before the rules took effect they had to be reported to Congress. But when this was done no change in the provisions of Rule 4 (f) was made by that body. This fact was influential in causing the majority of the court to sustain, against attack, Rule 35 in *Sibbach v. Wilson & Co.*,[18] and may well cause the court to sustain 4 (f). On the other hand certain lower courts have held 4 (f) to be beyond the power of the Supreme Court under the enabling act and its fate remains to be seen.[19]

Assuming that the Supreme Court's power to promulgate Rule 4 (f) was under the enabling act a matter of "practice and procedure" and thus valid, as we think it is, there seems nothing to prevent the Court's amending Rule 4 (f) so as to permit the service of process in suits against directors any place in the United States.[20] That such an amendment would have to be reported to Congress is required by the terms of the enabling act, but this could readily be done if the Court would promulgate an amended rule. It is doubtful, however, whether the Court could be persuaded to make such a limited change. The wisdom of its doing so is questionable. This is particularly true in view of the fact that its power to promulgate 4 (f)

[17](April, 1937) Report of the Advisory Committee on Rules for Civil Procedure, 14.

[18]312 U. S. 1, 61 Sup. Ct. 422 (1941).

[19]Williams v. James, 34 F. Supp. 61 (W. D. La. 1940) where the cases both ways are cited and discussed.

[20]The enabling act (Sections 723 (b) and 723 (c) of Title 28 U. S. C.) says "the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and the courts of the District of Columbia, the forms of process . . . in civil actions at law." It also provides that, "The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. . . ." Nowhere in the enabling act is there an express provision giving the court the power of amendment. Such power must be implicit in the power given to the court by Congress to promulgate the rules in the first place. However, Gustavus Ohlinger, Esq., makes an able argument to the effect that the "clearest authorization" must be given by Congress to the Supreme Court, "as the present rules have the effect of law even to the extent of superseding inconsistent statutes" and since "such clear authorization is lacking in the Enabling Act," the court is without power to amend the Federal Rules of Civil Procedure or promulgate new ones. Ohlinger, *Problems of Jurisdiction and Venue* (1940) 26 CORNELL L. Q. 240. The Advisory Committee was of a different view. See (1938) Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, 179. Its view seems to have prevailed because, with Mr. Justice Black dissenting, the Court on December 28, 1939, amended Rule 81 (a) (6) of the Rules. See 3 MOORE'S FEDERAL PRACTICE (2 yr. Supp. 1940) 157 and compare 59 Sup. Ct. clxxv and 1 MOORE'S FEDERAL PRACTICE (2 yr. Supp. 1940) 13, 14. In amending 81 (a) (6) the method of the enabling act was used and the amendment reported to the Congress.

was questioned at the time and is still being questioned. Therefore, the wiser course to pursue would seem to be to appeal directly to Congress for legislation.

This legislation should take the form of an amendment to Section 112 of Title 28, the federal venue statute, so as to permit all of the directors of a corporation to be sued together in a federal court in the state of the corporation's domicile. It should be provided further that in such an action process may be served any place in the United States or its territories. If possible, provision should be made for service upon its directors who are non-residents of the United States.[21]

We have suggested that the proposed statute permit a corporation to sue all of its directors in the United States district court in the state of the corporation's domicile. This suggestion is deliberately made, mindful of the rule of *Strawbridge v. Curtiss*.[22] Inevitably that rule will be violated here since by statute many of the states require that there be at least one resident director. His citizenship and that of the corporation will be the same and complete diversity will be lacking. But that this apparent violation has precedent can be seen in the interpleader act which has been framed on the theory that under Article III of the Constitution complete diversity is not necessary and that *Strawbridge v. Curtiss* is distinguishable because decided under the Judiciary Act of Congress. If this provision of the interpleader act be upheld, there is every reason that a similar provision may be made here.

Recently, the Supreme Court of its own motion in *Treinies v. Sunshine Mining Co.*[23] raised the question of its jurisdiction under the interpleader act. Although in that case there was complete diversity and jurisdiction was sustained, Mr. Justice Reed significantly said:

> "Before considering the questions raised by the petition for certiorari, the jurisdiction of the federal court under the Act of January 20, 1936, must be determined. As this issue affects the jurisdiction of this Court, it is raised on its own motion. By the Act of January 20, 1936, the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants who have property of the requisite value claimed by citizens of different states.
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> "The suit may be maintained 'although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of the other'. Process may run at least throughout all the states.

[21]Blackmer v. United States, 284 U. S. 421, 52 Sup. Ct. 252 (1931); Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Milliken v. Meyer, 311 U. S. 457, 61 Sup. Ct. 339 (1941).

[22]3 Cranch 267, 2 L. ed. 434 (1806).

[23]308 U. S. 66, 60 Sup. Ct. 44 (1939).

"As required by the Act this case was begun by the complainant, a corporation of the State of Washington, impleading one group of claimants who are citizens of that same state and another, the adverse group, who are citizens of Idaho. Under the Interpleader Act, this identity of citizenship is permissible since diversity only between claimants is required. The Interpleader Act is based upon the clause of § 2, Article III, of the Constitution which extends the judicial power of the United States to controversies 'between citizens of different states.' Is this grant of jurisdiction broad enough to cover the present situation?

"The Judicial Code, § 24, provides for original jurisdiction of suits of a civil nature between citizens of different states in precisely the language of the Constitution. The present wording is practically the same as that of the Act of March 3, 1875, 'the circuit courts . . . shall have original cognizance . . . of all suits . . . in which there shall be a controversy between citizens of different states' and that of the original Judiciary Act of September 24, 1789, 'the suit is between a citizen of the state where the suit is brought and a citizen of another state.' Without ruling as to possible limitations of the constitutional grant, it is held by this Court that the statutory language of the respective judiciary acts forbids suits in the federal courts unless all the parties on one side are of citizenship diverse to those of the other side. For the determination of the validity of the Interpleader Act we need not decide whether the words of the Constitution, 'Controversies . . . between Citizens of different States', have a different meaning from that given by judicial construction to similar words in the Judiciary Act. Even though the constitutional language limits the judicial power to controversies wholly between citizens of different states, that requirement is satisfied here."[24]

Since there is such a genuine need for an efficient interpleader procedure there is every reason to suppose that when the court meets the point, it will uphold the jurisdiction of the federal courts to entertain bills of interpleader even though complete diversity be lacking. Zechariah Chafee, Jr., in a recent article states that jurisdiction may be upheld "in spite of the partial cocitizenship" if the court wishes to do so. He says:

"The broad ground is tenable, that complete diversity of citizenship is not required by Article III, Section 2 of the Constitution: 'The judicial Power shall extend . . . to Controversies . . . between Citizens of different States.' This clause may be satisfied when there is a genuine controversy between two claimants who reside in different states, even though the litigation also involves another controversy between the stakeholder and the cocitizen claimant. Although in many cases not involving interpleader the Supreme Court has denied jurisdiction unless all the parties on one side live in different states from all those on the other side. The Court drew this requirement of complete diversity of

[24]308 U. S. 66 at 70-72, 60 Sup. Ct. 44 (1939).

citizenship from the language of the statutes and not from the Constitution. These cases merely held that Congress had not as yet permitted federal suits where there was a partial cocitizenship. They did not hold that Congress could not constitutionally permit such suits if it wished, for example, by the Interpleader Acts.

"The objection may be urged that the wording of the statutes under which the Supreme Court has required complete diversity of citizenship is exactly the same as the wording of Article III, Section 2 of the Constitution. If these words in the statute demand complete diversity of citizenship, do not they also demand it when they occur in the Constitution? The best reply to this objection is, that constitutional language may properly be given a wider interpretation than statutory language. Since the Constitution has a broader purpose than a statute and is intended to last for a much longer time, its wording should possess a flexibility which is not needed in a statute. Such is the view of Mr. Justice Holmes:

> " 'But it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'

"An additional argument for the position that partial cocitizenship is permitted by the Constitution is found in the fact that the Supreme Court has frequently sanctioned it in federal litigation under the judge-made doctrines of separable controversy and the ancillary jurisdiction. If in these complex cases where one suit includes several controversies and where justice and convenience require that the presence of two parties from the same state in one of the controversies shall not prevent the settlement of the entire litigation, the United States courts are enabled to go ahead through judicial law-making, why can they not also receive the same power to promote convenience and justice in interpleader cases from Congressional legislation? Partial cocitizenship ought to be just as constitutional under a statute as under a doctrine declared by court."[25]

The statute should be so drawn, however, that if this provision be held unconstitutional it will not affect the constitutionality of the balance of the statute.

Even if such a provision as above suggested, destroying the rule requiring complete diversity, were declared unconstitutional, the non-resident defendant directors might be able to interplead the resident directors as third party defendants under Rule 14 of the Federal Rules of Civil Procedure which permits such interpleader by defendant when the person not a party to the action "is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him." Under the wording of Rule 14 this

[25] *Federal Interpleader Since the Act of 1936* (1940) 49 YALE L. J. 377, 395-6.

can be done even in a state such as New York, which does not permit contribution between joint tortfeasors even though the third party defendant be of the same citizenship as the plaintiff.[26] However, despite the wording of Rule 14, it bas been held by Judge Chestnut in *Malkin v. Arundel Corp.*[27] that a joint tortfeasor may not be interpleaded unless the plaintiff amends his complaint to ask relief against the proposed third party defendant. This holding has been predicated not only on the wording of Rule 14 which says, "The plaintiff may amend his pleadings" but also upon the proposition that to permit this to be done would violate the substantive law. Commenting upon the point James A. Pike and Henry G. Fischer say:

> "It is clear, of course, that the *right* to contribution is a substantive right and that Rule 14 cannot, under the limitations of the Enabling Act and the rule of Erie Co. v. Tompkins, operate to extend it. Consequently, it has been held that under a statute whereby a defendant has a right to contribution only as against those whom plaintiff chooses to join as codefendants, an illegal tort-feasor cannot be brought in a third-part defendant, solely on the basis of a possible liability of contribution, unless plaintiff amends his complaint to claim relief against the new party. This interpretation seems correct, since if defendant were allowed to bring in the third party against the will of the plaintiff, he would be extending his substantive rights in a manner not permissible in the state courts."[28]

But to the writers this seems to be wrong. The bringing in of a party defendant is a procedural matter. It does not directly affect the substantive rights, though it does indirectly do so. There is no substantive law right preventing the several defendants from being sued together since it is merely the right of the plaintiff at his option to sue one or more tortfeasors. Thus if the federal court acting under the authority of Rule 14 permits a defendant to bring in a co-tortfeasor as an additional party defendant, it would seem that this would not be a violation of *Erie v. Tompkins*[29] unless the substantive law of the state denied that the proposed third party defendant was liable to the plaintiff.

It may be said on behalf of this legislation that it is likely to decrease

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[26]Holtzoff, *Some Problems Under Federal Third-Party Practice* (1941) 3 LA. L. REV. 408.

[27]36 F. Supp. 948 (D. Md. 1941). The Maryland law as to contributions among joint tortfeasors appears to be the same as New York. It is interesting to note in connection with the New York law of contribution the case of Haines v. Bero Engineering Construction Corp., 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dep't 1930), decided by Judge Crouch and cited approvingly in Fox v. Western N. Y. Motors Lines, Inc., 232 App. Div. 308, 249 N. Y. Supp. 643 (4th Dep't 1931), *reversed*, 257 N. Y. 305, 178 N. E. 289 (1931).

[28]4 FED. RULES SERV. 900 at 901.

[29]304 U. S. 64, 58 Sup. Ct. 817 (1938).

rather than increase suits of this kind in the federal courts. At present several different suits must be brought. To bring most of them the corporation must leave the state of its domicile. Under the proposed statute only one suit need be instituted. However, bearing in mind the warning that Mr. Justice Frankfurter has voiced[30] against the extension of the jurisdiction of the federal courts to purely state matters, such a statute could provide that it would not be operative when the state of the corporation's domicile enacts a statute under which suit against all directors may be maintained in the courts.

In 1936 Section 112[31] was amended so as to provide:

> "Suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon the corporation in any district wherein such corporation resides or may be found."[32]

The House Committee on Judiciary, in favorably reporting this amendment, thus expressed its purpose:

> "Its purpose is to plug a loophole in judicial procedure through which holding companies and parent organizations are enabled to strip a subsidiary corporation of all its assets to the loss of minority stockholders of the subsidiary corporation without possibility of being brought to account in any court, either Federal or State."[33]

When we examine this bill together with the report of the House Committee on Judiciary three tacit propositions are immediately discernable. In promulgating this bill Congress gave cognizance to: (1) the tremendous importance of the corporate form to the economic life of this country and therefore, necessarily, the proportional importance of preventing any abuse of that method of doing business; (2) the possibility that in some instances, due either to imperfections of legal and governmental systems or to practical considerations beyond their control, the separate states are unable to either correct or cope with these abuses; (3) the duty of the national government

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[30]Frankfurter, *Distribution of Judicial Power Between the State and Federal Courts* (1928) 13 CORNELL L. Q. 499. In connection with this article it is interesting to note the following quotation from Justice Frankfurter in 10 U. S. L. WEEK 4007, 4009 (U. S. 1941) where he says: "The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offence to State sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business."

[31]49 STAT. 1213 (1936), 28 U. S. C. § 112 (Supp. 1940).

[32]Amendment of April 16, 1936, c. 230, 49 STAT. 1213.

[33]H. R. REP. No. 2257, 74th Cong., 2d Sess. (1936).

in such cases to step in and fulfill its obligations as a federal government by exercising its power, territorially broader than any state power, to remedy the problem of its helpless members. To show that these three propositions exist also where service of process is attempted today on cleverly located wrongdoing directors has been the purpose of this article. Congressional legislation is required!