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Federal Jurisdiction -- Courts -- Acquiring Jurisdiction by Attachment of Nonresident's Property and Constructive Service

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classification upon which the tax is based is the use of the room for the purpose of displaying goods and securing orders for interstate sales, and, therefore, the tax is, in reality, one upon the privilege of selling rather than upon the privilege of use.

The tax having been shown to fall within the classification of a privilege tax,[20] the rule laid down in the *Robbins* case[21] and its successors[22] would seem applicable to invalidate it as being a direct and undue burden upon interstate commerce. Recent decisions have modified the rule of the *Robbins* case as to what constitutes an interstate sale. *Banker Brothers v. Pennsylvania*[23] apparently limited the application of the rule to cases where the out-of-state manufacturer or his agent makes the sale; and *Wiloil Corporation v. Pennsylvania* held that to constitute an interstate sale the contract must require interstate transportation.[24] Despite the modifications embodied in these decisions it seems that the principal case does not fall within their scope, and must, therefore, be governed by the rule as originally laid down. The Supreme Court in so recent a case as *Southern Pacific v. Gallagher*,[25] citing the *Robbins* case, reiterated the rule that "A license tax on sales by samples burdens one selling only goods from other states."

MARSHALL V. YOUNT.

Federal Jurisdiction—Courts—Acquiring Jurisdiction by Attachment of Nonresident's Property and Constructive Service.

Originating with *Toland v. Sprague*,[1] an unbroken line of Supreme Court decisions[2] have decreed that a federal court cannot acquire original jurisdiction over a nonresident of the district in which the court is

[20] The Revenue Act of 1937, of which this tax is a part, classifies it as a privilege tax.

[21] Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

[22] See note 7, *supra*.

[23] 222 U. S. 210, 32 Sup. Ct. 38, 56 L. ed. 168 (1911) (Banker Bros. of Pennsylvania kept no cars in stock, but sold by the use of demonstrators' cars manufactured in New York. Purchasers contracted with Banker Bros. to buy cars and pay the freight from New York, and received a warranty from the manufacturer. Banker Bros. accepted the drafts drawn on them by the manufacturer, received the cars, and delivered them to the purchasers. The Pennsylvania 2% general sales tax was held applicable to such sales).

[24] 294 U. S. 169, 55 Sup. Ct. 358, 79 L. ed. 838 (1935) (a tax of 3 cents per gallon on fuels sold and delivered by distributors in Pennsylvania was held to apply to a Pennsylvania corporation taking orders through agents and shipping from Delaware to purchasers in Pennsylvania); Sears, Roebuck & Co. v. McGoldrick, 279 N. Y. 184, 18 N. E. (2d) 25 (1938) (to the same effect).

[25] —U. S. —, —, 59 Sup. Ct. 389, 392, 83 L. ed. Adv. Ops. 352, 355 (1939).

[1] 12 Pet. 300, 9 L. ed. 1093 (U. S. 1836).

[2] *Ex parte* Des Moines & M. Ry., 103 U. S. 794, 26 L. ed. 461 (1880); Laborde v. Ubarri, 214 U. S. 173, 29 Sup. Ct. 552, 53 L. ed. 955 (1909); Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. ed. 1053 (1913).

sitting by attaching his property within the district and serving him only constructively, at least where the cause of action is a purely personal one;[3] but that attachment is an ancillary proceeding, available only when jurisdiction *in personam* is acquired by personal service or a general appearance.[4]

Contrary to this restriction is the practice common to the state courts whereby, pursuant to statutory authorization, property of a nonresident defendant may be attached although the defendant is served only constructively.[5] The constitutional validity of such procedure has not been seriously doubted since the decision of *Pennoyer v. Neff*.[6] Sanction was found in the state's jurisdiction over all property within its boundaries for the state court's judgment against the property seized, although the judgment had no efficacy beyond that.[7] Constructive service was deemed sufficient notice to the defendant when coupled with the presumptive notice resulting from seizure of his property by attachment.[8]

Recent developments tend to spotlight the history of the federal position. Closely adhering to a prior circuit court decision,[9] the United States Supreme Court, in *Toland v. Sprague,* laid down the following

[3] But where the cause of action is purely *in rem, e.g.,* to enforce a claim to property rather than to enforce a personal obligation against the defendant, a federal district court has jurisdiction to proceed against property lying within its district although a nonresident defendant is served only constructively. This authority arises from 18 STAT. 472 (1875), 28 U. S. C. §118 (1934), which embraces two classes of cases: (1) Suits to *enforce* any legal or equitable *lien* upon, or claim to, real or personal property within the district; (2) suits to *remove* any encumbrance or lien or cloud upon the title to such property.

[4] The doctrine set forth in *Toland v. Sprague* has been followed in a host of lower federal court decisions. Richmond v. Drefous, 20 Fed. Cas. No. 11,799 (C. C. D. R. I. 1831); Day v. Newark India Rubber Mfg. Co., 7 Fed. Cas. No. 3,685 (C. C. S. D. N. Y. 1850); Chittenden v. Darden, 5 Fed. Cas. No. 2,688 (C. C. N. D. Ga. 1875); Anderson v. Shaffer, 10 Fed. 266 (C. C. S. D. Ohio 1881); Boston Electric Co. v. Electric Gas Lighting Co., 23 Fed. 838 (C. C. D. Mass. 1885); Noyes v. Canada, 30 Fed. 665 (C. C. D. Kan. 1887); Perkins v. Hindryx, 40 Fed. 657 (C. C. D. Mass. 1889); Lackett v. Rumbaugh, 45 Fed. 23 (C. C. W. D. N. C. 1891): Bucyrus Co. v. McArthur, 219 Fed. 266 (M. D. Tenn. 1914); Cleveland & W. Coal Co. v. J. H. Hillman & Sons Co., 245 Fed. 200 (N. D. Ohio 1917).

[5] An extensive collection of state decisions construing their respective statutes, which permit constructive service on a nonresident defendant, is found in 9 ROSE'S NOTES ON UNITED STATES REPORTS (rev. ed. 1918) 1115-1120, as supplemented by 2 ROSE'S NOTES ON UNITED STATES REPORTS (Supp. 1932) 702-704.

[6] 95 U. S. 714, 24 L. ed. 565 (1877); see Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559, 563, 9 Sup. Ct. 603, 605, 32 L. ed. 1045, 1048 (1890); Arndt v. Griggs, 134 U. S. 316, 323, 10 Sup. Ct. 557, 561, 33 L. ed. 918, 920 (1890); Roller v. Holly, 176 U. S. 398, 405, 20 Sup. Ct. 410, 412, 44 L. ed. 520, 523 (1900); Grannis v. Ordean, 234 U. S. 385, 393, 34 Sup. Ct. 779, 782, 58 L. ed. 1363, 1368 (1914).

[7] Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931 (U. S. 1870); Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. ed. 138 (1906).

[8] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); *cf.* Owenby v. Morgan, 256 U. S. 94, 111, 41 Sup. Ct. 433, 438, 65 L. ed. 837, 846 (1921).

[9] Picquet v. Swan, 19 Fed. Cas. No. 11,134 (C. C. D. Mass. 1828).

propositions: (1) the federal courts may issue no process beyond the territorial limits of their respective districts and may serve only persons found within those limits, in the absence of positive legislation to the contrary;[10] (2) Congressional acts[11] adopting the state practice for the federal courts did not operate to enlarge the sphere of the federal courts' jurisdiction, but merely prescribed the forms and modes of process to be used in acquiring jurisdiction over persons within the reach of such process; and (3) an attachment against a person's property may issue out of a federal court only as a part of, or together with, process served upon him personally. Major reliance was placed upon the Eleventh Section of the Judiciary Act of 1789[12] (hereinafter referred to as Section 739) which provided that no civil suit should be brought in a district or circuit court ". . . by any original process in any other district than that whereof he [the defendant] is an inhabitant or in which he shall be found at the time of serving the writ." Four of the justices dissented from that part of the opinion dealing with attachment upon constructive service on the ground that it was unnecessary for the decision, and, in two instances, expressed the belief that such procedure was available in federal courts.

After the decision in *Toland v. Sprague,* two significant statutory changes occurred. The Act of 1872[13] (hereinafter referred to as Section 915) provided: "In the common law cases in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit and district courts may, from time to time, by general rules adopt such state laws as may be in force in the states where they are held in relation to attachment and other process. . . ." And the Act of 1887,[14] amending the venue restrictions of Section 739, provided that in diversity-of-citizenship cases suit might be brought in the district of either the plaintiff's or the defendant's residence. Without straining the meaning of these enactments, it could be said that they destroy the basis for the decision in *Toland v. Sprague.*[15] Yet when that contention was advanced, the Supreme

[10] By virtue of Rule 4(f) of the Federal Rules of Civil Procedure, a federal district court, sitting in a state containing more than one district, may issue its process throughout the entire state.

[11] 1 STAT. §93 (1789) and 1 STAT. §275 (1792), 28 U. S. C. §724 (1934).

[12] REV. STAT. §739 (1875), 28 U. S. C. §112 (1934).

[13] REV. STAT. §915 (1875), 28 U. S. C. §726 (1934).

[14] 24 STAT. §552 (1887) as amended 25 STAT. 433 (1888), 28 U. S. C. §112 (1934).

[15] Two lower federal courts asserted that Section 915 enlarged their jurisdiction to permit the acquiring of original jurisdiction over a nonresident defendant by means of attachment and publication of summons. Guillow v. Fontain, 11 Fed. Cas. No. 5,861 (C. C. E. D. Pa. 1875); Brooks v. Fry, 45 Fed. 776 (C. C. W. D.

Court, in the *Big Vein Coal Co.*[16] case reiterated the doctrine that attachment in the federal courts is not a device for acquiring jurisdiction, but is available solely as an auxiliary remedy when there has been personal service. Section 915 was summarily dealt with by remarking that it had been before the Court in *Ex parte Des Moines & M. Ry.*[17] Furthermore, the Court reasoned that the Act of 1887 did not abrogate the necessity for personal service, for had Congress intended such a radical change it would have expressly so provided.[18]

The Court's position in these cases was somewhat compromised, at least from the standpoint of consistent policy, by its decision of a related question in cases removed from state courts. Although a federal court could not proceed *originally* against a nonresident by attachment and constructive service, if a state court had acquired jurisdiction by that procedure, a federal court succeeded to that jurisdiction upon removal.[19] And that was true where the state court had attached the nonresident's property, but had not, prior to removal, completed the formalities of service by which its jurisdiction would be perfected. In the latter event, the federal court acquired an inchoate jurisdiction which ripened into full jurisdiction over the attached property when the formalities of service were completed.[20] Again, however, the Court found statutory authority for its position.[21]

Ark. 1891). However, numerous other lower federal court decisions had construed Section 915 to pertain only to forms and modes of practice to be observed when the federal court could obtain *in personam* jurisdiction: Nazro v. Cragin, 17 Fed. Cas. No. 10,062 (C. C. D. Iowa 1874); Harland v. United Lines Tel. Co., 40 Fed. 308 (C. C. D. Conn. 1889); Lackett v. Rumbaugh, 45 Fed. 23 (C. C. W. D. N. C. 1891); Central Trust Co. of N. Y. v. Chattanooga R. & C. R. R., 68 Fed. 685 (C. C. E. D. Tenn. 1895); United States v. Brooke, 184 Fed. 341 (S. D. N. Y. 1910); Smith v. Reed, 210 Fed. 968 (N. D. Ohio 1912).

[16] Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. ed. 1053 (1913).

[17] 103 U. S. 794, 26 L. ed. 461 (1880) (the Court omitted any mention of Section 915).

[18] Lower federal courts had previously held that the Act of 1887 introduced no new principle obviating the necessity for personal service. Harland v. United Lines Tel. Co., 40 Fed. 308 (C. C. D. Conn. 1889); United States v. Brooke, 184 Fed. 341 (S. D. N. Y. 1910); Smith v. Reed, 210 Fed. 968 (N. D. Ohio 1912).

[19] Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. ed. 398 (1905); Crocker Nat. Bank v. Ragenstecher, 44 Fed. 705 (C. C. D. Mass. 1890); Richmond v. Brookings, 48 Fed. 241 (C. C. D. R. I. 1891); Vermilya v. Brown, 65 Fed. 149 (C. C. S. D. N. Y. 1894); Blumberg v. A. B. & E. L. Shaw Co., 131 Fed. 608 (C. C. N. Y. 1904).

[20] Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. ed. 138 (1906) (suggesting that no publication of service was necessary in federal court since defendant had sufficient notice as evidenced by his special appearance to secure removal); Lebensburger v. Scofield, 139 Fed. 380 (C. C. A. 6th, 1905) (publication of summons ordered by district court); Friedman Bros. & Sons Neckwear Co., Inc. v. Greaney, 297 Fed. 478 (S. D. N. Y. 1923).

[21] REV. STAT. §646 (1875), 28 U. S. C. §79 (1934) provides: "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered

In the recent case of *Rorick v. Devon Syndicate, Ltd.*,[22] suit was brought in a state court against the nonresident defendant on a personal cause of action. An attachment was levied upon property of the defendant, and service by publication completed. The defendant secured a removal to the federal district court on a special appearance. A supplemental attachment issued from the district court and was levied upon additional property of the defendant. On defendant's motion, this latter attachment was dissolved on the ground that no personal service had been made upon the defendant. This ruling was affirmed in the circuit court of appeals.[23] Speaking for the Supreme Court, Mr. Justice Douglas proceeded to assail vigorously the holding in *Toland v. Sprague* and the cases subsequently affirming it. Three arguments buttress his attack: First, if Section 739[24] justified the Court's conclusion that a defendant must be personally served to permit the levy of an attachment, that justification was removed by the statutory revisal authorizing suit in the district of either the plaintiff's or defendant's residence. Second, the philosophy underlying the decision in *Toland v. Sprague* and the *Big Vein Coal Co.* case, *viz.*, that it is unjust to adjudicate a person's rights without affording him notice by personal service,[25] was repudiated by Section 646[26] and by the decision in the removal cases. Third, Congress has, in Section 915,[27] expressly granted to plaintiffs in the federal courts the same remedies by attachment or other process that are available in the state courts.

The actual decision in the principal case is confined to the proposition that, where attachment has supplied *quasi-in-rem* jurisdiction to a state court prior to removal, the federal court is permitted to issue a supplemental attachment, provided such a remedy is available under the state procedure. Hence, the hostile and extended consideration of the doctrine of *Toland v. Sprague* appears to be gratuitous *dictum*, for the

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to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. . . ."

[22] 306 U. S. 626, 59 Sup. Ct. 643, 83 L. ed. Adv. Ops. 620 (1939).

[23] Rorick v. Devon Syndicate, 100 F. (2d) 844 (C. C. A. 6th, 1939). Additional factors, irrelevant to the present discussion, which were relied on in the disposition of the case, were: (1) the district court held the original affidavit in attachment void because taken before a notary disqualified as an "interested" party; (2) the circuit court held the attachment issued by the state court to be premature and void because executed before commencement of service by publication, in violation of a state statute. Both these holdings were subsequently reversed by the Supreme Court as being based on an erroneous construction of the state statutes.

[24] REV. STAT. §739 (1875), 28 U. S. C. §112 (1934).

[25] See Toland v. Sprague, 12 Pet. 300, 329, 9 L. ed. 1093, 1105 (U. S. 1836); Picquet v. Swan, 19 Fed. Cas. No. 11,134 at 613 (C. C. D. Mass. 1828); Nazro v. Cragin, 17 Fed. Cas. No. 10,062 at 1260 (C. C. D. Iowa 1874).

[26] REV. STAT. §646 (1875), 28 U. S. C. §79 (1934); see note 22, *supra*.

[27] REV. STAT. §915 (1872), 28 U. S. C. §726 (1934).

question actually raised and the reasoning of the lower courts could have been disposed of by reference to the removal cases discussed above.

Speculation arises as to the motives of the Court in discussing—and then adversely—the doctrine of *Toland v. Sprague*. Was it merely an attempt to educate the lower courts on the distinction between the use of attachment in cases of removal and in cases of original jurisdiction? Such a purpose would hardly necessitate criticism of the doctrine. Or was the Court intimating that on a future occasion it may not refuse to allow a federal district court to acquire original jurisdiction by way of attachment and constructive service? Such an intimation would not be surprising from a Court which has recently displayed its willingness to re-examine any questionable precedents.[28] The disparity between the scope of attachment in the state courts and in the federal courts may be an unfortunate retention.[29] In the light of the recent revision of federal procedure allowing federal process to run throughout the state in which the court sits,[30] a change permitting federal courts to acquire original jurisdiction over a nonresident defendant by means of attachment and constructive service might be a desirable adjunct to the usefulness of the federal courts.

JAMES K. DORSETT, JR.

Libel and Slander—Publication—Privilege—Dictation to a Stenographer.

Plaintiff, having been discharged from the employ of defendant company for alleged misconduct, went to defendant's manager and requested a separation notice which was required to be filed with the Unemployment Compensation Commission. The manager made a notation on a blank notice that the cause of separation should be "Misconduct", and, at his request, plaintiff took the notice to defendant's stenographer who filled it out and inserted as the cause of separation the word "Misconduct". In an action for libel, the Court sustained the defendant's demurrer, holding that there was no publication to support the action, as communication to a stenographer was insufficient.[1]

Much authority supports the decision reached here. On the theory that a corporation can act only through its agents,[2] it is held that com-

[28] Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938); Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. ed. Adv. Ops. 577 (1939).

[29] Early criticism was found in Dormitzer v. Illinois & St. Louis Bridge Co., 6 Fed. 217, 218 (C. C. D. Mass. 1881).

[30] Federal Rules of Civil Procedure 4(f).

[1] Satterfield v. McLellan Stores, 215 N. C. 582, 2 S. E. (2d) 709 (1939).

[2] Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 74 So. 278 (1917).