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CIVIL PROCEDURE-JURISDICTION-COMMISSION OF ISOLATED TORT BY FOREIGN CORPORATION AS "DOING BUSINESS" WITHIN THE STATE

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CIVIL PROCEDURE—JURISDICTION—COMMISSION OF ISOLATED TORT BY FOREIGN CORPORATION AS "DOING BUSINESS" WITHIN THE STATE—Plaintiff, a Vermont resident, brought action for damages in the Vermont court, alleging negligence of defendant in re-roofing plaintiff's house located in that state. Defendant, a Massachusetts corporation, had not qualified to do business in Vermont, nor had it appointed an agent to receive service therein. There was no evidence to indicate that defendant was actively engaged in business there. Substituted service was made upon defendant through the Secretary of State of Vermont as authorized by a statute.[1] The statute stipulated that the term "doing business" included those instances in which a foreign corporation made a contract in Vermont with a resident thereof which called for performance within the state; or in which a foreign corporation committed a tort in whole or in part in Vermont. There was no question concerning adequacy of notice and opportunity to appear. *Held,* a state may constitutionally pass a statute subjecting a foreign corporation which commits a tort wholly within the state to the jurisdiction of its courts for the purpose of determining liability for damages arising from such a tort. *Smyth v. Twin State Improvement Corporation,* (Vt. 1951) 80 A.(2d) 664.

The very nature of the work performed by the defendant would seem to point to the existence of a contract. However, the decision rests entirely upon

[1] Vermont Rev. Stat. (1947) §1592.

the existence of tort liability, thus presenting an issue which heretofore has received little attention.[2] This inattentiveness is probably due to the general assumption that isolated torts within a state do not provide a sufficient basis for jurisdiction over a foreign corporation unless the state's police power is also involved.[3] But a state should be able, by statute, to condition entry and activity, single or multiple, without resort to its police power.[4] Cases in this field generally deny jurisdiction over foreign corporations unless they are found to be "doing business" within the state, but this is due usually to the wording of the statute involved.[5] The Vermont statute present in the principal case attempts to equate the commission of one tort to "doing business." The definition is novel, for judicial interpretation has crystallized that term as involving considerably more.[6] Vermont, of course, may prescribe any meaning it likes to such a term, but definitional strategy will not, of itself, bestow jurisdiction.[7] However, there are numerous examples allowing jurisdiction based upon the doing of an act less than "doing business" when the cause of action arises from this same act.[8] Thus the question of jurisdiction actually hinges upon the presence of minimum contacts between the defendant and the state, and the compliance with "traditional standards of fair play,"[9] rather than on any particular defi-

[2] The "Restaters" have expressly left the point undecided. See 2 JUDGMENTS RESTATEMENT §23 and Caveat (1942); 4 CONFLICT OF LAWS RESTATEMENT §88 (1934) and Supplement (1948). See also annotations, 94 L. Ed. 1181.

[3] For example, see Doherty and Co. v. Goodman, 294 U.S. 623, 55 S.Ct. 553 (1935); Rosenberg Bros. and Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170 (1923). It is clear that, whether or not police power is involved, the state can condition the use of its highways by nonresident motorists upon an implied consent to substituted service of process as to liabilities arising from such use. See Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927); discussed in Scott, "Hess and Pawloski Carry On," 64 HARV. L. REV. 98 (1950). See also 4 CONFLICT OF LAWS RESTATEMENT Supplement, §§84, 88, 89 (1948).

[4] This is especially true as to foreign corporations who are not entitled to all the constitutional "privileges and immunities" that individuals are. See Scott, "Jurisdiction Over Non-Residents Doing Business Within a State," 32 HARV. L. REV. 871 (1919); Culp, "Process in Actions Against Non-Residents Doing Business Within a State," 32 MICH. L. REV. 909 (1934). Of course a statute must yield to the superior requirements of the Federal Constitution as to due process if the facts of particular case bring it into play. Washington ex rel. Bond and Goodwin and Tucker v. Superior Court, 289 U.S. 361, 53 S.Ct. 624 (1933). And each question of due process depends upon its own individual facts. International Harvester Co. v. Commonwealth of Kentucky, 234 U.S. 579, 34 S.Ct. 944 (1914).

[5] E.g., Fiorella v. Baltimore and Ohio R. Co., (D.C. Pa. 1950) 89 F. Supp. 850; Smith v. Louisville and Nashville R. Co., (D.C. N.Y. 1950) 90 F. Supp. 189; Landaas v. Canister Co., (D.C. N.Y. 1946) 69 F. Supp. 835.

[6] Traveler's Health Assn. v. Commission of Virginia, 339 U.S. 643, 70 S.Ct. 927 (1950); International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945); State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, 331 Mo. 1015, 56 S.W. (2d) 28 (1932), cert. den. 289 U.S. 746, 53 S.Ct. 689 (1933).

[7] Doyle v. Southern Pacific Co., (D.C. Mo. 1949) 87 F. Supp. 974.

[8] E.g., see Hess v. Pawloski, supra note 3; Johns v. Bay State Abrasives Co., (D.C. Md. 1950) 89 F. Supp. 654; Highway Steel and Mfg. Co. v. Kincannon, 198 Ark. 134, 127 S.W. (2d) 816 (1939).

[9] Traveler's Health Assn. v. Commission of Virginia, supra note 6; International Shoe Co. v. Washington, supra note 6.

nition of "doing business." Thus, in the principal case it is probably immaterial whether or not the defendant was "doing business."[10] This case appears to be another step in a trend[11] which tends to equate a state's power over a party with the commission of specified acts whose performance has been conditioned upon the submission of the party to the jurisdiction of the state for any liability arising therefrom.[12] Objections to this development seem to be outweighed by the arguments favoring it, provided constitutional requirements of notice and opportunity to appear are met. First, the scope of this type of statute is limited to the case in which most of the pertinent facts must, of necessity, have occurred within the state.[13] Second, this type of act, rather than discriminating against the nonresident, places him in the same status as the resident, and therefore, neither confers nor denies special privileges or immunities to either group.[14] Third, the burden on a defendant is certainly no greater in this type of case than in the instance where an in rem action is allowed to cut off a party's rights irrevocably without personal appearance.[15] Fourth, the result in the principal case would seem particularly desirable from a Conflict of Laws standpoint, since the liability can be determined by a court familiar with applying the law of the place of occurrence rather than a court which, in some instances, may find itself unversed in the application of such law. Fifth, if cases of actual hardship to a defendant arise, the doctrine of forum non conveniens may be employed to handle the problem[16] in both state and federal courts.[17]

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[10] See Johns v. Bay State Abrasive Products Co., supra note 8, in which a Maryland statute allowing jurisdiction over foreign corporations when torts are committed or contracts are made and performed within the state, regardless of whether found to be doing business or not, was held valid under the circumstances involved in the case. But a finding of "doing business" would be essential in cases other than those which come precisely within the terms of the statute in the Johns case or the Smyth case.

[11] For an analysis of this trend, see 49 MICH. L. REV. 881 (1951).

[12] English courts have long asserted jurisdiction in incidents where nonresidents have committed specified acts within the territorial limits, although the offender has departed from the country. Since the English definition of "foreign corporation" means only those from other nations, a resident would have to resort to action in another nation's tribunals; so the tendency toward allowing jurisdiction in England is much stronger than in the United States where "foreign corporation" generally refers to one incorporated in a sister state whose laws are always strikingly similar to those of the state considering the jurisdictional question. See Logan v. Bank of Scotland, [1906] 1 K.B. 141 (C.A.); Egbert v. Short, [1907] 2 Ch. 205.

[13] The most logical place to have trial in a tort action would seem to be within the jurisdiction of its occurrence.

[14] Sugg v. Hendrix, (5th Cir. 1944) 142 F. (2d) 740.

[15] See Anderson v. Luckett, 321 U.S. 233, 64 S.Ct. 599 (1944); Security Savings Bank v. California, 263 U.S. 282, 44 S.Ct. 108 (1923).

[16] See Hand, J., Kilpatrick v. Texas & Pacific R. Co., (2d Cir. 1948) 166 F. (2d) 788. With regard to the Smyth case it seems rather apparent that requiring a Massachusetts corporation to appear in a Vermont court would not involve undue hardship.

[17] E.g., Whitney v. Madden, 400 Ill. 185, 79 N.E. (2d) 593 (1948); and Leet v. Union Pacific R. Co., 25 Cal. (2d) 605, 155 P. (2d) 42 (1944).