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Solicitation as a Basis of Jurisdiction Over a Foreign Corporation

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but it is ten times as distasteful to kill?" On the other hand, should we support the position of Judge Sherwood in *Bartlett* v. *State* and hold that human honor, dignity, and right are in equal value to human life?

It appears that the very existence of such divergent views impels us inevitably to the conclusion that the retreat rule should not stand as the final test of self-defense, but rather should be but *one factor* in determining the guilt or innocence of the defendant.

As Justice Holmes wrote in *Brown* v. *U S.*, "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."[38] An avenue of possible retreat should be a circumstance in the case along with size and the location of parties, provocation, suddenness of combat, and other factors a jury must weigh in determining whether the defendant is to be excused for his homicide in self-defense.

ROBERT HALL SMITH

SOLICITATION AS A BASIS OF JURISDICTION OVER A FOREIGN CORPORATION

The amenability of foreign corporations to suit in state courts has long been a troublesome problem, both in state courts and, since the problem is essentially one of due process, in federal courts. It has been said that in matters of jurisdiction the courts tend to treat natural persons and corporations similarly, but this is overstatement. On the other hand, the dictum of Mr. Chief Justice Taney in *Bank of Augusta* v. *Earle* that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created,"[1] does not present a realistic view of the situation. And yet, Taney's statement represented the prevailing view at one time. Such a doctrine could not stand in an era in which the corporation was fast becoming the most popular method of carrying on business.

To meet the demands of practical necessity in subjecting foreign corporations to proceedings in courts outside their state of domicil, various theories have been advanced. As in the case of an individual, jurisdiction in personam may be acquired over a foreign corporation by consent. An agent may be appointed by the corporation to accept service of process. The appointment of an agent[2] or of a state official to accept service of process is treated as consent to the exercise of jurisdiction. Where such an appointment has been made by the corporation, it is clear that there is actual consent to service of process and the state's courts have jurisdiction to render a valid judgment.[3] Where such an appointment is not made consent is sometimes implied. The theory of "implied consent" supposes that since a corporation may not enter a state without permission, its voluntary entry into the state renders valid the assumption that it has impliedly assented to

[38] 256 U. S. 335, 343 (1921). Holmes went on to say, "Detached reflection cannot be demanded in the presence of an uplifted knife."

[1] Barrow Steamship Company v. Kane, 170 U. S. 100 (1898).
13 Pet. 519 (U. S. 1839).

[2] Pennsylvania Fire Insurance Company v. Gold Issue Mining and Milling Company, 243 U. S. 93 (1917).

[3] *Ibid.*

the statutory requirements of the state. Thus, if a state statute provides that when no actual appointment of an agent is made that it will be deemed that a state official is authorized to accept service of process, it is presumed that the corporation by entering the state consents to this provision.

The consent theory is not broad enough to cover all situations where it is clearly established, as a matter of law, that a foreign corporation can be sued. For example, a state cannot exclude a foreign corporation which seeks to do only interstate business. In such a case the consent theory is wholly inapplicable unless the corporation actually consented to the jurisdiction of the state, because implied consent is based on the power of the state to exclude the foreign corporation. Yet, the state can provide for suit, even in the absence of consent[6] or power to exclude the corporation, provided the corporation is doing acts which the courts recognize as sufficient to warrant an inference of "corporate presence."[7] Such a theory is based on the supposition that the corporation is actually present within the state, a condition precedent to which is a finding that the corporation is "doing business."[8] The courts have been reluctant to formulate any definite rules as to just what constitutes "doing business" usually stating that each case is to be decided upon its own specific facts.[9] It has generally been held that when acts done within the state constitute part of the corporation s business and are continuous or of some duration, the corporation is "doing business" within the state.[10] It has been held that "mere solicitation" is not "doing business" in the jurisdictional sense.[11] A recent decision of the Supreme Court, *International Shoe Company* v. *Washington*,[12] has made such a holding dubious authority. Fundamentally, it is the purpose of this paper to examine the implications of that decision.

Solicitation, as used in the jurisdictional sense, means the practice of corporate agents procuring or attempting to procure orders for the corporation. Those orders are taken subject to the acceptance of the home office. When and if they are accepted they are usually filled by shipping the product directly to the customer from some point outside the state. In any large business engaged in selling to the public, solicitation is essential to success. Probably no businessman would seriously argue that solicitation is not "doing business" Yet the courts have held for years that "mere solicitation" does not satisfy the jurisdictional requirements of "doing business"

One of the first cases on solicitation of business as it relates to the jurisdictional problem was *Green* v. *Chicago, Burlington & Quincy Ry. Co.*[13] The defendant Railway Company was sued on a cause of action arising outside the forum. The defendant's business organization and trackage were not in the forum, but in another jurisdiction. The defendant's agent who had been served with process was employed to solicit freight and passenger traffic and for this purpose

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[6] The Lafayette Insurance Company v. French, 18 How. 404 (U. S. 1855).

[7] International Harvester Company of America v. Kentucky, 234 U. S. 579 (1914).

St. Louis Southwestern Railway Company v. Alexander, 227 U. S. 218 (1912).

[8] See Note 6 *supra.*

[9] See Note 7 *supra,* at 227.

[10] Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917).

[11] Green v. Chicago Burlington and Quincy Railroad Company, 205 U. S. 530 (1907).

[12] 326 U. S. 310 (1945).

[13] 205 U. S. 530 (1907).

an office was maintained in the forum. He sold no tickets and received no payment for transportation of freight. The defendant denied its corporate presence within the forum. The U. S. Supreme Court held:

> "The business shown in this case was in substance nothing more than that of solicitation. This is not enough to bring the defendant within the district so that process can be served upon it."[14]

This decision stood for years and may still stand as the primary authority in the solicitation cases. However, it should be noted that the suit was brought on a cause of action which arose outside the state of the forum. In the light of recent decisions, it should not be overlooked that the Court may have been influenced to a large extent by principles of fairness.

The question was again presented to the Supreme Court in *International Harvester Co.* v. *Kentucky*.[15] The effect of this case was to modify greatly the implications of the *Green* case. The court treated the earlier decision as an extreme case, but did not overrule it. On the contrary, it expressly reaffirmed its rule that solicitation alone was not enough to give a court jurisdiction over a foreign corporation. However, the court distinguished the *Green* case on two grounds. First, that in this case the authority to receive payment was given to the agent,[16] while in the *Green* case there was no such authority· and second, that the solicitation in this case resulted in a continuous stream of shipments into the state, while in the *Green* case no goods were shipped into the state as a result of the solicitation.

Four years later in *Peoples Tobacco Co.* v. *American Tobacco Co.*,[17] the court vacated service of process upon a soliciting foreign corporation because "mere solicitation" was not "doing business" for purposes of "corporate presence" *International Harvester Co.* v. *Kentucky* was distinguished on the ground that it involved, in addition to a continuous course of solicitation, authority on the part of the agents of the corporation to receive payments. After the *Tobacco Co.* decision, the lower federal courts commenced to use the *International Harvester Co.* case as a foundation for the thesis that solicitation plus something more constituted "doing business"

In *Davega* v. *Lincoln Furniture Co.*,[18] a foreign corporation s agent solicited in New York, sending the orders to the home office for acceptance. In addition to soliciting orders the agent occasionally assisted in the collection of overdue accounts and had authority to make adjustments subject to company approval. At infrequent intervals he sold goods that had been sent to New York as samples. It was held, probably by analogy to the cases basing jurisdiction on "doing business that the settlement of claims by the agent was too sporadic and that the sale of samples too small a part of the company s total business to be considered as a material addition to the solicitation. Thus in order to meet the "solicitation plus" rule the additional activities had to be regular, and there was even a suggestion that they had to constitute a substantial part of the corporation s total business.[19]

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[14] *Id.* at 533.
[15] See Note 6 *supra*.
[16] *Id.* at 586.
[17] 246 U. S. 79 (1918).
[18] 29 Fed. 2d. 164 (C.C.A. 2d 1928).
[19] *Id.* at 167.

In *Barnett* v. *Texas & Pacific Ry.*,[20] requisite additional activities over and above solicitation were found. The acts deemed material were the selling of tickets for transportation on the defendant's own lines, and the issuing of bills of lading, all of which were done within the forum state. The court held that the case did not fall within the rule in the *Green* case.

The foregoing decisions may now be well on the way toward becoming matters of only historical interest because of the recent decision of the Supreme Court in *International Shoe Co.* v. *State of Washington*, mentioned above.[21] A foreign corporation had its principal place of business in St. Louis, Missouri. It had no place of business in Washington where the suit was brought and made no contracts there. During a period of years it employed salesmen whose activities were directed by company officials in St. Louis. The salesmen worked on a commission basis. They were supplied with samples which they displayed to retail dealers. Sometimes they rented sample rooms for which they paid and were reimbursed by the corporation. Their authority was limited to the exhibition of samples and the solicitation of orders at fixed prices. When orders were received they were sent to St. Louis for acceptance or rejection. When the orders were accepted the merchandise was shipped directly to the customers from points outside the State of Washington. The salesmen had no authority to contract or make collections. In holding that the State of Washington had jurisdiction Chief Justice Stone departed from the "corporate presence" doctrine and announced a new solution to the problem. The new theory advanced was that a state has jurisdiction over a foreign corporation if the activities of the corporation in a state have been such that to permit suit there would be in accordance with "fair play and substantial justice."

In relaxing the presence theory the Chief Justice pointed to cases holding that when the activities of a foreign corporation have been continuous and systematic, the courts of the state have jurisdiction over the corporation as to actions arising out of acts done within the forum.[22] He mentioned previous decisions of the Supreme Court holding that where there is only a single or isolated acts of an agent of a foreign corporation, the state where such acts occur has no jurisdiction in actions arising out of such acts.[23] He next referred to a class of cases holding that where there have been continuous operations of a substantial nature by a foreign corporation, the state where these operations are carried on has jurisdiction in actions arising out of acts done outside the state.[24] He also cited cases where jurisdiction is based on a single act done by a non-resident individual which gives rise to the cause of action sued on,[25] as in the non-resident motorist cases. From these decisions the conclusion was reached that the true criterion for determining whether or not a state has jurisdiction over a foreign corporation is not mechanical or quantitive, but rather based upon the nature and quality of acts done within the state. Reference was also made to the fact that a foreign corporation doing acts within a state enjoys the benefit of the protection of the laws of that state; that an obligation may arise out of such acts, and that to require the corporation

[20] 145 Fed. 2d 800 (C.C.A. 2d 1944).
[21] See Note 12 *supra.*
[22] Commercial Mutual Accident Co. v. Davis, 213 U. S. 245 (1909); International Harvester Co. v. Kentucky, 234 U. S. 579 (1914).
[23] Rosenberg Bros. & Co. v. Curtis Brown Company, 260 U. S. 516 (1923).
[24] Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917).
[25] Hess v. Pawloski, 274 U. S. 352 (1927); Kane v. State of New Jersey, 242 U. S. 160 (1916).

to respond to an action arising out of such acts could "hardly be said to be undue."

Does this decision mean that the general rule of the *Green* case, that mere solicitation alone is not enough to give a state jurisdiction over a foreign corporation, has been discarded in favor of the "fair play and substantial justice" rule? Will *International Shoe Co.* case be held to its facts, the most important of which indicate that the cause of action arose out of activities carried on within the state of Washington? It should be recalled that in the *Green* case the cause of action arose outside the state. Because of this difference it may well be argued that when the Supreme Court is faced directly with the problem of whether solicitation alone is sufficient to give a state jurisdiction that the *Green* and *International Shoe Co.* cases will be distinguished on that ground. However there is nothing in the language of the latter decision that would indicate such a distinction was intended. The court might also harmonize its former ruling that solicitation alone is not enough to give a state jurisdiction with the *International Shoe Co.* case by pointing out that there were sufficient additional activities carried on by the corporate agents in Washington to bring that case within the "solicitation plus" rule, although this point was not even mentioned in the opinion.

At this point it might be interesting to examine subsequent decisions in the state and lower federal courts to determine to what extent they have been influenced by the *International Shoe Co.* case. It seems clear that one result of that decision is to require less corporate activity within the state than was required in the past as a basis of asserting jurisdiction, *i.e.*, certain activities may now subject a foreign corporation to state jurisdiction, although formerly such activities would not have amounted to "doing business." In a recent case,[26] the facts of which are almost on all fours with those of the *Green* case, the *International Shoe Co.* case was cited to support a holding that the defendant corporation was present.

A frequently recurring "mere solicitation" fact situation is that of a foreign railroad corporation engaged in soliciting freight and passenger business. The facts in *Kilpatrick* v. *Texas & P Ry. Co.*[27] are typical. The defendant corporation maintained an office in New York, for the sole purpose of soliciting freight and passenger business. No bills of lading were issued at this office, no settlement of claims made, and no tickets sold. Plaintiff brought an action in New York to recover for personal injuries received in Texas. The District Court applied the "mere solicitation" rule without referring to the *International Shoe Co.* case and granted a motion to dismiss. This decision was reversed in the Circuit Court of Appeals, Judge Learned Hand stating:

> "So far as it [the foreign corporation] must be present' in order to satisfy the territorial limitation upon the powers of a court when acting in personam, it should be enough constitutionally that it shall have extended *its activities* into the territory where the court's process runs."[28] (Italics writer's)

This federal court decision would seem to indicate that solicitation alone may be sufficient for jurisdiction over a foreign corporation. A number of other cases seem to support this view.[29] Although the Supreme Court has not yet held that

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[26] Lasky v. Norfolk & W Ry. Co., 157 Fed. 2d 674 (C.C.A. 6th 1946).
[27] 166 Fed. 2d 788 (C.C.A. 2d 1948).
[28] *Id.* at 791.
[29] In the following cases foreign corporations were held to be subject to jurisdiction where the activities of the corporation agents were mainly, if not entirely solicitatious the courts expressly following the *International Shoe Co.* Case:

solicitation alone will make a foreign corporation subject to the jurisdiction of the state where it occurred, its opinion on the subject has been intimated. Justice Rutledge writing the opinion in *Nippert* v. *City of Richmond*,[30] involving a state's power to tax interstate commerce, said that the *International Shoe Co.* case decided that regular and continuous solicitation constitutes "doing business contrary to prevailing notion."[31]

Whether it is just to require a foreign corporation to defend a suit brought in the forum state should not be mechanically determined by a mere weighing of the amount of activity carried on there; rather a consideration of the nature and quality of the activities carried on within the state and their connection with the obligation sued on should be determinative. Where the cause of action arose from activities carried on by a foreign corporation within the state, the inconvenience and expense of litigation in a foreign jurisdiction should fall on the corporation rather than on the citizens of the forum state who dealt with the corporation. Thus, if a cause of action arises out of a solicitation or solicitations within a state, that state should have jurisdiction to decide the controversy, and this is believed to be the result under the *International Shoe Co.* decision. If the foreign corporation's activities are only single or isolated acts and the cause of action is unconnected with them it seems unjust to subject the corporation to the inconvenience of a suit in a foreign jurisdiction. However, if the corporate operations within the forum are continuous and substantial, even though the cause of action did not arise from those operations, the implication of the *International Shoe Co.* decision is that the corporation may be required to defend a suit in the state where those operations were carried on. According to the dictum the *Nippert* case regular and continuous solicitation would be sufficient.

The "presence" theory of jurisdiction over a foreign corporation is vague and unsatisfactory. The "fair play and substantial justice" theory enunciated in the *International Shoe Co.* case is also somewhat vague and unsatisfactory, but promises better results than the former doctrine. Neither rule affords definite information as to a corporation contemplating *some* activity in other states. In the future as in the past the facts in each case must be examined as each case arises. This is not a desirable state of the law in the United States where business transactions freely cross state lines.

A better and simpler solution to this perplexing and important problem would be to allow a state court to take jurisdiction in any action against a foreign corporation which arises out of an act or acts done by its agents within the state, or when such acts constitute a link in a *series of acts* which culminate in giving rise to the liability sued on. Ample support for such a solution can be found in Supreme Court decisions. A direct analogy for such a rule may be found in the decisions upholding statutes subjecting non-resident motorists to the jurisdiction of the state where the liability sued on arose.[32] Also, the Supreme Court decisions conferring jurisdiction on state courts in actions arising out of the sale of securities by non-residents support this solution to the problem.[33] If the statutes

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Bourze v. Nardis Sportswear, 165 Fed. 2d 33 (C.C.A. 2d 1948); Marlow v. Hinman Milking Mach. Co., 7 F.R.D. 751 (1947); Wooster v. Trimont Mfg. Co. 356 Mo. 682, 203 S.W 2d 411 (1947).

[30] See 327 U. S. 416 (1946).

[31] *Id.* at 422.

[32] Hess v. Pawloski, 274 U.S. 352 (1927).

[33] Henry L. Dougherty v. Goodman, 294 U. S. 623 (1935).

involved in these situations can constitutionally confer jurisdiction upon state courts over non-resident *natural persons*, it seems that the same result should be reached in respect to *foreign corporation*. The suggested rule would allow state courts to take jurisdiction over all causes of action connected with solicitation within the state. It would not include a purely transitory cause of action which is unrelated to any act done within the state. Perhaps in this class of cases there is greater merit in the "fair play and substantial justice" theory than any other. If a corporation is carrying on regular and continuous solicitation within the state there is nothing "unfair" in requiring it to defend a suit on a transitory cause of action, but not otherwise.

It is impossible at the present time to determine whether the *Green* case and its "mere solicitation" rule has been completely absorbed in the broader theory of the *International Shoe Co.* case. However, the reception of the latter case by the state and lower federal courts and the broad language of the case itself indicate that in the near future, if not already, "mere solicitation" by a corporation will be sufficient to subject it to the jurisdiction of the state where the solicitation occurred. Therefore, if the decision in the *Green* case has not veen overruled, it may safely be said that it has been quietly interred.

ARLOE W MAYNE

PAYMENTS TO WIDOWS OF DECEASED EMPLOYEES AS TAXABLE INCOME OF THE WIDOW — I.T. 4027

I.T. 4027,[1] recently issued by the Income Tax Unit of the Bureau of Internal Revenue, has laid down the rule that "irrespective of a plan voluntary or involuntary, definite or indefinite, payments made by an employer to the widow of a deceased officer or employee, in consideration of services rendered by the officer or employee, are includible in the gross income of the widow for Federal income tax purposes." This ruling, which is applicable to payments received beginning January 1, 1951, represents a substantial change from the previous Treasury position.

In 1921, in O.D. 1017, the Treasury held that a payment to the widow of a deceased officer of his salary for two months after his death was a gratuity and was not taxable income of the widow. In I.T. 3329,[3] in 1939, it was ruled that payments made for a reasonable time by a corporation to the widow of a deceased officer were deductible by the corporation as a business expense but were not taxable income to the widow. In this I.T., it was said that "When an allowance is paid by an organization *to which the recipient had rendered no service* [italics, writer s], the amount is deemed to be a gift or gratuity and is not subject to Federal income tax in the hands of the recipient." Thus, an attractive opportunity was offered to employers to make tax free "3329 payments" to widows and still deduct them as a business expense.[4] It is clear, however, that the courts have not generally gone as far as the implications of I.T. 3329.

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[1] 1950 Int. Rev. Bull. No. 21 at 2; 505 CCH par. 6208.

[3] 5 Cum. Bull. 101 [501 CCH par. 52.474]. This was expressly reversed by I. T. 4027. See also T. D. 2090 to the same effect. Dec. 14, 1914 [501 CCH par. 52.474]. This was expressly overruled by I. T. 4027.

[3] 1939-2 Cum. Bull. 153. This was expressly overruled by I. T. 4027 on the point herein discussed.

[4] P-H Students Tax Law Service, Current Matter, par. 10, 182 (1950).