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PROCESS-OBTAINING PERSONAL JURISDICTION OVER FOREIGN CORPORATION BY SERVICE OF PROCESS ON LOCAL SALES AGENT

F. William Hutchinson S.Ed.
University of Michigan Law School

PROCESS—OBTAINING PERSONAL JURISDICTION OVER FOREIGN CORPORATION BY SERVICE OF PROCESS ON LOCAL SALES AGENT—Defendant, a Texas manufacturing corporation, employed a corporate agent to solicit orders in New York. The agent maintained a showroom, used defendant's name on its office door and stationery, and paid all the expenses of the New York business out of sales commissions. All orders were subject to acceptance by the defendant and were filled from Texas. In an action for trade-mark infringement brought in the New York state court and removed to the federal district court, service of summons and complaint was made upon the manager of the New York agency. The district court quashed the service and dismissed the complaint for want of jurisdiction, holding that mere solicitation of orders plus defendant's other local activities did not subject defendant to personal service.[1] On appeal, *held*, reversed. Service was properly made under New York law, and there is no such burden on defendant as to make the service invalid under the federal Constitution. *Bomze v. Nardis Sportswear, Inc.*, (C.C.A. 2d, 1948) 165 F. (2d) 33.

The problem of obtaining jurisdiction in personam over a foreign corporation has troubled the courts since the time of Taney's dictum that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." [2] In view of expanding interstate commerce, jurisdiction could not be limited to the state of incorporation, since it was clearly inequitable to require every local plaintiff to proceed to a foreign jurisdiction to sue a foreign corporation on a local cause of action. Two theories were usually advanced to justify local jurisdiction: either the foreign corporation had "impliedly consented" to be sued, or it was "actually present" because doing local business.[3] Neither theory was wholly satisfactory, for both were founded in fiction and did not cover all situations.[4] In particular, it was seldom clear what constituted "doing business" for jurisdictional purposes, although it was generally agreed

[1] Bomze v. Nardis Sportswear, Inc., (D.C. N.Y. 1946) 68 F. Supp. 156, noted in 60 HARV. L. REV. 654 (1947). Judge Conger agreed, at p. 158, that the facts presented "another borderline case," but held that Davega v. Lincoln Mfg. Co., (C.C.A. 2d, 1928) 29 F. (2d) 164, and Deutsch v. Hoge, (C.C.A. 2d, 1944) 146 F. (2d) 201, were controlling authority.

[2] Bank of Augusta v. Earle, 13 Pet. (38 U.S.) 519 at 588 (1839).

[3] 23 AM. JUR., Foreign Corporations, § 487; GOODRICH, CONFLICT OF LAWS, § 73 (1938); 60 A.L.R. 994 (1929).

[4] GOODRICH, CONFLICT OF LAWS, § 73 (1938); see also the discussion in 35 MICH. L. REV. 969 (1937).

that something more than mere solicitation of orders was required.[5] In 1945 the Supreme Court in *International Shoe Co. v. Washington*[6] recognized that the real problem is one of balancing the convenience of local action to the plaintiff against the corresponding burden on the foreign defendant. The controlling inquiry, said Chief Justice Stone, should be whether the foreign corporation has established "sufficient contacts or ties with the state of the forum to make it reasonable and just" that the corporation be amenable to local jurisdiction.[7] In the present case Judge Learned Hand leans heavily on the principles of the *International Shoe Co.* case,[8] both to dispose of the federal due process question and to reconcile the facts before him with the prior New York decisions.[9] As to the facts, he considers it unimportant that the defendant was not responsible for taxes, salaries, and other expenses of the New York agency, since "it makes no difference whether the principal or the agent pays the expenses of the business, so long as they come out of the same pocket in the end." [10] It is significant that except for the agent's use of defendant's name, a factor which the opinion does not stress, the defendant apparently had no "contacts or ties" with the New York business other than the solicitation of orders and payment of commissions.[11] Thus the end result of Judge Hand's opinion appears to be that a foreign corporation which does no more than solicit orders through a local but independent sales agency is subject to local jurisdiction. This is a considerable departure from the doctrine that jurisdiction in personam requires "solicitation plus." [12] It is a departure, however, which is probably desirable in view of the widespread business use of such independent agencies; further, it would seem to accord with the general views expressed in the *International Shoe Co.* case. Judge Hand's approach to the question of jurisdiction over foreign corporations will not make it easier to distinguish the facts in borderline cases, but his approach should at least help to free the courts from theoretical considerations and permit the issue to be decided in each instance by the more realistic method of balancing the opposing interests.

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[5] 60 A.L.R. 994 (1929); Green v. Chicago, Burlington & Quincy R.R., 205 U.S. 530, 27 S.Ct. 595 (1907); cf. International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944 (1914).

[6] 326 U.S. 310, 66 S. Ct. 154 (1945), noted in 21 N.Y. UNIV. L.Q. 442 (1946).

[7] 326 U.S. 310 at 320, 66 S. Ct. 154 (1945).

[8] Judge Hand himself had suggested a similar rule of reasonableness in Hutchinson v. Chase & Gilbert, (C.C.A. 2d, 1930) 45 F. (2d) 139.

[9] Cardozo, J., stated the New York rule, that a foreign corporation is subject to jurisdiction if it is "present" in the state, in Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917). However, neither the Tauza case nor later New York decisions attempted to formulate a general standard by which presence could be determined; for example, see Lillibridge, Inc. v. Johnson Bronze Co., 220 App. Div. 573, 222 N.Y.S. 130 (1927), affirmed without opinion, 247 N.Y. 548, 161 N.E. 177 (1928); and Chaplin v. Selznick, 293 N.Y. 529, 58 N.E. (2d) 719 (1944).

[10] Principal case at 36.

[11] Id. at 34.

[12] Note 6, supra.