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FEDERAL PROCEDURE — DIVERSITY JURISDICTION OVER
A LOUISIANA PARTNERSHIP

Diversity jurisdiction of the federal judiciary is its power to hear and adjudicate controversies between "Citizens of different States."¹ In *United Steelworkers of America v. R. H. Bouligny, Inc.*,² the Supreme Court reaffirmed the rule that an unincorporated association (there a labor union) is not a citizen for purposes of diversity jurisdiction. The decision answers most of the speculation that, since the case of *Puerto Rico v. Russell*,³ the Court would recognize unincorporated bodies as citizens for these purposes.⁴

In *Russell*, suit was brought against a Puerto Rican *sociedad en commandita*.⁵ The Court ruled that the *sociedad* itself, not its individual members, was the party defendant because in "the tradition of the civil law, as expressed in the Code of Puerto Rico, the *sociedad* is consistently regarded as a juridical person."⁶ In view of *Bouligny's* limiting of *Russell* to its civilian setting, the question arises whether the *Bouligny* result would apply in litigation involving a Louisiana partnership.⁷

In cases involving multiple parties, the traditional rule is that, for diversity jurisdiction to exist, there must be complete diversity between all parties plaintiff, on the one hand, and all parties defendant on the other — that is, no plaintiff can be a citizen of the same state as any defendant.⁸ The applicability of this rule to stockholders of corporations was denied in *Louis-*

1. U.S. CONST. art. III, § 2. The statute governing diversity jurisdiction is 28 U.S.C. § 1332 (1966).

2. 382 U.S. 145 (1965).

3. 288 U.S. 476 (1933).

4. See, e.g., *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964).

5. The *sociedad en commandita* is a traditional civilian form of business organization which may contain one or more *general* partners who carry on the firm's business and are personally liable for debts of the firm. It is characterized by the presence of partners *en commandita*, who contribute capital in return for a share of the firm's earnings. In *Russell* the firm consisted solely of partners *en commandita*, a structure more similar to the corporation than to the common American partnership.

6. 288 U.S. 476, 480, 481 (1933).

7. The analysis in *Russell* rather than its holding is the concern of this Note, for the case did not involve the question of diversity jurisdiction. See note 45 *infra*.

8. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); WRIGHT, FEDERAL COURTS § 24 (1963). For argument that this rule is not compelled by the United States Constitution, see Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 27 (1964). See also Supporting Memorandum A, ALI Study of the Division of Jurisdiction Between State and Federal Courts: Proposed Final Draft No. 1 (1965).

ville R.R. v. Letson,⁹ and again in *Marshall v. Baltimore & Ohio R.R.*,¹⁰ in which the Court constructed a fictive presumption that all members of a corporation are citizens of the state of incorporation — in effect, treating the corporation itself as a citizen of the state. In 1958 Congress, in pursuit of a general policy to restrict diversity jurisdiction,¹¹ and taking a more realistic view of the corporation, eliminated the “magic quality of the corporate charter”¹² and made the corporation a citizen of its principal place of business as well as its state of incorporation.¹³

The prospect that unincorporated bodies might receive treatment similar to that given corporations was dashed by *Chapman v. Barney* in 1889.¹⁴ This landmark decision required complete diversity with respect to all members of a joint stock company for diversity jurisdiction and has been applied to all unincorporated associations. The *Chapman* rule is derived from the traditional common-law view of partnership as an aggregate of individuals,¹⁵ but persists even in cases arising in states which provide by statute that for procedural, taxation, and other purposes unincorporated associations are to be treated as corporations.¹⁶ The refusal of federal courts to be bound by a state’s treatment of its unincorporated bodies is justified by the fact that federal law, and not local law, determines whether an association possesses citizenship for purposes of diversity jurisdiction.¹⁷

There is a clear inconsistency in the distinction drawn between corporate and unincorporated organizations. Functionally, an unincorporated association such as the American Express Co. or the United Steelworkers Union, may display all the salient characteristics of personality of a corporation, yet *Chapman* severely restricts the availability to it of a federal forum.¹⁸

9. 43 U.S. 497 (1844).

10. 57 U.S. 314 (1853).

11. Scott, *The Dual Citizenship of Corporations and Their Principal Place of Business*, 23 *FED. B.J.* 103, 117 (1963); Note, 44 *MINN. L. REV.* 308, 310 (1959).

12. Note, 34 *GEO. WASH. L. REV.* 793, 794 (1966).

13. See 28 U.S.C. § 1332(c) (1964).

14. 129 U.S. 677 (1889).

15. See CRANE, *THE LAW OF PARTNERSHIP* 8-12, § 3 (1938).

16. See, e.g., *Brocki v. American Express Co.*, 279 F.2d 785 (1960).

17. See Note, 78 *HARV. L. REV.* 1661, 1662 (1965).

18. It should be noted that we are leaving aside discussion of the device sometimes used to defeat the requirement of complete diversity. This device is the class action in which the representatives of the class who are named as parties to the action are chosen so that diversity will exist as to them and, thereby, as to the class. See *FED. R. CIV. P.* 23.

Since the 1958 extension of a corporation's "citizenship" to its principal place of business,¹⁹ the fact of a corporate charter seems an outdated ground for distinction. The inconsistency has greatly offended legal writers, and there has been a massive clamor for a re-evaluation of *Chapman*.²⁰

In some quarters the *Russell* decision had been hailed as a revocation of the "unrealistic" *Chapman* rule — as indicative of a trend toward treating unincorporated associations as citizens for diversity purposes.²¹ To resolve conflicting decisions of the Second²² and the Fourth²³ Circuits, the Court granted certiorari in *Boulogny*.²⁴ Although recognizing merit in the criticism of *Chapman*,²⁵ it found the question of changing the rule "properly a matter for legislative consideration which cannot be adequately or appropriately dealt with by this Court."²⁶ Recognition of the citizenship of an unincorporated labor union would create practical difficulties "which we could not adequately resolve. . . . We should, for example, be obliged to fashion a test for ascertaining of which State the labor union is a citizen."²⁷ More important, such a rule would enlarge diversity jurisdiction and increase the volume of federal litigation, violating the congressional policy of reducing diversity jurisdiction evident in the expansion of corporate citizenship in 1958.²⁸

In *Boulogny* the Court distinguished *Russell* as involving not only a different legal question, but a unique civilian institution, the *sociedad en commandita*. The question arises whether the Louisiana partnership, with its civilian heritage, might be treated

19. See 28 U.S.C. § 1332(c) (1964).

20. See A.L.I. *Study of the Division of Jurisdiction between State and Federal Courts: Proposed Final Draft No. 1* § 1301(b)(2) (1965); Laski, *The Personality of Association*, 29 HARV. L. REV. 404 (1916); Magruder & Foster, *Jurisdiction over Partnerships*, 38 HARV. L. REV. 793 (1924); Comment, 50 VA. L. REV. 1135 (1964); Comment, 75 YALE L.J. 138 (1965); Comment, 66 YALE L.J. 712 (1957); Note, 65 COLUM. L. REV. 162 (1965); Note, 33 COLUM. L. REV. 540 (1933); Note, 34 GEO. WASH. L. REV., 793 (1966); Note, 78 HARV. L. REV. 1661 (1965); Note, 78 U. PA. L. REV. 102 (1930).

21. See, e.g., *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964); 3 MOORE, FEDERAL PRACTICE § 17.25, at 1413 (2d ed. 1964); Note, 33 COLUM. L. REV. 540 (1933).

22. *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964).

23. *Boulogny, Inc. v. United Steelworkers*, 336 F.2d 160 (4th Cir. 1964).

24. 382 U.S. 145 (1965).

25. *Id.* at 150.

26. *Id.* at 147.

27. *Id.* at 152.

28. Comment, 6 UTAH L. REV. 231, 243 (1958). For discussion of the merits of this policy see Comment, 51 VA. L. REV. 178 (1965); see also Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964).

as a juridical person²⁹ like the *sociedad* in *Russell*. The nature of Louisiana's partnership suggests an affirmative answer. Since the early case of *Dick v. Byrne*³⁰ the partnership has been treated as an *entity* by the courts:

"A partnership once formed and put into action becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil person which has its peculiar rights and attributes. Une personne fictive et morale séparée des associés."³¹

This view compelled the now well-established rule that, during the existence of the partnership, its suits can be maintained by the firm alone, and litigation based on partnership obligations must be brought against the firm and not against the individual partners.³²

The conceptual distinction between the entity view and the traditional common-law concept of partnership as a mere aggregate of individuals suggests a logical ground for distinguishing the Louisiana partnership from its common-law counterpart and treating it as a citizen for diversity purposes. But a functional comparison of the Louisiana commercial and ordinary partnerships with their counterparts in other states compels

29. The word "partnership" is here used to refer to the commercial and ordinary partnerships recognized by the Louisiana Civil Code.

Art. 2825: "Commercial partnerships are such as are formed:

"1. For the purchase of any property and the sale thereof, either in the same state or changed by manufacture.

"2. For buying or selling any personal property whatever, as factors or brokers.

"3. For carrying personal property or passengers for hire, in ships, vessels, or in any other vehicle of transportation."

Art. 2826: "Ordinary partnerships are all such as are not commercial . . ." The term "partnership" does not here include the partnership *in commendam*, which LA. CIVIL CODE art. 2828 (1870) calls "a species of partnerships, which may be incorporated with either of the other kinds . . ." Its nature requires that it be considered separately from the commercial and ordinary partnerships.

30. 7 Rob. 465 (1844). The court accepted the view of the French commentator Toullier.

31. *Wolf v. New Orleans Tailor-Made Pants Co.*, 52 La. Ann. 1357, 1365, 27 So. 893, 897 (1900).

32. O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LA. L. REV. 450, 462 (1949). See LA. CODE OF CIVIL PROCEDURE art. 688 (1960) which says: "A partnership has the procedural capacity to sue to enforce its rights in the partnership name, and appears through and is represented by an authorized partner."

The entity concept has been the basis for much jurisprudential law, both substantive and procedural, and for the interpretation of statutes and contracts. *E.g.*, a member of a partnership, sued by his individual creditor, could not plead in compensation a debt due by his creditor to the firm — nor could a creditor seize the undivided interest of a partner in the firm. *Smith v. McMicken*, 3 La. Ann. 319 (1848).

the conclusion that the differences are largely historical and theoretical and that the federal courts will look beyond these to apply the *Chapman* rule to them.³³

The basic statutory law governing partnership is found in articles 2801-2890 of the Louisiana Civil Code of 1870. These provisions were taken largely from the French and remain virtually unchanged since their promulgation in the Code of 1825. When the articles were drafted, it was thought that a commercial code would also be adopted. Consequently, although mention was made of the "commercial" partnership,³⁴ its detailed regulation was left to the envisioned commercial code, and the Civil Code established rules intended³⁵ to apply to "ordinary" partnership.³⁶ With the failure of the legislature to adopt a commercial code, the articles of the Civil Code were left as the only rules governing partnership. But these provisions were not designed to regulate the complexities of commercial dealings and proved insufficient. Courts and lawyers were forced to look to French, Spanish, and Anglo-American law for guidance. At first the persuasiveness of the civilian commentators was strong, but "by 1842 Anglo-American authorities definitely had forged ahead of the other extra-Louisiana authorities cited by Louisiana courts, never again to be overtaken."³⁷ Thus, it is hardly surprising that the results reached by Louisiana courts are substantially similar to those reached in other states.³⁸ The basic consequence of the entity theory, that partnership property is owned by the firm itself and not by the individual partners, is also the general result in Anglo-American jurisdictions.³⁹ Likewise, it is a general conclusion that partnership debts cannot be compensated against the claims of an individual partner, or the debts of an individual partner against partnership claims.

Nor do Louisiana courts adhere consistently to the entity concept. In *Dezendorf v. National Cas. Co.*⁴⁰ the court ignored the

33. For a thorough comparison of the Louisiana partnership with its counterpart in Anglo-American law see O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LA. L. REV. 307 and 450 (1949).

34. LA. CIVIL CODE art. 2825 (1870).

35. O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LA. L. REV. 307, 308 (1949).

36. LA. CIVIL CODE art. 2826 (1870).

37. O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LA. L. REV. 307, 317 (1949).

38. *Id.* at 456.

39. *Ibid.*

40. 171 So. 160 (La. App. 2d Cir. 1936). A partner brought an action in

entity theory to reach a conclusion in accord with the rule in other states. In view of the role into which the judiciary has been thrust, that of providing a set of rules, in the absence of sufficient legislation, to govern partnership activity, it seems quite proper that courts should depart if necessary from a rigorous application of the entity concept to formulate just and workable rules.

This practical search for solutions has occurred in the other states. The treatment of the partnership as an entity has long been common among commercial men and accountants, and is now prevalent among courts and legislatures.⁴¹

In view of the recognition given the entity concept by many states,⁴² it seems improbable that Louisiana can be viewed as an exceptional jurisdiction. Treatment of the Louisiana partnership as a citizen for diversity jurisdiction might open the door to an *ad hoc* judicial examination of the law of each state to determine whether that state's partnership deserves treatment as a "citizen."

The effect of the scanty jurisprudence is that Louisiana partnerships will be subjected to the *Chapman* rule. The case of *Empire Rice Mill Co. v. K. & E. Neumond*⁴³ dismissed as unpersuasive an earlier case treating a partnership as a citizen.⁴⁴ This strengthens the conclusion that *Russell* will not be construed to make the Louisiana commercial or ordinary partnership a citizen for diversity purposes.

However, some aspects of *Russell* are still relevant. Certainly the waves of implication created by dicta in *Russell* were quieted by *Bouligny*. But the holding of *Russell* that the domicile of partners *en commandita* has no effect on jurisdiction continues to be valid.⁴⁵

tort against the partnership. *Held*, a partner cannot recover as an employee from the partnership of which he is a member.

41. CRANE, PARTNERSHIP 13 (2d ed. 1952).

42. The entity view is nowhere more patent than in *State v. Pielsticker*, 118 Neb. 419, 225 N.W. 51 (1929) and *Chisholm v. Chisholm Construction Co.*, 298 Mich. 25, 298 N.W. 390 (1941).

43. 199 Fed. 800 (E.D. La. 1912).

44. *Liverpool, Brazil, & River Platte Navigation Co. v. Agor & Lelong*, 14 Fed. 615 (E.D. La. 1882).

45. Ironically, *Russell* was not directly concerned with constitutional diversity jurisdiction. It was not until the 1956 amendment to 28 U.S.C. § 1332 that the Commonwealth of Puerto Rico was included in the term "states" for diversity jurisdiction. The action was brought against the *sociedad* without naming its members as defendants. The partners *en commandita*, all United States citizens,

The Louisiana partnership *in commendam*⁴⁶ is essentially the same civilian institution as the *sociedad en commandita* involved in *Russell*. The relation of the partner *in commendam* to the firm is in the nature of that of a stockholder to his corporation.⁴⁷ He is not personally liable for firm debts beyond his contractual obligation to contribute to the firm.⁴⁸ He may not even be made a party to a suit against the partnership.⁴⁹ Thus, in a suit against a Louisiana partnership *in commendam*, under the same reasoning as that in *Russell*, it will be only the citizenship of the *general* partners which will determine whether diversity exists. This result, that the citizenship of partners *in commendam* is irrelevant for determining jurisdiction, is the essence of the *Russell* decision, and it would be the proper result in a suit against a Louisiana partnership *in commendam*.⁵⁰

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removed the action to the federal district court under the Organic Act of Puerto Rico, 48 U.S.C. § 863 (1958), which grants federal jurisdiction where all parties on either side are United States citizens not domiciled in Puerto Rico. The Supreme Court ruled that the members were not "parties" within the meaning of the Organic Act because the *sociedad* had independent citizenship in Puerto Rico, and that the action was not removable to federal court. See Comment, 50 VA. L. REV. 1135 (1964).

46. LA. CIVIL CODE art. 2839 (1870): "Partnership *in commendam* is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more."

47. C. S. Burt & Co. v. Laplace, 114 La. 489, 38 So. 429 (1905).

48. The partner *in commendam* was colorfully described in Ullman & Co. v. Briggs, Payne & Co., 32 La. Ann. 655, 659 (1880) as "a money lender, who instead of permitting himself to be swayed by an illusion of cupidity, by embarking blindly in some hazardous enterprise or imprudent speculation, wisely determines not to imperil himself and his property beyond well-defined limits."

49. In re M. F. Dunn & Brother, 115 La. 1084, 40 So. 466 (1906), which held that the partner *in commendam* is not a real partner as to third parties and was neither a necessary nor proper party to a suit against the firm because he is not suable for firm debts. Of course if he has not paid into the firm to the full extent of his contractual obligation, he may be sued for the part unpaid. LA. CIVIL CODE art. 2842 (1870); De Lizardi v. Gossett, 1 La. Ann. 138 (N.O. App. 1846).

50. The same result obtains in suits involving the limited partnership found in other states, and derived from the French *société en commandite*. Under the UNIFORM LIMITED PARTNERSHIP ACT, 8 UNIFORM LAWS ANNOTATED § 26, the limited partner is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against a liability to the partnership. 38 N.Y. CONSOL. LAWS ANN. § 115 (McKinney 1966).

The conclusion has been recently confirmed in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966). In that action by a customer against a brokerage firm, where there was diversity between the customer and all general partners, identity of citizenship between the customer and a limited partner of the broker was not fatal to diversity jurisdiction.