

## **Covenants—Measure of Damages (Morgan Lake Co. v. N.Y., N.H. & H.R. Co., 262 N.Y. 234 (1933))**

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requiring it to take out a license,<sup>2</sup> yet in the former case there must be dealings of such a nature as to show an intention of the corporation to subject itself to the local jurisdiction.<sup>3</sup> There is no precise test of the nature or extent of business that must be done.<sup>4</sup> The facts of each case are controlling.<sup>5</sup> Plaintiff here is not amenable to suit merely because it was selling goods through a subsidiary, nor is the degree of control of the selling agent important.<sup>6</sup> The presence of the president of the corporation, under the circumstances of this case, certainly does not bring the corporation under the head of doing business. A single act by an agent or officer of the corporation, even if in the course of regular business, does not constitute the corporation as doing business in the foreign state.<sup>7</sup> How much less would the mere act of entry by the president for the purpose of conferring on litigation show an intention of the corporation to subject itself to the local jurisdiction?<sup>8</sup>

J. R. O'D.

COVENANTS—MEASURE OF DAMAGES.—The Central New England Railroad Co., by a covenant in a deed of land, agreed to pay for all damages caused by sparks, ashes, cinders or coal dust, to ice on a lake beyond fifty feet on each side of its right of way. This railroad was later merged with the defendant. Plaintiff seeks damages for injury to the ice on his property caused by the smoke and the cinders

<sup>2</sup> *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

<sup>3</sup> *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 33 Sup. Ct. 233 (1918).

<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728 (1903); *Peterson v. Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 27 Sup. Ct. 513 (1907); *People's Tobacco Co. v. American Tobacco Co.*, *supra* note 3; *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U. S. 333, 45 Sup. Ct. 250 (1925); *Bertha Zinc & Mineral Co. v. Clute*, 7 Misc. 123, 27 N. Y. Supp. 342 (1894). In that case it was held that a consignment of goods to factors, which would be more nearly "doing business" than selling goods through a subsidiary, would not subject the defendant corporation to service.

<sup>7</sup> *Tauza v. Susquehanna Coal Co.*, *supra* note 2. Cardozo, J., in saying, that a corporation, to be serviceable, must have been engaged in a continuity of transactions, by implication held that one transaction would be insufficient for service; *Pittsburgh & Shawmut Coal v. State*, 118 Misc. 50, 192 N. Y. Supp. 310 (1922); *Gumbinsky Bros. Co. v. Smalley*, 203 App. Div. 661, 197 N. Y. Supp. 530 (1st Dept. 1922), *aff'd*, 235 N. Y. 619, 139 N. E. 758 (1923); *Spigel-May-Stern Co. v. Mitchell*, 125 Misc. 604, 211 N. Y. Supp. 495 (1925).

<sup>8</sup> *Philadelphia & Reading Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280 (1917); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U. S. 516, 43 Sup. Ct. 170 (1923); *James Dickinson Farm Mortgage Co. v. Harry*, 273 U. S. 119, 47 Sup. Ct. 308 (1927); *Scheinman v. Bonwit Teller*, *supra* note 1.

from the defendant's locomotives during the years 1908 to 1928. *Held*, the covenant was in the nature of party walls and border fences. The evidence of sales price of the damaged ice without showing the reasonable market value thereof is insufficient to warrant recovery for breach of covenant to pay for the damage to ice. *Morgan Lake Co. v. N. Y., N. H. & H. R. Co.*, 262 N. Y. 234, 186 N. E. 685 (1933).

Although deeds contain a provision to the effect that covenants run with the land, such provision in the absence of other legal requirements is insufficient to accomplish such a purpose.<sup>1</sup> But where it is in the nature of a covenant not to injure property, expressed in an affirmative way, by agreeing to repair the injury, or make good the loss by payment of damages, it is a lien upon the property before other incumbrances.<sup>2</sup> Such a covenant by express words attaches to and runs with the land.<sup>3</sup> When a corporation absorbs another, by act of merger and by virtue of such merger it becomes vested with all property and rights of such company.<sup>4</sup> It is also bound by all the obligations of the said company.<sup>5</sup> The possessor corporation assumes the liabilities of the merged corporation in the same manner as if it had itself incurred such liabilities.<sup>6</sup> Actual damages are proved by showing the difference between the value of the article sold,<sup>7</sup> if the same was a good article, and the actual amount received for the article as sold. This represents the actual loss and no more can be recovered.<sup>8</sup> Liability is based upon the actual market value of the damaged goods,<sup>9</sup> and in ascertaining the amount of damages the evidence should be confined to the actual market value of the article sold at the time and place of delivery,<sup>10</sup> nor is the price for which the article sold admissible in the seller's favor as evidence of its market value.<sup>11</sup>

J. I. G.

<sup>1</sup> *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17 (1895); *Sebald v. Mulholland*, 155 N. Y. 455, 50 N. E. 260 (1898); *Crawford v. Krollpfeiffer*, 195 N. Y. 185, 88 N. E. 29 (1909).

<sup>2</sup> *Levy v. Schurmacher Const. Co.*, 255 N. Y. 83, 174 N. E. 70 (1930).

<sup>3</sup> *Guarantee Trust Co. v. N. Y. & Queens County Rd. Co.*, 253 N. Y. 190, 170 N. E. 887 (1930); *Greenfarb v. R. S. K. Realty Corp.*, 253 N. Y. 130, 175 N. E. 649 (1930).

<sup>4</sup> N. Y. STOCK CORP. LAW (1923) §85.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Jones v. Morgan*, 90 N. Y. 4 (1882).

<sup>8</sup> Instant case.

<sup>9</sup> *Den Norske Americkalinge Actiesselskabet v. Sun Printing and Pub. Assn.*, 226 N. Y. 1, 122 N. E. 463 (1919); *Groves v. Warren*, 233 N. Y. 160, 135 N. E. 230 (1922).

<sup>10</sup> *Dana v. Fiedler*, 12 N. Y. 40 (1854); *Parsons v. Sutton*, 66 N. Y. 92 (1876).

<sup>11</sup> *Williams v. Fitch*, 18 N. Y. 546 (1859); *Flannigan v. Madden*, 81 N. Y. 623 (1880); *Matter of Smith*, 95 N. Y. 516 (1884); *People ex rel. McCarthy v. Mayor, etc.*, 102 N. Y. 630, 8 N. E. 85 (1886); *Latimer v. Burrow*, 163 N. Y. 7, 57 N. E. 95 (1900).