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Federal Procedure - Diversity Jurisdiction - Unincorporated Labor Unions. *United Steelworkers of America v. Bouligny*, 86 S. Ct. 272 (1965)

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adopted by the decisions in line with the majority seems to be better. The primary fault of the minority view is that it fails to consider the context of the tolling statute in its relation to the whole concept of justice. Men are entitled to a speedy and fair adjudication of their rights. By allowing actions to be delayed for indefinite periods the door is left open for fraud and deceit. Permitting the tolling statutes to operate where the plaintiff has other means of service could cause great hardship, for a defendant might not know for years that he had even been charged with negligence. By considering the implications of a literal interpretation the majority view reaches a solution which is fairer to all parties concerned.

The Virginia Supreme Court of Appeals in the instant case adopted the majority rule. The decision of *Bergman v. Turpin* thus adopts a more rational interpretation of the law, and sets a precedent which should be easy to follow in future Virginia cases. However, in making this exception to the tolling statute the court could have perhaps strengthened its argument by using *Wilson v. Kootz*¹⁴ and *Brown v. Butler*.¹⁵ These cases support the majority rule and are based on an early opinion by Chief Justice John Marshall which stated that the plaintiff's rights to a suit or action must have been "actually or constructively obstructed" before the tolling statute applies. This would have given the court a sounder answer to the plaintiff's contention that the *Ficklin's Case* should apply, and also would have provided them with somewhat of a precedent for their decision in Virginia.

Mark S. Dray

Federal Procedure—DIVERSITY JURISDICTION—UNINCORPORATED LABOR UNIONS. In *United Steelworkers of America v. Bouligny*,¹ Respondent, a North Carolina corporation, commenced an action in a state court seeking damages for defamation. The Petitioner, an unincorporated labor union whose principal place of business is in Pennsylvania, removed the case to a federal district court asserting diversity of citizenship as a basis for removal.

14. 7, Cranch (11 U. S.) 202 (1812).

15. 87 Va. 621, 13 S.E. 71 (1891).

1. 86 S. Ct. 272 (1965).

Respondent sought to have the case remanded to the state court and based his claim upon the ground that there was no diversity in fact as the citizenship of an unincorporated association is the citizenship of its individual members.

The Supreme Court granted certiorari to rule on the diversity question as it pertained to unincorporated labor unions. There, the Court, upholding the decision of the Court of Appeals,² denied removal and held that the whole question of whether labor unions ought to be assimilated to the status of corporations for diversity purposes and what rules should ultimately apply to such citizenship are decisions better suited to the legislature and not the judiciary.

The center of the controversy on diversity jurisdiction has stemmed from the proper interpretation of the word "citizen" as it was used in article III, section 2 of the Federal Constitution.³ The Supreme Court attempted to clarify this when, in 1853, in *Marshall v. Baltimore & Ohio R.R.*,⁴ they extended citizenship to corporations indirectly by declaring that although a corporation was not a legal entity that could possess citizenship, all of its stockholders were presumed to be citizens of the incorporating state. The Court circumvented the issue as to whether a corporation was a citizen by creating a legal fiction that all of its stockholders were citizens of the state of incorporation. This, in effect, extended diversity jurisdiction to corporations.

However, the question as to whether an unincorporated association was a citizen for diversity purposes was not ultimately decided until 1889, when, in *Chapman v. Barney*,⁵ the Supreme Court delineated the

2. 336 F.2d 160 (4th Cir. 1964). The Court of Appeals remanded the case to the state court on the ground that an unincorporated labor union could not be deemed, for purposes of diversity jurisdiction, a citizen of the state of its principal place of business. They held that to establish diversity, the union should have averred the diverse citizenship of its individual members.

3. In U.S. Const. art. III § 2, it was provided that "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States". To implement this section, Congress enacted the Judiciary Act of 1789, § 11, 1 Stat. 73 at 78 which authorized the federal courts to exercise jurisdiction over suits where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State".

4. *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314 (1853).

5. *Chapman v. Barney*, 129 U.S. 677 (1889). The court held that merely alleging that one is a joint stock association organized under the law of a state and, therefore, a citizen of that state is insufficient for it must also be shown that it is a corporation organized under the laws of that state. They further stated that although it had the power to sue or be sued in a state court, that fact does not give it the power to sue in a federal court. As to diversity jurisdiction, it must also be alleged that there is complete diversity between the members of that association.

rule that joint stock associations are analogous to partnerships and are, therefore, unincorporated associations, not possessing citizenship for purposes of federal diversity jurisdiction. The Court in *Boulogny* applied and followed this rule and found unincorporated labor unions wanting in respect to such citizenship.

In 1922, the Supreme Court, in slightly modifying the strict *Chapman* rule, handed down their decision on the *United Mine Workers v. Coronado Coal Co.*,⁶ declaring that even in states that do not permit unincorporated associations to sue in their own names, in a federal court, such associations may sue in their common names for the purpose of enforcing substantive rights existing under the Constitution or laws of the U.S. This was revolutionary in its time, for unions were recognized as legal entities for the purpose of suits in the federal courts.

One case, however, has continued to trouble the courts in reference to the citizenship of unincorporated associations. This was the case of *Puerto Rico v. Russell and Co.*⁷ which applied a test to a Puerto Rican limited partnership and by close examination found it so close to a corporation that it should be treated as one for diversity purposes. Although this case has tended to confuse some courts who based their whole decision upon it,⁸ the Supreme Court has subsequently held that this case did not in any way abrogate the *Chapman* rule.

In 1939, Congress, following the lead of the *Coronado* case, included among the Federal Rules of Civil Procedure, Rule 17(b)⁹ which not only followed that case but extended it to all cases involving federal substantive rights. In 1947, Congress specifically extended the above

6. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922).

7. *Puerto Rico v. Russell and Co.*, 288 U.S. 476 (1933).

8. *Mason v. American Express Co.*, 334 F.2d 392 at 403 (2nd Cir. 1964). The court stated in their decision that "What we do decide is that the 1889 decision of *Chapman v. Barney* . . . is no bar today to denominating a New York joint stock association for delivery purposes; and that, on the basis of the test set forth in *Puerto Rico v. Russell and Co.* such an association possesses, because of its essential characteristics under the law of its creation, a complete enough separate legal personality to be treated as a citizen for purposes of federal diversity jurisdiction".

9. Fed. R. Civil P., 17(b). "The capacity of an individual other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or to be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and . . ."

principles to labor unions by enacting within the Taft-Hartley Act¹⁰ a provision which provided citizenship for unions only for the purpose of enforcing federal substantive rights.

The long controversy over the many interpretations of the word "citizen" as it pertains to corporations should have ended when, in 1958, Congress passed an amendment to the diversity statute of the Judicial Code¹¹ which specifically referred to corporations as citizens. This, in effect, abandoned the *Marshall* approach¹² but left the question of citizenship as it pertains to unincorporated associations still in question.

This has become evident due to the fact that a number of cases have still been coming before the courts with the diversity question being ultimately adjudicated.¹³ Some recent cases have held that the rule as delineated within the *Chapman* case should be abandoned.¹⁴ Also, several noted authorities¹⁵ in this field have leveled well-founded criticisms at the rule. Thus, the trend toward recognition of labor unions and unincorporated associations as citizens for diversity jurisdiction con-

10. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 185(c) (1947). "For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members".

11. 28 U.S.C. § 1332(c) (1958). "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business".

12. *Marshall v. Baltimore & Ohio R.R.*, *supra* note 5.

13. *Underwood v. Maloney* 256 F.2d 334 (3rd Cir. 1958); *cert. denied* 358 U.S. 864 (1958); *Arbuthnot v. State Auto Ins. Ass'n* 264 F.2d 260 (10th Cir. 1959); *Textile Workers Union of America, CIO v. Bates Mfg. Co.* 158 F.Supp. 410 (D. Me. 1958). These cases held that for diversity purposes, an unincorporated association has no citizenship apart from that of its members.

14. *Calgaz v. Calhoun* 309 F.2d 248 (5th Cir. 1962). Here it was felt that under the present ruling, it was necessary, in order to prevent unincorporated associations from virtual immunity from suit in federal courts, to circumvent that ruling by recognizing the litigating capacity in an association when it sues or is sued in a class action under Rule 23(a) of the Fed. Rules of Civil Procedure. *See, Rutland Ry. v. Locomotive Engineers*, 307 F.2d (2nd Cir. 1962). Here the court felt that the only practical approach to the procedural problems involving unincorporated associations was to assimilate them to the status of corporations.

15. 3 Moore, *Federal Practice* ¶ 17.25 at 1413 (2nd ed. 1964); 2 Barron & Holtzoff, *Federal Practice and Procedure* § 487 at 56 (1961). They feel that in order to make 17(b) of the Fed. Rules of Civil Procedure more generally effective, unincorporated associations must be allowed to sue in the federal court on the basis of diversity and that the present federal rule must be changed so that they will be endowed with citizenship.

tinues and seems likely to persist until the matter is ultimately settled.

Even the Supreme Court in remanding this case stated emphatically that they recognized the "widespread support for the recognition of labor unions as juridical personalities".¹⁶ With this statement, the Court itself seems to feel the need for change but only differs as to which branch of the federal government should initiate the change. They feel and with some justification, regardless of the opinions of their critics, that the proper avenue for correction of this situation is solely within the responsibility of Congress.

David K. Sutelan

Torts—FEDERAL TORT CLAIMS ACT—GOVERNMENT LIABILITY FOR TORTS OF SERVICEMEN. Contrary to Army regulations, defendant, an Army sergeant, inadvertently took home a few small explosive devices and left them in a drawer. Plaintiff, a thirteen-year-old boy, was given one of these devices by defendant's wife. Plaintiff lit the fuse, but before he could throw the device, it exploded, causing serious injuries.¹ In an action under the Federal Tort Claims Act,² the District Court denied recovery under Georgia law on the ground that the intervening act of the wife "snapped the chain of causation" that might impose any liability of the United States for the negligence of the sergeant. The Court of Appeals, Fifth Circuit, reversed this ruling, finding that the intervening act was foreseeable under Georgia law, and hence, the Government was liable in the absence of any affirmative defenses. The case was remanded for a determination of the issue of contributory negligence.

Both courts invoked the Georgia rules of *respondeat superior* in find-

16. *United Steelworkers v. Bouligny*, *supra* note 1, at 276.

1. *Williams v. United States*, 352 F. 2d 477 (5th Cir. 1965).

2. "[T]he district courts . . . shall have exclusive jurisdiction of all civil actions or claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." U.S.C.A. #1346(b) (1950).