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Conflict of Laws: The Development of the Doing of an Act Theory of Jurisdiction

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Even where the testator has specified a time within which the executor is to sell, "the power (to sell) does not cease because of a failure to exercise it within the time prescribed, and it may be exercised after the expiration of the period in the absence of a clear expression to the contrary."⁴⁸ But if the power of sale is given for a specified purpose which no longer exists, the executor may not sell thereafter.⁴⁹

The personal representative is, of course, subject to individual liability for failure to make disposition or distribution of the personalty within the proper time. As a rule he must make good the loss to the estate. Thus for example, an executor who held cotton for fourteen to twenty months hoping to get better prices, while the price thereof was steadily dropping, was surcharged with the loss.⁵⁰ In *In re Tyson's Estate*⁵¹ the administrator was charged the difference between the inventory value of certain jewelry and the amount realized on the sale of it.

CLARENCE CORNELIUS

CONFLICT OF LAWS: THE DEVELOPMENT OF THE DOING OF AN ACT THEORY OF JURISDICTION

Until comparatively recently, the traditional categorical bases¹ by which jurisdiction is obtained in actions *in personam* had been: first, by the presence of the defendant within the state;² secondly, by the allegiance or domicile of the defendant;³ and thirdly, by the consent of the defendant.⁴ But with the integration of business into large, incorporated units, and with the ever-increasing ease of travel between the states, the traditional means of obtaining jurisdiction became inadequate in the light of the new problems raised.

An early evidence of such inadequacy appeared in the corporation cases. As the law on obtaining jurisdiction over foreign corporations developed, the courts first attempted to apply one of the traditional theories, namely that service could be effected by consent. The initial argument stated that a corporation had domicile only in

⁴⁸ Note 31 A. L. R. 1394, 1395 (1924).

⁴⁹ *Id.* at 1405.

⁵⁰ *Pulliam v. Pulliam, Ex'r*, 10 Fed. 53 (1881).

⁵¹ 80 Pa. Super. Ct. 29 (1922).

¹ See Scott, *Jurisdiction Over Nonresident Motorists*, (1926) 39 Harv. L. Rev. 563 at 569, 570.

² *Darrah v. Watson*, 36 Iowa 116 (1872). Under the traditional theory of "presence", a sub-classification is presented by the general appearance cases (see *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9 (1890)).

³ *Blackmer v. United States*, 284 U. S. 421, 52 Sup. Ct. 252 (1932). The domicile cases also come logically under the traditional allegiance basis.

⁴ *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Beale, *The Jurisdiction of Courts Over Foreigners*, (1913) 26 Harv. L. Rev. 193.

the state of its incorporation,⁵ and that another state might exclude it entirely unless certain conditions were met. Consequently it was made a condition to the corporation's doing business in the state that its consent to defend suit be given. But the weakness of this argument appeared in the inability of the court to point out the actual giving of consent, either objectively or subjectively,⁶ and it was finally vitiated by Mr. Justice Holmes in *Flexner v. Farson*⁷ when he pointed out that:

" . . . The consent that is said to be implied in such cases [where the nonresident defendant is a corporation] is a mere fiction, founded upon the accepted doctrine that the state could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in."

The second attempt of the courts to nationalize jurisdiction over non-resident corporations was founded upon the traditional theory of "presence". Discarding the doctrine that a corporation can be present only in the state of its incorporation, the argument advanced on the assumption that conducting business continuously in another state amounts to the presence of the corporation within the boundaries of that state for the purpose of service, so that service upon an agent of the corporation is valid.⁸

But the employment of each of these traditional bases was such a fictional fabrication that the courts apparently were not satisfied by resort to consent or presence as justifications of the desired result. Hence a new theory evolved, namely the "doing of an act" doctrine, under which the fictional element might be excluded. The conclusion reached was that since a state may, without violating any constitutional limitation, forbid a foreign corporation to do business in the state until it has consented to the jurisdiction of its courts as to causes of action arising out of the business, the state may therefore provide that the doing of acts which constitute continuous business shall subject the corporation to the jurisdiction of its courts as to such causes of action.⁹

The doing of an act concept, thus conceived, required the doing of more than one particular act, and it would seem evident that the widest application which the theory might possibly have would be an instance in which there is not enough activity to constitute continuous business in the ordinary sense. Such a case is *Stevens v. Television*,

⁵ *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519 (1839); *Lafayette Ins. Co. v. French*, 59 U. S. (18 How.) 404 (1865).

⁶ *Old Wayne Mutual Life Ins. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236 (1906); *Bagdon v. Reading Co.*, 217 N. Y. 432, 111 N. E. 1075 (1916).

⁷ *Flexner v. Farson*, 248 U. S. 289, 293, 39 Sup. Ct. 97 (1919).

⁸ *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1916); for a case arising in Kentucky see: *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944 (1913).

⁹ *Scott, Jurisdiction Over Nonresident Motorists*, (1926) 39 Harv. L. Rev. 563.

Inc.²⁰ Here the defendant foreign corporation made a few sales in New Jersey, but was not doing business continuously, and, upon investigation by the authorities, the defendant and its agents left the state. In seeking an injunction, the attorney-general, in accordance with a statute providing substituted service for corporations acting within New Jersey, and on the direction of the court, served the defendant corporation personally outside the state on an *in personam* claim. On special appearance the court held that service based upon the doing of an act, namely the making of sales within the state, was sufficient to vest the court with jurisdiction.

The corporation cases were not the only object to which the doing of an act theory was applied, for, with the increase of automobile transportation and the growing dangers to persons and property resulting from the negligent operation of vehicles on the highways, a need was presented for statutes subjecting nonresident motorists to the jurisdiction of courts at the *locus* of the wrong. Here, again, the well-established principle of jurisdiction by presence was not available, for the nonresident had left the state. The basis of allegiance was of no avail for the allegiance of the defendant was toward another sovereign. So New Jersey enacted the first nonresident motorist statute upon the idea of consent, requiring the nonresident motorist upon entering the state to execute an express consent appointing the secretary of state as agent, with whom service might be left in actions arising out of a defendant's negligent operation of his automobile on the public highways.²¹

But Massachusetts, profiting from the introduction of the doing of an act theory into the corporation cases, later passed a statute providing that the act of using its highways on the part of a nonresident motorist constituted an implied appointment of the registrar of motor vehicles as the agent of the nonresident upon whom service might be made.²²

The last and most recent step in the development of the doing of an act principle arose in the individual enterpriser cases, as an extension of the foreign corporation and the nonresident motorist rules. In the case of *Doherty & Co. v. Goodman*²³ the defendant, a New York individual, operated his business by designating an agent in Iowa to sell securities. A controversy arose and process was served on the agent under a statute providing that a corporation or individual might be served for actions arising out of the business by delivery of process to its agent where the corporation or individual was not a resident of the county in which the cause of action was created. Meeting the defendant's claim of discrimination by saying that the statute affected residents of other counties of Iowa just as much as it did the

²⁰ 111 N. J. Eq. 306, 162 Atl. 248 (1932).

²¹ Discussed in *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30 (1916).

²² Discussed in *Hess v. Pawloski*, 274 U. S. 352, 47 Sup. Ct. 632 (1927).

²³ 294 U. S. 623, 55 Sup. Ct. 553 (1935).

residents of other states, the court held, on special appearance, that the defendant, through the act of establishing an agency within the county, voluntarily appointed his own agent by the force of the statute to receive substituted service in actions *in personam* growing out of that agency. The Supreme Court of Iowa, in reaching the same result on its hearing of this case,¹⁴ had subscribed to the view that the "true rule" is laid down by the Restatement of the Conflict of Laws, citing section 90:

"A state can exercise through its courts jurisdiction over an individual who has done an act or caused an event within the State, as to a cause of action arising out of such an act or event, if by the law of the state at the time when the act was done, a person by doing the act or causing the event subjected himself to the jurisdiction of the state as to such cause of action."¹⁵

In retrospect and by way of observation, then, it would seem that the growth and development of the doing of an act theory was fostered by the influence of practical necessity. From a pragmatically philosophical standpoint it would seem to be axiomatic that where there is more than one theory which may be applied to a given situation, the one which is legally the most correct and which also reaches the most expedient result is most worthy of adoption. Since the doing of an act theory fulfills these requirements, it would seem most worthy of adoption. Furthermore, there would seem to be no theoretical or practical obstacle to applying the doing of an act doctrine with just as great a force in the case of nonresident motorists or individual enterprisers as it has been applied in dealing with corporations.

What objections then might be offered to the continued development of the doing of an act doctrine? There are two conceivable exceptions which might be taken by any defendant that suggest themselves to this writer. First, the defendant may offer the objection of personal inconvenience; but the courts have shown this to be an inconvenience that is reasonable. Moreover, answering to any suit whatsoever involves the element of inconvenience, the differentiation being a matter of degree; and if it is reasonable there can be no personal objection, for the public as a whole is served. Secondly, the defendant may complain that as a citizen of state X he may be summoned by substituted service for doing an act in state Y by virtue of a statute in force in the latter, while if he were a citizen of state Y and were to do the same act in X he would not be subject to service, either because X has no statute or because the statute is very narrow

¹⁴ *Goodman v. Henry L. Doherty & Co.*, 218 Iowa 529, 255 N. W. 667 (1934); the court stated that it rested its opinion upon the decision it had rendered in the "identical" case (involving a like action against the same defendant) of *Davidson v. Henry L. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700 (1932) in which it quoted sec. 90 of the Restatement, Conflict of Laws *infra*, n. 15.

¹⁵ Restatement, Conflict of Laws (Tentative draft 1925) sec. 90. Except for a slight change in wording this same provision appears in the Restatement, Conflict of Laws (1934) at sec. 84.

in scope. Here is a practical objection which might be removed by the adoption of a uniform act.

It is submitted, therefore, that the statutes relating to jurisdiction over nonresidents should undergo study and revision by a national committee; that the revised statutes should employ the doing of an act theory as one of the bases upon which nonresidents are to be subjected to the jurisdiction of courts at the *locus* of the wrong, for the reasons previously pointed out; and, finally, that such a model statutory section, thus compiled, should be presented in the form of a uniform act¹⁸ for adoption by all the states.

HOWARD E. TRENT, JR.

INTERPRETATION OF KENTUCKY STATUTES CONCERNING DIVISION FENCES

At common law there was no duty upon the landowner to erect and maintain fences between himself and his neighbor. Each owner was bound at his peril to keep his cattle upon his own lands whether the lands of his neighbors were fenced or unfenced.¹ However where an owner of land and his grantors have for more than twenty years maintained a specific portion of a partition fence a spurious kind of easement may arise by prescription.² The easement seems to be founded upon the duty which at common law required the owner of a close at his peril to keep his cattle thereon, and to prevent them from trespassing on an adjoining close; and when the owner of the latter erected a fence for his protection, and maintained it for the prescriptive period, he was deemed to have discharged his neighbor from his original duty, and to have become bound to protect his own close.³

In Kentucky the matter of division fences, their construction and maintenance is governed by statute. Section 1784 of the Kentucky Statutes applies to improved lands and provides:

"When a division fence is desirable, or is made necessary by the division of improved or enclosed lands, or no fence or division fence exists between the improved or enclosed lands of adjoining owners . . . either party may after he has built a lawful fence upon his portion of the line require the other to erect a lawful fence . . . upon his portion of the line . . . and if he fails to do so, after three months notice, in writing, may erect such fence, and the cost of erecting such fence shall constitute a lien, superior to all others, upon the land of the recusant in favor of the party erecting such fence, and shall be enforced as other liens."⁴

¹⁸ For an interesting discussion of uniform acts and their desirability, see Williston, *Life and Law* (1940) 217-219.

¹ Harper, *Torts* (1933) sec. 166.

² *Carter v. Riegel*, 54 N. J. L. 498, 24 Atl. 484 (1892).

³ *Carter v. Riegel*, 54 N. J. L. 498, 24 Atl. 484 (1892); see note 68 Am. Dec. 626 at 628 (1885).

⁴ Carroll's *Kentucky Statutes* (Baldwin, 1936) sec. 1784.