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## Pleading — Lack of Jurisdiction as a Defense in Federal Courts

Plaintiff, a citizen of Pennsylvania, instituted a tort action in a federal district court against a corporate defendant. Defendant filed an answer admitting that the plaintiff's action was a common law action based on diversity of citizenship. Subsequently, and four days before the running of the applicable state statute of limitations, the defendant filed a motion to amend its answer to allege defendant was incorporated in two states, one being the state of plaintiff's citizenship, and moved to dismiss for lack of jurisdiction. *Held*: Motions denied. Federal Rule of Civil Procedure 15(a) grants discretion to the court to permit or deny the amendment, and to allow the amendment in the face of the running of the statute of limitations would be unjust.<sup>1</sup>

Omitting cases where a federal question is involved, the important prerequisite for federal jurisdiction is diversity of citizenship.<sup>2</sup> It has always been a requirement that the petition allege diversity of citizenship, and failure to do so constitutes grounds for dismissal or reversal which the court will grant on its own initiative.<sup>3</sup> The problem of when and by what method the defendant may raise a jurisdictional question, when jurisdiction is alleged, has not always been the same.

Prior to 1875 jurisdiction could be challenged only at the trial stage by way of a plea in abatement in actions at law and by plea or demurrer in equity actions.<sup>4</sup> Failure to challenge jurisdiction by these methods resulted in a waiver of the defense.<sup>5</sup> In the Act of 1875<sup>6</sup> Congress provided:

If...it shall appear to the satisfaction of the...[District] Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said [District] Court

<sup>1</sup> *Klee v. Pittsburgh & W. V. Ry.*, 22 F.R.D. 252 (W.D. Pa. 1958).

<sup>2</sup> Formerly Jud. Code, § 24(1), 28 U.S.C. § 41(1) (1911). Now 28 U.S.C. §§ 1331, 1332, 1341, 1342, 1345, 1354, 1359 (1948).

<sup>3</sup> *Mattingly v. Northwestern V. R.R.*, 158 U.S. 53 (1895).

<sup>4</sup> See *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 183 (1935).

<sup>5</sup> See note 4 *supra*.

<sup>6</sup> Act of March 3, 1875, c. 137, § 5 (18 Stat. 472). After the enactment of the Judicial Code of 1911 the subject matter of this section was contained in Jud. Code, § 37, 28 U.S.C. § 80. This section was omitted in the 1948 amendment as unnecessary.

...the said [District] Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed....

In 1884 the Supreme Court decided the leading case of *Mansfield, C. & L. M. R.R. v. Swan*<sup>7</sup> under the Act of 1875. Over the objection of the plaintiff a contract case was removed by the defendant to a federal court. After trial, judgment was rendered for the plaintiff and on appeal the defendant questioned the jurisdiction of the court. The Supreme Court held that jurisdiction was an absolute requirement and not only could not be waived, but should be determined by the trial court, even though no question of jurisdiction was raised by either party, whenever the question of jurisdiction was suggested.

In 1886 the Supreme Court in *Hartog v. Memory*<sup>8</sup> cast doubt upon the holding of the *Mansfield* case. In a contract action, plaintiff alleged diversity and the defendant filed an answer on the merits. In the course of the trial testimony was given which raised doubt as to the citizenship of both parties. The defendant's motion for dismissal for lack of jurisdiction was granted summarily. On appeal the Supreme Court reversed, holding that even though the Act of 1875 granted a trial court power, without motion by a party, to dismiss the suit whenever a fraud on its jurisdiction was discovered, neither party had the right, without a proper pleading, to introduce and rely upon evidence to show a lack of diversity where the plaintiff alleged diversity and the defendant answered, and that the lower court erred when it dismissed summarily without giving the plaintiff an opportunity to rebut or control the questioning testimony. The Supreme Court made no mention of the *Mansfield* case in its opinion.

In 1889 the Supreme Court in *Morris v. Gilmer*<sup>9</sup> reviewed the *Hartog* case. This was an action in equity where the averment of diversity was made and an answer was filed. Before final hearing the defendant moved for dismissal for lack of diversity of citizenship, which motion was denied. On appeal the holding was reversed and the court affirmed the wording in the *Mansfield* case. The court held that there was no particular mode in which the facts showing lack of jurisdiction had to be brought to the attention of the court and that the language of the *Hartog* case did not mean otherwise, the grounds there being failure to give

<sup>7</sup> 111 U.S. 379 (1884).

<sup>8</sup> 113 U.S. 588 (1886).

<sup>9</sup> 129 U.S. 315 (1889).

the plaintiff a chance to rebut the defendant's claim of lack of diversity.

In *Hill v. Walker*<sup>10</sup> a court of appeals considered the foregoing cases, and many subsidiary cases. Plaintiff alleged jurisdiction in a contract action and the defendant filed a general denial in his answer. At the trial some testimony was introduced concerning citizenship. On appeal the defendant attempted to raise the question of jurisdiction and the court of appeals held that although the objection could be raised in any manner below, and that a general denial might be sufficient, the burden of proof was on the defendant to show lack of diversity to the satisfaction of the trial court. This interpretation of the case permitted a jurisdictional objection to be raised at any time, but placed the burden of proof upon the one questioning the jurisdiction. This would present an interesting question if the court raised the objection.

This issue of the burden of proof came before the Supreme Court in *McNutt v. General Motors Acceptance Corp.*<sup>11</sup> The Court held that the plaintiff must allege all elements of jurisdiction in the pleadings, and that even where alleged, if challenged by the defendant, the plaintiff must bear the burden of proof in supporting them. Where they are not challenged, the trial court may insist that the jurisdictional facts be established. The Court in holding that the Act of 1875 applied to both equity and law actions considered the *Hill* case and by implication reversed that part of the holding concerning burden of proof.<sup>12</sup>

This was the last Supreme Court or court of appeals opinion, which considered in detail the question of federal court jurisdiction based on diversity of citizenship until after the adoption of the Federal Rules of Civil Procedure in 1938.<sup>13</sup> In 1940, the major cases, and the effect of the Federal Rules of Civil Procedure, were considered at length by the Court of Appeals of the 7th circuit in *Page v. Wright*.<sup>14</sup> In this equity action the plaintiff's pleading contained an averment of jurisdiction, and the defendant's answer admitted jurisdiction. Summary judgment was entered for the plaintiff on his motion. The defendant then attempted to file an amended answer showing a lack of diversity of citizenship and

<sup>10</sup> 167 F. 241 (8th Cir. 1909).

<sup>11</sup> 298 U.S. 178 (1936).

<sup>12</sup> *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

<sup>13</sup> Title 28 U.S.C.

<sup>14</sup> 116 F.2d 449 (7th Cir. 1940), Cert. denied, 312 U.S. 710 (1940).

moved to dismiss. The district court denied the motion. On appeal, the court of appeals held that jurisdiction could not be conferred by agreement, consent or collusion of the parties, whether contained in their pleadings or otherwise, and that a party can not be precluded from raising the question, *by any form of laches, waiver or estoppel*.<sup>15</sup> The court continued, saying that raising of the jurisdictional issue is not left to the court's discretion since Rule 12(h) of the Federal Rules of Civil Procedure specifically provides: ". . . that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter the court shall dismiss the action." The court held that Rule 12(h) continues in effect the language of the Act of 1875 (which was codified as 28 U.S.C. § 80 in 1911) and that there was no discretion left to the court under either Rule 12(h) or 28 U.S.C. § 80.

<sup>c</sup> Since 1940, the cases follow the view adopted in the *Page* case. In all these cases the question of jurisdiction came up prior to appeal to the court of appeals. However, the holdings have been uniform that whether the question is raised in the answer,<sup>16</sup> subsequent to the answer but prior to trial,<sup>17</sup> during trial,<sup>18</sup> or after trial but before appeal,<sup>19</sup> the question may be raised and there is no waiver or estoppel.

Although the effect of repeal of 28 U.S.C. § 80, in the 1948 revision of Title 28, on the decision in the *Page* case, has been raised by text writers,<sup>20</sup> there seems no reason for a different result in view of Rule 12(h) and the Revisor's comments.<sup>21</sup>

<sup>15</sup> Emphasis added. See note 14 *supra* at 453.

<sup>16</sup> *Mills v. Journeymen*, 83 F.Supp. 240 (W.D. Mo. 1949); *Hackner v. Guaranty Trust*, 117 F.2d 95 (2d Cir. 1941).

<sup>17</sup> *Parmellee v. Ackerman*, 252 F.2d 721 (6th Cir. 1958); *Fugle v. United States*, 157 F.Supp. 81 (D. Mont. 1957); *Carstens v. Great Lakes Towing*, 71 F.Supp. 394 (N.D. Ohio 1945); *Indemnity Ins. Co. v. Pan Am.*, 57 F.Supp. 980 (S.D.N.Y. 1944); *Clemente Eng. Co. v. DeLiso Constr.*, 53 F.Supp. 434 (D. Conn. 1944); *Farr v. Detroit Trust*, 116 F.2d 807 (6th Cir. 1941).

<sup>18</sup> *Ambassador East v. Orsatti*, 155 F.Supp. 937 (E.D. Pa. 1957). Reversed on other grounds 257 F.2d 79 (3d Cir. 1958) which cited with approval *Page v. Wright*, *supra*.

<sup>19</sup> *Lee Wing Wong v. Dulles*, 214 F.2d 753 (7th Cir. 1954); *Zank v. Landon*, 205 F.2d 615 (9th Cir. 1953).

<sup>20</sup> HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 720 (1953).

<sup>21</sup> See comments following FED. R. CIV. P. 12(h). Also see the discussion concerning the revisor's notes in *Page v. Wright*, *supra*.

In view of the consolidation and clarification of the problem of questioning jurisdiction, as set out in the *Page* case, and which has been uniformly followed in the lower federal courts to date, the decision in the instant case seems in error.<sup>22</sup> The court apparently overlooked Rule 12(h) and its effect of withdrawing from the discretion of the court the question of whether or not to have a hearing on the question of jurisdiction, and the running of the statute of limitations, while regrettable is not grounds for finding federal jurisdiction.<sup>23</sup>

As long as corporate defendants incorporated in a single state, the dilemma which faced the plaintiff in the instant case did not often arise. However, when corporations began incorporating in more than one state, and thus obtained dual citizenship for purposes of jurisdiction,<sup>24</sup> the burden on the attorney, seeking to ascertain before filing suit in the federal court whether or not the required diversity existed, became more onerous. In 1958 Congress amended 28 U.S.C. § 1332 by adding a new subsection which provides that a ". . . corporation shall be deemed a citizen of . . . the State where it has its principal place of Business . . ."<sup>25</sup> Since the effective date of this amendment, the plaintiff's attorney must not only ascertain in what states the corporate defendant is incorporated, but must also gauge what state possesses the defendant's principal place of business. To the extent that the plaintiff's attorney errs on either of these conclusions, the problems presented by the instant case may arise.

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<sup>22</sup> Note that there is dictum in both *Gavin v. Hudson & M. R.R.*, 185 F.2d 104 (3d Cir. 1950) and *Ambassador East v. Orsatti*, 257 F.2d 79 (3d Cir. 1958), the court of appeals under which the district court in the instant case is placed, to the effect that there can be no waiver or estoppel of the raising of the question of jurisdiction. The court in the instant case while citing the *Gavin* case does not make mention of the language in that case to this effect.

<sup>23</sup> *Gilbert v. David*, 235 U.S. 561 (1915).

<sup>24</sup> *Jacobson v. New York, N.H. & H. R.R.*, 206 F.2d 153 (1st Cir. 1953). Affirmed 347 U.S. 909 (1954). But see *Gavin v. Hudson & M. R.R.*, 185 F.2d 104 (3d Cir. 1950).

<sup>25</sup> — Stat. — (1959).