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Conclusion

These tests have arisen primarily as a result of an attempt by the Commission and the federal courts to deal with modern economic developments. The conglomerate merger is an invention fathered by the need to achieve the diversification necessary for economic growth and often for business survival. In formulating tests applicable to conglomerate mergers, the authorities have repeatedly underlined the fact that they are in no sense establishing per se rules of illegality. Rather, they are attempting to deal with the individual aspects of each merger—separate and distinct from previous decisions. It is all too easy to disregard these disclaimers and regard the tests as establishing per se rules.

It would be economically convenient if definite rules were clearly drawn and uniformly accepted so as to enable the lawyer to more accurately evaluate a proposed conglomerate merger. In their stead, tests have been developed and applied to meet the varied economic arrangements presented. Future proposed mergers must first be examined under each of these tests, and then the individual finding must be compared and evaluated in order to determine the cumulative effect of the merger upon competition.



ACCESS OF THE UNINCORPORATED ASSOCIATION TO THE FEDERAL
COURTS: VENUE AND DIVERSITY RESTRICTIONS

The constitutional grant of diversity jurisdiction to the federal courts extends "to Controversies . . . between Citizens of different States . . ."¹ In *Strawbridge v. Curtis*² the United States Supreme Court declared that in order to satisfy the requirements of diversity it must appear that there is *complete* diversity, *i.e.*, no plaintiff being of the same citizenship as any defendant. According to common-law principles, an unincorporated association was deemed a citizen of each state wherein a member of the association was domiciled.³ The requirement of *complete* diversity in a case involving a large unincorporated labor union or a joint stock company may be a practical impossibility since, in most cases, at least one member of the association will be a citizen of the same state as an adverse party. Thus, unless there is a federal question, these associations are excluded from the federal

¹ U.S. Const. art. III, § 2; see 28 U.S.C. § 1332(a) (1) (1964).

² 7 U.S. (3 Cranch) 267 (1806).

³ *Chapman v. Barney*, 129 U.S. 677 (1889).

courts. Two recent cases have examined the present status of this rule and reached divergent conclusions.⁴

The establishment of venue requirements has created an analogous problem. Venue, when jurisdiction is based on diversity of citizenship, may be laid "only in the judicial districts where all plaintiffs or all defendants reside."⁵ When jurisdiction is based on a federal question, however, venue must be laid only where all the defendants reside.⁶

Traditionally, residence of such associations has been determined by the separate residences of their members.⁷ Yet, very often in the case of large unincorporated associations there is no judicial district where all their members reside. However, in *Sperry Prods., Inc. v. Association of Am. R.R.s.*,⁸ the Second Circuit found such associations to be analogous to corporations—residence, thereby, being determined by the association's principal place of business. The courts, however, are still searching for the limits of this analogy, and are divided as to whether residence of an association should include every judicial district where it is doing business.⁹

The purpose of this note is to discuss the recent developments in the treatment of unincorporated associations in regard to diversity jurisdiction and venue. The validity of recent cases and their import is to be judged on the basis of existing law and interpretation of judicial precedent.

Diversity Jurisdiction

A corporation for diversity jurisdiction purposes is treated, by statute, as an entity; it is a citizen both of the state of its incorporation and the state in which its principal place of business is located.¹⁰ Prior to the enactment of this statute, the courts had indulged in the conclusive presumption that all the shareholders of a corporation were citizens of the state of incorporation.¹¹ Through this fiction corporations enjoyed access to the federal courts although *complete* diversity of jurisdiction did not really exist.

⁴ *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964); *Bouligny v. United Steelworkers*, 336 F.2d 160 (4th Cir. 1964).

⁵ 28 U.S.C. § 1391(a) (1963).

⁶ 28 U.S.C. § 1391(b) (1963).

⁷ *Sutherland v. United States*, 74 F.2d 89, 93 (8th Cir. 1934); *Koons v. Kaiser*, 91 F. Supp. 511, 515 (S.D.N.Y. 1950).

⁸ 132 F.2d 408 (2d Cir. 1942).

⁹ Compare *American Airlines, Inc. v. Air Line Pilots Ass'n*, 169 F. Supp. 777, 781-82 (S.D.N.Y. 1958), with *Cherico v. Brotherhood of R.R. Trainmen*, 167 F. Supp. 635, 638 (S.D.N.Y. 1958).

¹⁰ 28 U.S.C. § 1332(c) (1964).

¹¹ *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314, 328-29 (1854); see Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 226 (1946).

This fiction was not adopted with respect to unincorporated associations. In *Chapman v. Barney*,¹² the Supreme Court established the rule that citizenship of the unincorporated association must be determined by reference to the citizenship of each individual member. Subsequent decisions have upheld this view even where the association in question was treated as a legal entity by the states.¹³

However, the Supreme Court in *Puerto Rico v. Russell & Co.*¹⁴ found a Puerto Rican *sociedad en comandita* to be so similar to an American corporation that for diversity jurisdiction the domicile of the *sociedad*, and not that of its individual shareholders, was controlling. In analyzing the civil law of Puerto Rico the Court stated:

therefore to call the *sociedad en comandita* a limited partnership in the common law sense . . . is to invoke a false analogy. In the law of the creator the *sociedad* is consistently regarded as a juridical person.¹⁵

The *Russell* case is the last direct discussion of this problem by the Supreme Court. Since, in *Russell*, the Supreme Court distinguished prior precedent and confined its discussion to the peculiarities of Puerto Rican law, subsequent lower court cases have limited the case to its facts.¹⁶

Recently, however, the Second Circuit in *Mason v. American Express Co.*,¹⁷ basing its decision on the *Russell* case, held that the Supreme Court had abandoned the mechanical approach of "labeling" organizations for a more flexible test

which demands that consideration be given to whether an organization's essential characteristics sufficiently invest it, like a corporation, with a complete legal personality distinct from that of the members it represents.¹⁸

In reaching this result the court compared the New York joint stock company to the Puerto Rican *sociedad*, concluding that "the joint stock association is as much like a true corporate body as the *sociedad*. . . ." ¹⁹

¹² 129 U.S. 677 (1889). Prior to Supreme Court adjudication of the question of citizenship of unincorporated associations, some lower federal courts had held joint stock companies entities for diversity purposes. *Baltimore & O.R.R. v. Adams Express Co.*, 22 Fed. 404, 407 (C.C.D. Md. 1884); *Fargo v. Louisville, N.A. & C. Ry.*, 6 Fed. 787, 791 (C.C.D. Ind. 1881).

¹³ See, e.g., *Thomas v. Board of Trustees*, 195 U.S. 207 (1904); *Arbuthnot v. State Auto Ins. Ass'n*, 264 F.2d 260, 262 (10th Cir. 1959).

¹⁴ 288 U.S. 476 (1933).

¹⁵ *Id.* at 480-81. (Emphasis added.)

¹⁶ See, e.g., *Sutherland v. United States*, 74 F.2d 89 (8th Cir. 1934); *Bouligny v. United Steelworkers*, *supra* note 4, at 163-64.

¹⁷ 334 F.2d 392 (2d Cir. 1964).

¹⁸ *Id.* at 393.

¹⁹ *Id.* at 400.

In *Boulogny v. United Steelworkers of America*²⁰ the Fourth Circuit, taking a contrary view, limited *Russell* to its facts. Although the court was concerned with a union as opposed to a joint stock company as in *Mason*, unions are regarded as entities no less corporate in form.²¹ The court reasoned that "unincorporated associations cannot be equated with corporations by a simple judicial decision attributing citizenship to them,"²² thereby limiting citizenship of corporate-in-form organizations only to those labeled "corporation." In so stating, the court referred to the statutory provision for determining corporate citizenship,²³ and indicated that only a corporation was to be deemed a citizen in diversity cases. The court, expressing awareness of informed sentiment in favor of treating unincorporated associations as citizens of their principal place of business, stated that such changes are in the province of the legislature, not the judiciary.²⁴ These two decisions are based on conflicting policies for determining citizenship in diversity cases. One view relies solely on the label affixed to the organization, while the other analyzes the attributes of juridical personality possessed by such an organization.

The resolution of this conflict depends upon the interpretation of *Puerto Rico v. Russell & Co.* This case may be viewed essentially as an analysis of Puerto Rican civil law and hence limited to its facts. Contrariwise, it can be interpreted as espousing the principle that legal personality should be determined by reference to the attributes of individuality possessed, rather than by reference to a mere label.

With respect to corporations, the Supreme Court, in discussing the development of the entity theory, said:

even those who formulated the rule found its theoretical justification only in the complete legal personality with which corporations are endowed.²⁵

Furthermore, in distinguishing prior cases which regarded the citizenship of associations as that of each member, the Court said:

but status as a unit for purposes of suit alone . . . not shown to have the other attributes of a corporation . . . has been deemed a legal

²⁰ 336 F.2d 160 (4th Cir. 1964).

²¹ See *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 385 (1922); Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40, 41 (1941).

²² *Boulogny v. United Steelworkers*, *supra* note 4, at 164.

²³ 28 U.S.C. § 1332(c) (1964).

²⁴ *Boulogny v. United Steelworkers*, *supra* note 4, at 164. Cf. S. REP. No. 1830, 85th Cong., 2d Sess. 3099, 3101-02 (1958).

²⁵ *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 479 (1933).

personality too incomplete; what was but an association of individuals for so many ends and a juridical entity for only a few was not easily to be treated as if it were a single citizen.²⁶

Thus, the Court distinguished prior precedent because those cases dealt with associations that only had the right to sue and be sued in their own name, and were devoid of other attributes of legal personality.²⁷ Thus relieved of prior precedent, the Court drew an analogy between the Puerto Rican *sociedad* and the corporation, by an examination of the basic characteristics of the *sociedad*.²⁸

In treating the *sociedad* as a juridical entity the Court departed from the "label test" employed by *Chapman*. Although *Russell* broke from precedent to the limited degree of allowing associations, so endowed with a legal personality, to be treated as corporations, an early Supreme Court case apparently supports a similar contention. The Court in *Marshall v. Baltimore & O.R.R.* said:

it is not reasonable that those who deal with such persons [persons doing business through corporations] should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names without regard to the things or persons they are used to represent.²⁹

Thus, the fact that the Court was construing Puerto Rican civil law is relevant to the question of whether future courts may delve behind the organization's label to determine if the designated label is indicative of a meaningful differentiation between corporations and unincorporated associations. Based on this interpretation of *Russell*, it would seem that a court cannot be precluded from analyzing peculiarities in local law, when such uniqueness in Puerto Rican law was a valid topic for analysis. Furthermore, refusal by the court in *Boulogny* to determine whether a juridical personality exists by assimilating the associations to corporations must be considered error.

Although the rationale of the *Mason* case finds support in *Russell*, its validity is still dependent upon an analysis of the status of a New York joint stock company. Such an analysis indicates that the joint stock company is similar to a corporation

²⁶ *Id.* at 480.

²⁷ *Id.* at 481.

²⁸ *Marshall v. Baltimore & O.R.R.*, *supra* note 11, at 327-28. Although this view was expressed with the purpose of holding corporations legal entities in determining citizenship for diversity purposes, it may be equally valid with regard to unincorporated associations if the characteristics of legal personality are deemed present.

²⁹ *E.g.*, *Hibbs v. Brown*, 190 N.Y. 167, 177-78, 82 N.E. 1108, 1111 (1907); *People v. Wemple*, 117 N.Y. 136, 147-48, 22 N.E. 1046, 1048 (1889).

in relation to the characteristics deemed important in the *Russell* case. The courts of New York, in dealing with the joint stock company as an entity, have indicated that the association should be compared to a corporation and, by analogy, the laws relating to corporations should be complied with.³⁰ The personality of the *sociedad* is almost identical to the New York joint stock company, and the characteristics singled out by *Russell* are all present in the joint stock company.³¹ Both associations are required to file public articles of association, may own their own property, transact business, and sue and be sued in their own name. The modern *sociedad* and joint stock company have perpetual existence regardless of death or withdrawal of individual members, vested management in the hands of directors with power to bind the association, and unlimited power of shareholders and members to transfer their interests.³² The one outstanding feature still existing in a joint stock company that evidences an association or partnership personality is the liability of the shareholders or members individually. Significantly, the members of the *sociedad* were also liable individually on the association's obligations, but the Supreme Court determined that such liability is of no great consequence and does not change its over-all personality.³³

A comparison of *Mason* and *Boulogny*, in the light of the above analysis of *Puerto Rico v. Russell & Co.*, establishes *Mason v. American Express Co.* as the better reasoned opinion.

Venue

In the case of a corporation, residence for venue purposes is laid in "any judicial district in which it is incorporated or licensed to do business or is doing business. . . ." ³⁴ However, the statute makes no reference to the residences of unincorporated associations.

Traditionally, venue for unincorporated associations was determined by reference to the residence of the individual members without regard to its status under state law.³⁵ Therefore, the ability of an unincorporated association to sue or be sued in a federal court was further restricted, because it would be rare

³⁰ *Puerto Rico v. Russell & Co.*, *supra* note 25, at 481.

³¹ N.Y. GEN. ASS'NS LAW §§ 2-6, 12, 13.

³² *People v. Coleman*, 133 N.Y. 279, 31 N.E. 96 (1892); *cf. Hibbs v. Brown*, 190 N.Y. 167, 82 N.E. 1108 (1907).

³³ *Puerto Rico v. Russell & Co.*, *supra* note 25, at 481. There are even more persuasive indicia of corporate personality existing in the treatment of the joint stock company under the laws of New York. N.Y. CONST. art. X, § 4; N.Y. TAX LAW §§ 198(3), 208.

³⁴ 28 U.S.C. § 1391(c) (1963); see also 28 U.S.C. § 1391(b) (1963).

³⁵ *Sutherland v. United States* *supra* note 16, at 93; *Koons v. Kaiser*, 91 F. Supp. 511, 515 (S.D.N.Y. 1950).

to find all the members of an association residing in the same district.

In *Sperry Prods. Inc. v. Association of Am. R.Rs.*³⁶ the entity theory was established for venue purposes. This new approach was also adopted without regard to the status of the association under local law.

The court stressed the procedural nature of venue provisions, and indicated that an unincorporated association should be treated as a corporation for venue purposes. An analogy was made to the corporate venue statute and the residence of the association was determined to be its principal place of business without regard to the multiple residences of the individual members.³⁷ The *Sperry* approach was soon widely adopted and alleviated somewhat the past difficulties in meeting the venue requirements.³⁸

In 1948, Section 1391(c) of the Federal Rules of Civil Procedure was passed, liberalizing the venue requirements for corporations. This section, like its predecessors, did not specifically mention unincorporated associations.³⁹ Thus, the courts were faced with the problem of whether to apply the new corporate provisions to unincorporated associations by a further extension of the *Sperry* doctrine.

Several courts have held that *Sperry* may not be enlarged because the new statute explicitly refers to corporations, and to interpret it to include unincorporated associations would "be . . . to say that the revisers were unaware of the difference between corporations and unincorporated associations."⁴⁰

A contrary view was expressed in *Rutland Ry. v. Brotherhood of Locomotive Eng'rs*⁴¹ where it was stated that venue is not a jurisdictional concept but is a doctrine of convenience with a different policy basis from jurisdiction. The court indicated that venue, therefore, should be treated in practical terms, by reference to the requirements of litigation involving unincorporated associations, and without regard to metaphysical terminology that is associated with jurisdiction.⁴² Thus, the court decided that venue may be laid in the district where the association is doing business, the residence of such associations being assimilated to that of corporations.⁴³

³⁶ 132 F.2d 408 (2d Cir. 1942).

³⁷ *Id.* at 411.

³⁸ *E.g.*, *Brotherhood of Locomotive Firemen v. Graham*, 175 F.2d 802, 804-05 (D.C. Cir. 1948); *Cherico v. Brotherhood of R.R. Trainmen*, 167 F. Supp. 635, 638 (S.D.N.Y. 1958).

³⁹ 28 U.S.C. § 1391(c) (1963).

⁴⁰ *Cherico v. Brotherhood of R.R. Trainmen*, *supra* note 38. *Accord, e.g.*, *Brotherhood of Locomotive Firemen v. Graham*, *supra* note 38, at 802 n.2; *Salvant v. Louisville & N.R.R.*, 83 F. Supp. 391, 396 (W.D. Ky. 1949).

⁴¹ 307 F.2d 21, 29 (2d Cir. 1962).

⁴² *Ibid.*

⁴³ *Ibid.*

Congress, by Section 1391 of the Federal Rules of Civil Procedure, indicated a liberal policy with regard to the difficulty of complying with venue provisions.⁴⁴ For venue purposes, corporations are subject to suit in any district where they are doing business. This requirement, as compared with the previous statute allowing suit only in the state of incorporation and the state where the principal place of business was located, is readily seen as making the venue requirements more easily met.⁴⁵ This liberalization of venue requirements indicates a consistent policy between the court in *Rutland* and Congress.

Conclusion

Federal diversity jurisdiction has been the subject of much discussion urging its restriction, or perhaps elimination.⁴⁶ In expanding diversity jurisdiction, contrary to such suggestions and general congressional policy,⁴⁷ *Mason* has rejected the labeling approach taken by *Boulogny*, and substituted a concept wherein organizations of similar structure are afforded like treatment.

Congress itself has provided that corporations are to be treated as legal entities for diversity purposes, but has not expressly included unincorporated associations under such a definition. However, since the Supreme Court has not limited "corporation" to a mere label, the result reached in *Mason* rests on firm ground.

Although congressional policy seeking to limit diversity jurisdiction must be respected, fine but illogical distinctions should not be used to foster that end. It is to be hoped that the potential for logic, implicit in the *Russell-Mason* approach, will be exploited by other courts when faced with similar issues.

The decision in *Sperry* and the relaxation of venue requirements provided in Section 1391(c) of the Federal Rules of Civil Procedure tend to support the result in *Rutland*. Furthermore, venue, which is basically a formula for the convenience of parties, should not become a means for limiting access to the federal courts.

⁴⁴ See Comment, *The Corporate Plaintiff and Venue Under Section 1319 (c) of the Judicial Code*, 28 U. CHI. L. REV. 112 (1959).

⁴⁵ See Note, *Doing Business as a Test of Venue and Jurisdiction Over Foreign Corporations in the Federal Courts*, 56 COLUM. L. REV. 394, 395-404 (1956).

⁴⁶ Frankfurter, *Distribution of Juridical Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928). *Contra*, Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 149, 265 (1933); see also Note, 48 MINN. L. REV. 1109 (1964) (extensive comments on the American Law Institute's recommendations for a new diversity jurisdiction statute).

⁴⁷ See Kessler, *Corporations and the New Federal Diversity Statute: A Denial of Justice*, 1960 WASH. U.L.Q. 239-47; Note, 38 N.Y.U.L. REV. 148-50 (1963); Note, 44 MINN. L. REV. 308, 310-16 (1959).

Once a court has jurisdiction, its power should not be frustrated by venue provisions unless the purpose behind those provisions is being served.

The *Rutland* case, like the *Mason* case, indicates a tendency of the federal courts, at least in the Second Circuit, to accept the realities of business forms when resolving issues of venue and jurisdiction, a tendency which has been all too long delayed.



AN APPRAISAL OF JUDICIAL RELUCTANCE TO IMPLY AN INDEMNITY CONTRACT IN TIME-BARRED BREACH OF WARRANTY SUITS

Introduction

In a New York action a third-party plaintiff has the right to indemnity only when he can show that (as between himself and the third-party defendant) there exists the relationship of "active-passive" tort-feasor or there is an express contract to indemnify. This comment will endeavor to demonstrate that the current limitation on an indemnity cause of action is unreasonable, and further that it fosters injustice and encourages collusive fraud, especially when the statute of limitations has run on the underlying cause of action.

New York Case Law

In a recent case¹ the defendant, a general contractor under contract with plaintiff to construct a building, was sued for damages for non-compliance with specifications regarding the installation of a fuel tank. Plaintiff alleged that the improper installation caused the tank to become corroded and thus unfit for use. Under CPLR 1007 the defendant impleaded its subcontractor, who had installed the tank, seeking indemnification for any possible liability to the plaintiff. More than six years had elapsed since the execution of the contract between the contractor (third-party plaintiff) and the subcontractor (third-party defendant). In dismissing the third-party complaint the court held that the statute of limitations barred any action thereon. Defendant-contractor contended that the statute of limitations² did not bar the suit since the third-party cause of action was one for indemnity, which would accrue only

¹ *City & County Sav. Bank v. M. Kramer & Son*, 43 Misc. 2d 731, 252 N.Y.S.2d 224 (Sup. Ct. 1964).

² CPLR 213.