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Tort Liability of Municipal Corporations in New York

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is held in the majority of jurisdictions, it at the same time realizes that the tenancy ends without notice each year, and is renewed by a further holdover.

Conclusion

Therefore, assuming our observations are correct, we find that if once again there is a prevalence of void parol leases, springing out of the development of adequate housing facilities and commercial buildings, or resulting from some other basis, six months' notice will be required to determine the year to year tenancy arising from entry into possession under the void parol lease. When, however, there is a holdover beyond the time provided for by the lease, the rule in the *Adams* case will be applicable and no notice will be required to terminate. At the present time, it is an open question as to whether or not this is the correct rule. The doubt results from what appears to have been an improper interpretation of the *Adams* case, and it is hoped that in the near future, this question will be resolved by a decision of our Court of Appeals, or an act of the Legislature.

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TORT LIABILITY OF MUNICIPAL CORPORATIONS IN NEW YORK

I

Until rather recently, this note might very appropriately have been entitled "Tort Immunity . . ." rather than "Tort Liability . . ." for municipal immunity was the general rule and not the exception until 1945. In that year, as a result of *Bernardine v. City of New York* [1] and other cases to be considered, the common law tort immunity of municipal corporations was finally abrogated. This immunity, derived from the state, was extended to a municipality in 1798 in *Russell v. Men of Devon.*[2] At that time the idea of the municipal corporate entity was still in a nebulous state and the action was in effect against the population as a whole. The basis for the decision was lack of precedent, fear of an infinity of actions and the absence of corporate funds out of which satisfaction could be had. Later decisions involved the additional explanations that the municipality derives no profit from the exercise of governmental functions,

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[1] 294 N. Y. 361, 62 N. E. 2d 604 (1945).
[2] 2 T. R. 667, 100 Eng. Rep. 359 (1798).

which are solely for the public benefit;[3] that in the performance of such duties public officers are agents of the state or of the public at large and not of the municipality, so that the doctrine of *respondeat superior* does not apply;[4] that municipalities cannot carry on their governmental functions if money raised by taxation for public use is diverted to making good the torts of employees;[5] and that it is unreasonable to hold the municipality liable for negligence in the performance of duties imposed upon it by legislature, rather than voluntarily assumed under its general powers.[6]

Municipal corporations are regarded as having a dual personality. They are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities and, at the same time, they are corporate bodies, capable of much the same acts as private corporations and having the same special and local interests and relations not shared by the state at large. The obvious injustices resulting from the immunity rule led to the attempted distinction between the two functions and the holding that in so far as they represent the state, in their governmental, political or public capacity, municipalities share its immunity from tort liability, while in their corporate, private or proprietary character they may be liable.[7]

This dual personality has caused the courts to adjudge the law into a tangle of disagreement and confusion. The departments of government almost invariably considered governmental are those established for fire and police protection, health and public charities.[8] As to other activities there has been an ever increasing diversity of opinion in different jurisdictions.[9] The line between the two functions is wavering and indistinct. "It has been long recognized that the distinction between governmental and corporate powers and functions is an illusory one incapable of uniform application and produc-

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[3] Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877); Maxmilian v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468 (1875).

[4] Burrill v. City of Augusta, 78 Me. 118, 3 Atl. 177 (1886); Everly v. Adams, 95 Kan. 305, 147 Pac. 1134 (1915); Maxmilian v. Mayor, *supra* note 3.

[5] Commissioners of Hamilton Co. v. Mighels, 7 Ohio St. 110 (1857).

[6] City of Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407 (1876); Evans v. City of Sheboygan, 153 Wis. 287, 141 N. W. 265 (1913). For other theories advanced by New York courts, see Note, 43 COL. L. REV. 84, 85, n. 1 (1943).

[7] Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (N. Y. 1842). That the distinction had been foreshadowed for some time before, see Barnett, *The Foundations of the Distinction Between Public and Private Functions*, 16 ORE. L. REV. 250 (1937).

[8] Augustine v. Town of Brant, 249 N. Y. 198, 204, 163 N. E. 732, 734 (1928).

[9] The numerous conflicting cases are collated in Note, 120 A. L. R. 1376 (1939).

tive of the most unsatisfactory results." [10] The truth of the matter is that most functions were originally in private hands.[11]

The distinction between governmental and proprietary functions was first declared by a New York court in 1842 in *Bailey v. City of New York*.[12] The test there laid down was that if powers are granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc,* is to be regarded as a private company. The test with its attempted clarifications has survived through the years. It is no small wonder that so general a rule would cause wide variety in its application in the jurisdictions adhering to it. In the final analysis it can make no difference to an injured person whether his damage was governmentally caused or proprietorially caused.

II

State Waiver of Immunity

The earliest statutory waivers of immunity were of two types: special enabling acts applying to a particular specified claim; and general statutory waivers, whereby the state assumed liability for the torts of specified employees. Generally under these statutes immunity from action was retained,[13] claims being heard by a designated board.

In 1897, the Court of Claims was established with jurisdiction over actions against the state, and immunity from action was waived in those cases where statutes had previously waived immunity from liability.[14] In 1920, the first Court of Claims Act [15] was passed, Section 12 of which restated the waiver of the state's immunity from action. No additional immunity from liability was expressly waived by this Act and the Court of Appeals, on grounds of public policy, refused to imply such waiver.[16] The Court of Claims Act was amended in 1929 [17] to include a new section, Section 12a, which waived the state's immunity from liability for the torts of its officers and employees. This section was hailed as ". . . a recognition and

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[10] HARPER, TORTS 663 (1933).

[11] See Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test,* 22 VA. L. REV. 910, 914, 915 (1936).

[12] 3 Hill 531, 38 Am. Dec. 669 (N. Y. 1842).

[13] Immunity is of two kinds: immunity from liability, under which the state is free from liability for its wrongs unless it agrees to allowing such liability to be imposed; and immunity from action, under which the state, even where it has waived its immunity from liability, is protected from having that liability determined in a court of law unless it gives its consent thereto. Smith v. State, 227 N. Y. 405, 125 N. E. 841 (1920).

[14] Laws of N. Y. 1897, c. 36, §§ 263, 264.

[15] Laws of N. Y. 1920, c. 922, § 12.

[16] Smith v. State, 227 N. Y. 405, 125 N. E. 841 (1920).

[17] Laws of N. Y. 1929, c. 467, § 12a.

acknowledgment of a moral duty demanded by the principles of equity and justice." [18]

These legislative enactments, by which immunity from action and immunity from liability have been waived in successive stages, terminated in the broad waiver now found in Section 8 of the Court of Claims Act which provides: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, ..." [19]

III

Municipal Immunity Effected by State Waiver

In *Bernardine v. City of New York,* an individual sought to recover for personal injuries caused by a runaway police horse. The contention of the city was that recovery was barred by common law immunity of the city from liability for wrongful performance of governmental duties. The Court of Appeals held that the immunity previously enjoyed by the city was abrogated by Section 8 of the Court of Claims Act. It was pointed out that none of the civil divisions of the state, such as its counties, cities, towns and villages, has any separate sovereignty [20] and that the legal irresponsibility previously enjoyed by such governmental units was nothing more than an extension of the exemption from liability which the state possessed.[21] It held that upon waiver by the state of its own sovereign dispensation, the former extension of immunity enjoyed by political subdivisions of the state was naturally brought to an end, with the result that civil divisions are answerable equally with individuals and private corporations for wrongs of its officers and employees, even if no separate statute sanctions such enlarged liability in a given instance.[22] Any plea of immunity on the ground that officers and employees when engaged in governmental functions are acting as delegates of the state and not in behalf of a municipal master [23] was vain, since argumenta-

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[18] Jackson v. State, 261 N. Y. 134, 138, 184 N. E. 735, 736 (1933).

[19] Laws of N. Y. 1939, c. 860, § 8.

[20] See N. Y. CONST. ART. IX, § 9; City of Chicago v. Sturges, 222 U. S. 313, 323, 56 L. ed. 215, 220 (1911).

[21] *See* Murtha v. N. Y. H. M. Col. and Flower Hospital, 228 N. Y. 183, 185, 126 N. E. 722 (1920).

[22] Holmes v. Erie County, 291 N. Y. 798, 53 N. E. 2d 369 (1944).

[23] This was the reasoning followed in Wilcox v. City of Rochester, 190 N. Y. 137, 82 N. E. 1119 (1907); Hughes v. County of Monroe, 147 N. Y. 49, 41 N. E. 407 (1895); Maxmilian v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468 (1875). When carried to its logical end, this reasoning would now result in the state's being liable for the torts of municipal officers and employees. Was not the real basis for extending immunity to municipalities the fear of an infinity of suits and the creation of a crushing burden of liability? That this fear was unfounded see Feezer, *Capacity to Bear Loss as a Factor in the*

tion which had been contrived as a front for the doctrine of governmental immunity did not survive the renunciation of that doctrine itself.[24]

The definite commitment made in the *Bernardine* case had been foreshadowed by a previous *per curiam* opinion and decision of that court and by decisions of lower New York courts. Thus in *Holmes v. Erie County*,[25] an action was brought against the county for personal injuries received while plaintiff was confined in the county's penitentiary and while he was working in the penitentiary workshop. The county made a motion to dismiss on grounds of failure to state a cause of action. The theory of the motion was the immunity of the county from suit since it was engaged in the performance of a governmental function. It was held that the complaint stated a cause of action. The Appellate Division, after adverting to Sections 8 and 12a of the Court of Claims Act, went on to say that the immunity of the county, a civil division of the state, in performing a governmental function, has its source in the immunity of the state while carrying out a governmental function delegated to the county by the state, and held that if the immunity of the state is destroyed, there is no basis for holding that a county, as a civil division of the state, is still immune. The court followed the reasoning of the Court of Appeals in *Bloom v. Jewish Board of Guardians*,[26] which involved a private corporation that operated an industrial school. There, the Court of Appeals had held that since the school had enjoyed a previous immunity from negligence of its employees only because it carried out a function of government for the state, when the state waived its own immunity, the immunity accorded to the school as an agent of the state did not survive. Similarly, in *McCarthy v. City of Saratoga Springs*,[27] it was held that a complaint against the city for the assault of a police officer employee of the city while acting as such, was not subject to dismissal on the ground of immunity from tort liability based on performance of a governmental function, and that the derivative immunity of a city ceased to exist after the waiver of immunity of the state.[28]

Decision of Certain Types of Tort Cases, 78 U. OF PA. L. REV. 805, 815-829 (1930); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 445-462 (1941).

[24] *Cf.* Miller v. City of New York, 292 N. Y. 571, 54 N. E. 2d 690 (1944).

[25] 291 N. Y. 798, 53 N. E. 2d 369 (1944), *affirming* 266 App. Div. 220, 42 N. Y. S. 2d 243 (4th Dep't 1943), *affirming* 178 Misc. 46, 32 N. Y. S. 2d 960 (Sup. Ct. 1942).

[26] 286 N. Y. 349, 36 N. E. 2d 617 (1941).

[27] 269 App. Div. 469, 56 N. Y. S. 2d 600 (3d Dep't 1945).

[28] *See, e.g.*, Young v. City of Potsdam, 269 App. Div. 918, 58 N. Y. S. 2d 102 (3d Dep't 1945); Miller v. City of New York, 266 App. Div. 565, 43 N. Y. S. 2d 79 (1st Dep't 1943), *aff'd without opinion*, 292 N. Y. 571, 54 N. E. 2d 690 (1944); Williams v. City of New York, 57 N. Y. S. 2d 39 (Sup. Ct. 1945). *Contra:* Volk v. City of New York, 259 App. Div. 247, 19 N. Y. S. 2d 53 (1st Dep't 1940), *rev'd on other grounds*, 284 N. Y. 279, 30 N. E. 2d 596

The *Bernardine* case was followed by *Steitz v. City of Beacon.*[29] This was an action to recover damages suffered as a result of fire. Plaintiff alleged that fire broke out on premises near those of plaintiff and that plaintiff's property was destroyed because of the negligence of the city in failing to create and maintain a fire department, including fire equipment and protection for the benefit of plaintiff's property and that of others, that the city negligently failed to keep in repair the pressure and flow regulating valves located near plaintiff's property, that it negligently operated a certain manually operated valve, and that by reason of such negligence an insufficient quantity of water was provided to effectively combat the fire in question. The Court of Appeals reiterated the doctrine laid down in the *Bernardine* case, stating the question for decision to be whether the facts alleged would be sufficient to constitute a cause of action against an individual under the same *duties* as those imposed upon the city solely because of failure to protect property from destruction by fire which was started by another. It was pointed out that in the absence of an assumption of duty by agreement or one imposed by statute there could be no liability. Though the court found that there was a duty to maintain a fire department, such duty imposed by city's charter was not designed to protect the personal interest of any individual but to secure the benefits of well ordered municipal government enjoyed by all as members of the community. *Moch Co. v. Rensselaer Water Co.*,[30] which held that a corporation under a positive statutory duty to furnish water for the extinguishment of fire is not rendered liable for damages caused by a fire started by another because of a breach of this statutory duty, was controlling. *Foley v. State of New York*,[31] which allowed recovery for injuries caused by negligence of state in failing to replace a burned out traffic light bulb, was distinguished. In that case the Vehicle and Traffic Law [32] imposed upon the state the duty to maintain traffic control lights upon state highways for the sole purpose of protecting individuals using the highways. The duty ran to plaintiffs and others similarly situated and the state was liable in tort for a breach of such duty.

In the *Steitz* case there was a dissenting opinion on the ground that as a result of the state waiver of immunity cities have become liable at least for the negligent maintenance of such facilities and appliances for fire protection as they possess. The dissent was of the opinion that the *Moch* case should not have been controlling since it was decided before the state waiver of immunity and the city of Rensselaer was not under a duty to supply its inhabitants with pro-

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(1940). But in the light of subsequent decisions this case may be safely disregarded.

[29] 295 N. Y. 51, 64 N. E. 2d 704 (1945); 20 ST. JOHN'S L. REV. 100 (1946).

[30] 247 N. Y. 160, 159 N. E. 896 (1928).

[31] 294 N. Y. 275, 62 N. E. 2d 69 (1945).

[32] N. Y. VEHICLE AND TRAFFIC LAW § 95a.

tection against fire. Obviously the majority of the court was influenced by that ever present fear of depleting public funds should it have imposed what it thought would be a crushing burden of liability. Quite apart from the city of Beacon's charter, liability might very well have been imposed on the theory that to assume control of an activity which induces foreseeable and reasonable reliance by others entails a duty of care to them.[33] The liability would not be unbearable, especially in New York where tort liability for the spread of fire is limited.[34] The municipality would only be liable for that which is a closely proximate result of the risk created by its own negligence, and that is fixed by decisional law.

The holdings of the *Bernardine* and *Steitz* cases were applied in *Murrain v. Wilson Line*[35] which was a wrongful death and personal injury action arising out of a jam on a city owned pier, occasioned by a refusal of lodge committeemen to open the gates. The lodge had chartered a steamboat from defendant, Wilson Line, for a day's outing. The steamship line had a permit from the defendant city, to make landings on the pier, paying therefore a regular wharfage charge. The pier was open to the public at all times but, for the purpose of regulating admission to boats, had a four-gate barrier at the river end. At the time a crowd started to gather, two police officers were in attendance and ten more were called in when the alarmingly overcrowded condition became apparent. Plaintiffs contended that the police officers did not act with the dispatch or in the manner required by the occasion and that the accidental trampling resulting in plaintiff's injury was caused by their failure to give proper attention to the situation. The complaint was dismissed, the reasoning of the court being that the city was not operating a business and therefore, since the pier was nothing more than the extension of a public street, all that could be expected from the city was police protection of the same nature and degree as would be afforded to any public gathering at any public place and not in the nature of individual care of private patrons. No claim was made that the action of any policeman inflicted injury upon anyone. The claim was that the police force failed to take the affirmative action which was necessary to avoid injury to members of the public, which is simply a failure of police protection. Such failure is not a basis of civil liability to individuals.

The final case to be considered is that of *McCrink v. City of New York*.[36] A New York City patrolman, while off duty and in-

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[33] Erie R. R. v. Stewart, 40 F. 2d 855 (C. C. A. 6th 1930); see PROSSER, TORTS 195 (1941).

[34] Hoffman v. King, 160 N. Y. 618, 55 N. E. 401 (1899).

[35] 270 App. Div. 372, 59 N. Y. S. 2d 750 (1st Dep't 1946), *aff'd without opinion*, 296 N. Y. 845, 72 N. E. 2d 29 (1947), *reargument denied*, 296 N. Y. 995, 73 N. E. 2d 572 (1947).

[36] 296 N. Y. 99, 71 N. E. 2d 419 (1947); 22 N. Y. U. L. Q. REV. 509.

toxicated, shot and killed Francis McCrink and seriously wounded Sidney Murphy. Murphy and the estate of McCrink sued for damages, the former for personal injuries, the latter for damages resulting from death. The actions, which were consolidated, were predicated upon the theory that the city negligently failed to discharge the patrolman when it knew, or in the exercise of reasonable care should have known, that his retention on the force involved a known risk of bodily harm to others. A patrolman was required to carry a revolver at all times.[37] The patrolman had a departmental record of three previous intoxications. The defense was that dismissal of the patrolman lay within the discretion of the Police Commissioner and that the city could not be held liable for his failure to act or for an improvident exercise of his discretion. In disallowing the defense, the court reasoned that Section 8 of the Court of Claims Act has limited the scope of that discretion. It is superseded by the duty to abate that risk if in related circumstances danger to others is reasonably foreseen. Otherwise the discretion would serve to restore without legislative action the immunity which the legislature has waived. That waiver having been effective to make the city liable as an individual or corporation for wrongful acts of its officers and agents,[38] it may not with impunity retain in service an employee from whose retention danger to others may reasonably be anticipated.[39] It was a question of fact for jury whether under the facts established the retention of the patrolman involved danger to others reasonably to be foreseen.

In summarizing, we have seen that since the *Bernardine* case we have an unequivocal expression by the Court of Appeals to the effect that state waiver of immunity has abrogated municipal immunity and that a municipal corporation is now liable as an individual or private corporation. The *Bernardine* case rendered a municipality liable for its agent's negligence of commission (misfeasance) in exercising a governmental function. The *Steitz* case refused to extend the liability so as to render the municipality liable for failure (nonfeasance) to exercise a governmental function, in the absence of a duty, owing to an individual as an individual rather than as a member of the public at large, either assumed or expressly imposed by the legislature. The *Murrain* case cites both the *Bernardine* and the *Steitz* cases with approval and is another instance of non-liability for nonfeasance of a governmental function; on the other hand the *McCrink* case is an example of liability based upon misfeasance.

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[37] Rule 288 of the Rules and Regulations of the New York City Police Department.

[38] Bernardine v. City of New York, 294 N. Y. 361, 62 N. E. 2d 604 (1945).

[39] Fletcher v. Baltimore & Potomac R. R., 168 U. S. 135, 140, 42 L. ed. 411, 413 (1897); Cusack v. Ottinger, 245 N. Y. 595, 157 N. E. 872 (1927).

Conclusion

Due to the rather recent changeover from immunity to liability it is difficult to ascertain what the courts will hold in any given instance. An influence of no small degree will be these two conflicting factors: that of giving an adequate civil remedy and that of preventing too extensive a burden of municipal liability. Somewhere between the two lies the practical solution. In a sense, the distinction between proprietary and governmental functions has been swept away. The decisive issue will be, as is common in all tort cases, whether or not there is a duty owing to the plaintiff. In a case of misfeasance there should be no difficulty because all persons, whether private or public, owe a duty to refrain from injuring another. In a case of nonfeasance, even where a duty is spelled out, the decisive issue will be whether that duty is owing merely to the public or to the plaintiff as an individual. This juridical device should prove to be a most effective weapon in limiting liability. In determining the type of duty owing, the courts will look to the legislative intent to be ascertained from the particular charter provision or statute involved. Perhaps, not a small problem will be the determination in any given case of whether there is involved misfeasance or nonfeasance.

Still extant on the statute books of New York are Sections 50a-d of the General Municipal Law waiving municipal liability within certain narrow, well defined areas.[40] Actions may still be brought upon these statutes resulting in the necessity of having judicial opinions rendered as to their applicability in a given case. That this procedure is useless and contains latent possibilities of confusion, needless delay and possibly injustice was aptly illustrated in the

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[40] N. Y. GEN. MUN. LAW §§ 50a-d.

Section 50a removes immunity only in actions resulting from negligent operation, by municipal employees, of municipally owned vehicles. Berger v. City of New York, 285 N. Y. 723, 34 N. E. 2d 894 (1941). The section is remedial in character and in derogation of common law and hence must be strictly construed. Bernardine v. City of New York, 294 N. Y. 361, 62 N. E. 2d 604 (1945).

Section 50b provides for the assumption of liability by the municipality for the negligence of its employees while operating a municipally owned vehicle or other facility of transportation and while acting within scope of his employment and provides that the municipality shall save harmless the employee. This section was intended to relieve the employee of his common law liability. Schwartz v. City of New York, — Misc. —, 25 N. Y. S. 2d 964 (Sup. Ct. 1941).

Section 50c was intended to permit the municipality to indemnify a policeman or fireman for the negligence of such individual in the operation of a vehicle other than a municipally owned vehicle, while in the performance of a governmental function. Schwartz v. City of New York, *supra.*

Section 50d imposes upon the municipality ultimate liability for all damages for personal injuries sustained by reason of malpractice of a physician or dentist while rendering medical or dental services gratuitously to a person in a public institution maintained in whole or in part by the municipality. Derlicka v. Leo, 281 N. Y. 266, 22 N. E. 2d 367 (1939).

Bernardine case. The issue there was whether a horse was a facility of transportation within the meaning of Section 50b. The trial court was of the opinion that it was not and dismissed the complaint. The Appellate Division reversed the trial court. The case was further appealed resulting in the Court of Appeals' adjudication that a horse is a facility of transportation within the meaning of Section 50b. This unnecessary waste of time, expense and clogging up of an already overcrowded court calendar could have been avoided. It takes no great stretch of imagination to postulate situations in which a cause of action might be dismissed for having been improperly brought under these statutes. That action might very well be res judicata should an attempt be made at a later date to bring the action properly under Section 8 of the Court of Claims Act. At the very least there would be the time consuming necessity for amending pleadings.

In so far as Sections 50a-d waive immunity in very limited instances only, they are misleading and obsolete. In this respect they are an erroneous reflection of the law as it exists today. It is submitted that Sections 50a-d be repealed and in their stead, that a statute in conformity with Section 8 of the Court of Claims Act be enacted.

VINCENT PIZZUTO.

THE LIBERALIZED CONCEPT OF "PRESENCE" IN THE ESTABLISHMENT OF JURISDICTION OVER FOREIGN CORPORATIONS

Introduction

There is an ever expanding use of the corporate device, through subsidiaries and affiliates, to carry on business activities over ever increasing areas, crossing not only state lines but national borders as well.[1] It becomes, therefore, increasingly important to re-examine, in the light of the latest decisions, the extent of the power of a local court to regulate the activities of a foreign corporation which affect the rights of local citizens and to subject such foreign corporation to its jurisdiction and process.

In an attempt to protect their citizens the legislatures of the various states have enacted laws requiring foreign corporations doing intrastate business in their state to obtain a license or certificate of authority from the state under pain of certain penalties. Most frequently the penalty consists of preclusion from local courts for the

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[1] See LIEFMANN, CARTELS, CONCERNS AND TRUSTS 244, 265 (1925); Bonsal and Borges, *Limitations Abroad on Enterprise and Property Acquisition*, 11 LAW & CONTEMP. PROB. 720, 737-738 (1946).