

Procedure - Foreign Corporation Held Not Subject to Illinois Jurisdiction under Civil Practice Act, Section Seventeen, unless Physically Present When "Doing Business" in Illinois - *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959)

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provision of the Railway Labor Act does not unreasonably violate an employee's right to contract. Further, infringement which might occur would be a reasonable exercise of Congress' power to regulate interstate commerce.

The more difficult point to resolve is whether freedom of speech is violated by the use of funds, collected under a union shop clause, to support programs which the plaintiffs oppose. Our courts have realized that in certain instances the right of free speech must be abridged in order to maintain our security. The United States Supreme Court has stated that although the right of freedom of speech is fundamental, it is not absolute. In *Whitney v. California*,<sup>11</sup> speaking of the rights of free speech and assembly, Mr. Justice Brandeis said: "Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, *economic*, or moral."<sup>12</sup> There are many cases where freedom of speech has been restricted by labor legislation, but most of these cases deal with preventing employers from using coercive language to dissuade employees from exercising their collective bargaining rights.<sup>13</sup>

When this case or a case involving similar facts and presenting the same issue reaches the United States Supreme Court, it is highly possible that the decision will not support the holding of the Georgia courts. This decision seems to go against the trend found in the Supreme Court decisions and would cause great repercussions in organized labor which would be adverse to the general welfare of the nation. For these reasons it does not seem probable that this decision will be affirmed by the Supreme Court of the United States.

<sup>11</sup> 274 U.S. 357 (1927).

<sup>12</sup> *Ibid.*, at 373 (emphasis supplied).

<sup>13</sup> *N.L.R.B. v. Bailey*, 180 F.2d 278 (C.A. 6th, 1950); *N.L.R.B. v. Kropp Forge*, 178 F.2d 822 (C.A. 7th, 1949); *N.L.R.B. v. Winona Textile Mills*, 160 F.2d 201 (C.C.A. 8th, 1947); *N.L.R.B. v. American Tube Bending*, 134 F.2d 993 (C.C.A.2d, 1943).

PROCEDURE—FOREIGN CORPORATION HELD NOT SUB-  
JECT TO ILLINOIS JURISDICTION UNDER CIVIL  
PRACTICE ACT, SECTION SEVENTEEN, UNLESS  
PHYSICALLY PRESENT WHEN "DOING  
BUSINESS" IN ILLINOIS

In 1953, after a series of negotiations at plaintiff's office in Chicago, between defendant, a New York manufacturing corporation not licensed to do business in Illinois, and plaintiff, an Illinois distributor of office machines, a contract was allegedly entered into, the terms of which were stated in a letter sent from defendant in New York to plaintiff in Illinois.

Under this agreement plaintiff, who had been selling defendant's machines in Illinois since 1939, was made exclusive distributor of Addo machines in the Illinois area. Upon receipt of orders from plaintiff, defendant delivered machines to an independent carrier in New York for shipment to plaintiff in Illinois. Over a two and one-half year period, \$150,000.00 worth of machines were purchased by plaintiff in this manner. Upon defendant's repudiation of the agreement and its appointment of other Illinois distributors, plaintiff filed suit in Illinois, claiming Illinois had jurisdiction over defendant Addo under Section 17(1)(a) of Chapter 110, Illinois Revised Statutes, 1955, and joined the Illinois distributors as co-defendants.<sup>1</sup> Addo filed a special appearance to contest jurisdiction, and an order was entered quashing service of summons, which was affirmed by the appellate court.<sup>2</sup> The Supreme Court of Illinois affirmed the lower courts, holding Section 17(1)(a) inapplicable, in that defendant was not deemed to have established those minimum contacts with Illinois necessary to submit to the jurisdiction of that state. *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959).

The constitutional question of due process is always involved where a state exercises in personam jurisdiction over absent nonresidents. Originally, because of the *capias ad respondendum*, due process came to be synonymous with physical power.<sup>3</sup> As formulated in *Pennoyer v. Neff*,<sup>4</sup> due process could only be satisfied where a state had actual physical control over the person of the defendant. Due to the rapid change of social, technological, and legal concepts, this stringent limitation of a state's exercise of jurisdiction gave rise to various legal fictions,<sup>5</sup> especially where the defendant was a corporation.<sup>6</sup> In such a case the complexity increased because of the rule that a corporation's legal entity was deemed to exist only in the state of incorporation.<sup>7</sup> Therefore, it was a logical consequence of the physical power doctrine that a corporation could only be sued in

<sup>1</sup> Section 17(1)(a) provides: "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts: (a) The transaction of any business within this State...."

<sup>2</sup> *Grobark v. Addo Machine Co.*, 18 Ill. App.2d 10, 151 N.E.2d 466 (1958).

<sup>3</sup> *McDonald v. Mabee*, 243 U.S. 90 (1917).

<sup>4</sup> 95 U.S. 714 (1877).

<sup>5</sup> *Westcott-Alexander v. Dailey*, 264 F.2d 853 (C.A. 4th, 1959); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (C.C.A.2d, 1931).

<sup>6</sup> *Westcott-Alexander v. Dailey*, 264 F.2d 853 (C.A. 4th, 1959).

<sup>7</sup> *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

the state of its creation.<sup>8</sup> The concepts employed to circumvent this conclusion included such things as the "consent" doctrine,<sup>9</sup> the "presence" doctrine,<sup>10</sup> the "doing business" doctrine<sup>11</sup> and the upholding of various state statutes of requiring the appointment of a resident agent to receive service of process as a condition precedent to being permitted to do business in the state.<sup>12</sup>

In *International Shoe Co. v. Washington*,<sup>13</sup> the Supreme Court attempted to do away with the existing confusion by laying down a new test. In holding that jurisdiction attached over a nonresident corporation by virtue of its employment of agents within the forum state to solicit orders with authority to contract for display rooms and equipment the court said:

[D]ue process requires only that in order to subject a defendant *in personam*, he have certain *minimum contact* with it such that the maintenance of the suit does not offend "traditional notions of *fair play and substantial justice*."

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the *quality and nature* of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no *contacts, ties, or relations*.<sup>14</sup>

Thus, in a relatively short period, the foundation for the test of due process changed from the strict requirement of physical power over the defendant to the flexible requirement of minimum contacts between the defendant corporation and the forum state. The factors to be considered in determining whether in a given case, minimum contacts have been established, include such things as, the nature and character of the busi-

<sup>8</sup> *Paul v. Virginia*, 8 Wall. (U.S.) 168 (1868).

<sup>9</sup> *Washington v. Superior Court*, 289 U.S. 361 (1933); *LaFayette Insurance Co. v. French*, 59 U.S. 404 (1855).

<sup>10</sup> *Philadelphia & Reading R.R. v. McKibben*, 243 U.S. 264 (1917); *Pennsylvania Lumbermen's Mutual Fire Insurance Co. v. Meyer*, 197 U.S. 407 (1905); *Tanza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

<sup>11</sup> *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (C.C.A.2d, 1931).

<sup>12</sup> *Commercial Mutual Accident Co. v. Davis*, 213 U.S. 254 (1909); *St. Clair v. Cox*, 106 U.S. 350 (1882).

<sup>13</sup> 326 U.S. 310 (1945).

<sup>14</sup> *Ibid.*, at 316, 319 (emphasis supplied).

ness;<sup>15</sup> the number and type of activities undertaken in the forum state;<sup>16</sup> whether such activities gave rise to the cause of action;<sup>17</sup> and whether the forum state has some special interest in granting relief to plaintiff, as a resident of the state.<sup>18</sup> The furthest extension of jurisdiction under the doctrine was reached in *McGee v. International Life Insurance Co.*,<sup>19</sup> where the only contacts with the state of the forum were *the mailing* of a reinsurance certificate to a California resident offering to insure him in accordance with an earlier policy, and his acceptance and payment of the premiums *by mail* until his death.

By virtue of the authority of these decisions, many states were quick to pass statutes which in general enunciated the minimum contact doctrine. In 1955, Illinois followed suit by an amendment to Section 17, Chapter 110, which conferred jurisdiction over any person or corporation transacting business within the state. The amendment withstood the test of constitutionality in *Nelson v. Miller*,<sup>20</sup> and was invoked by plaintiff in the *Grobark* case in an attempt to subject defendant to the jurisdiction of the Illinois courts. Although the *Nelson* case involved a tort, which provides another basis for jurisdiction under Section 17, the court spoke in sweeping terms when it defined the legislative intent motivating Sections 16 and 17: "Sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause."<sup>21</sup>

Thus, *Nelson* is seen as a declaration of intention by the Illinois Supreme Court to conform to the trend of expanded jurisdiction over absent nonresident defendants.<sup>22</sup> In subsequent decisions involving Section 17(1) (a), the courts held jurisdiction to attach over out-of-state defendants by virtue of: (1) a contract negotiated for and executed in Illinois, for the sale of a part interest in an oil well located in Texas;<sup>23</sup> (2) the formation

<sup>15</sup> *MacInnes v. Fountainebleau*, 257 F.2d 832 (C.A.2d, 1958).

<sup>16</sup> *International Shoe Co. v. Washington*, 326 U.S. 321 (1945); *Green v. Chicago, Burlington & Quincy R.R. Co.*, 205 U.S. 530 (1906).

<sup>17</sup> *Simon v. Southern R.R. Co.*, 236 U.S. 115 (1915); *French v. Gibbs*, 189 F.2d 787 (C.A.2d, 1951).

<sup>18</sup> *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Traveler's Health Association v. Virginia*, 339 U.S. 643 (1950).

<sup>19</sup> 355 U.S. 220 (1957).

<sup>20</sup> 11 Ill.2d 378, 143 N.E.2d 673 (1957).

<sup>21</sup> *Ibid.*, at 389, 679 (emphasis supplied).

<sup>22</sup> In *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957), the court said: "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and [individuals]."

<sup>23</sup> *Bluff Creek Oil Co. v. Green*, 257 F.2d 83 (C.A. 5th, 1958).

of an employment contract in Illinois with an Illinois resident, where the work was to be performed within the state;<sup>24</sup> (3) the mere solicitation and securing of two purchase orders in Illinois by defendant's agent, coupled with the promise to send an employee to train purchasers in the use of the equipment.<sup>25</sup>

In all of these cases the out-of-state corporation employed an agent within the forum state to conduct some activities therein. In the instant case, an agent came into Illinois for preliminary negotiations with the plaintiff, but no contract was made at that time. Subsequently, a letter was sent from defendant in New York to plaintiff in Illinois, which purportedly made plaintiff exclusive distributor of defendant's machines in the Illinois area. Only the appellate court considered this letter as a possible basis for jurisdiction, but rejected the proposition that the letter was a contract made in Illinois, holding it to be, "unilateral and void for want of mutuality."<sup>26</sup> The issue therefore resolves itself into a determination of whether the above activities, coupled with the resulting \$150,000.00 worth of machines shipped into Illinois over a two and one-half year period, constitute minimum contacts with Illinois, when defendant remained outside Illinois during the entire period. In reaching its decision, the court emphasizes this absence of activity by the defendant within the state, noting: (1) at no time did defendant maintain an office or employ an agent in Illinois; (2) defendant shipped machines into Illinois by independent carrier; (3) sales of machines were consummated upon receipt of orders in New York; and (4) plaintiff and defendant had a purchaser-seller, and not a principal-agent relationship.

Therefore, what the court does in this case is to interpret the "transaction of any business" provision of Section 17 quite literally, by requiring the commission of some definite act or the transaction of some business *within the forum state*.<sup>27</sup> Quoting directly from the recent Supreme Court case of *Hanson v. Denckla*,<sup>28</sup> the court says:

[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.<sup>29</sup>

In its reasoning, the court, in *Grobark*, relied heavily on the *Hanson* case. In that case, the settlor of a trust died domiciled in Florida. Prior

<sup>24</sup> *Sunday v. Donovan*, 16 Ill. App.2d 116, 147 N.E.2d 401 (1958).

<sup>25</sup> *Berlemann v. Superior Distributing Co.*, 17 Ill. App.2d 522, 151 N.E.2d 116 (1958).

<sup>26</sup> *Grobark v. Addo Machine Co.*, 18 Ill. App. 10, 15, 151 N.E.2d 466 (1958).

<sup>27</sup> *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615 (N.D. Ill., 1959).

<sup>28</sup> 357 U.S. 235 (1958).

<sup>29</sup> *Ibid.*, at 253.

to her death the deceased had appointed a Delaware trustee, while she was in Delaware. The trustee and the trust assets remained exclusively in Delaware. The United States Supreme Court found Florida had jurisdiction over neither the trustee nor over the trust assets.<sup>30</sup> In ruling on this relatively simple question of jurisdiction, the court used the following strong language, quoted in the *Grobark* case:

[I]t is a mistake to assume that this trend (in expanding jurisdiction) heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions [on in personam jurisdiction] are a consequence of territorial limitations on the power of the respective States.<sup>31</sup>

In the *Grobark* case, the dissenting opinion of Justice Davis, joined by Justice Schaeffer, noted the apparent contradiction of the majority opinion with the *Nelson* case, where the legislative intent was defined as the "assertion of jurisdiction over nonresident defendants to the extent permitted by the due process clause." In declaring defendant Addo to have the necessary minimum contacts, Justice Davis referred to: (1) defendant's negotiations with plaintiff in Chicago to establish the relationship; (2) the sale of \$150,000.00 worth of defendant's machines to an Illinois resident over a two and one-half year period; (3) the presence of the individual resident defendants, and the inability of plaintiff to join them in any New York action; and (4) the underlying purpose of the minimum contacts doctrine which he felt this case defeats.

The *Grobark* case is seen as a limitation of the trend of expanding jurisdiction over foreign corporations and individuals, to which Illinois had expressly conformed previously. In interpreting Section 17(1)(a) as requiring, literally, the transaction of business by the defendant within the state, the court is, in effect, limiting the decisions in *Traveler's Health Association v. Virginia*,<sup>32</sup> and *McGee v. International Life Insurance Co.*,<sup>33</sup> to contracts of insurance. A case decided after *Grobark*, *Insull v. New York World-Telegram Corp.*,<sup>34</sup> expressly adhered to *Grobark* and reached the same conclusion. In denying jurisdiction over an out-of-state publisher whose only contacts with Illinois were the shipping of newspapers which allegedly contained libelous material to several Illinois newsdealers and subscribers, the court said:

Although jurisdiction premised upon such a transaction [a contract for insurance] has been sustained as constitutional in terms which could also apply to other types of business transactions . . . we are not thereby authorized to

<sup>30</sup> *Contra*, on closely analogous facts in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Atkinson v. Superior Court*, 49 Cal.2d 338, 316 P.2d 960 (1957).

<sup>31</sup> *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). <sup>33</sup> 355 U.S. 220 (1957).

<sup>32</sup> 339 U.S. 643 (1949).

<sup>34</sup> 172 F. Supp. 615 (N.D., Ill., 1959).

construe Section 17(1)(a) as incorporating by inference the more liberal 17(1)(d) test.<sup>35</sup>

From the foregoing, it is to be concluded that Section 17(1)(a) requires the *physical presence* of the defendant or his agent within Illinois and the transaction of the business in question at that time, "and not that he or his agent transact the business outside Illinois, or even from outside Illinois with independent persons in Illinois."<sup>36</sup>

<sup>35</sup> *Ibid.*, at 628.

<sup>36</sup> *Ibid.*, at 628.

REAL PROPERTY—NEGATIVE RECIPROCAL EASEMENT  
HELD RETROACTIVE WHERE COMMON GRANTOR  
REACQUIRED LOT ORIGINALLY CONVEYED  
WITHOUT RESTRICTION FOR  
COLLUSIVE PURPOSE

Defendant grantor conveyed one lot of his original tract to his brother without any restrictions as to the property's use. He conveyed the remaining lots within an area of two blocks of his brother's lot with restrictions that the property was to be used only for dwellings of a value of \$5,000 or more. These deeds were recorded, and subsequently, the grantor's brother built a duplex valued at less than \$5,000 on his lot. The grantees, whose deeds contained the restrictions, took no action to enjoin the brother from building the duplex. The brother then reconveyed the lot to the defendant, who proceeded to build a trailer camp on the property. The grantees brought this action to enjoin the grantor's activities. The chancellor decreed that the grantor was bound by reciprocal negative easements as to the entire two blocks in the original tract. On appeal to the Supreme Court of Michigan, the decree was affirmed on the ground that the grantor was estopped from showing that the reciprocal negative easements would be retroactive and, therefore, not binding on him. *Cook v. Bandeen*, 356 Mich. 328, 96 N.W.2d 743 (1959).<sup>1</sup>

The importance of this case lies in the unusual factual situation presented where a common grantor makes a conveyance without restrictions, followed by several conveyances with restrictions, and a reconveyance of the first lot is then made to the common grantor in the hope the property will not be subject to the reciprocal negative easements affecting the other lots.

Generally, a reciprocal negative easement arises when a common grantor conveys one lot with restrictions of benefit to all the land retained.

<sup>1</sup> The principal case is entitled *Brownson v. Bandeen*, but was consolidated with and under the title as given above.