GRAY and others *v.* QUICKSILVER MINING CO.

(*Circuit Court, D. California.* August 18, 1884.)

JURISDICTION OF CIRCUIT COURT—SUIT AGAINST FOREIGN CORPORATION—WHERE BROUGHT—ACT OF 1875, § 1—WAIVER OF EXEMPTION—APPOINTMENT OF AGENT, UPON WHOM PROCESS MAY BE SERVED.

The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, which he may waive; and when a foreign corporation, in pursuance of the laws of a state in which it carries on business, designates a person upon whom process may be served, it thereby consents to be sued in the district embracing such state, and waives the exemption granted to it under the act of congress.

Motion to Quash Service of Subpœna.

Wm. Matthews, for motion.

L. D. Latimer, *contra*.

SAWYER, J. The defendant is a corporation organized and existing under the laws of New York, working a quicksilver mine in Santa Clara county, California. A statute of California, passed in 1872, (St. Cal. 1871–72, p. 826,) requires every corporation created by the laws of any other state, doing business in this state, "to designate some person residing in the county in which the principal place of business of said corporation in this state is, upon whom process may be served, * * * and file such designation with the secretary of state. * * * And it shall be lawful to serve on such person so designated any process issued as aforesaid," etc. Foreign corporations complying with this provision enjoy certain specified advantages, and those not complying are subjected to certain prescribed disabilities. In pursuance of the provisions of said statute of California, the defendant, on July 18, 1872, filed in the office of the secretary of state of the state of California, a document under the seal of the corporation, and signed by its president and secretary, whereby "James B. Randall, who resides in New Almaden, Santa Clara county, in the state of California, being the county in which the principal place of business of said company is, as the person upon whom process issued * * * may be served." The subpœna in this case was served in due form upon said James B. Randall.

It is claimed on behalf of defendant that under the act of congress of 1875, relating to the jurisdiction of the United States courts, section 1, it is not liable to be sued in the United States circuit court for the district of California, or elsewhere in the national courts out of the state of New York. Said statute provides "that no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or *in which he shall be found* at the time of serving such process or commencing such proceeding," etc.

It is insisted that a corporation, under the decisions of the United

States supreme court, can only be regarded as an inhabitant of the state under whose laws it derives and continues its existence, and, for similar reasons, that it cannot be found in any other state, and therefore it is not liable to be sued in any other state; and so it has been heretofore frequently held in this and other circuits, where there were no other facts or circumstances to affect the question. But the supreme court has directly held that this provision of the United States statute "is not one affecting the general jurisdiction of the courts. It is one rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive;" and that filing a designation of a person upon whom service may be made in another state, in pursuance of the laws of such state, requiring a party to be designated upon whom service of process may be made, is a waiver of its privilege, and constitutes a consent to be sued in such state. In *Ex parte Schollenberger*, 96 U. S. 377, 378, the supreme court says upon this subject:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located, by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter, or excluded by local laws. Under such circumstances it seems clear that it may, for the purpose of securing business, consent to be 'found' away from home, for the purposes of a suit, as to matters growing out of its transactions. The act of congress prescribing the place where a person may be sued, is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the circuit court has jurisdiction of the causes, and should proceed to hear and decide them."

Similar views are announced in *Railroad Co.* v. *Harris*, 12 Wall. 65; *St. Clair* v. *Cox*, 106 U. S. 355–357; S. C. 1 Sup. Ct. Rep. 354; *N. E. Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 146; S. C. 4 Sup. Ct. Rep. 364. Like rulings have been made many times in the various circuit courts.

The defendant having designated a person upon whom process may be served in pursuance of the requirements of the statute of California, it has thereby consented to be sued in the district of California, and waived the exemption granted to it under the act of congress. The service was upon the person so designated by defendant, and is in all respects regular.

The motion to quash the service must be denied; and it is so ordered.

FRANKLIN INS. CO. *v.* SEARS.[1]

(*Circuit Court, S. D. Ohio, W. D.* July 2, 1884.)

1. PRINCIPAL AND AGENT—INSURANCE—AGENT ORDERED TO CANCEL POLICY—DEFAULT OF SUBAGENT OR BROKER.
   Where an insurance company had ordered S., its agent, to cancel a policy which he had written, the policy containing a stipulation for its cancellation, and a loss occurred to the company through the failure to have the policy canceled, in an action by the company against S., *held*, that S. was not relieved from liability by showing that he had directed the broker, who placed the insurance with him, to have the policy canceled. The broker, in procuring the cancellation, was the agent of S., and S. was responsible for the broker's default.
2. SAME—CUSTOM—BROKERS.
   In such action it is incompetent, for the purpose of so relieving S. from liability, to prove a custom to procure the cancellation of policies through the broker placing the insurance with the company's agent.
3. SAME—CHARGE OF COURT—WHAT AMOUNTS TO NEGLIGENCE.
   In such action it was not error to charge the jury that, if the broker called at the place of business of the insured and finding him absent made no inquiry whether any one present was authorized to receive for the insured the uncarned premium, when in fact such a person was present, and there was no other step taken to effect a cancellation until a loss occurred, the broker was guilty of negligence, for which S., the defendant, was liable.
4. REASONABLE TIME—QUESTION OF LAW, WHEN.
   What is a reasonable time, is always, where the facts are undisputed, a question exclusively for the court.

At Law.

Wilby & Wald, for plaintiff.

Burnet & Burnet, for defendant.

SAGE, J. The motion for a new trial is upon two grounds: *First*, that the court erred in refusing to permit the defendant to introduce testimony to prove a custom to procure the cancellation of a policy of insurance by the agency of the broker who placed the insurance with him,—a custom, the defendant offered to prove, of universal prevalence, not only at Cincinnati, where the policy which the defendant was ordered by the plaintiff to cancel was issued, and where the property insured was located, but also at Boston, the place of the home office of the plaintiff.

On the twenty-second of May, 1882, the defendant, then plaintiff's agent at Cincinnati, issued plaintiff's policy to the Central Oil Company, of which a Mr. Upson was sole proprietor, insuring certain oil works in the sum of $750 against loss by fire. On the twenty-seventh of the same month the defendant wrote advising the plaintiff of the insurance. The letter was received at Boston on the twenty-ninth, and the plaintiff immediately mailed an order to the defendant to cancel the policy. That letter, it was admitted, was received by the defendant by due course of mail, which it was in

[1] Reported by J. C. Harper, Esq., of the Cincinnati bar.