

The Liberalized Concept of "Presence" in the Establishment of Jurisdiction Over Foreign Corporations

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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 It is submitted that Sections 50a-d be repealed and in their stead, that a statute in conformity with Section 8 of the Court of Claims Act be enacted.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

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).

purposes of an action in contract.² Generally, the statutes require that a foreign corporation desiring a license to do business in the state must designate in the certificate the Secretary of State as its agent to receive service of process. This designation of the Secretary of State is a contractual obligation and confers personal jurisdiction on the local courts.³

Some of the elements necessary to bring a foreign corporation within the statutes requiring a license must necessarily be present in order to acquire jurisdiction over an unlicensed foreign corporation in order to sue it in a state other than that in which it is domiciled. It does not follow, however, that because a foreign corporation is present and doing business in a state so as to subject it to service of process and the jurisdiction of the local courts, it is likewise present and doing business in that state so as to require its qualification as a foreign corporation. It is true that in each case there must be a more or less continuous course of business and manifestation of presence in the state, but for the purposes of jurisdiction the business done may be entirely of an interstate nature, while the statutes relating to licensing apply only to intrastate business, and provide penalties for doing such business before compliance.⁴

In other words, "doing business" sufficient to bring a corporation within the jurisdiction of the local courts does not mean that the corporation must maintain such a relation to "doing business" as to

² See N. Y. GEN. CORP. LAW § 218 which provides, in part, that "A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority." In *Lebanon Mill Co., Inc. v. Kuhn*, 145 Misc. 918, 920, 261 N. Y. Supp. 172, 174 (Mun. Ct. 1932), Judge Genung, in applying § 218, said that "... within the ambit of a transient, occasional, non-continuous sphere of activity, a foreign corporation may prosecute its corporate functions here, without incurring the disability imposed by Section 218, General Corporation Law. Beyond that sphere immunity ceases, and compliance with the statute becomes mandatory as a condition to suit in the courts of this state. If the corporate activity of a foreign corporation is attended with an appreciable measure of volume, continuity, and regularity, it is forbidden to sue here upon a contract here made if the contract be not preceded by a local authorization to transact business in this state.

"The problem is essentially one of fact. There are no fixed standards of appraisal. The tokens of a forbidden activity must be found in the nature of the particular foreign corporate enterprise, and what is done in this state in the furtherance thereof."

³ *American Blower Co. v. Sturtevant*, 61 F. Supp. 756 (S. D. N. Y. 1945); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. ed. 167 (1939). RESTATEMENT, CONFLICT OF LAWS § 90 (1934). "A state can exercise through its courts jurisdiction over a foreign corporation in so far as the corporation has consented to the exercise of jurisdiction, whether or not the corporation is doing business within the state, and whether or not the cause of action arose out of business done within the state."

⁴ *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917); *International Text Book Co. v. Tone*, 220 N. Y. 313, 115 N. E. 914 (1917). See also PRASEKER, *NEW YORK PRACTICE* § 64 (1947) and *THE CORPORATION TRUST COMPANY, WHAT CONSTITUTES DOING BUSINESS* 170 (1946).

bring it within the statutory provisions requiring a license. There is no precise test of the nature or extent of the business which must be done in either case (each case being determinable upon its own peculiar facts and conditions), but enough must be done to allow the court to say that the corporation is present in the state; and the fact that the business is interstate in character does not give the corporation local jurisdictional immunity.

In *International Shoe Co. v. State of Washington*,⁵ a recent leading case on the question of jurisdiction, the Supreme Court, while liberalizing the requirements for obtaining jurisdiction over a foreign corporation, said that "presence" in a state for the purpose of jurisdiction "has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." The importance of the *International Shoe Co.* decision lies in the possibility of its being utilized to shut off still another avenue of escape used by foreign corporations, not licensed to do business in the state of the forum, *viz.*: to evade liability for their acts within that state by denying their "presence" there for the purpose of jurisdiction. Such a situation was recently before the Supreme Court in the government's antitrust suit against various television manufacturers.⁶

I

It is an elementary and fundamental principle that no personal judgment against a non-resident defendant is valid unless the court which renders it has first obtained jurisdiction over the person of such defendant, and that such jurisdiction must be secured through the service of process upon the defendant or through his voluntary appearance in the action.⁷ In applying this principle to corporate

⁵ 326 U. S. 310, 317, 90 L. ed. 95, 102 (1945).

⁶ *United States v. Scophony Corporation*, 333 U. S. 795, 92 L. ed. 763 (1948). In this case, the Supreme Court, while reaffirming the doctrine of the *International Shoe* case, held that a British Corporation which made strenuous efforts in New York to salvage its enterprise from war disasters by first manufacturing and selling television equipment in New York and, when that failed, by licensing and exploiting its patents by other means, was "transacting business" of a substantial character in New York so as to establish venue there under the Clayton Act and was "found" there within the meaning of the service-of-process clause of Section 12 of the Clayton Act; therefore the corporation was amenable to suit and service in the Government's antitrust prosecution in the Southern District of New York.

⁷ *Hansberry v. Lee*, 311 U. S. 32, 85 L. ed. 22 (1940); *McDonald v. Mabee*, 243 U. S. 90, 61 L. ed. 608 (1917); *Pennoyer v. Neff*, 95 U. S. 714,

defendants, the courts have held that a corporation is not amenable to service of process in a foreign jurisdiction unless such corporation is transacting business within the foreign jurisdiction to such an extent as to subject it to the jurisdiction and laws thereof, and the question as to whether a corporation is "doing business" or "found" within a particular jurisdiction so that it can be there served with process is to be determined on the facts of each case.⁸

In determining the "presence" of a corporate entity the court must decide what acts of human beings are to be attributed to the corporation. A corporation has no physical existence apart from that of its agents when transacting the corporation's business, although the use of "supernatural terms" is not infrequent in discussing the problem. Thus it was long ago said that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created," and that it cannot "actually exist" in another state than that of its incorporation.⁹ But it has long since been recognized that a corporation does not "actually exist" in the state where it is incorporated to any greater extent than it does in a state where its business is carried on. In both states the corporation is found only to the extent that courts attribute to it the acts of those human beings who are transacting corporate business.

It is equally well established that jurisdiction over a non-resident corporation may not be acquired by service of process upon a director or officer of such corporation, unless the corporation itself has subjected itself to the local jurisdiction by doing business therein. Thus in *Riverside & D. R. Cotton Mills v. Menefee*¹⁰ the Supreme Court held that a court may not, without violating due process, render a judgment against a foreign corporation where such corporation has not entered the jurisdiction for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process has been served. The mere fact that an officer of a corporation may be temporarily in the

24 L. ed. 565 (1878). For an excellent discussion of the methods to be utilized in acquiring jurisdiction of *non-resident natural persons* as well as the theories upon which *in personam* jurisdiction and judgment have been sustained in respect to a non-resident corporation, association or person, see Prashker, *Service of Summons on Non-Resident Natural Persons Doing Business in New York*, 15 ST. JOHN'S L. REV. 1 (1940).

⁸ *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. ed. 1479 (1914); *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218, 57 L. ed. 486 (1912); *Green v. Chicago B. & Q. Ry.*, 205 U. S. 530, 51 L. ed. 916 (1907). In *People's Tobacco Company v. American Tobacco Company*, 246 U. S. 79, 87, 62 L. ed. 587, 590 (1918), the Court said: ". . . Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted."

⁹ *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 589, 10 L. ed. 274, 307, (U. S. 1839).

¹⁰ 237 U. S. 189, 59 L. ed. 910 (1915).

state on personal business or even permanently residing therein, if not for the purpose of transacting business for the corporation or vested with authority by the corporation to transact business in said state, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances. Further, in *Lumiere v. Mae Edna Wilder, Inc.*,¹¹ Mr. Justice Brandeis stated: ". . . that jurisdiction over a corporation cannot be acquired in a district in which it has no place of business and is not found, merely by serving process on an executive officer temporarily therein, even if he is there on business of the company, has been settled."¹²

In determining whether a corporation is found within a given locality, just as in determining whether an individual is domiciled there, the actual facts of the case control and not the intentions or desires of the corporate management.¹³

II

While it is recognized that the question whether or not a corporation is doing business within a particular jurisdiction so as to subject itself to the court's jurisdiction depends upon the facts of each case, the recent trend of the decisions of the Supreme Court and the

¹¹ 261 U. S. 174, 177, 67 L. ed. 596, 600 (1923).

¹² *But see* *Hutchinson v. Chase & Gilbert*, 45 F. 2d 139, 141 (C. C. A. 2d 1930), where Judge Learned Hand said: "It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes. The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent it, and we can see no qualitative distinction between one part of its doings and another, so they carry out the common plan. If we are to attribute locality to it at all, it must be equally present wherever any of its work goes on, as much in the little as in the great . . . There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home. . . ."

"We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts."

¹³ Thus with respect to *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. ed. 1479 (1914), it was said in *Haskell v. Aluminum Company of America*, 14 F. 2d 864, 868 (D. Mass. 1926): "In that case there was an obvious intent and desire on the part of the Harvester Company not to do business in such a manner as to justify the courts of the State of Kentucky in taking jurisdiction over it. . . . All contracts with people in Kentucky were required to be made outside of that state."

Nevertheless, the Supreme Court found that the *International Harvester Company* was "doing business" in Kentucky sufficient to warrant service of process despite the interstate nature of the business and the orders given by the company to its agents not to carry on business within the state of such nature as to subject the company to the Kentucky jurisdiction.

Circuit Court of Appeals of the Second Circuit exhibit a liberalized concept of what constitutes doing business.¹⁴

The bellwether decision enunciating this new trend is *International Shoe Co. v. Washington*,¹⁵ wherein the State of Washington sought to secure unemployment taxes from a Delaware corporation which manufactured its shoes outside of Washington. The defendant there had no office in Washington, made no contracts there, maintained no stock of the merchandise, and made no deliveries in intrastate commerce. It merely employed salesmen who were paid on a commission basis, and who rented exhibition rooms. The salesmen were not authorized to enter into contracts. The new test is stated by Chief Justice Stone as follows: "It is evident that 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. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . 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. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . ."

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."¹⁶ While it is likely that the Supreme Court was influenced in this case by the fact that the suit was being brought to recover taxes for the public benefit, there can be no question of the fairness of the philosophy behind the new test.

The effect of this decision on concepts previously held by the Circuit Court of Appeals of the Second Circuit is illustrated by *Bomze v. Nardis Sportswear, Inc.*¹⁷

¹⁴ ". . . contrary to formerly prevailing notions." *Nippert v. Richmond*, 327 U. S. 416, 422, 90 L. ed. 760, 764 (1946).

¹⁵ 326 U. S. 310, 90 L. ed. 95 (1945).

¹⁶ *Id.* at 319, 90 L. ed. at 103.

¹⁷ 165 F. 2d 33 (C. C. A. 2d 1948). That case involved an appeal from an order and judgment quashing service of the summons and dismissing the complaint against appellee, Nardis Sportswear, Inc., a Texas corporation, on the ground that it was not doing business in the State of New York. The case originally arose in the state court and was thereafter removed to the federal court on diversity of citizenship grounds, the plaintiffs being citizens

Adopting the hypothesis discussed in *Lillibridge v. Johnson Bronze Co.*¹⁸ that the state courts should take federal decisions as their absolute standard in determining the constitutional limit of their power over a foreign corporation, Judge Learned Hand stated:¹⁹

. . . *International Shoe Co. v. Washington*, has effected a change. The Supreme Court there declared that the corporation's "presence" was to be determined by balancing the opposed interests: the convenience of the obligee against the burden upon the corporation. That is a test not different in kind from that which has been repeatedly used, when the inquiry is whether it will "unduly burden" interstate commerce to fetch a corporation, engaged in such commerce, from the place of its principal activities to defend the action. If that be the test, the question at once becomes relevant whether the action is based upon a liability arising out of the local activities; for it is almost always less burdensome to subject a corporation to the defense of actions so arising than to those arising elsewhere.²⁰ Indeed probably some such notion is at the basis of those decisions which permit a state to subject to process in personam transients who, while within its borders, have incurred a liability under its laws.²¹

of Pennsylvania. The action was based on infringement of trade marks in the State of New York. The defendant had entered into an arrangement with three individuals doing business as West Coast Sales Company, by which it appointed them agents to solicit orders in New York and to further the sale of women's sportswear manufactured by it, subject to written approval and acceptance at such prices and upon such conditions as it should authorize in writing, the power to accept orders or assume obligations being absolutely reserved to it. West Coast Sales Company was to maintain a showroom for the display of defendant's goods in New York but was to employ its own assistants and be responsible for employers' liability insurance, workmen's compensation, and other such obligations. It was to be compensated by commissions, defendant-appellee advancing certain commissions and paying rent for a limited period. Thereafter, another company organized by the same individuals, the Sopic Corporation, took over the contract, leased an exhibition room, paid rent, employed two salesmen to solicit orders, and two office girls, paid for the telephone, outfitted the office and paid all the taxes and similar liabilities. Sopic Corporation was paid commissions on \$400,000 of orders which was about 9% of the defendant's business.

The court pointed out that, since the trade mark was used in New York, the liability arose out of local activities and held that both under the New York and federal decisions, the Texas corporation was doing business in the State of New York.

¹⁸ 200 App. Div. 573, 222 N. Y. Supp. 130 (1st Dep't 1927), *aff'd without opinion*, 247 N. Y. 548, 116 N. E. 117 (1927).

¹⁹ *Bomze v. Nardis Sportswear, Inc.*, 165 F. 2d 33 (C. C. A. 2d 1948).

²⁰ *Simon v. Southern Ry.*, 236 U. S. 115, 130-132, 59 L. ed. 492, 500-501 (1915); *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 22, 51 L. ed. 345, 351 (1907).

²¹ *Bomze v. Nardis Sportswear, Inc.*, 165 F. 2d 33, 35 (C. C. A. 2d 1948), citing *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623, 79 L. ed. 1097 (1935); *Young v. Masci*, 289 U. S. 253, 77 L. ed. 1158 (1933); *Hess v. Pawloski*, 274 U. S. 352, 71 L. ed. 1091 (1927); *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222 (1916).

III

In *Kilpatrick v. Texas & Pacific Ry.*,²² the Circuit Court of Appeals for the Second Circuit decided that the power of the court extends constitutionally if any of a company's activities continuously take place within the jurisdiction of the court or the liability arose there, and that where an Act of Congress is the basis for jurisdiction for action, no undue burden upon interstate commerce can arise. The action in the *Kilpatrick* case depended upon the Federal Employers Liability Act.²³

Concurrent jurisdiction of the federal courts under the Act is granted by Section 6 of the Act,²⁴ which provides in part: "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

Judge Learned Hand, in construing this section in the light of *International Shoe Co. v. Washington*, said:

Therefore, as we understand it, when a railroad is doing business continuously outside the state of its incorporation, §6 makes irrelevant any question of *forum non conveniens*; but, when a railroad or any other corporation is doing business continuously outside the state of its incorporation, that presence which subjects it to personal service in actions for which no venue is specifically provided, depends upon the issue of *forum non conveniens*.²⁵

This principle that there is no question of *forum non conveniens* has been held applicable in the case of subpoenas issued in actions brought by the Government under the antitrust laws, since the statutory provisions governing the issuance of subpoenas clearly contemplate service in any district within the United States. Section 13 of the Clayton Act²⁶ specifically provides:

In any suit, action or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district. . . .

²² 166 F. 2d 788 (C. C. A. 2d 1948). Plaintiff-appellant was injured on respondent's railroad line in Texas. Jurisdiction was based on the following facts: The railroad maintains an office of eight employees who continuously solicit business in New York, both passenger and freight. The passenger business so procured is booked by the Consolidated Ticket Office in the City of New York which issues tickets—including coupons for passage over the defendant's line—collects fares and accounts to defendant. It does not appear in detail how the freight business is conducted, but the court assumed that the initiating carriers issued joint waybills and bills of lading, collected freight and accounted to defendant. The railroad also has a financial agent in New York which transfers its shares, and pays the dividends and interest on its shares and bonds and equipment trust certificates.

²³ 35 STAT. 65 (1908), as amended, 45 U. S. C. §§ 51-60 (1946).

²⁴ 35 STAT. 66 (1908), as amended, 45 U. S. C. § 56 (1946).

²⁵ *Kilpatrick v. Texas & Pacific Ry.*, 166 F. 2d 788, 791 (C. C. A. 2d 1948).

²⁶ 38 STAT. 736 (1914), 15 U. S. C. § 23 (1946).

Therefore, for example, in cases where subpoenas in connection with a grand jury proceeding under the antitrust laws are served on a corporation principally doing business in another jurisdiction, the only question to be determined is whether the activities of the company in the state of the forum are sufficient for the court constitutionally to exercise jurisdiction. "It cannot be present in a place where none of its activities take place, and, literally at any rate, it is present wherever any of them do take place. It would therefore seem that, so far as it must be present in order to satisfy the territorial limitations upon the powers of a court when acting in personam, it should be enough constitutionally that it shall have extended its activities into the territory where that court's process runs. If that be true, the question whether it must stand trial in the particular forum which the plaintiff has chosen is . . . identical with the plea of 'forum non conveniens.' Since the Supreme Court has held . . . that the plea is not permissible in an action under the Federal Employers Liability Act, and the defendant was 'present' in the only sense that a corporation can be present, the action well lay. Obviously, no question of any undue burden upon interstate commerce can arise as to an Act of Congress."²⁷

Given the proper procedural support for doing so, a state may give judgment *in personam* against a non-resident, who has only passed through its territory, without personal service within the state, if the judgment be upon a liability incurred while he was within its borders.²⁸ The presence of the obligor within the state subjects him to its law while he is there, and allows it to impose upon him any obligations which its law entails upon his conduct.

The federal court, on a recent occasion in the field of antitrust law, has adopted substantially the same test as was applied in the *Kilpatrick* case, in determining whether or not subpoenas were properly served.²⁹

It is to be noted that statutory differences will often complicate the question whether there is not only venue in the court but also whether the defendant has been validly served. For example, the general rule governing venue and service of process against a foreign corporation, both under Section 12 of the Clayton Act³⁰ and under

²⁷ See note 25 *supra* at 791.

²⁸ *Hess v. Pawloski*, 274 U. S. 352, 71 L. ed. 1091 (1927).

²⁹ *In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013 (S. D. N. Y. 1947).

³⁰ 38 STAT. 736 (1914), 15 U. S. C. § 22 (1946), provides as follows:

"Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

The value of this section lies in its relief of persons injured through corporate violations of the antitrust laws from the often insurmountable obstacle

the due process clause of the Federal Constitution, is that a foreign corporation may be sued or served in a jurisdiction if it is "found" or "present" therein; and it is "found" or "present" within a jurisdiction if it does business therein "of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted."³¹

Under Section 12 of the Clayton Act there is venue in the court if the defendant is either "found" or "transacts business" within the judicial district, whereas that section permits service of process only in a district in which the defendant is "found." The venue provision is more easily satisfied because the mere "transaction of business" by a corporation within the judicial district lays the basis for venue in the court. A foreign corporation may be validly served with process in a district, if it "'transacts' business therein of any substantial character."³² The venue provision, however, is satisfied if the defendant merely "transacts business" within the district.³³ The fairness of liberally construing the jurisdictional requirements is indicated in the words of the court in *Frey & Son v. Cudahy Packing Co.*: "A corporate defendant who is enough in the state or district there to wrong someone should be held to be enough in the state or district to be there answerable for what it has there wrought. . . ."³⁴

It will therefore be noted that the same general concept, *i.e.*, corporate presence within a jurisdiction, determines whether a foreign corporation has been validly served with process both under Section 12 of the Clayton Act and, independently of statute, under the

of resorting to distant forums for redress of wrongs done in the places of their business or residence.

But see Pub. L. No. 773, 80th Cong., 2d Sess., 28 U. S. C. § 1404(a) (Supp. 1948), which provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

While it has not yet been adjudicated, it would seem that this section may well modify Section 12 of the Clayton Act since it can be construed as authorizing a plea of *forum non conveniens* in civil antitrust actions.

³¹ *People's Tobacco Company v. American Tobacco Co.*, 246 U. S. 79, 62 L. ed. 587 (1918); *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218, 57 L. ed. 486 (1912); *Consol. Textile Co. v. Gregory*, 289 U. S. 85, 77 L. ed. 1047 (1933); *United States v. Aluminum Co. of America*, 20 F. Supp. 13 (S. D. N. Y. 1937); *Haskell v. Aluminum Co. of America*, 14 F. 2d 864 (D. Mass. 1926).

³² *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359, 373, 71 L. ed. 684, 689 (1927); *Haskell v. Aluminum Co. of America*, 14 F. 2d 864 (D. Mass. 1926); *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 54 F. 2d 107 (E. D. Ky. 1931).

³³ *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359, 372, 373, 71 L. ed. 684, 689 (1927); *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 786 (S. D. N. Y. 1936); *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corp.*, 46 F. 2d 623, 624 (C. C. A. 1st 1931).

³⁴ 228 Fed. 209, 213 (D. Md. 1915).

due process clause of the Constitution.³⁵ "Corporate presence" has the same meaning in both contexts, and the standards of venue and service of process under Section 12 would seem to be in fact the same as those of constitutional due process as set forth by the Supreme Court in *International Shoe Co. v. Washington*.³⁶ There, the Court appears to substitute, for a mechanical and quantitative approach to the problem of corporate presence within a jurisdiction, a more practical test, under which venue may be established against a foreign corporation if the forum has sufficient contacts with the corporate activity so that an unreasonable burden is not imposed upon the corporation in defending a suit therein.

As to service of process the basic consideration is to provide adequate notice to the defendant.³⁷ It would therefore seem that service of process may be made against a foreign corporation if there is reasonable assurance that such service will convey actual notice of the pendency of the proceeding against the corporation.

IV

It has been the increasing practice of corporations to transact their business far from the state of their incorporation through the utilization of corporate subsidiaries and affiliates. This should not complicate the question of jurisdiction and service since, despite the recognition of corporate existence as a distinct entity, the Supreme Court has on numerous occasions wholly disregarded the corporate fiction where separate corporations have been formed to accomplish a forbidden result.³⁸

In the recent important *North American* case³⁹ involving the dissolution of a utilities empire, the Supreme Court decided that the power of Congress under the commerce clause is adequate to reach through intercorporate arrangements and strike at the heart of the evils which its statutes sought to undo. Where the facts indicate

³⁵ The courts have not undertaken to distinguish between the constitutional content of "corporate presence" and its statutory content under Section 12 of the Clayton Act. They have, when dealing with the meaning of "corporate presence" or with the word "found" in a specific statute, relied on cases involving different statutory or constitutional contexts as apposite precedents. Thus, in the *International Shoe* case, the Supreme Court relied, without apparent distinction, on prior decisions involving the due process clause of the 14th Amendment, the diversity jurisdiction of the federal courts, and venue provisions applicable to the Sherman Act.

³⁶ 326 U. S. 310, 90 L. ed. 95 (1945). In the *Scophony* case, *supra*, note 6, however, the Court declined to decide this point, as it explained in footnote 13 of its opinion, because there was no necessity for doing so in that case.

³⁷ *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

³⁸ *United States v. Lehigh Valley R. R.*, 254 U. S. 255, 65 L. ed. 253 (1920); *United States v. Reading Co.*, 253 U. S. 26, 64 L. ed. 760 (1919); *United States v. Del. Lack. & West. R. R.*, 238 U. S. 516, 59 L. ed. 1438 (1914). See also *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 141 (E. D. Mo. 1916).

³⁹ *North American Co. v. SEC*, 327 U. S. 686, 90 L. ed. 945 (1946).

that a parent corporation controls a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies, the courts will not permit themselves to be blinded by mere forms but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.⁴⁰ The same principle was followed in *Detroit Motor Appliance Co. v. General Motors Corp.*,⁴¹ a patent infringement suit.

Even where the management of the parent corporation intends to insulate itself from the operation of its subsidiaries, the facts are controlling. In *Gray v. Eastman Kodak Co.* the court said: ". . . Undoubtedly what was here planned was that each corporation should be a distinct and independent entity having nothing in common beyond, as we have said, a common stock ownership and managerial control. The drift is, however, usually uncontrollable in all such cases toward the business which is done being done by the real owners and the separation of corporate entities ignored. Whether what is done is the one thing or the other is a fact to be found."⁴²

It therefore follows that a foreign or even alien corporation would be "found" within a jurisdiction if it there carried on its activities (which were the basis of the suit) through an agent—corporate or otherwise.⁴³ The converse situation was involved in *S.E.C. v. Minas De Artemisa, S.A.*,⁴⁴ where the court concluded that the service of a subpoena upon the American parent corporation, domiciled in Arizona, was sufficient to require its alien subsidiary, domiciled in Mexico, to produce and submit records to the Securities and Exchange Commission, *i.e.*, the alien subsidiary was "found" within the district of Arizona.

The use, therefore, of a local corporate agent by a foreign corporation will be unavailing to insulate the foreign corporation against local jurisdiction and service where the activities of the foreign corporation within the jurisdiction have not only been continuous and systematic, but also give rise to the liabilities sued on.

⁴⁰ *Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n*, 247 U. S. 490, 62 L. ed. 1229 (1918).

⁴¹ 5 F. Supp. 27 (E. D. Ill. 1933). There, the General Motors Corporation was held in contempt of an injunction against infringement of a patented product on proof of the dealing by its subsidiaries in an infringing product. The General Motors Corporation attempted to avoid liability by showing that it, personally, had not carried on the objectionable practices, and that it should be subject to suit only in the district of its residence. The court, however, held that the subsidiaries were mere agents or adjuncts, were carrying out the activities of the parent company under its control and direction and for its benefit, and that the parent corporation was "found" wherever these subsidiaries were "found."

⁴² 53 F. 2d 864, 865 (E. D. Pa. 1930).

⁴³ *United States v. United States Alkali Export Ass'n*, Civil No. 24-464, S. D. N. Y., July 16, 1946; *Dobson v. Farbenfabriken of Elberfeld Co.*, 206 Fed. 125 (E. D. Pa. 1913).

⁴⁴ 150 F. 2d 215 (C. C. A. 9th 1945).

Conclusion

The liberalized concept enunciated by the Supreme Court since the *International Shoe* case goes a long way toward dissipating the formerly widely abused immunity from suit enjoyed by foreign corporations in jurisdictions other than that of their residence. The court has substituted for a merely quantitative, hairsplitting approach to the problem of corporate presence within a jurisdiction, a more practical test which seems to be fair to all. No longer may a foreign corporation come to a district, engage there in outlawed activities, then by artful arrangement of agents' authority, or of their comings and goings, successfully defeat or delay its just punishment.

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