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Commissioner of a Single Tort as Giving Jurisdiction over a Foreign Corporation

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convicting the accused of the principal crime they will be, in effect, imposing a sentence of life imprisonment on him. Prosecutors often refrain from framing indictments and informations under these statutes because of this difficulty of getting convictions.¹³ These practical difficulties could be largely avoided by the adoption of the procedural reform just advocated. In the alternative, it has been suggested that the mandatory provisions for punishment be stricken from the habitual criminal statutes, and that they be replaced by more flexible provisions taking full advantage of indeterminate sentencing, or permitting the courts, prisons, or certain administrative bodies wide discretion in deciding the length of the sentence which should be imposed.¹⁴

Since society and the courts are slowly coming around to the conclusion that the punishment should not only fit the crime but also the criminal, and that in framing a penal code one should consider the aspects of rehabilitation and correction in addition to punishment, it might be questioned that prior conviction is a sufficient criterion to establish that a man is a habitual criminal. In England it is necessary to establish that the defendant was at the time the principal offense was committed "leading a persistently dishonest and criminal life."¹⁵ This may be shown in various ways, prior convictions being persuasive but not conclusive evidence of it.

In conclusion, it is submitted that the Wyoming Habitual Criminal Act, in its present form, is prejudicial to the defendant, and may defeat the main purpose for which it was originally intended; further, that it is not in harmony with present day society's concept of punishment tempered with rehabilitation because of its inflexible punishment provision and its arbitrary standard for ascertaining the status of habitual criminality. The Legislature might well consider amending the act along one or more of the lines suggested.

JAMES H. WILSON

COMMISSION OF A SINGLE TORT AS GIVING JURISDICTION OVER A FOREIGN CORPORATION

In a recent Vermont case the plaintiff sued the defendant, a foreign corporation, to recover for damages to the plaintiff's house allegedly caused by the negligence of the defendant in re-roofing the dwelling. The action was brought under a statute giving state courts jurisdiction over a foreign

13 Report of Indiana Committee of Observance and Enforcement of Law, Jan. 5, 1931.

14 Metcalf, *Recidivism in the Courts*, 26 J. Crim. L. and Criminology 367 (1936).

15 *Rex v. Baggot*, 4 Crim. App. 67 C.C.A. (1910).

corporation which had committed a single tort within the state.¹ The defendant, in a special appearance, moved to dismiss on the grounds that the statute violated the "due process clause" of the United States Constitution. *Held*, that the state may subject the corporation to its jurisdiction when to do so does not offend "traditional notions of fair play and substantial justice." *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

In discussing the defendant's contention, the court said that prior to *International Shoe Company v. Washington*² the power a state over a foreign corporation was regarded as based on the "implied consent" of the corporation or the "presence" of the corporation within the state, but that "these fictions were expressly discarded by the United States Supreme Court" in that case. In their place was substituted another test, namely that the foreign corporation need only have "certain minimum contacts with it (the forum) that the maintainance of the suit does not offend 'traditional notions of fair play and substantial justice.'" "

In reaching its decision, the Vermont court sought to point out a shifting definition of "due process" from "emphasis on the territorial limitations of courts to emphasis on providing notice and opportunity to be heard." As to the particular facts, the court pointed out that it was not an undue hardship for the defendant to defend in a Vermont court, and since it had received actual notice of the suit (via registered mail), "due process" had been met.

In examining the judicial history of this aspect of "due process," it is found that the court's jurisdiction is based on its de facto power over the person who is present within the jurisdiction.³ However, this rule has been modified in cases involving non-resident motorists who have been sued under statutes permitting service on a state officer as agent for the non-resident.⁴ The validity of these statutes have been upheld by the Supreme Court of the United States on the grounds that not only has a state the power to prescribe regulations for the use of its highways by residents and non-residents alike; but that this power necessarily extends to

1. Vermont Statutes 1947, sec. 1562, "Doing business, definition, service of process. If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporation and shall be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against such foreign corporation arising from or growing out of such contract or tort. . . ."

2. 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

3. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878).

4. Wyo. Comp. Stat. 1945, sec. 60-1101, ". . . The use and operation by a non-resident of the State of Wyoming or his agent of a motor vehicle over or upon any street or highway within the State of Wyoming, shall be deemed an appointment by such non-resident of the secretary of state of the State of Wyoming as his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him, growing out of such use or operation. . . ."

permit the state to provide, as a condition for the operation of a motor vehicle upon its highways, that a state official shall be deemed to be an agent for the service of process upon a non-resident in actions arising from the operation of a vehicle upon its highways. The reason given for this rule is that since motor vehicles are dangerous machines, it is in the public interest that a state may make and enforce regulations reasonably calculated to promote care on the part of all.⁵

In the case of defendant corporations the rule has been much the same as that applicable to individuals, namely that the state's jurisdictional powers depend upon the "presence" within the state of the defendant. However, corporations, unlike individuals, may be "present" in any number of places at one time. Therefore it has been necessary to formulate tests to determine when a foreign corporation is "present," and it follows that a foreign corporation is present when it is "doing business" within the state.⁶ But, what is the definition of the phrase "doing business?" This was the problem the Vermont legislature was attempting to solve when it passed the statute involved in the instant case.

It has been argued that inasmuch as the Constitution does not deny to a state the power to exclude a foreign corporation from doing business or acquiring or holding property within the state,⁷ that any act by a foreign corporation may be considered to be "doing business" within the state, thereby subjecting the corporation to the jurisdiction of the state courts.⁸ However, it has been held that the corporation must either do a series of acts which clearly indicate that it is transacting business within the state; or it must perform an act, as a part of the ordinary business of the corporation, which clearly indicates an intent to carry on a part of its business within the state.⁹ The mere fact that a foreign corporation has solicited business through its salesmen is insufficient to constitute presence where the salesmen have had no authority to accept orders.¹⁰ It was this rule which was modified to some extent by the International Shoe Company case.¹¹ Other courts have made similar exceptions by subjecting foreign corporations to their jurisdiction where it appears that contractual relations exist, between the corporation and citizens of the state, which were entered into after active solicitation by the corporation's salesmen, even though

5. *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).

6. *Cordts v. Beneficial Loan Soc.*, 34 F Supp. 197 (D.N.J. 1940).

7. *Ashbury Hospital v. Cass County, N.D.*, 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6 (1945).

8. 20 C.J.S. 48.

9. *Thompson, Corporations* (3rd Ed.), Vol. 8, p. 851; see also *Restatement of the Law, Conflicts of Laws*, p. 244.

10. 20 C.J.S. 57, 58.

11. *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). (In that case the defendant corporation employed from eleven to thirteen salesmen within the state over a period of several years, and it was through the efforts of these salesmen that it was able to continuously sell large quantities of its merchandise to Washington residents. The Supreme Court thought these facts sufficient to show presence for the purpose of imposing the state's jurisdiction.)

the actual contracts were made in another jurisdiction.¹² Nevertheless, there is little authority for holding that a single isolated transaction, standing alone, is sufficient to give a state jurisdiction.¹³

The trend in legislative and judicial thinking seems to be that since the large increase in number and size of corporations, together with modern transportation developments, have made it possible for corporations to greatly extend their markets, it is in the public interest to demand that foreign corporations defend in the local jurisdiction *in actions arising within that jurisdiction*. Otherwise, a foreign corporation, like the non-resident motorist, is practically immune from suit in any but its own jurisdiction. A corporation exercising the privilege of participating in activities within a state enjoys the benefit and protection of the laws of that state; and insofar as that exercise gives rise to certain obligations, it can hardly be said to be unfair to require the corporation to respond to suits to enforce those obligations arising out or connected with its activities within the state.¹⁴

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12. Thus a resident of New York was permitted to sue a Massachusetts insurance company which employed a salesman in New York City and who maintained a telephone listing and an office in the name of the corporation. *Ace Grain Co., Inc. v. American Eagle Fire Ins. Co. of New York*, 95 F. Supp. 784 (S.D. N.Y. 1951).
 13. *McMaster v. Robinson's Women's Apparel*, 45 F. Supp. 99 (D. Nebr. 1942).
 14. *International Harvester Co. v. Kentucky*, 234 U.S. 579, 34 S.Ct. 948, 58 L.Ed. 1484 (1914).