Chicago-Kent Law Review

Volume 33 | Issue 2 Article 4

March 1955

Due Process and the Mail-Order Insurer

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NOTES AND COMMENTS

Due Process and the Mail-Order Insurer

In an age when jet power and super-sonic speeds have made this planet small indeed, improved means of communication have operated to expand commerce and multiply the number of contacts between people formerly isolated from one another. As distances have been shrinking under the onslaught of modern technology, modern law has been struggling to keep pace but the non-shrinkable qualities inherent in state boundaries and in constitutional due process have generated a degree of schizophrenia in the body politic which, only recently, appears to be responding to psychiatric treatment accorded by courts and legislatures. One of the problems fostered by this growth of long-distance relationships concerns the mail-order insurance business. In the typical case, an insurer located in one state solicits business by modern means of communication in other states, where it maintains no offices, no property, nor agents, and where it is not licensed to do business. Local residents of these other states, having filled out applications for insurance, mail the same to the home state of the insurer where, after acceptance, a policy is sent by return mail. When claims arise under such policies and litigation is required thereon, suit can usually only be brought in the home state of the insurer because other states would lack the means to acquire *in personam* jurisdiction over the defendant company. If the amount of the claim should be small, or if witnesses would have to be transported to establish proof of the claim, the insured would, in effect, be precluded from suing simply because the recovery would not justify the expense. The result, then, is a sense of frustration which invokes a clamor for relief in an area where, years ago, no relief would have been needed.

Illinois, no less faced with this problem than other states, has already taken one important step to remove the annoying dilemma by adopting an Unauthorized Insurers Process Act.[1] It is also now attempting a further envelopment of the problem by means of a proposed addition to the Civil Practice Act.[2] The first of these closely parallels the model Unauthorized

[1] Ill. Rev. Stat. 1953, Vol. 1, Ch. 73, § 735.

[2] See Tentative Final Draft of Proposed Amendments to Illinois Civil Practice Act (1954), printed for the Joint Committee of the Illinois State and the Chicago Bar Associations by Burdette-Smith Co., Chicago. Section 17 thereof, in part, reads: "(1) Any person, whether or not a citizen or resident of this State who . . . does any of the acts hereinafter enumerated, thereby submits said person . . . to the jurisdiction of the Courts of this State as to any cause of action arising in this State from . . . (d) the insuring of any person, property or risk located within this State, whether the policy is delivered by mail or otherwise." Sub-section 2 thereof describes the manner to be followed in conveying notice of suit to the defendant. The proposed section is intended to replace Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 141.

Insurers Service of Process Act drafted by the National Association of Insurance Companies,[3] a statute which appears to be proving itself as an effective method for subjecting foreign unauthorized insurers to the jurisdiction of the forum. The other, if enacted, may have to face scrutiny on constitutional grounds. In that event, the legal propositions set forth hereafter may prove to be of value.

The legal hurdles first encountered by the model act arose from the attempt therein to define the term "doing business" so as to allow for valid substitute service on a corporation which had only tenuous bonds within the state, for both the common law[4] and the holding in *Pennoyer* v. *Neff*[5] have bearing on the ability of a state to acquire jurisdiction over a foreign corporation. At common law, in the absence of any statute, a foreign corporation could not be sued in an *in personam* action outside the state of its incorporation because such a corporation was deemed not to possess legal existence other than in the jurisdiction which created it.[6] Since no corporation was then deemed able to act or to be reached except through its agents, who could exercise their authority only in the area where the corporation itself existed, one early New York case held that, when the agent left the state in which the corporation was created, his functionary character did not accompany him so service of process elsewhere was not legally possible.[7] This case was cited with approval in a later Massachusetts holding, which added that all foreign corporations were beyond the processes of the courts of that commonwealth.[8] But statements of this nature were, at times, accompanied with a suggestion that the doctrine might be otherwise if the foreign corporation should send its officers or agents to reside in other states in order to transact business there on its account.[9]

The doctrine exempting a corporation from suits in states other than the one of its creation became a source of manifest injustice as the number, powers, and activities of corporations increased. Agents sent by these corporations into other states frequently opened offices and conducted business there on behalf of their corporations, which corporations were, in effect, as much represented there as they were in the state of creation. Being protected by the laws of these states and allowed to sue

[3] Richards, The Law of Insurance, Vol. 1, § 55, at p. 261.

[4] An excellent historical statement of the common law on the point appears in the opinion in St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882).

[5] 95 U. S. (5 Otto) 714, 24 L. Ed. 565 (1878).

[6] Peckham v. North Parish in Haverhill, 33 Mass. (16 Pick.) 274 (1834).

[7] McQueens v. Middleton Mfg. Co., 16 Johns. (N. Y.) 5 (1819).

[8] Peckham v. North Parish in Haverhill, 33 Mass. (16 Pick.) 274 (1834).

[9] Libbey v. Hogdon, 9 N. H. 394 (1838).

in the courts thereof, it seemed only right that they should be held responsible in those courts for obligations and liabilities incurred there. As the doctrine of *Pennoyer* v. *Neff*,[10] however, required that a court rendering a personal judgment against a non-resident defendant had to acquire jurisdiction over the party by personal service within the jurisdiction or by voluntary appearance, neither of which could usually be found present, the injustice had to be suffered until, with the decision in the case of *St. Clair* v. *Cox*,[11] the United States Supreme Court noted the existence of a power in a state to exclude a foreign corporation from doing business within the state or to admit in on conditions. Recognition was there given to the fact that due process requirements would be met in the event the foreign corporation should stipulate that, in any litigation arising out of its transactions within the state, the corporation would accept service of process on its local agent, or other person specifically designated, as being sufficient to bind it.

No difficulty thereafter arose in those situations where the foreign corporation actually consented to be sued and specifically appointed an agent to receive service of process.[12] It frequently happened, however, that foreign corporations would engage in activities within a state without actually consenting to be sued there. In that event, the Supreme Court, under its earlier decisions, found a basis for an exercise of the power of the forum over such corporations in one or the other of three factors, which factors were by no means clearly distinct and overlapped each other to a great extent. It would, for example, attempt to ascertain whether, from all the facts involved, an inference could be drawn that the corporation had impliedly consented to suit,[13] was "present" in the territory of the forum,[14] or was "doing business" therein.[15] If so, it was said to have submitted itself to the control of the local jurisdiction,[16] the cases ordinar-

[10] 95 U. S. (5 Otto) 714, 24 L. Ed. 565 (1877).

[11] 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882).

[12] Service of process, pursuant to the requirements of a statute under which it was licensed to do business within the state, would be unquestionably sufficient to give a court jurisdiction over a foreign corporation: Ex parte Schollenberger, 96 U. S. (6 Otto) 369, 24 L. Ed. 853 (1878); Re Louisville Underwriters, 134 U. S. 488, 10 S. Ct. 587, 33 L. Ed. 991 (1890).

[13] The Lafayette Insurance Co. v. French, 59 U. S. (18 How.) 404, 15 L. Ed. 451 (1856); St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882).

[14] Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916 (1907); St. Louis, S. W. R. Co. v. Alexander, 227 U. S. 218, 33 S. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B 77 (1913).

[15] Henrietta Min. & Mill. Co. v. Johnson, 173 U. S. 221, 19 S. Ct. 402, 43 L. Ed. 675 (1899); Commercial Mut. Accident Co. v. Davis, 213 U. S. 245, 29 S. Ct. 445, 53 L. Ed. 782 (1909); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372 (1923).

[16] People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C 537 (1918).

ily inferring that the corporation, by "doing business," had impliedly consented to be sued or was impliedly present within the forum.[17]

Primarily and basically, the question was and still is one with regard to due process,[18] stemming from the Fourteenth Amendment and the requirement that the service of process be reasonably calculated to give notice to the defendant so as to permit it to have its day in court.[19] In recent years, however, courts have tended to depart from the fiction of consent, implied from the concept of "presence" within the state, and to give weight sometimes to the place of contracting and sometimes to the place of performance as the basis for state power over foreign corporation. This departure became perfected as the result of the Supreme Court holding in the case of *International Shoe Company* v. *Washington.*[20] Classifying earlier ideas as being no more than fictions which begged the point, the court there laid down a new test, saying that constitutional demands would be met "by such contacts of the corporation with the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[21] With Mr. Justice Black disagreeing, the court also said that: ". . . due process requires only that in order to subject a defendant to 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.' "[22]

This new test is not without its questions, particularly as to the standards to be used in determining whether "minimum contacts" do or do not exist,[23] but it should prove helpful in the insurance situations. In that connection it could be noted that, under earlier holdings, the mere solicitation of business within a state on behalf of a foreign corporation

17 More recent cases have been tabulated in Eulette, "Service of Process on Foreign Corporations," 20 CHICAGO-KENT LAW REVIEW 330 (1942), which discusses the subject from the standpoint of the constitutional requirements as to due process.

18 Daoud v. Kleven Investment Co., Inc., 30 N. J. Super. 38, 103 A. (2d) 257 (1954).

19 Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357 (1940).

20 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057 (1945).

21 326 U. S. 310 at 317, 66 S. Ct. 154, 90 L. Ed. 95 at 102.

22 326 U. S. 310 at 316, 66 S. Ct. 154, 90 L. Ed. 95 at 102.

23 The court did say: "[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 . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and ordinary administration of the laws which it was the purpose of the due process clause to insure." 326 U. S. 310 at 319, 66 S. Ct. 154, 90 L. Ed. 95 at 103-4.

would not be sufficient to subject the foreign corporation to local suit as that act was not considered to be a species of "doing business" within the forum.[24] Accordingly, in the earlier Illinois case of *Pembleton* v. *Illinois Commercial Men's Association*,[25] absent any statute, it was held that a solicitation of business within a state by the policy-holders of an unauthorized insurance corporation would not be sufficient to support an exercise of *in personam* jurisdiction by the forum. It was also about this time that the case most frequently cited as sustaining the freedom of mail-order insurers from service of process where the only activity within the forum consists of solicitation, that of *Minnesota Commercial Men's Association* v. *Benn*,[26] was decided. A Montana statute there provided for the appointment of the secretary of state as agent to receive process in suits against foreign corporations doing business within the state who failed to appoint a statutory agent. The Minnesota corporate defendant, with neither property nor agent in Montana, had procured new members there both by mail and by personal solicitation on the part of existing members who had no authority to contract in its behalf, all applications being accepted or rejected at the home office in Minnesota. Holding that Montana was without jurisdiction, the Supreme Court said that, as the defendant was not "doing business" in Montana, the statutory attempt to provide for service of process on a local state official was invalid.

If the law had remained static, statutes of the type here under consideration would be clearly unconstitutional, but two cases decided by the United States Supreme Court in the interval between the Minnesota Commercial Men's Association and the International Shoe decisions have helped to weaken the concepts of the former and to pave the road for the "minimum contact" rule of the latter. In the case of *Osborn* v. *Ozlin*,[27] the court said that a state had a legitimate interest in all insurance policies protecting its citizens against risks, an interest which the state could protect even though "state actions may have repercussions beyond state lines."[28] It followed this up, in *Hoopeston Canning Company* v. *Cullen*,[29] by rejecting a contention that a state's power to regulate must be determined by a "conceptualistic discussion of the theories of the place of

[24] Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916 (1907). But see International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1913), where resort to a "solicitation plus" test to support jurisdiction was approved.

[25] 289 Ill. 99, 124 N. E. 355 (1918). The court did remark that, if a person with authority to contract, adjust claims, or receive premiums, had been within the state, the result would have been otherwise.

[26] 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573 (1923).

[27] 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074 (1940).

[28] 310 U. S. 53 at 62, 60 S. Ct. 758, 84 L. Ed. 1074 at 1078.

[29] 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777, 145 A. L. R. 1113 (1943).

contracting or of performance," saying that a court could give "great weight" to the "consequences" of the contractual obligations in a state where the insured resided, and the "interest' which a state had in seeing to it that those obligations were carried out.[30]

While this due process justification for an exercise of jurisdiction by the forum over the unauthorized alien insurer was being evolved, two other events occurred which gave birth to the Illinois statute mentioned above. On June 5, 1944, the day before D-Day in Europe, the United States Supreme Court dropped a bombshell of its own on the insurance industry in the form of the decision in the case of *United States* v. *South-Eastern Underwriters Association*.[31] By it, the seventy-six year old principle of *Paul* v. *Virginia*[32] was overthrown as the court decided that the business of insurance, partaking of the nature of interstate commerce, was subject to federal regulation. Following thereon, Congress passed the McCarran-Ferguson Act with its declaration that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several states"[33] but with the warning that if the states did not revise their insurance regulations the federal government would. The model Uniform Unauthorized Insurers Process Act,[34] one of several state measures designed to meet this challenge, has since been adopted by twenty-one state legislatures.[35]

It was the intent of the statute to subject the unauthorized, out-of-state insurer, principally those in the mail-order business, to the jurisdiction of the courts of the enacting states by designating those acts which could be considered as the doing of "business" within the state for jurisdictional purposes.[36] It is ironical, however, that the major test as to the validity of statutes of this character was fought in a battle in which the

30 318 U. S. 313 at 316, 63 S. Ct. 602, 87 L. Ed. 777 at 782.

31 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

32 75 U. S. (8 Wall.) 168, 19 L. Ed. 357 (1869).

33 15 U. S. C. A. § 1012.

34 Richards, op. cit., p. 261.

35 Cal. Deering Insurance Code Ann. 1950, Ch. 4, § 1610; Conn. Gen. Stat., 1953 supp., Tit. 42, Ch. 291, § 2109c; Fla. Stat. Ann. 1953, Tit. 35, § 625.28 to § 625.33; Ga. Code Ann. 1953, Tit. 56, § 56.601a to § 56.610a; Ill. Rev. Stat. 1953, Vol. 1, Ch. 73, § 735; Iowa Code Ann. 1949, § 507A.1 to § 507A.5; Kan. Gen. Stat. Ann. 1949, Ch. 40, §§ 40-2001-6; Ky. Rev. Stat. 1953, § 304.583; West La. Rev. Stat. Ann. 1950, Tit. 22, Ch. 1, § 1253; Me. Laws 1949, Ch. 96; Flack Md. Code Ann. 1951, Vol. 2, Art. 48A, §§ 336-42; Mass. Laws 1950, Ch. 781; Mich. Stat. Ann. 1953, Tit. 24, Ch. 242, §§ 24.567(101)-(106); Vernon Mo. Stat. Ann. 1949, §§ 375.160-9; Neb. Rev. Stat. 1952, §§ 44-137.01-.10; N. H. Laws 1949, Ch. 200; N. J. Stat. Ann. 1950, Tit. 17, Ch. 51, §§ 17:51-1 to 17:51-5; McKinney N. Y. Consol. Laws Ann., Insurance Law, § 59-a; Purdon Pa. Stat. Ann. 1954, Tit. 40, Ch. 2, §§ 1005.1-1005.6; Vernon Tex. Civ. Stat. Ann. 1952, Art. 21.38, § 6; Va. Code Ann. 1950, §§ 38.1-63 to 38.1-70.

36 See, in particular, Ill. Rev. Stat. 1953, Vol. 1, Ch. 73, § 735(2)(a).

uniform statute was not directly engaged. In the case of *Travelers Health Association* v. *Virginia*,[37] the United States Supreme Court was asked to examine into the power of a state to issue a cease and desist order against an unauthorized foreign insurer conducting its business by mail. The Virginia "blue sky" law there concerned provided for the service of process on mail order insurers by registered mail where other types of service were unavailable "because the offering is by advertisement and/or solicitation through . . . mail . . . or other means of communication beyond the limits of the state."[38] In response to the defendant's contention that service under the statute violated due process because all of the defendant's activities occurred outside Virginia, Mr. Justice Black, speaking for the court, said: "[Where] business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes 'doing business' sufficiently to justify regulation in the state where the effects of the 'business' are felt, the narrow grounds relied on by the court in the Benn case cannot be deemed controlling."[39] Measured by the principles of the Osborn, Hoopeston, and International Shoe cases, the contacts of the defendant with Virginia residents, together with that state's interest in the faithful observance of the insurance contracts so made, were said to justify Virginia's exercise of jurisdiction, particularly since the insurer did not engage in isolated or short-lived transactions but systematically and widely delivered its certificates in Virginia following solicitations based on recommendations made by Virginians.

Since that decision, several cases have arisen in lower courts wherein the model Unauthorized Insurers Process Act has been directly involved. In *Parmalee* v. *Iowa State Traveling Men's Association*,[40] the insurer, domiciled in Iowa and with no office, agent, or property within Florida, had effected contracts of insurance with Florida residents by mail. In a suit arising under one of these contracts, the insurer contended that substitute service of process on the local insurance commissioner, as provided by the Florida statute,[41] violated due process. The federal district court, upon a finding that the transaction of business entirely by mail did not constitute "doing business" within the state so as to make the defendant

[37] 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1950).

[38] Va. Code Ann. 1950, Vol. 3, Ch. 8, § 13-139.

[39] 339 U. S. 643 at 647, 70 S. Ct. 927, 94 L. Ed. 1154 at 1161.

[40] 206 F. (2d) 518 (1953), cert. den. 346 U. S. 877, 74 S. Ct. 125, 98 L. Ed. 66 (1953), with Mr. Justice Reed and Mr. Justice Jackson dissenting.

[41] Fla. Stat. Ann. 1953, Tit. 35, §§ 625.28 to 625.33.

amenable to service of process in the fashion mentioned, dismissed the action. On appeal, the service statute was held to be constitutional and the lower court holding was reversed. Declaring it not to be a denial of due process for a state to prescribe its own definition for "doing business" so long as the insurer had "certain minimum contacts within the state," the Court of Appeals for the Fifth Circuit treated the conduct of effecting policies by mail as constituting a sufficient minimum contact to meet the requirements of due process.[42]

While the United States Supreme Court has not, as yet, ruled directly on the validity of the model act, there is little reason to doubt its constitutionality when measured against the background of the latest pronouncements by that court. Indeed, one New York jurist, in a case involving the statute, said that, in view of the Travelers Health decision, it would seem that the issue, at this late date, is no longer one of constitutional limitation but rather one of statutory policy and construction.[43] Because the statute is comparatively new, judicial construction has been scant in character but it is already possible to recognize the major outlines. For example, under the New York version of the act,[44] it was held in the case of *Zacharakis* v. *Bunker Hill Mutual Insurance Company*[45] that an alien insurer which had conducted negotiations for a single policy of insurance on property within the state through the mails had established a sufficient minimum contact with New York to warrant service of process on the Superintendent of Insurance of that state as agent for the insurer.[46] The statute has also been held to permit suit and service on a policy so issued in favor of a third party injured by the insured. Such a person, after obtaining an unenforcible judgment against the insured, has been said to be a "beneficiary" entitled to utilize the service provisions against the

42 See also Ace Grain Co. v. American Eagle Fire Ins. Co., 95 F. Supp. 784 (1951), where the federal district court held that the statute neither violated due process nor constituted an unreasonable infringement upon interstate commerce.

43 See Kaye v. Doe, 204 Misc. 719, 125 N. Y. S. (2d) 135 (1953).

44 McKinney N. Y. Consol. Laws Ann., Insurance Law, § 59-a.

45 281 App. Div. 487, 120 N. Y. S. (2d) 418 (1953). Dore, P. J., wrote a dissenting opinion. Leave to appeal granted: 121 N. Y. S. (2d) 271 (1953).

46 Under the rule of Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co., 124 F. 259 (1903), isolated acts were not considered to be sufficient to charge an insurer with "doing business" within a state. The majority, recognizing that the case of Travelers Health Association v. Virginia, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1950), did involve multiple transactions, nevertheless said: "It scarcely can be doubted that a single clearly established transaction, or one each of two or more separate kinds of transactions related to the same contract, as . . . the payment of the premium and the negotiation back and forth as well as the issuance of the policy, would operate with equal force to confer jurisdiction. Quantity could not alone be the test of the validity of the statute." 281 App. Div. 487 at 493, 120 N. Y. S. (2d) 418 at 423.

foreign insurer under the same circumstances as would be true for the insured.[47]

Treated as a substitute service statute, however, the model act has been interpreted and applied strictly according to its terms. In the case of *Parmalee* v. *Commercial Travelers Mutual Accident Association*,[48] for example, a decision quashing service was affirmed inasmuch as the insured had obtained his policy by mail while residing in Kentucky and at a time prior to the passage of the Florida statute. A subsequent transfer of the insured's residence to Florida was treated as being insufficient to bring the statute into operation with respect to a suit brought in Florida as the certificate had not been delivered in Florida to a Florida resident. Construed as being confined for use only in those cases where the policy has been delivered to a resident within the state wherein suit is attempted, the statute is subject to at least one important limitation.

It is for this reason that an attempt is being made to revise the Illinois Civil Practice Act to provide for substitute service of process against mail-order insurers, as well as other persons who might maintain minimum contacts of varied character with the state.[49] As the proposal appears to meet with the tests relating to due process laid down in the International Shoe Company decision and as reaffirmed in the Travelers Health Association case,[50] there is every reason to believe that, if the proposal is adopted, Illinois will have a second effective weapon to combat the jurisdictional problems generated by the mail-order insurance business. Not only will the insured then be able to enforce the benefits of his insurance coverage before a conveniently located tribunal but the rights of the unauthorized insurer will not be abridged for the law will then merely provide a method for the adjustment of disputes without undue inconvenience to either party.

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[47] Kaye v. Doe, 204 Misc. 719, 125 N. Y. S. (2d) 135 (1953).

[48] 206 F. (2d) 523 (1953). The decision therein was followed in the case of Berg v. Commercial Travelers Mut. Acc. Ass'n of America, 207 F. (2d) 775 (1953).

[49] The text of the Illinois proposal is set forth above at note 2.

[50] Md. Code 1951, Art. 23, § 88(d), subjecting a foreign corporation to suit in "any cause of action arising out of a . . . liability incurred for acts done" within the state, was upheld in Compania de Astrol, S. A. v. Boston Metals Co., — Md. —, 107 A. (2d) 357 (1954). Vt. Stat. 1947, § 1562, applying to foreign corporations making contracts "with a resident of Vermont to be performed in whole or in part by either party in Vermont," was sustained in Smyth v. Twin State Imp. Corp., 116 Vt. 569, 80 A. (2d) 664, 25 A. L. R. (2d) 1193 (1951).