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Conflict of Laws--Securing Service on Corporations

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STUDENT NOTES AND COMMENTS

CONFLICT OF LAWS—SECURING SERVICE ON CORPORATIONS

It is well established that a state has jurisdiction over a corporation present within the state. The problem herein to be considered is one of determining what constitutes presence sufficient for obtaining jurisdiction, and for this purpose certain tests have come to be accepted as controlling.

Domestic Corporations. A corporation may be sued in the state of its incorporation although its business may be in fact carried on elsewhere,[1] the theory being that a corporation is domiciled in the state in which it is chartered and can be said to be sufficiently present there at all times as to be amenable to service.[2] Personal service on its principal officer would always be valid while a statute providing for something less than personal service would be equally valid subject to the condition that the method is one reasonably calculated to give notice of the suit and opportunity to defend.[3]

Foreign Corporations. The problem of presence within the state for the purpose of obtaining jurisdiction is limited largely, if not entirely, to cases in which a corporation is being sued in a state other than the one of its incorporation. The following situations are said to give jurisdiction over a foreign coprration:

(a) *Appearance or bringing of suit.* In a companion note,[4] the writer has discussed appearance as a basis for jurisdiction in the case of an individual. It is enough to say that the same rules apply to appearance by corporations. Likewise, a foreign corporation, by becoming a plaintiff in a cause of action, subjects itself to the jurisdiction of the court to the same extent as a natural person under similar circumstances.[5]

(b) *Consent.* There is no longer any doubt that a state may impose reasonable requirements upon a foreign corporation as a condition to the granting of permission to do business within its

[1] RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 87.
[2] STUMBERG, CONFLICT OF LAWS (2d Ed. 1937) p. 81.
[3] RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 87, comments 2, b.
[4] Note (1945) 33 Ky. L. J. ————.
[5] *Ibid.*

borders.[6] One of the most common of these requirements is that the corporation must appoint an agent to receive service. By appointing such an agent, the corporation is said to have consented to the jurisdiction of the state.[7] The question becomes: Is the consent limited to causes of action arising out of business done within the state or does it extend to transitory causes of action as well? In *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining and Milling Co.*,[8] a fire insurance company filed with the State of Missouri a power of attorney making the Superintendent of the Insurance Department its agent to receive service. The state court held that this constituted consent to suit on a transitory cause of action and the holding was affirmed by the United States Supreme Court in an opinion written by Justice Holmes. Jurisdiction was said to rest on consent, arising out of the power of attorney filed with the state.

The statute frequently provides that, (if the corporation does not appoint an agent), service may be on some state official such as the Secretary of State in suits growing out of business done within the state. Although the corporation cannot be said to have consented in fact, it is frequently said that it has given its implied consent by coming in and doing business. This, however, seems strained. Is it not better to say that the foreign corporation, by coming in and doing business, is present so that it can be subjected to jurisdiction just as a person actually present can be subjected? This theory makes presence the test. As in the case of an individual, the foreign corporation may be served if present in the state and it is present in the state if it is doing business there. There are isolated cases[9] indicating that the same result could be obtained in absence of statute and Professor Scott believes that this is sound.[10] On the other hand, there is no doubt that statutes of this type are valid,[11] provided

[6] Atlantic Refining Co. v. Virginia, 302 U. S. 26 (1937); Railway Express Agency, Inc. v. Virginia, 282 U. S. 440 (1931); Lafayette Insurance Company v. French, 18 How. 404 (1858).

[7] RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 91, comment a.

[8] 243 U. S. 93 (1917).

[9] Wilson Packing Co. v. Hunter, 30 Fed. Cas. 253, No. 17,852 (S. D. Ill. 1879); see Barrow Steamship Co. v. Kane, 170 U. S. 100 at 108 (1898).

[10] Scott, Jurisdiction Over Nonresidents Doing Business within a State (1919) 32 HARV. L. R. 871.

[11] American Railway Express Co. v. Royster Guano Co., 273 U. S. 274 (1927).

that the requirements of due process are satisfied. Service upon a state official, if the cause of action arises out of the business done within the state,[12] has been held to satify this requirement. It is well settled, however, that such procedure is not sufficient as to transitory causes of action, a distinction made by Justice Holmes in the decision mentioned above.[13] If the corporation is actually within the state and doing business there, it may be queried whether the distinction rest on any sound rationalization.

A statute in the state of Washington provided that if the corporation's agent was no longer within the state, service could be had upon the Secretary of State but no provision was made for notice to be given to the corporation of the suit against it. The United States Supreme Court, in *Washington* v. *Superior Court, Etc.*,[14] approved a state [Washington] decision based on this statute, holding that service on the Secretary of State subjected the corporation to jurisdiction even though the corporation had been dissolved, had withdrawn from the state and its agent had moved to California, and no attempt was made by the Secretary to notify the corporation of the suit. Justice Roberts, speaking for the court, justified the decision as necessary to protect persons who had done business with the corporation and said that the corporation could have protected itself by appointing a new agent. This decision is open to criticism in that it apparently dispenses with the usual requirement that service be of such a nature that it is reasonably calculated to give notice to the defendant and to give him opportunity to be heard. Justice Roberts recognized that this requirement exists in the case of individuals but said that the power of the state to exclude a corporation distinguished the corporation cases. This is in seeming contradiction to the general rule that a corporation, just as an individual, cannot be deprived of its property without due process of law.[15] The fact that the corporation could have protected itself is no answer to the argument that such a statute, in failing

[12] *Ibid.*, RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 92, comment a.

[13] See Pennsylvania Fire Insurance Co. v. Gold Issue Mining and Milling Co., 243 U. S. 93 at 96 (1917).

[14] 289 U. S. 361 (1933).

[15] Riverside and Dan River Cotton Mills v. Menneffee, 237 U. S. 189 (1915).

to require notice, violated the due process clause of the Constitution.

Doing Business Within the State. In addition to the statutes which make a state official an agent to receive service if the corporation comes in and does business and does not appoint an agent, a state may by statute provide that if a foreign corporation is doing business within the state, it is subject to service.[16] Various theories have been suggested in support of the validity of this rule, none of which is entirely satisfactory to Stumberg.[17] It is his contention that the best explanation is ". . . that it would be unfair to the plaintiff to compel him to go to another jurisdiction to sue when the cause of action . . . arises out of business done there [in the state] . . .[18]" The writer prefers to express the same idea in terms of the presence theory discussed above. It would seem that if a corporation has come into the state and is doing business there, it is present, and, being present, it is reasonable to make it subject to jurisdiction and, contrariwise, it would be unreasonable to allow it to avoid jurisdiction by failing to appoint an agent.

While the rule is well enough settled, the difficulty lies in determining what constitutes "doing business" so that the rule applies. The New York court has said that there is no precise test either as to the nature or extent of the business that must be done.[19] It must be enough to enable the court to say that the corporation is present for if it is present, it may be served. Whether a corporation is doing business sufficient for jurisdiction to attach is, in the last analysis, a question of due process of law under the federal Constitution.[20] For if it was never present within the state it cannot be served, and a personal judgment against it would deprive it of property without due process of law.

Though each case must be decided on its own facts there are certain tests that have been laid down, chiefly negative in character. For instance, a single transaction is not sufficient to con-

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

[17] STUMBERG, CONFLICT OF LAWS (2d Ed., 1927) pp. 89, 90.

[18] *Ibid.* at 91.

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

[20] Hall v. Wilder Manufacturing Co., 316 Mo. 812, 293 S. W. 760 (1927).

stitute "doing business."[21] The corporation must be there ". . . not occasionally or casually but with a fair measure of permanence and continuity . . ."[22] On the other hand, the business need not be of a sufficient degree or the particular quality that would require it to get a permit to do business or to allow it to sue in the courts of the state.[23] While some courts have held that solicitation of orders is not "doing business,"[24] others have adopted the seemingly better view that continuous solicitation is sufficient to constitute doing business so that jurisdiction can be secured.[25] The courts have held consistently that service on an official of a subsidiary company, though the subsidiary is completely dominated by the parent company, is not sufficient for obtaining jurisdiction.[26] The distinct corporate entity of the subsidiary is emphasized but it can be argued that the susidiary is doing business for the benefit of the parent company and service on the proper official is reasonably calculated to give notice to the parent company.

A comparison of the facts in the following cases will indicate the difficulty of stating with any degree of exactitude the test of what constitutes doing business. In *Tauza* v. *Susquehanna Coal Co.*,[27] a Pennsylvania corporation with its principal office in Philadelphia but with a branch office in New York was sued in New York. The branch office consisted of a sales agent with eight assistants but all sales were subject to confirmation by the home office so that the agents were merely soliciting orders and the contracts were formed in Pennsylvania. The New York court held that the corporation was amenable to service. The acts done were said to be sufficient to enable the court to say

[21] Hutchinson et al. v. Chase and Gilbert, Inc., 45 F. (2d) 139 (C. C. A. 2d, 1930).

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

[23] International Text-Book Co. v. Tone, 220 N. Y. 313, 115 N. E. 914 (1917).

[24] Peoples Tobacco Co., Limited v. American Tobacco Co., 246 U. S. 79 (1918); Davega, Inc. v. Lincoln Furniture Manufacturing Co., Inc., 29 F. (2d) 164 (C. C. A. 2d, 1928).

[25] International Text-Book Co. v. Tone, 220 N. Y. 313, 115 N. E. 914 (1917); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917).

[26] Canon Manufacturing Co. v. Cudahy Packing Co., 267 U. S. 333 (1925); Peoples Tobacco Co., Limited v. American Tobacco Co., 246 U. S. 79 (1918).

[27] 220 N. Y. 259, 115 N. E. 915 (1917).

that the corporation was present and therefore within the jurisdiction of the courts.

The defendant in *Hutchinson et al.* v. *Chase and Gilbert et al*[28] was a Massachusetts corporation which maintained a small office in New York with a small bank account also in New York for the use of this office. On occasion, the directors met there. Stocks had been sold and advertising material was sent out from New York. The contract on which the suit was brought was made in New York but a federal court held that the corporation was not subject to the jurisdiction of the New York courts, saying that there must be some continuous dealings in the state and that it was fairer that the plaintiff should go to Boston. The corporation apparently considered its business sufficiently continuous to warrant maintaining an office in New York at all times. And when it is remembered that the contract sued on was made in the state, the facts in this case may well be regarded as stronger than those in the *Tauza* case. As one court expressed it, if the corporation does business " . . . under the protection of the laws . . . it ought to be liable to the burdens as well as the benefits of the laws."[29]

In a case in a federal district court in Pennsylvania a railroad had a passenger and freight agent in Philadelphia whose business it was to solicit passengers and procure freight. He sold no tickets but took prepaid orders for tickets to be delivered in Chicago. Although the court held that this was not sufficient to give Pennsylvania jurisdiction, nevertheless it was said, "It is obvious that the defendant was *doing* there a *considerable business* of a certain kind. . . . "[30] (Italics supplied).

The writer believes that "doing business" is an unsatisfactory test for determining jurisdiction. As the above cases indicate, the phrase does not have sufficiently definite legal meaning to make for any degree of uniformity. While the test cannot be and should not be too precise, it should be stated in terms that have fairly definite legal connotations. The rule might well be expressed in terms of what is reasonable under the circumstances. If a corporation comes into a state and does an act or

[28] 45 F. (2d) 139 (C. C. A. 2d, 1930).
[29] Wilson Packing Co. v. Hunter, 30 Fed. Cas. 253, No. 17, 852 (S. D. Ill., 1879).
[30] Green v. Chicago, Burlington and Quincy Railway Co., 205 U. S. 530 at 533 (1907).

acts which can reasonably be said to affect its business, it should be considered present for service *in causes of action arising out of that act or those acts.* This is subject, of course, to the requirements of due process.

This rule differs little, if at all, from the one embodied in the non-resident motorist statutes. Such statutes are based on the theory that the individual has come into the state and done an act and that it is necessary for the protection of local citizens that he continue subject to service in actions arising out of that act, even though he has since left the state.[31]

The writer believes that there is no sound distinction between the non-resident motorist who has come into the state and done an act and a foreign corporation that has come in and done an act reasonably affecting its business. The need for protection is as great in one case as in the other and there is no logical reason why jurisdiction should exist in the one and not in the other. The much discussed case of *Doherty & Company* v. *Goodman*[32] adopted the "doing of an act" theory in the case of a non-resident individual who through an agent went into a state and sold securities. This decision can be extended by an easy and logical step to include foreign corporations. Actually the statute involved included non-resident corporations and there is no reason to believe that if the defendant in the case had been such, the decision would not have been the same.

The "doing of business" theory was originated for the purpose of obtaining jurisdiction over foreign corporations. The "doing of an act" theory, an extension of the original theory, has only been applied to individuals up to this date. If the extension should ultimately be applied to foreign corporations, the circle will have been completed. The slow but steady growth of the law is the result of such extensions.

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[31] Hess v. Pawloski, 274 U. S. 352 (1927).
[32] 294 U. S. 623 (1935).