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Foreign Corporations - Jurisdiction - Degree of Business Activity Necessary to Subject the Foreign Corporation to Jurisdiction

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injunction against it, thereby deciding whether the use of adjoining land is lawful. It can be said then that persons often have the option of rendering another's act lawful or unlawful, and courts which have held laws, allowing such an option, to be invalid as a "delegation of legislative power", seem to have overlooked this treatment. Thus, such courts are subject to the argument that it is the legislature which has laid down restrictions, to be imposed under certain circumstances, and the private person's act is just a "circumstance" which brings a situation under the law.

The courts which strike down the non-signer provision may be concerned with the plight of the retailer whose price is fixed. But most courts permit the legislature to fix prices, and the retailer is equally oppressed whether his price is subject to the whim of the legislature or of someone else. A few courts hold that all men are free to set their own price; the legislature is held to have practically no price-fixing power, and thus none to delegate. If the courts are interested in the retailer's freedom, they should adopt this position, rather than the pretext that the legislature has delegated its power to the manufacturer.

George Lincoln

FOREIGN CORPORATIONS–JURISDICTION–DEGREE OF BUSINESS ACTIVITY NECESSARY TO SUBJECT THE FOREIGN CORPORATION TO JURISDICTION

Defendant, a New Jersey corporation, sold a machine of special design to an Illinois partnership, which in turn loaned it to the plaintiff, a Georgia resident. In the contract of sale, the defendant expressly warranted that the machine would be capable of producing certain tubing. When it failed to function properly, the defendant undertook to repair it at the request of the plaintiff. In the course of this operation, defendant's representatives came into Georgia. Under their supervision, expenses in excess of $11,000 were incurred, and plaintiff paid this amount. In the plaintiff's action for breach of warranty, based on doing business in Georgia, the defendant filed a plea to the jurisdiction of the court on the ground that the defendant corporation had not been doing business in the State of Georgia. The trial court entered judgment sustaining the plea and this holding was affirmed in the court of appeals which ruled that the defendant's activities did not constitute doing business in Georgia. *Lamex, Inc. v. Sterling Extruder Corporation,* 109 Ga. App. 92, 135 S.E.2d 445 (1964).

The purpose of this case note is to determine to what extent a foreign corporation may engage in a business activity within a state other than its domicile, without subjecting itself to the jurisdiction of the courts of that state. The scope of this inquiry is primarily limited to those states which determine the question of jurisdiction according to the traditional standard of doing business (Georgia is such a representative state). The statutory expansion of this concept will be noted briefly to illustrate the trend toward increasing the permissible scope of state jurisdiction over foreign corporations.

It is generally recognized, in the field of corporation law, that the term "doing business" has three separate meanings. The courts have long recognized a distinction among the activity required for a business (1) to qualify under the licensing and regulatory statutes of a state,[1] (2) to be brought within the state's power of taxation,[2] and (3) to be made amenable to service of process.[3] It is commonly accepted that a lesser degree of activity is required to satisfy the jurisdictional requirement than for either licensing or taxation.[4]

There is, however, no recognized standard which can be used to determine conclusively whether a foreign corporation is, in fact, doing business.[5] If anything approaching such a rule exists, it might be a statement to the effect that the nature and extent of activity must be such as to "warrant the inference that the corporation has subjected itself to the

[1] The question of qualification commonly arises where the defendant resident raises as a defense a state statute denying unlicensed foreign corporations doing business within the state access to the courts of the forum. The court must then determine whether the corporation was, in fact, doing business in order to rule on the validity of the defense. For qualification purposes, a foreign corporation is doing business within a state when it transacts "some substantial part of its ordinary business therein." Royal Insurance Co. v. All States Theaters, 242 Ala. 417, 422, 6 So. 2d 494, 497 (1942).

[2] The general rule in this area appears to be that the power to tax will be upheld where the foreign corporation has a sufficient nexus or connection with the state. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[3] The nature and extent of business contemplated by licensing statutes is one thing; However, "activities insufficient to make out the transaction of business within these statutes may yet be sufficient to bring the corporation within the state so as to make it amenable to process." Tauza v. Susquehana Coal Co., 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917) (Cardozo, J.).

[4] International Harvester Company of America v. Kentucky, 234 U.S. 579 (1914); International Text Book Co. v. Tone, 220 N.Y. 313, 115 N.E. 914 (1917); Lamont v. Moss Cigar Co., 218 Ill. App. 435 (1920); Hartstein v. Seidenbach's Inc., 129 Misc. 687, 222 N.Y.S. 404 (1927).

[5] People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1917); Miller v. Tulsa Petroleum Company, 117 F. Supp. 359 (M.D. Pa. 1953).

local jurisdiction."[6] In the final analysis, then, each case must rest on its own peculiar set of facts.[7]

Often a question is raised as to whether the corporate activity has been repeatedly carried on within the forum. Where the answer is in the affirmative, the courts have overwhelmingly sustained jurisdiction.[8] Normally, in the absence of "single-act" jurisdictional statutes,[9] an isolated transaction will not be equated with the doing of business,[10] but, in certain jurisdictions, constituting a small minority, such a transaction has been deemed sufficient to subject a foreign corporation to in personam jurisdiction.[11] Other tests commonly applied to determine the question of doing business include: the maintenance of offices or showrooms;[12] the presence of agents or officers;[13] and the performance of services within the state.[14]

Turning now to the *Lamex* case, it appears that the opinion of the Georgia court was based upon authority which was improperly applied. The court relied heavily on the test used in *Redwine v. United States Tobacco Co.*,[15] disregarding the fact that this was a tax case,

[6] People's Tobacco Co. v. American Tobacco Co., *supra* note 5, at 87. *Accord*, Erving v. Chicago & N.W. Ry., 171 Minn. 87, 214 N.W. 12 (1927); Armstrong Co. v. New York Cent. & H.R.R. Co., 129 Minn. 104, 151 N.W. 917 (1915); Scene-in-Action Corp. v. Knights of the Ku Klux Klan, 261 Ill. App. 153 (1931).

[7] Favell-Utley Realty Co. v. Harbor Plywood Corp., 94 F. Supp. 96 (N.D. Cal. 1950); Atlas Mut. Ben. Ass'n v. Portsceller, 43 Del. 298, 46 A.2d 643 (1945); Dobson v. Maytag Sales Corp., 292 Mich. 107, 290 N.W. 346 (1940); J. R. Watkins Co. v. Hamilton, 32 Ala. App. 361, 26 So. 2d 207 (1946).

[8] Housing Authority v. Brown, 244 N.C. 592, 94 S.E.2d 582 (1956); Clay v. Kent Oil Co., 72 S.D. 629, 38 N.W.2d 258 (1949); Halpin v. North American Refractories Co., 151 Misc. 764, 272 N.Y.S. 393 (1934).

[9] 14 DE PAUL L. REV. 202 (1964).

[10] Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949), *cert. denied* 339 U.S. 947 (1950); Dratz v. Occidental Hotel Co., 325 Mich. 699, 39 N.W.2d 341 (1949); Schultz v. Long Island Mach. & Equip. Co., 173 So. 569 (La. App. 1937).

[11] S. Howes Co., v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954), *appeal dismissed* 348 U.S. 983 (1955); Times Bldg. Co. for Use of Gray-Knox Marble Co. v. Cline, 233 Ala. 600, 173 So. 42 (1937); Harnischfeger Sales Corp. v. Sternborg Co., 179 La. 317, 154 So. 10 (1934); State v. Gregory, 209 Wis. 476, 245 N.W. 194 (1932).

[12] Dahl v. Collette, 202 Minn. 544, 279 N.W. 561 (1938); Swasey v. Knopf, 150 Misc. 541, 269 N.Y.S. 651 (1933).

[13] Southeastern Distributing Co. v. Nordyke & Marmon Co., 159 Ga. 150, 125 S.E. 171 (1924); Taylor v. Friedman Co., 152 Ga. 529, 110 S.E. 679 (1922).

[14] Boney v. Trans-State Dredging Co., 237 S.C. 54, 115 S.E.2d 508 (1960); Malooly v. York Heating & Ventilating Corp., 270 Mich. 240, 258 N.W. 622 (1935).

[15] 209 Ga. 725, 75 S.E.2d 556 (1953). In this case, the Georgia Supreme Court held that promotional activities by a foreign corporation did not constitute doing business within the forum as the activity was not engaged in with the prospect or purpose of making a profit.

necessitating a greater degree of business activity for a jurisdictional basis than that required to make a foreign corporation subject to ordinary process.[16]

The same lack of discernment colored the court's reliance on the case of *York Mfg. Co. v. Colley*,[17] which involved a question of licensing. Here, a contract made in interstate commerce provided for the shipment to a Texas buyer of an ice plant which was to be assembled at buyer's expense under the supervision of an expert furnished by seller. When a controversy arose over the contract, the defendant buyer contended that the installation aspect was intrastate in character, and therefore precluded the plaintiff from maintaining a cause of action since it was not licensed to do business within the state. The Supreme Court rejected the defendant's contenton, holding that, as the contract was indivisible and made in interstate commerce, plaintiff was not required to be licensed in the State of Texas. The Georgia court, in relying on this case, ignored the fact that, though the matter to be considered concerns questions of licensing, in the determination of jurisdiction, licensing is of scant concern.[18]

Considering the case of *Georgia Lumber & Veneer Corp. v. Solem Machine Co.*,[19] the court of appeals assumed the facts were analagous to *Lamex*, but a close examination shows that this assumption was erroneous.[20] A marked difference between the fact situation is present, in that (1) the repair service furnished in the *Solem* case was done merely as an accommodation, and (2) no local expense was incurred by the repairman. Furthermore, this case also relies upon the test set forth in the *Redwine* Case,[21] thus using a tax standard in a matter concerned solely with jurisdiction.

The *Lamex* decision was not based upon the "isolated transaction" test,[22] which, if it be conceded that the defendant was involved in Georgia in but one isolated transaction, would have constituted justification for the holding of the court of appeals. Rather, the court chose to follow

[16] *Supra* note 4.

[17] 247 U.S. 21 (1918).

[18] It has long been recognized that even where the business carried on by a corporation is entirely interstate in character, this factor will not render the corporation immune from the ordinary process of the courts of the state. International Harvester Company of America v. Kentucky, 234 U.S. 579 (1914).

[19] 150 F. Supp. 126 (M.D. Ga. 1957).

[20] *Ibid.* In this case the extent of defendant's activity was: (1) starting a sanding machine which defendant had been sold to plaintiff who installed it; (2) demonstrating its operation to plaintiff's employees; (3) inspecting the initial operation; and (4) providing service and repair for a nominal charge. The service activity amounted to approximately sixteen work days over a one year period.

[21] *Supra* note 15.

[22] *Supra* note 10.

Allied Finance Co. v. Prosser,[23] a case that blatantly overlooked decisions which held that single transactions were sufficient to constitute doing business.[24] In relying upon the "isolated transaction" test the Georgia court clearly lags behind current thought on this matter. As a result, the status of the law in Georgia more closely resembles the "rigid" rule set forth in *Pennoyer v. Neff*,[25] than the more flexible standard enunciated in *International Shoe Company v. State of Washington*,[26] which expanded the permissible scope of state jurisdiction over non-resident defendants.[27]

In Illinois, the yardstick of *International Shoe*, announced by the Supreme Court,[28] was adopted by the General Assembly in its revision of the Civil Practice Act in 1955,[29] and among other things, provided that one is subject to service for a cause of action arising from the transaction of any business within the state.[30] The constitutionality of this amended provision was sustained two years later, and it was recognized then that the state had a legitimate interest in "providing redress in its courts against persons, who, having substantial contacts with the state, incure obligations to those entitled to the state's protection."[31] Furthermore, in recent decisions the state's requirements for jurisdiction have been further relaxed so as to permit maximum application of the "minimum contact" rule set forth in *International Shoe*.[32]

The facts in the present case tend to show that the business activity of the defendant constituted far more than an isolated transaction or "single-act". It is true that under the original sales contract the defendant

[23] 103 Ga. App. 538, 119 S.E.2d 813 (1961).

[24] *Id.* at 541, 119 S.E.2d at 816. In this case the Georgia court denied service of process holding: "We can find no case where the courts have stretched the term doing business to include a single transaction entered into by an individual." *Contra*, see *supra* note 11.

[25] 95 U.S. 714 (1877). In this decision, the Supreme Court equated in personam jurisdiction to physical power over the defendant.

[26] 326 U.S. 310, 316 (1945). In this landmark case on the subject it was held: ". . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

[27] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[28] *Supra* note 26.

[29] Berlemann v. Superior Distributing Co., 17 Ill. App. 2d 522, 151 N.E.2d 116 (1958). This case discussed the legislative intent for the amendment and cited International Shoe Company v. Washington, *supra* note 21.

[30] ILL. REV. STAT. ch. 110, § 17 (1963).

[31] Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[32] Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Hertz Corp. v. Taylor, 15 Ill. 2d 552, 155 N.E.2d 610 (1959).

was bound to make the adjustments necessary to produce a workable installation. However, nothing in this provision required that the defendant purchase material within the state, supervise and direct local personnel, and utilize local plants in the undertaking.

The expense incurred by the defendant was the result of its continuous and regular activity in connection with several subsidiary contracts executed with local business concerns, and this activity would seem to be of sufficient extent so as to make the defendant amenable to process.[33] Accordingly, it would appear that there was little basis here for application of the "single-transaction" test, and it seems that in selecting the standard that it did here, the Georgia court gave clear notice that it has not yet chosen to seek a broad basis of jurisdiction over foreign corporations.

Michael Toomin

[33] "To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." International Shoe Company v. Washington, *supra* note 26, at 319.

HUSBAND AND WIFE–TORTS–INTERSPOUSAL IMMUNITY: PROCEDURAL OR SUBSTANTIVE BAR?

The plaintiff was a passenger in an auto driven by her husband at the time an accident occurred between the husband's vehicle and another. The wife brought suit for personal injuries sustained in the accident against the special administrator of the estate of her deceased husband, who died prior to the commencement of the action. The issue, thus presented, is can an injured wife maintain a tort action against her husband's estate for a negligent act committed by the deceased husband during coverture? The trial court held that such an action can be maintained. On appeal that decision was affirmed. *Poepping v. Lindemann*, 128 N.W.2d 512 (Minn. 1964).

Minnesota does not allow a personal action between husband and wife for an injury occurring during coverture.[1] May the fact that the tortfeasor husband is demised give rise to a cause of action where none is permitted between living spouses? Under Minnesota's abatement and survival acts,[2] a cause of action arising out of bodily injuries or death

[1] Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920).

[2] MINN. STAT. ANN. ch. 573, § .01 (1947).