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County in Which Process May Be Served Upon and Officer or Agent of a Corporation

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regulations should not invalidate such a regulation, for, as already observed, interstate commerce, being a practical conception, should be dealt with in a practical way. Hence, the West Virginia case and the New York case, in holding constitutional such state regulation of the rate of sale, are clearly correct in conclusion.[30] But, since such a regulation of the so-called "rate of sale" includes, in practical effect, a regulation of the rate of transportation, it would seem to follow that there is, in this respect, no practical distinction between two sorts of state regulations. Therefore, since a state can regulate such "rate of sale", *a fortiori* it would seem that a state can regulate such rate of transportation, for certainly under the implied prohibitions of the commerce clause a state cannot do by indirection what it cannot do directly.[31]

—T. P. H.

COUNTY IN WHICH PROCESS MAY BE SERVED UPON AN OFFICER OR AGENT OF A CORPORATION.—Until some few years ago, it had been the uniform practice in West Virginia to serve process upon an officer or agent of a corporation in the county in which he resided. Prior to acts of 1903, it was understood to be erroneous in all instances if the return did not show that the officer or agent was served in the county in which he resided.[1] This requirement grew out of a rather curious chain of statutory construction whereby chapter 50 of the Code is made to control the service of process in the circuit courts.

It wlll be noted that section 7 of chapter 124 of the Code designates the officers and agents of a corporation upon whom service may be had in the circuit courts, but fails to specify any place of service. The Supreme Court early felt that it was under the necessity of seeking elsewhere for some statute fixing the place of service.[2] Section 6 of chapter 41 of the Code provides as follows:

> "The service of process, when person or property is not to be taken into custody, or it is not otherwise specially provided,

[30] Pennsylvania Gas Co. *v.* Public Service Comission, *supra*, in which the United States Supreme Court affirmed the conclusion of the New York court.

[31] For a collection of cases in point see 7 A. L. R. 1094, an annotation on the West Virginia case herein discussed.

[1] See cases cited in Stout *v.* B. & O. R. Co., 64 W. Va. 502, 506, 63 S. E. 817, 131 Am. St. Rep. 940 (1918).

[2] It has always been very doubtful to the writer, for reasons that need not be stated here, whether it was ever intended that chapter 50 of the Code should control the service of process in the circuit courts.

> shall be subject to the regulations contained in the several sections from thirty-two to thirty-nine inclusive of chapter fifty of this Code."

On the ground that it was not otherwise specially provided for service of process in the circuit courts upon corporations, it was held that such service is controlled by sections 34-38 of chapter 50 of the Code. For purposes of this discussion, it will be sufficient merely to note that section 34 contains the general provisions for service upon domestic corporations in a justice's court, and section 35 contains corresponding provisions for service upon foreign corporations.

Prior to Acts of 1903, section 34 read as follows:

> "Unless otherwise specially provided such process or order, and any notice, against a corporation, may be served upon the president, cashier, treasurer or chief officer thereof, or if there be no such officer, or if he be absent, on any officer, director, trustee, or agent of the corporation, at its principal office or place of business, or in any county in which a director or other officer, or agent, of said corporation may reside. . . . ."

Section 38, which has not been amended nor reenacted since 1881, provides that service upon an officer or agent of a corporation under the preceding sections "shall be in the county in which he resides; and the return must show this." Hence, prior to Acts of 1903, it was held necessary in all instances that the return show service in the county in which the officer or agent resided.

By Acts of 1903, immediately after the language quoted above, the following provision was added to section 34:

> "Or and officer or agent of said corporation in the county in which the property, land or other thing in controversy may be, or in any county where the cause of action arises."

The effect of this amendment has been construed in *Speidel Grocery Co.* v. *Warder*,[3] and *Stout* v. *B. & O. R. Co.*,[4] in the former case by way of *dictum*. As Judge Brannon observed in *Speidel Grocery Co.* v. *Warder*, the statute, since the amendment, is poorly constructed and indefinite, but it is believed that his interpretation of it in the latter case, properly understood, with one possible exception,[5] is sound.

[3] 56 W. Va. 602, 49 S. E 534 (1904).
[4] Cited in note 1, *supra*.
[5] It is not clear that in section 34 as amended the words "or in any county in which a director or other officer may reside" must be ignored in all instances; but this is a question aside from the main discussion.

The clear purport of the amendment, standing alone, is to the effect that an officer or agent of a domestic corporation may be served "in the county in which the property, land or other thing in controversy may be, or in any county where the cause of action arises", whether such officer or agent reside therein or not. *To this extent,* since the amendment is subsequent in enactment to section 38, it is held to repeal the latter section.[6] In a justice's court, the action must be brought either (1) in the county where the cause of action arises or (2) in the county where the defendant, or one of the defendants, resides,[7] and process cannot be directed for service outside of the county of venue.[8] Hence it would seem that in all instances in a justice's court where the action is brought against a domestic corporation in the county where the cause of action arises, it is no longer necessary for the return to show that the officer or agent served resides in the county of service.[9]

But suppose that the basis of venue is the principal office or place of business of the corporation, in other words, its residence.[10] Clearly, in such instance, the action may be brought in a county where neither the cause of action arose nor where the "property, land or other thing in controversy" is, and the officer or agent may, according to section 34, be served at the principal office or place of business. In other words, the nature of the service may be such that it does not come within any of the conditions specified in the amendment, and the conclusion is that in such instances the old rule still must govern, and the return must show service in the county of the officer's or agent's residence. Of course, if the action should be brought in a county conforming to any of the several conditions mentioned in the amendment, the old rule would not operate, regardless of the ground or grounds of venue.

Since the amendment which partly repeals section 38 relates only to section 34, it is easy to reach the conclusion that section 38 still operates with full force and effect upon section 35 relating to foreign corporations. The propriety of this conclusion was indicated in *Stout* v. *B. & O. R. Co.,* and recently was adjudicated in *Leiter* v. *American-La France Fire Engine Co.,*[11] where it is held that the return of service upon the agent of a foreign corporation must still in all instances show that the process was served in the

[6] See Speidel Grocery Co. *v.* Warder and Stout *v.* B. & O. R. Co., *supra.*
[7] W. VA. CODE, c. 50, §16.
[8] W. VA. CODE, c. 50, §17; Speidel Grocery Co. *v.* Warder, *supra.*
[9] Stout *v.* B. & O. Co., *supra,* where the point is actually decided.
[10] See Speidel Grocery Co. *v.* Warder, *supra.*
[11] 104 S. E. 56 (W. Va. 1920).

county where the agent resides. As to the point actually decided, the conclusion of the court is logical and correct; but the opinion goes further and, by way of *dictum,* asserts, in effect, that section 38, insofar as it relates to section 34, is entirely repealed, thus making necessary the conclusion that in no instance where an officer or agent of a domestic corporation is served is it necessary for the return to show that he was served in the county of his residence.

It is submitted that the *dictum* in the latter case is too broad. The writer does not have sufficient courage to undertake even a suggestion of the possibilities reposing in the statutory medley involved; but it is believed that the statute has been subjected to sufficient analysis in the previous paragraphs to show that section 38 still operates to some extent upon section 34, relating to domestic corporations. Moreover, previous decisions of the Supreme Court indicate the same conclusion. It is true that the syllabus in *Speidel Grocery Co.* v. *Warder* may be cited in support of the *dictum* in the recent case, but only a glance at this syllabus is necessary to disclose that it is ambiguous. Properly understood, the phrase "whether the person served resides therein or not, and the return of service need not show that he resides therein" is intended to refer exclusively to those instances wherein the action is brought in the county where the cause of action arises. The course of reasoning throughout the opinion in *Speidel Grocery Co.* v. *Warder* makes this clear, and so does Judge Brannon's express language. He expressly decides nothing except that the return need not show that the officer or agent was served in the county where he resides when the action is brought in the county where the cause of action arises. He expressly declines to decide anything as to the necessities of the return when the action is brought in the county where the corporation has its principal office or place of business and where the cause of action did not arise. At the bottom of page 608 of the opinion, he says, "I will not say whether it has repealed the necessity of showing in the return the residence where the action is in the county of the office."

In *Stout* v. *B. & O. R. Co.,* the only other case except *Leiter* v. *American-La France Fire Engine Co.,* in which the question is discussed, the opinion does not say so, but evidently the action was brought in the county where the cause of action arose. So far as the actual adjudication extends, *Stout* v. *B. & O. R. Co.* does not go any farther than the *dictum* in *Speidel Grocery Co.* v. *Warder* is

quoted, but Judge Miller beyond a doubt gave to it the interpretation hereinbefore stated as the correct one. He says:

> "This construction may not necessarily work a repeal of section 38. It may perhaps still be applied with its full force to the other provisions of section 34; but this question is not presented and we do not decide it."

Perhaps the *dictum* in *Leiter* v. *American-La France Fire Engine Co.* either is inadvertent or else was based, without full consideration, upon the ambiguous syllabus of *Speidel Grocery Co.* v. *Warder.* —L. C.

FORFEITURE OF OIL AND GAS LEASE FOR BREACH OF COVENANT.—The Supreme Court of Kansas recently has affirmed a judgment canceling an oil and gas lease for breach of an express covenant to complete a well on the premises within sixty days.[1] The lease in question was for a term of one year and as long thereafter as oil or gas should be produced or operations continued. The lessees covenanted "to complete a well on said premises within sixty (60) days from the date hereof, or in case of a failure to complete a well within the time above specified, to pay to the first parties fifteen dollars ($15) in advance for each additional month such completion is *unavoidably* delayed from the time above mentioned for the completion of such well, until the well is completed or this contract is surrendered, as is hereinafter provided; . . ." The lessees did not begin a well within sixty days from the date of the lease. Two days after the expiration of the sixty day period the lessor served notice on the lessees that the lease was forfeited for failure of the lessees to perform the covenants and conditions therein. Suit was then started to cancel the lease. The trial court found that the lessees had made no effort to develop the premises within sixty days, and that this failure to do so was not the result of unavoidable delays. The court held that the proper construction of the covenant was that the lessees were bound to complete a well within sixty days, except that its completion might be deferred in case there was unavoidable delay, and that by reason of the omission and neglect of the defendants to keep and perform this covenant they had forfeited their rights. Judgment was entered canceling and setting aside the lease. The Supreme Court affirmed this judgment on the sole ground that the defend-

[1] Waters *v.* Hatfield, 190 Pac. 599 (Kan. 1920).