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If the conclusion of the majority was justified in fact, their judgment was, of course, justified in law. Upon the legal questions involved, the opinion of the minority judges seems unassailable. That a mere authority to receive the interest does not justify the receipt of the principal, and that authority to receive the principal at maturity does not justify receiving prepayments, has been established by many cases, in addition to those cited in the opinion.⁶

In attempting to state a "principle" or maxim for the apportionment of losses between "two equally innocent persons," the court does not seem to have been more successful than many other courts. Most maxims for dealing with two equally innocent persons turn out to be maxims for dealing with two unequally innocent persons.

That the plaintiff was "more at fault" was found by the majority from the fact that he had not warned the borrowers not to make payments of principal to the agent. That no such warning is ordinarily necessary is clear. The majority found it necessary in the present case from the lender's knowledge that the loan was to a negro church. "He would know they were usually ignorant and easily deceived." That such knowledge may affect the case seems clear. The minority denied that it was actually the fact in the present case.

FLOYD R. MECHEM.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SUITS BY NON-RESIDENTS AGAINST FOREIGN CARRIERS ON FOREIGN CAUSES OF ACTION.—[Ohio] In *Davis, Director-General of Railroads v. Farmers' Cooperative Equity Co.*,¹ decided in 1923, the federal Supreme Court held it a violation of the commerce clause for Minnesota to permit suit to be brought in its courts by a Kansas plaintiff in regard to a purely Kansas transaction against a Kansas railroad corporation represented in Minnesota only by a resident solicitor of traffic for its railway lines, all located outside of Minnesota, process being served on the solicitor. Mr. Justice Brandeis said (for the court):

"The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a state. *International Harvester Co. v. Kentucky* (1914) 234 U. S. 579. The requirements of orderly, effective administration of justice are paramount. . . . [After referring to *Kane v. New Jersey* (1916) 242 U. S. 160:] It may be that a statute like that here assailed would be valid, although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered into within the state, or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them. But orderly, effective

6. See *Bacot v. Loan & Trust Co.* (1925) 132 S. C. 340; *Huisman v. Althoff* (Iowa 1926) 209 N. W. 525; *Schenk v. Dexter* (1899) 77 Minn. 15; *Security Co. v. Graybeal* (1892) 85 Iowa 543, 39 Am. St. Rep. 311; *Wagner v. Grimm* (1902) 169 N. Y. 421.

1. (1923) 262 U. S. 312.

administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. . . . Avoidance of waste in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."²

In *Iron City Produce Co. v. American Railway Express Co.*³ the Ohio Court of Appeals has recently extended this doctrine so as to deny to Ohio the power to permit a Pennsylvania plaintiff to sue a non-resident express company in the Ohio courts upon a cause of action arising out of an interstate transaction conducted wholly outside of Ohio.

The power of a state validly to subject an undomiciled foreign corporation to suit therein has generally been contested under the due process clause of the Fourteenth Amendment. If a foreign corporation does no business and has no property there, and has not actually consented to the jurisdiction, either in advance or by voluntarily appearing in the suit, a state cannot authorize a judgment, good even where rendered, upon any personal cause of action whatever, although service be had upon corporate officers temporarily or permanently within the state.⁴ Upon general principles a foreign corporation may of course actually consent to the jurisdiction of a state's courts, either generally or for the purposes of a particular suit, and, when this consent is evidenced by the actual appointment by the corporation of an agent to accept the service of process generally within the state, actions by non-residents upon causes of action arising wholly outside the state may be included at the will of the state.⁵ Where a state law provides that foreign corporations doing business within the state may be sued by service of process upon a public officer, but the corporation has not in fact consented to this or appeared in the suit, such service will not support a judgment upon a cause of action arising from transactions outside of the state, even though obtained by a resident of the state.⁶ In both of the federal Supreme Court cases deciding this, the public official served did not in fact notify the defendant of

2. 262 U. S. at 317.

3. (Ohio App. 1926) 153 N. E. 316.

4. *Riverside etc. Mills v. Menefee* (1915) 237 U. S. 189 (cases). As to the effect that may be given by the state to an actual appearance to contest the jurisdiction, see *York v. Texas* (1890) 137 U. S. 15; *Western Indemnity Co. v. Rupp* (1914) 235 U. S. 261; *Chicago Life Ins. Co. v. Cherry* (1917) 244 U. S. 25.

5. *Smolik v. Phil. & Reading Coal & Iron Co.* (D. C. S. D. N. Y. 1915) 222 Fed. 148; *Bagdon v. Phila. & Reading Coal & Iron Co.* (1917) 217 N. Y. 432; *Pennsylvania Fire Ins. Co. v. Gold Issue M. & M. Co.* (1917) 243 U. S. 93.

6. *Old Wayne Mut. Life Assn. v. McDonough* (1907) 204 U. S. 8; *Simon v. Southern Ry.* (1915) 236 U. S. 115.

the suit and judgment was taken by default, so the decisions might have gone upon the lack of constitutional notice of the litigation; but they were not put upon this ground but upon the more general one that, while a foreign corporation, by doing business in a state, must be held to have "assented" to such (presumably reasonable) terms as the state may impose regarding service of process in actions regarding such business, such "assent" would not be "implied" as to business transacted outside the state. This "assent," however, has been latterly frankly recognized to be only a fiction,⁷ so that any reasoning based upon its quality of genuine consensuality is of dubious validity.

When a foreign corporation does business in a state by its own voluntarily appointed agents, the federal Supreme Court has said that it may be sued in the federal courts of that state (or of the District of Columbia) by service upon such agents upon a transitory cause of action arising outside of the state, by either a resident⁸ of the state, or even by a non-resident,⁹ and even in the absence of any state or federal statutory authority for such suits. Local statutory authority to this effect is upheld in several well-considered state cases.¹⁰ It is possible that the above federal decisions may be reconsidered in the light of later analysis,¹¹ even under the Fourteenth Amendment; but, assuming them to be valid against that objection, how far does the commerce clause forbid such jurisdiction to state courts against corporations engaged in interstate or foreign commerce? The *Davis* case¹² presents the strongest situation for such restraint, a foreign railway corporation, without lines in the state, engaged wholly in the solicitation of interstate traffic, sued by a non-resident upon a foreign transaction. In the principal case the defendant had lines in the state and did a substantial internal business also. If it had done no interstate business, the validity of the Minnesota statute allowing local suits on foreign claims of non-residents would have been clear under the authorities above cited. The effect upon its interstate commerce of allowing such suits is both direct and indirect: interstate employees are called away from their regular occupations to go to other states as witnesses, and the resulting expense is practically a charge upon the whole business, state and interstate. During the late war the burden of such practices was so great

7. *Smolik v. Phil. & Reading C. & I. Co.* (D. C. S. D. N. Y. 1915) 222 Fed. 148, 151, approved by Holmes, J., for the court in *Pennsylvania Fire Ins. Co. v. Gold Issue M. & M. Co.* (1917) 243 U. S. 93, 96.

8. *Baltimore & Ohio R. R. Co. v. Harris* (1871) 12 Wall 65 (suit in District of Columbia by a resident thereof against a Maryland railroad corporation for a Virginia tort).

9. *Barrow SS. Co. v. Kane* (1898) 170 U. S. 100 (suit in federal courts of New York by resident of New Jersey against a British steamship corporation for an Irish tort).

10. *Reynolds v. M. K. & T. Ry.* (1917) 228 Mass. 584; *Rishmiller v. D. R. & G. R. R.* (1916) 134 Minn. 261; *Tausa v. Susquehanna Coal Co.* (1917) 220 N. Y. 259.

11. See *A. W. Scott* in (1926) Harv. Law. Rev. 39: 579-80, note.

12. See note 1, above.

that the Director-General of Railroads issued an order requiring all tort suits against railroads to be brought where the cause of action arose or where the plaintiff resided. This was upheld as a reasonable order in *Alabama & Vicksburg Ry. v. Journey*,¹³ and the facts upon which the order was based were said to be of general application in time of peace as well as war in the *Davis* case, above.

In the absence of congressional action it is difficult to predict whether the federal courts will hold the permitting of such suits enough of a burden on interstate commerce to be invalid or not. State regulation of intrastate railway rates unfavorably affecting interstate rates and earnings on the same road was held not invalid, without congressional action, in the *Minnesota Rate Cases*,¹⁴ while heavy state penalties for not furnishing cars for local shipments on demand, likely to cause such shipments to be preferred to interstate ones, was held bad per se under the commerce clause.¹⁵ The older case of *Barrow Steamship Co. v. Kane*¹⁶ permitted a New Jersey plaintiff to sue a British steamship company in the federal courts of New York for a personal tort committed in Ireland. The defendant was doubtless engaged wholly in foreign commerce, though no mention was made of this in the case, but it had terminals in New York and its ships entered and left the state, so it was not necessarily within the protection of the *Davis* case, above, where the defendant operated no lines in the state of the forum. Besides, the hardship of compelling an American plaintiff to resort to the courts of Great Britain to sue upon a transitory tort action is obvious. But it is doubtful how far the *Barrow* case can be considered a binding authority today in the absence of any discussion in it of the commerce point, first raised in later cases. An up-to-date decision of the Supreme Court upon the matter would be welcome.

JAMES PARKER HALL.

INVOLUNTARY SERVITUDE AND STRIKES—CONSTITUTIONAL LAW—KANSAS INDUSTRIAL ACT.—[United States] The recent case of *Dorchy v. Kansas*¹ evidences that the Kansas Industrial Court Act, although considerably limited in scope by several decisions of the United States Supreme Court,² still retains sufficient vitality, especially in its penal features, to warrant limitations upon the right of

13. (1921) 257 U. S. 111.

14. (1913) 230 U. S. 352. Federal regulation of all railroad rates is valid, however, on account of the effect of local rates upon the total income of the roads from which they must be maintained for interstate as well as local purposes. See *Railroad Commission of Wisconsin v. C. B. & Q. R. R.* (1922) 257 U. S. 563.

15. *St. Louis, etc., Ry. v. Arkansas* (1910) 217 U. S. 136.

16. (1898) 170 U. S. 100.

1. (1926) 47 Sup. Ct. Rep. 86.

2. The first case coming to the United States Supreme Court involving the Kansas Industrial Court Act found no federal question present, and the case, therefore, was dismissed for lack of jurisdiction: *Howat v. Kansas*