St. John's Law Review

Volume 13, April 1939, Number 2 Article 14

Jurisdiction--Burden on Interstate Commerce--Suit in New York--Action Accruing in Utah (Jensen v. United Air Lines Transport Corp., 255 App. Div. 611 (1st Dept. 1938))

St. John's Law Review

obtained through embezzlement,[17] was recognized by the court in the instant case as perhaps not justified by the terms of the statute.[18] But feeling itself constrained to follow prior decisions, the court refused to make a change without legislative authority.[19] It would seem the court lost sight of the fact that past decisions are to be treated as merely indicative of the trend of judicial behavior rather than as binding precedent.

J. R. P.

JURISDICTION—BURDEN ON INTERSTATE COMMERCE—SUIT IN NEW YORK—ACTION ACCRUING IN UTAH.—The plaintiffs bring this action for the wrongful death of their brother who was killed while a passenger on one of the defendant carrier's airplanes. The crash occurred near Salt Lake City in the State of Utah. One of the plaintiffs is a *bona fide* resident of New York State; the other is a resident of Minnesota. The defendant, appearing specially, has moved to set aside service of the summons and complaint on the ground that (1) it is not doing business within this state to the extent necessary to subject it to the jurisdiction of the court; and (2) even if it is carrying on business here, to compel defense of the action in the State of New York would be imposing an undue burden on interstate commerce. *Held,* the order of Supreme Court granting defendant's motion to set aside service, reversed. The defendant's activities show that it is doing business within this state, and that it is subject to service of process here. Moreover, there is no merit to the defendant's contention that a suit between these parties in a New York court is an unreasonable burden on interstate commerce. *Jensen* v. *United Air Lines Transport Corp.*, 255 App. Div. 611, 8 N. Y. S. (2d) 374 (1st Dept. 1938).

Torts are transitory actions [1] and can be prosecuted, generally, in any state where the courts have jurisdiction over the parties.[2] Although a plaintiff has become a resident of this state subsequent to the time when his cause of action arose outside the state, and defendant is a foreign corporation, the courts of this state may not refuse

[17] Sanette Corp. v. Sanette Corp. of New England, 132 Misc. 455, 230 N. Y. Supp. 102 (1928) (where the factor obtains possession of goods rightfully and then conceives a plan to convert the same to his own use, the Factor's Act is applicable). It would, therefore, seem that the absence or presence of an *animus furandi* at the time the factor obtained possession of the goods is the criterion as to the statute's applicability in this class of cases.

[18] Instant case at 545.

[19] *Ibid.*

[1] BURDICK, TORTS (4th ed. 1926) 256–260; EDGAR AND EDGAR, TORTS (3d ed 1936) 104.

[2] Crashley v. Press Publishing Co., 179 N. Y. 27, 71 N. E. 258 (1904).

to entertain jurisdiction over the action.[3] But the courts of a state may not assume jurisdiction in such a manner as to prejudice the constitutional rights of a defendant.[4] Consequently, interstate carriers have frequently challenged the jurisdiction of state courts upon the theory that to compel them to defend in the courts of a particular state necessarily and unreasonably burdens interstate commerce [5] in violation of the commerce clause of the Constitution.[6]

In actions where the interstate carriers have pleaded the preceding defense, the courts have weighed three primary factors in their decisions: (1) the place of the accrual of the action; (2) the residence of the plaintiff; (3) the transaction of business by the defendant within the state where the action is being prosecuted.[7] Where none of these elements appears, it has uniformly been held that to allow prosecution of the action would place a serious and unreasonable burden upon the carrier.[8] Even where the plaintiff had become a resident of

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[3] Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N. Y. 152, 139 N. E. 223 (1923); Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1936).

[4] Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1936).

[5] See Davis v. Farmers' Co-op. Equity Co., 262 U. S. 312, 43 Sup. Ct. 556 (1923), where at page 315 Judge Brandeis says, "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; and that the amounts demanded are large; and that in many cases carriers deem it advisable or imperative to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations and that this impairs efficiency in operation and causes directly and indirectly heavy expense to the carriers * * * these are matters of common knowledge." See Atchison, T. & S. F. R. R. v. Wells, 265 U. S. 101, 44 Sup. Ct. 469 (1924); Missouri *ex rel.* St. Louis Ry. v. Taylor, 266 U. S. 200, 45 Sup. Ct. 47 (1924); Hoffman v. Missouri *ex rel.* Foraker, 274 U. S. 21, 47 Sup. Ct. 485 (1927); Michigan Central R. R. v. Mix, 278 U. S. 492, 49 Sup. Ct. 207 (1929); Denver & R. G. W. R. R. v. Terte, 284 U. S. 284, 52 Sup. Ct. 152 (1932); International Milling Co. v. Columbia Transportation Co., 292 U. S. 511, 54 Sup. Ct. 797 (1934); Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1936); Jensen v. United Air Lines Transport Corp., 255 App. Div. 611, 8 N. Y. S. (2d) 374 (1st Dept. 1938).

[6] U. S. CONST. Art. I, § 8, cl. 3.

"The commerce clause as used in connection with this problem is nothing more than a device used in determining the place of trial in civil actions such as these under consideration," Farrier, *Suits Against Foreign Corporations as a Burden on Interstate Commerce* (1933) 17 MINN. L. REV. 381, 390; see Foster, *The Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217.

[7] See Farrier, *loc. cit. supra* note 6, at 386. In that article will be found a lucid and ingenious analysis of the possible situations which can arise involving these three elements.

[8] Davis v. Farmers Coop. Equity Co., 262 U. S. 312, 43 Sup. Ct. 556 (1923), where a Kansas corporation brought action in Minnesota under a bill of lading issued in Kansas. Defendant carrier did no business in Minnesota, except to maintain an agent for solicitation of traffic. *Held,* Minnesota statute permitting service upon such agent of a foreign railroad, which has its lines in other states, in suits arising in other states in favor of non-residents, is invalid

the state after the cause of action accrued elsewhere, if defendant carrier is not operating within the state, jurisdiction will not be entertained.[9]

On the other hand, where one or more of the following factors have appeared, the courts have retained jurisdiction:[10] where plaintiff was a resident of the state before the cause of action arose outside the state;[11] where defendant was doing business within the state;[12]

as violation of the commerce clause of the Constitution. See also Atchison, T. & S. F. R. R. v. Wells, 265 U. S. 101, 44 Sup. Ct. 469 (1924).

[9] Michigan Central R. R. v. Mix, 278 U. S. 492, 49 Sup. Ct. 207 (1929); Denver & R. G. W. R. R. v. Terte, 284 U. S. 284, 52 Sup. Ct. 152 (1932); Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 388, 199 N. E. 629, 632 (1936), where Lehman, J., said: "In the action brought by Madsen against this appellant, no circumstance exists which would justify a conclusion that the defendant may reasonably be compelled to submit to a suit here. The accident occurred in another state; the defendant carries on no activities here except to solicit business for commerce which does not touch this State. The plaintiff was not employed in this State or resident here when the cause of action arose. Thus the exercise of jurisdiction in the negligence action by the courts of this State would be an unreasonable burden upon the business of interstate and foreign commerce conducted by the defendant. * * *"

Cf. Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N. Y. 152, 139 N. E. 223 (1923), where defendant was not an interstate carrier, and defense of undue burden on interstate commerce was not pleaded.

See Baltimore Pub. Co. v. Swedish-American-Mexico Line, 143 Misc. 229, 256 N. Y. Supp. 284 (1st Dept. 1932), where a foreign corporation, sued on a cause of action arising outside the state and unconnected with any business done within the state by the defendant, was held not entitled to claim that action was undue burden on interstate commerce where it has joined issue, and has delayed for more than five years in objecting to the jurisdiction. See also Brown v. Canadian Pac. R. R., 143 Misc. 239, 256 N. Y. Supp. 294 (1st Dept. 1932); Rojzenblitt v. Polish Transatlantic Shipping Co., 162 Misc. 251, 293 N. Y. Supp. 79 (1936).

[10] Missouri *ex rel.* St. Louis, B. & M. R. R. v. Taylor, 266 U. S. 200, 45 Sup. Ct. 47 (1924); International Milling Co. v. Columbia Transportation Co., 292 U. S. 511, 54 Sup. Ct. 797 (1934); Jensen v. United Air Lines Transport Co., 255 App. Div. 611, 8 N. Y. S. (2d) 374 (1st Dept. 1938); American Ry. Express Co. v. Rouw Co., 173 Ark. 810, 294 S. W. 401 (1927).

[11] Noonan, J., in Johnston v. Atlantic Coast Line R. R., 128 Misc. 82, 217 N. Y. Supp. 758 (1926), "While it is important that litigation should not impose an undue burden upon interstate commerce, it is equally important that a plaintiff should not be unduly hampered in getting his grievances duly adjusted by a proper tribunal."

See also Griffin v. Seaboard Air Line Ry., 28 F. (2d) 998 (D. C. Mo. 1928); Cressey v. Erie R. R., 278 Mass. 284, 180 N. E. 160 (1932).

"* * * The interests of individuals in enforcement of private rights must be balanced against the interests of the public as a whole in untrammeled and efficient interstate transportation, and in such balance the factor of plaintiff's residence should be given considerable weight." (1933) 18 MINN. L. REV. 69, 70.

Cf. Justice Cardozo's statement in International Milling Co. v. Columbia Transportation Co., 292 U. S. 511, 519, 54 Sup. Ct. 797 (1934): "We do not hold that the residence of the suitor will fix the proper forum without reference to other considerations, such as the nature of the business of the corporation to be sued * * * Residence, however, even though not controlling is a fact of high significance. Our next inquiry must be whether there is anything in the nature of the activities of the defendant to overcome its force."

[12] O'Brien v. So. Bell Telephone Co., 292 Fed. 379 (D. C. Ala. 1923);

where the cause of action arose within the state.[13] "In the cases where the jurisdiction of the state court was sustained there were factors present which dictated the conclusion that orderly and effective administration of justice required the carrier to submit to suit in the State where the action was brought." [14]

While it is unquestionably true that repeated considerations of the problem have made the criterion to be applied in these cases "clearer",[15] it is still true that, to a great extent, the facts of each case present a unique problem [16]—a problem that can be properly solved when the court keeps in mind the necessities of "orderly, effective administration of justice." [17]

L. J.

LABOR LAW—N. L. R. B.—JURISDICTION—POWER TO ISSUE AFFIRMATIVE ORDERS.—Defendants are public utilities engaged in the sale of electric energy. Although not directly engaged in interstate sales of electricity, they supply power to public utilities, transportation companies and departments of the Federal Government, all located within the state but engaged in interstate operations. Charges were filed with the N. L. R. B. by the United Electrical and Radio Workers of America, affiliated with the C. I. O., accusing defendants of interfering with the right of employees to form or join their own labor organizations, and of contributing to the A. F. of L.[1] Defen-

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Harris v. American Ry. Express Co., 12 F. (2d) 487 (C. C. A. D. of C. 1926); Murnan v. Wabash Ry., 220 App. Div. 218, 221 N. Y. Supp. 332 (2d Dept. 1927); N. V. Brood en Beschuitfabrek v. Aluminum Co. of America, 136 Misc. 349, 239 N. Y. Supp. 702 (1930); Erving v. Chicago, N. W. Ry., 171 Minn. 87, 214 N. W. 12 (1927).

[13] See Farrier, *loc. cit. supra* note 6, at 381, 389, 390.

[14] Lehman, J., in Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 387, 199 N. E. 628 (1936).

See cases cited in notes 10, 11, 12, *supra.*

[15] See Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 386, 199 N. E. 629 (1936); Jensen v. United Air Lines Transport Corp., 255 App. Div. 611, 613, 8 N. Y. S. (2d) 374 (1st Dept. 1938).

[16] It is necessary to keep in mind that this discussion is based upon the assumption that the defendant corporation is within the jurisdiction of the court by due process, and the only question which is to be considered is whether such jurisdiction casts so heavy a burden on the carrier as to interfere unreasonably with interstate commerce.

[17] See International Milling Co. v. Columbia Trans. Co., 292 U. S. 511, 54 Sup. Ct. 797 (1934); Matter of Baltimore Mail Steamship Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1936).

[1] 49 STAT. 452, 29 U. S. C. A. § 158 (Supp. 1935): "It shall be an unfair labor practice for an employer * * * (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."