A LEGAL FICTION WITH ITS WINGS CLIPPED.

Resort to a legal fiction has, from ancient times, been a common means of extending or limiting both rights of action, and rights of defense to actions, where justice seemed to require or as the case might be, to deny a remedy. An arbitrary assumption has been made by which a new character has been assigned to a party, and thereby his access to the courts facilitated or obstructed.

The Romans began by providing modes of judicial relief for and against themselves alone. Soon they perceived that this was hardly fair, in view of the number of their fellow countrymen who were not Romans, and so had no part in the *Jus Quiritium*. The praetors therefore gave equal opportunities for judicial relief for or against them by the use of the legal fiction. Ulpian devotes a large space to describing this mode of procedure. "*Civitas Romana*," he says, "*peregrino fingitur, si eo nomine agat aut cum eo agatur quo nomine nostris legibus actio constituta est, si modo justum sit eam actionem etiam ad perigrinum extendi, velut si furtum faciat perigrinus, * * * item si perigrinus furti agat.*" [1]

When the Constitution of the United States was framed, the business of the country was done by natural persons. Of moneyed corporations, such as now control so much of it, there were at the close of 1787 less than thirty. The most important one, the Bank of North America, had been chartered by the United States and re-incorporated by several of the States. The only others were nine incorporated by Massachusetts, two by Connecticut, one by New York, four by Pennsylvania, two by Maryland, six by Virginia and three by South Carolina.[2]

In providing therefore as to the parties over whom the juris-

[1] Commentaries, IV, 37. [2] Two Centuries Growth of American Law, 296.

diction of the courts of the United States should extend, the Convention of 1787 gave no particular attention to private corporations. It had rejected by a vote of eight States to three a motion made by Madison to insert in the Constitution a grant of power to Congress to create corporations for certain purposes.[1] The States had thought best to charter but few, and there was a general popular jealousy of such a mode of combining capital and concentrating power.

In 1791 Hamilton carried through Congress his plan of establishing a national bank. Any "person, copartnership, or body politic" could subscribe for shares, and its operations were to be commenced at Philadelphia. The subscribers and their successors and assigns were made a corporation by the name of *The president, directors and company of the bank of the United States*, and empowered "by that name" * * * "to sue and be sued" * * * "in courts of record or any other place whatsoever."

A few years after its organization, the bank brought an action of trover in the Circuit Court of the United States for the District of Georgia, in its corporate name, against certain citizens of that State. The declaration referred throughout to the bank as the "petitioners," and alleged that the petitioners "are citizens of the State of Pennsylvania." The suit was dismissed on a plea to the jurisdiction, on the ground that the bank, as a corporation, could not sue in the Circuit Court. On the argument upon a writ of error from the Supreme Court of the United States, two points were made by the bank: (1) that the charter authorized it to bring the action; and (2) that it could sue because it was a corporation composed of citizens of a State other than that of which the defendants were citizens.

Chief Justice Marshall, speaking for the court, overruled the first claim. The grant of power to sue was intended, he said, simply "to give a capacity to the corporation to appear, as a corporation, in any court which would by law have cognizance of the cause, if brought by individuals."

The second claim he sustained. The corporation, he ob-

[1] Elliot's Debates, V, 440, 543.

served, was "certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name." But the Constitution had established national tribunals for the decision of controversies between aliens and a citizen or between citizens of different States. Aliens and citizens of different States are in no less danger from the possibility of local favoritism because "they are allowed to sue by a corporate name. That name indeed cannot be an alien or a citizen; but the persons whom it represents may be the one or the other, and the controversy is in fact and in law between those persons suing in their corporate character by their corporate name for a corporate right, and the individual against whom the suit may be instituted." * * * "If the Constitution would authorize Congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation then the Judicial Act ought to be construed to give it. For the term *citizen* ought to be understood as it is used in the Constitution, and as it is used in the laws. That is, to describe the real persons who come into court in this case under their corporate name." Inasmuch then as the plaintiffs had alleged that they were citizens of Pennsylvania, the suit should not have been abated. "Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation." [1]

The plea in this case raised no issue as to the truth of the statement in the declaration that the plaintiffs, (that is, of course, all the plaintiffs), were citizens of Pennsylvania. Marshall, however, must have been aware that the shareholders in the bank of the United States were not all citizens of a single State.

He repeatedly expressed to his associates on the bench his regrets that this decision had been made and his conviction that it was unsound in principle.[2] Nevertheless it was rigorously applied as a precedent, and the practice established of treating

[1] Bank of the United States *v.* Deveaux, 5 Cranch, 61.

[2] Louisville R. R. Co. *v.* Letson, 2 How. 555.

the jurisdiction of the Circuit Court as limited, in suits against corporations, to those in which all the corporators were citizens of the State it which it sat.[1] In a case, for instance, coming up to the Supreme Court in 1828, two citizens of South Carolina had sued in the Circuit Court in Georgia the bank of the State of Georgia, a corporation chartered by that State, alleging also that William B. Bullock, a citzen of Georgia, was "President of the mother bank" and Samuel Hale, a citizen of Georgia was "President of the Branch Bank at Augusta." There was only a brief *per curiam* opinion, but the mandate of the court was "that as the bill does not aver that the corporators of the bank of the State of Georgia which bank is defendant in the suit are citizens of the State of Georgia, the Circuit Court has no jurisdiction of the cause."[2]

The true doctrine, however, had remained in dispute in the consultation room, and a few years after Marshall's death an opportunity came to make a new departure.

A South Carolina corporation was sued in the Circuit Court of the United States in South Carolina by a citizen of New York. It pleaded to the jurisdiction that some of its shareholders were citizens of the latter State. On a writ of error the Supreme Court, in 1844, held that Marshall's reasoning in the Deveaux case was incorrect and that "when a corporation exercises its powers in the State which chartered it, that is its residence, and such an avernment is sufficient to give the Circuit Courts jurisdiction."[3]

The broad ground was emphatically taken as the sole basis of the judgment that "a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a

[1] *Ibid.*

[2] Breithaupt *v.* Bank of Georgia, 1 Pet. 238.

[3] Louisville R. R. Co. *v.* Letson, 2 How. 559.

citizen of the State which created it and where its business is done, for all the purposes of suing and being sued."[1]

These positions were sharply criticised in a dissenting opinion, given in 1852, by Mr. Justice Daniel, who then took the ground that a corporation as such could in no sense be deemed a citizen either of a State or of the United States.[2] At the same time, Mr. Justice Catron insisted in one of the concurring opinions, that the jurisdiction of the Circuit Court in case of corporations, public or private, depended on the citizenship of the managing officers. "All corporations," he observed, "must have trustees and representatives, who are usually citizens of the State where the corporation is created; and these citizens can be sued and the corporate property charged by suit."[3] A year later the court was again divided on these questions. The opinion of the majority seemed to sustain the position which had been taken, as above stated, by Mr. Justice Catron, but from that proceeded to push on a little farther. Though nominally parties, it was remarked, the corporators were not really such. It was not reasonable that their representatives "should be permitted to allege the different citizenship of one or more of their stockholders in order to defeat the plaintiff's privilege." * * * "The persons who act under these faculties and use this corporate name may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there." * * * "The presumption arising from the *habitat* of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that 'the defendants are a body corporate by the Act of the General Assembly of Indiana' is a sufficient averment that the real defendants are citizens of that State."[4] Mr. Justice Catron dissented from this re-editing of his theory, and two

[1] *Id.* 557.

[2] Rundle *v.* Delaware & Raritan Canal Co., 14 How. 101.

[3] *Id.* 95.

[4] Marshall *v.* Baltimore & Ohio R. R. Co., 16 How. 314, 328, 329.

other justices filed vigorous opinions in which they both deplored and ridiculed it. The Deveaux case, said Mr. Justice Daniel, was an *ignis fatuus;* the Letson case was another; but the present was "indeed the *chef d'oeuvre* amongst the experiments to command the action of the spirit in defiance of the body of the Constitution."[1]

In Covington Drawbridge Co. *v.* Shepherd, 20 How. 227, 233, the existence of a conclusive presumption that all the shareholders in a corporation were citizens of the State which chartered it was re-affirmed, and both parties held to be estopped in an action at law from denying it. In Ohio & Mississippi R. R. Co. *v.* Wheeler, 1 Black. 286, 290, it was plainly announced that the presumption was a "legal" one, and that no averment or evidence to the contrary was admissible to rebut it.

The legal fiction was now complete. The corporation was to be deemed a citizen of the State to which it owed its existence, not because it was an artificial person of its creation, having no right to exercise its franchise elsewhere; not because its managing officers were exercising its franchises there; not because all its shareholders were in fact citizens of the State; but because the court had concluded to make the false assumption that they were, and to hear no proof to the contrary.

This was illogical, but convenient. Corporations were rapidly multiplying as early as 1807, when the Deveaux case was decided. They had come to control the business of the country when the Letson case came up. It was in all probability then politically necessary for the safety of their capitals that they should have access to the courts of the United States. Law, in the phrase of Sir Henry Maine, had to be brought into harmony with society.[2] The law to be thus dealt with was in form inflexible. The Constitution of the United States gave the citizens of each State large rights in other States. It was plain that this grant was never meant to extend to artificial persons.[3] But how avoid the effect of the general rule of hermeneutics that a word occurring more than once in a written instrument shall be taken

[1] *Id.* 344.

[2] Ancient Law, 24.

[3] Paul *v.* Virginia, 8 Wall. 168, 181.

always in the same sense, unless the context clearly points to a different construction? What was thought the least dangerous method was adopted. The term *citizen* was given the same meaning wherever found in the Constitution, but at the cost of what has sometimes been stigmatized as a judicial lie.

Several of the States were apprehensive, at the time when they were considering the ratification of the Constitution, that by such devices the Federal courts would enlarge their powers. New York, in her act of ratification, declared that it was an inviolable right of the people "that the jurisdiction of the Supreme Court of the United States or of any other court to be instituted by the Congress is not in any way to be increased, enlarged, or extended by any fiction, collusion, or mere suggestion." The spirit of Benthamism was already in the air. Hamilton's resistless energy had secured ratification, but Clinton and his followers were determined to set all the guards they could to circumscribe his success, and here they tried to set one at a real danger point.

It was with unnecessary harshness that Bentham declared that "a fiction of law may be defined as a willful falsehood, having for its object the stealing legislative power by and for hands which could not, or durst not, openly claim it." But in his philosophy there was no place for the fact that in all governments the judiciary, in administering in one generation a written law made for another which has long passed away, may be forced at times to give it a new reading, if not a new wrench. If this be done by resort to a legal fiction, the essence of a lie is wanting. There is no intent to deceive, and nobody is deceived. It is a convention to which litigants are compelled to accede, as the price of being recognized by the courts. It must be supported by public sentiment, or it will soon perish; and if so supported becomes a kind of popular legislation.

The fiction which has been the subject of this article took definite, and as it was supposed final shape in 1862, at the hand of Chief Justice Taney, in the Ohio & Mississippi Railroad case. But as time went on, and corporations of an inter-State character and composition became numerous and powerful, new difficulties became apparent in working under it.[1] The Supreme

[1] See Southern Railway Co. *v.* Allison, 190 U. S. 326, 338.

Court, in 1896, apologetically described its creation as a step which "went to the very verge of judicial power."[1] Nine years later, in Doctor *v.* Harrington, they marked the limits of the verge, but in such a way as practically to overrule many of their earlier decisions.

New Jersey shareholders in a New York corporation brought, by reason of their interest as such, a bill in equity against another New York corporation, to which they made the former corporation a defendant, on an apparently good cause of action, in the Circuit Court. The cause was dismissed because of the conclusive presumption that all the shareholders of each company were citizens of New York. The plaintiff's therefore could not be heard to allege that they were citizens of New Jersey, and, if they could, the corporation to protect whose rights the suit was brought being in substance a plaintiff, there would, even then, be citizens of New York on each side of the action. On an appeal to the Supreme Court this decree was reversed. The reason, said the brief opinion by Mr. Justice McKenna, for adopting the presumption was to establish the citizenship of the corporation for the purpose of jurisdiction in the Federal Courts. "This, then, was its purpose and to stretch it beyond this is to stretch it to wrong. It is one thing to give to a corporation a status and another thing to take from a citizen the right given him by the Constitution of the United States."[2]

The underlying question nevertheless had been repeatedly before the court in previous years, and had been decided the other way, after full consideration. In 1840, for instance citizens of Louisiana sued a Mississippi bank in the Circuit Court, and a plea to the jurisdiction that two other citizens of Louisiana were, and were when the action was brought, among its shareholders, was held sufficient. "It is perfectly clear," said the court, "that the same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs."[3] If the Constitution of the United States gave the plaintiffs no

[1] St. Louis & San Francisco Railway *v.* James, 161 U. S. 545, 563.

[2] Doctor *v.* Harrington, 196 U. S. 9, 586, 587.

[3] Commercial Bank of Vicksburg *v.* Slocomb, 14 Pet. 60, 64.

access to the Circuit Court in that case, it is hard to see how it gave any to the plaintiffs in Doctor *v.* Harrington. The defendant really won in one case and lost in the other not because the written law had changed, but because a new generation of judges gave it a new interpretation, and twisted an old theory into a new shape.

The ease with which this may be done, under such circumstances, is both a sign of the strength of written Constitutions and of the utility of the legal fiction. Written Constitutions are strong because, if need be, new meanings can be read into them and old meanings read out of them, in the quiet of a court room, by judicial authority. Legal fictions have been found of service, because they make bridges between social epochs: useful while travel goes that way; easily burned, or shifted to new positions, when it moves forward to some new goal.

Courts which invent such fictions, or accept them when invented by lawyers, incur a great responsibility. Modern judges seldom assume the power. They seldom, and perhaps never, should. Certainly it can only be legitimate when there is a knot to be cut that nothing could avail to untie. Nor can the cords be left flying loose. The fiction must be consistent with itself.

The real error of the Supreme Court, in regard to that which has been discussed in this article, was committed before it was ever brought forward. It lay in Marshall's rejecting the first claim set up in the Deveaux case. A corporation should have been held, by virtue of its own personality, to be a citizen of the State which created it, within the meaning of Article III of the Constitution, notwithstanding it could not be deemed a citizen within the meaning of Article IV. The purposes of the two provisions were obviously so different, that the word *citizen* might fairly be taken to have in each a different sense.

To treat an artificial person thus as a citizen might have been itself indeed the assertion of a legal fiction, but it would have been a fiction far simpler and more manageable than one created by a legal presumption of a state of facts which, in nine cases out of ten, everybody knew did not and in the nature of things could not exist.

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