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Bob R. Bullock

led to Section 175, first adopted in the 1954 Internal Revenue Code, which allows a deduction to taxpayers engaged in the business of farming for expenditures incurred for soil conservation or for the prevention of erosion of land used in farming.[25]

In conclusion, it would appear that the distinguishing factors between an expense for the conservation of income producing property under Section 212 and a capital expenditure under Section 263 are: (1) an expense incurred for the acquisition of property, with a useful life of over one year is a capital expenditure; whereas an expense deductible under Section 212 must be to conserve property *held* for the production of income, and (2) a capital expenditure under Section 263 must be one which changes the physical structure of the property, which results in an increased value or life of the property, or adapts the property to a different use, whereas, an expense to be deductible under Section 212 does not change in any way the physical state of the property. On the contrary the expenses must be to protect, shield, guard, or preserve the property in its *existing* state.

THOMAS S. SMITH

THE EXPANDING STATE JUDICAL POWER OVER NON-RESIDENTS

The ultimate expansion to date of state judicial power over non-residents was recently announced by the Supreme Court of the United States in *McGee v. International Life Insurance Co.*[1] The Court upheld a California statute[2] subjecting foreign insurance corporations to suit in California on an insurance contract with a California resident even though the insurer could not be served with process within the state. The insured purchased a life insurance policy from the defendant. He accepted the policy and paid the premiums by mail from California to the defendant's principal office in Texas. When the insured died the defendant refused to pay the claim to the insured's wife as beneficiary. The wife was granted a default judgment in California after serving process upon the defendant by registered mail in Texas. Unable to collect the judgment she filed suit upon it in Texas. The Texas courts refused to enforce the judgment, holding that it was void since the California court had no jurisdiction over the defendant insurance company. The defendant apparently had never solicited or done business in California except for the policy involved here. On certiorari the Supreme Court held that the California Court had acquired jurisdiction over the defendant within the requirements of due process; the judgment was therefore entitled to full faith and credit. It

25. I.R.C. § 174.

1. 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957).
2. Cal. Insurance Code §§ 1610 to 1620 (1953).

is sufficient for purposes of due process that the suit was based on a contract which had "substantial connection" with that state so as not to offend the "traditional notions of fair play and substantial justice."

The force and effect of "in personam" judgments rendered against non-residents without personal service upon them, or without their voluntary appearance, has a long historical evolution in the United States Courts. Since the adoption of the Fourteenth Amendment the validity of such judgments may be questioned on the ground that the court lacks jurisdiction over the person, and the adjudication of his personal rights would be violation of due process. Consequently the judgment would not be entitled to full faith and credit in other states. The first milestone was laid by the Supreme Court in the celebrated case of *Pennoyer v. Neff*.[3] In that case the Court laid down the narrow doctrine that an "in personam" judgment rendered against a non-resident who did not appear or who was not personally served with process within the territory of the forum was void.

The *Pennoyer* doctrine met with some early exceptions which allowed limited expansion of a state's judicial power over non-residents. The doing of a single act may subject the non-resident defendant to the jurisdiction of the state courts when that act is considered inherently dangerous. This exception first appeared when the Supreme Court declared that the non-resident motorist statutes were within the valid exercise of the state's police power.[4] These statutes provide for service of process upon a state officer as agent for the non-resident motorist in any action growing out of the operation of a motor vehicle in the state by the non-resident. The requirements of due process were not violated notwithstanding the fact that jurisdiction was based on a single act within the state with constructive notice to the defendant. In *Henry L. Doherty & Co. v. Goodman*[5] a statute was upheld which provided for service of process upon the resident agent of the defendant, although the defendant had never been personally within the jurisdiction of the court. This was held a valid exercise of police power by the state, justified by the need to control the activity of persons selling securities.

The *Pennoyer* doctrine applies to personal judgments of the state courts against corporations.[6] In actions arising out of the foreign corporation's activities in the state,[7] no jurisdictional problem exists where the

3. 95 U.S. 714, 24 L.Ed. 565 (1878).
4. Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).
5. 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097 (1953).
6. St. Clair v. Cox, 106 U.S. 350, 1 S.Ct. 354, 27 L.Ed. 222 (1882).
7. A state may have power to subject a foreign corporation to suit in personam on a cause of action arising from corporate activities within the state. However, a question arises as to the state's power to subject such corporation to suit on a transitory cause of action arising in another state, or on a cause of action arising out of an act entirely distinct from the corporate activities carried on in the state. This question has now been authoritatively settled by the Supreme Court in Perkins v. Benquet Consol. Mining Co., 342 U.S. 96, 72 S.Ct. 413, 96 L.Ed. 485

corporation has appointed an agent for service of process.[8] However, corporations frequently engage in activities in a state without expressly consenting to suit or appointing an agent for service of process; therefore the state courts could not obtain jurisdiction if no representative of the corporation was in the state long enough to be served with process. In this situation the Supreme Court has, in its earlier decisions, relied upon three different tests to determine whether such corporations could be subjected to the jurisdiction of the state courts upon constructive notice. The theory of "implied consent" was first used to obtain jurisdiction over non-resident corporations. Since a state could exclude a foreign corporation from doing business within its boundaries, it had the power to require such corporations to consent, either express or implied, to suit within the state before it could qualify to transact business there.[9] Another test was that if the corporation was "present" within the forum state by reason of its activities there it might be subjected to suit.[10] Third, if the corporation was found to be "doing business" in the state it was subject to the jurisdiction of its courts.[11]

These fictitious tests have been discarded by the Supreme Court in *International Shoe Co. v. State of Washington.*[12] The Court adopted a new test requiring "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice." An estimate of the inconveniences resulting to the defendant from a trial away from home is also relevant in this connection. It is significant to note that although *International Shoe* was a suit against a corporation, the Court clearly indicates that the "minimum contacts" test also applies to non-resident individuals.[13]

In applying the "minimum contacts" test the Court has made it clear

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(1951). The Court held that the due process clause of the Fourteenth Amendment does not prohibit or compel such suits. Such suits may be entertained if the corporation has sufficient ties with the state, and proper notice is given to the corporation. See also, 23 Am.Jur., Foreign Corporations § 496.

8. Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining Milling Co., 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917). The extent of the authority thereby conferred by the consent is a question of interpretation of the instrument of consent or of the statute requiring it.
9. Lafayette Ins. Co. v. French, 18 How. 404, 14 L.Ed. 451 (U.S. 1856).
10. International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479 (1914).
11. Louisville & N. R. Co. v. Chatters, 279 U.S. 320, 49 S.Ct. 329, 73 L.Ed. 711 (1929); Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S.Ct. 308, 43 L.Ed. 569 (1898).
12. 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945). The defendant corporation employed from 11 to 13 resident salesmen who solicited orders which were sent out of the state to be accepted and filled by the defendant. It was through the efforts of these salesmen over a period of years that the defendant was able to continuously sell large quantities of its merchandise to Washington citizens. The Supreme Court held that these were sufficient contacts with the state of Washington to subject it to the jurisdiction of the state's courts.
13. Id. at 316, 66 S.Ct. at 159. "But now the capias and respondendum has given way to the personal service of summons or other form of notice, 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 have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

that two different standards of measurement could be applied to determine whether the defendant's contacts were sufficient to meet the requirements of due process. The measurement relied on by the court was "quantitative" in that the number of contacts and the period of time over which they occurred was considered material. The Court noted that the activities carried on in behalf of the defendant were systematic and continuous throughout the years. These activities resulted in a large volume of interstate business. The obligation sued upon arose out of those very activities.[14] Secondly, as an additional measurement, the Court introduced what might be characterized as a "qualitative" test. Although the commission of some single or occasional acts will not be sufficient to impose jurisdiction over the non-resident, other acts, because of their "nature and quality" may be deemed sufficient (citing police power cases). "The test cannot be simply mechanical or qualitative. 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."

The "single act" language of the "minimum contacts" test has a two-fold significance. It opened the way for the "substantial connection" theory of the *McGee* decision which was based on a single contract with a resident of California. It also prompted several states to enact "single act" legislation giving the state courts jurisdiction over non-residents whose only contact with the state has been a single act or transaction. In *Campania de Astral, S.A. v. Boston Metals Co.*,[15] the Maryland Courts upheld a Maryland statute which imposed jurisdiction in personam upon a non-resident in a suit arising out of a single contract made within the state. A Vermont statute subjecting non-residents to jurisdiction in suits arising out of a single tort committed in the state was upheld in *Smyth v. Twin State Improvement Co.*[16] These statutes were upheld on the "single act" language of the *International Shoe* case. The Supreme Court footnoted these cases in the *McGee* opinion. Except for a non-resident motorist statute,[17] Wyoming has no "single act" legislation through which the courts could obtain jurisdiction over an absent non-resident. In view of the *McGee* case and increasing interstate commerce it would appear that the state legislature should give this problem consideration. Of the states which have attempted to expand jurisdiction by statute, none has made a more comprehensive attempt than Illinois. The Illinois statute[18] has extended the jurisdiction of the state courts to the limits of due process. It provides in part for jurisdiction in personam in the Illinois courts over absent non-residents as to suits arising from (a) the transaction of any

14. Supra note 7.
15. 205 Md. 237, 107 A.2d 357, 49 A.L.R.2d 646, certiorari denied, 348 U.S. 943, 75 S.Ct. 364, 99 L.Ed. 738 (1954).
16. 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193 (1951).
17. Wyo., Comp. Stat. § 60-1101 (1945).
18. Ill. Civ. Prac. Act., art. 3 ,§ 17 (1954).

business within the state, and (b) the commission of a tortious act within the state. This statute has not been tested before the Supreme Court, but it seems certain in the light of the *McGee* case that its constitutionality is less likely to be challenged.

In *Traveler's Health Association v. Virgina,*[19] decided only seven years before *McGee,* the Supreme Court reaffirmed the "minimum contact" test. A Virginia judgment was upheld even though the only contact with the defendant insurance association had with the state was an extensive mail-order business. It had obtained approximately 800 members in Virginia. The defendant had no officers or agents within the state. In applying the "minimum contacts" test the court held that such a suit was consistent with "fair play and substantial justice." Notice by registered mail is not offensive to due process where the defendant had systematically over a period of years sold insurance to residents of Virginia. The "Blue Sky Laws" under which the case arose are a well recognized exercise of the state's police power.

The *McGee* case is an obvious expansion of the state judicial power. Jurisdiction was based upon a single contract, rather than the systematic sale of insurance over a period of years. It gave the Supreme Court an opportunity to test the "single act" language of *International Shoe,* measured in "qualitative" terms rather than the traditional "quantitative" terms of prior cases. In adopting this new "substantial connection" test the Court was very careful to set out the factors justifying the need for extending state judicial power:

> Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communications have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

Furthermore, the dicta is clear that this expansion applies both to non-resident individuals as well as foreign corporations.[20]

Although the *McGee* opinion is very terse and clear, it leaves many questions to be answered. Its language very aptly applies to the particular circumstances of the *McGee* case, but the same language could equally as well be applied to a multitude of entirely different fact situations. Therefore it is not clear how far the Court will be willing to stretch the limits of due process in order to give a state court jurisdiction over a particular non-resident. The Court did not specifically mention "police power." Yet it did cite the police power cases in stating that "California

19. 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950).
20. McGee v. International Life Insurance Co., 355 U.S. 220, 222, 78 S.Ct. 199, 201 (1957). ". . . a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents."

has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. When claims are small or moderate, individuals frequently could not afford the cost of bringing an action in a foreign forum." This approach could very well be used as a limiting factor in the application of the "substantial connection" test. Likewise, the court did not fail to consider the inconveniences that would result to the defendant if he were forced to defend a suit away from home. In some states the doctrine of "forum non conveniens" may, in the sound discretion of the court, be used to refuse jurisdiction. The doctrine presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for choice between such forums. The factors to be considered in the doctrine are the private interests of the litigants and considerations of public interest.[21]

Exactly what elements the Court would require to establish a "substantial connection" between the forum state and a defendant's act or transaction is not clear. In the *McGee* case the insurance contract was accepted in California, premiums were mailed from that state by the insured, and the insured was a resident there when the policy was issued and when he died. In a similar case if one or more of these elements were missing a court could well deny jurisdiction over the defendant. The "substantial connection doctrine advances a very flexible test which may be used to establish state jurisdiction only when the courts feel that in doing so the traditional notions of fair play and substantial justice will not be offended. This, of course, must depend upon the particular circumstances and relative interests of the parties in each case.

Since the *McGee* case the Supreme Court has had but one opportunity to consider the "substantial connection" test. In *Hanson v. Denckla,*[22] by a five to four decision, the Supreme Court refused to allow jurisdiction over a non-resident defendant. The plaintiff relied principally on the *McGee* case. The suit arose in Florida in a controversy concerning rights to the corpus of an inter vivos trust established in Delaware by the settlor who later became domiciled in Florida. The settlor administered the Delaware trust, received trust payments, and exercised a power of appointment under the trust agreement while domiciled in Florida. The settlor died in Florida, and her will was probated there. The trust corpus was to pass under the will if the power of appointment should fail. Most of her beneficiaries were domiciled in Florida. The Florida court held that the trust was invalid, and that the corpus should pass under the will. By reason of a Florida statute the Delaware trustee was an indispensable party in an action to determine the validity of the trust. Constructive notice was served upon the trustee by mail pursuant to the Florida statute. The Supreme Court held that the trustee had no "substantial connection" with Florida to justify jurisdiction in personam over the Delaware trustee.

21. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1005 (1947).
22. 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

The trustee performed no acts which would bear the same relationship to the agreement as the solicitation of insurance in the *McGee* case. Florida had no "manifest interest" in providing redress for its citizens under these circumstances. (The Court cited the police power cases.) The application of the substantial connection rule "will vary with the quality and nature of the defendants activity. It is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the state."

All of the ramifications of the *McGee* doctrine have not been evolved. However , a logical conclusion appears that the Supreme Court has discarded the traditional tests for state jurisdiction in an attempt to establish a doctrine which can be applied to the various circumstances which arise in our expanding national economy and interstate business. The *McGee* doctrine is very general so that it may be applied under a variety of circumstances. Yet, as illustrated by *Hanson v. Denckla,*[23] it contains language which may limit its application in other situations where the demands of due process so require.

BOB R. BULLOCK

ELIMINATION OF PREEMPTIVE RIGHTS IN A WYOMING CORPORATION

Under the common-law doctrine of preemptive rights, shareholders have a right or option to subscribe for newly authorized issues of shares before they are offered to the public. This right allows the shareholders to subscribe to the newly authorized issue of shares in proportion to their present holdings, and it is intended to safeguard the shareholders against unfairness and dilution of their interest and voting power. The right has been made subject to various exceptions on grounds of practical convenience.

Ballantine claims the right aims to safeguard shareholders against unfairness in the issues of shares, particularly against two possible wrongs:[1]

> (1) the manipulation of voting control of the corporation by the issue of shares to some one shareholder or group to the exclusion of others, and
>
> (2) the issue of shares at an inadequate price to favored persons, thereby diluting the proportionate interest of other shareholders.

The various exceptions based on grounds of practical convenience as recognized by some courts are shares previously authorized, as distinguished

23. Ibid.

1. Ballantine, Corporations, P. 487 (rev. ed. 1946).