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Constitutional Law--State Jurisdiction over Foreign Corporations

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adverse or insufficient judgment in the trial court.[19] An attorney cannot be required to take an appeal unless it is provided for in his contract.[20]

In reading the cases one is inclined to conclude that the courts are at times straining to find divisibility in order to achieve a just result. But to find divisibility solely for that purpose is stretching the concept to areas neither contemplated nor covered by contract. The law does not recognize the equities of the parties in determining whether a contract is entire or divisible. It is purely a matter of construction.[21] Also, reasonable value as a basis for the award in the *Moore* case is completely inconsistent with recovery under a divisible contract for fully performed parts thereof.[22]

If a recovery for Moore is to be justified at all, it should rest frankly upon the principle of *Britton v. Turner*.[23] This would align California with the jurisdictions supporting the minority position that it is inequitable to allow a party to retain benefits beyond the extent of his assessable damages without obligation and thus to be unjustly enriched at the expense of another.[24]

James R. Slaybaugh

CONSTITUTIONAL LAW—STATE JURISDICTION OVER FOREIGN CORPORATIONS

> In part, I believe, the conflict at the bar is a product of the circumstance that the rule is in process of redefinition and has apparently not yet crystallized in its new form.[1]

When Federal District Judge Rifkind said this in 1945, he was referring to the absence of any concrete rule for determining the amenability of a foreign corporation to suits in state courts.

In December, 1957, when the case of *McGee v. International Life Insurance Co.*[2] was decided by the United States Supreme Court, a new step toward this crystallization of a rule was taken. In this case, Lulu B. McGee recovered a default judgment against the insurance company in a California court. The company, a Texas corporation, had no agents or offices in California and had never done business here apart from the isolated transactions relating to the policy sued on. The policy had been mailed to the insured, McGee's son in California. Premiums were mailed from California where the insured was a resident until his death. The California courts based jurisdiction on service of

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[19] See Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43 (1913).

[20] WOOD, FEE CONTRACTS OF LAWYERS § 51 (1936).

[21] Pacific Wharf & Storage Co. v. Standard Am. Dredging Co., 184 Cal. 21, 192 Pac. 847 (1920).

[22] The plaintiff in the *Moore* case also relied on Salopek v. Shoemann, 20 Cal. App. 2d 150, 124 P.2d 21 1942, as authority for the point that an attorney discharged for cause may recover the reasonable value of services actually rendered up to the time of his discharge. The *Salopek* case can be distinguished on the facts. In that case the court found that the attorney had been discharged for cause, but they found no evidence that he had committed any breach of his contract.

[23] See Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953), following *Britton v. Turner* and in which the authorities are collected and discussed.

[24] See 5 CORBIN, CONTRACTS § 1127, at 568–70 (1950). *But see* 5 WILLISTON, CONTRACTS § 1477, at 4130 (rev. ed. 1938).

[1] Snyder v. White Eng'r. Corp., 60 F. Supp. 789, 790 (S.D.N.Y. 1945).

[2] 355 U.S. 220 (1957).

process on the Insurance Commissioner, as authorized by the Insurance Code, which provides:[3]

> Any of the acts described in Section 1611 [issuance or delivery of contracts of insurance, solicitation of applications, collection of premiums, or any other transactions arising out of such contracts], when effected in this State, by mail or otherwise, by a foreign or alien insurer . . . shall constitute an appointment by such insurer of the commissioner . . . to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding . . . arising out of any such contracts of insurance . . . .

The company was served by registered mail at its principal place of business in Texas, as required by the Insurance Code.[4] Unable to collect the judgment in California, Mrs. McGee brought an action in Texas to enforce it. The Texas court refused enforcement, holding that service of process outside California was ineffective to acquire jurisdiction.[5]

The United States Supreme Court reversed the Texas court, deciding that assumption of jurisdiction by the California court was not a denial of due process, saying:[6]

> It is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with the state.

In the *McGee* decision, the United States Supreme Court relied on the "fair play" rule first presented in *International Shoe Co. v. Washington.*[7] Prior to this case, jurisdiction over a foreign corporation was determined by mechanical rules that required a fixed *quantity* of activity in the state for the corporation to be subject to suit there. The International Shoe case substituted a consideration of the *quality* and nature of the corporation's activity as the test for jurisdiction. To be amenable to suit, due process required only that the foreign corporation have:[8]

> . . . certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

State courts are not required to expand their jurisdiction co-extensive with a federal holding like *International Shoe* which redefines and liberalizes the due process requirement. An examination of the California cases, however, shows the intention of the courts here is to extend their jurisdiction to the full extent permitted by federal interpretation of the due process clause.

It is a statutory requirement for jurisdiction over a foreign corporation in California that the corporation be doing business in the state.[9] What constitutes doing business is not rigidly defined, but is held to be determined by the interpretation given to the term by the federal courts.[10] Thus, each federal case expanding

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[3] CAL. INS. CODE § 1610.

[4] CAL. INS. CODE § 1612.

[5] McGee v. International Life Ins. Co., 288 S.W.2d 579 (Tex. 1956).

[6] 355 U.S. at 223.

[7] 326 U.S. 310 (1945).

[8] *Id.* at 316.

[9] CAL. CODE CIV. PROC. § 411; Kneeland v. Ethicon Suture Lab., Inc., 118 Cal. App. 2d 211, 212 (n.2), 257 P.2d 727, 728 (1953). See also Eclipse Fuel Eng'r Co. v. Superior Court, 148 Cal. App. 2d 736, 307 P.2d 739 (1957).

[10] See note 8 *supra.* See also Le Veck v. Griesedieck W. Brewery Co., 233 F.2d 772 (1956); Jeter v. Austin Trailer Equip. Co., 122 Cal. App. 2d 376, 265 P.2d 130 (1953).

the concept of doing business is automatically accepted as the California definition.

Applying the "fair play" rule of the *International Shoe* case as the most recent federal interpretation of doing business, the California District Court of Appeal said:[11]

> The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state . . . .

It is evident that this rule, like the "fair play" rule on which it is based, does not provide a really concrete test for jurisdiction. It creates but does not answer the question of what is precisely necessary to make a corporation "sufficiently present." The California courts, however, have developed fundamental tests to aid in answering this question.

Two requirements consistently demanded are that the corporation have some personal representation within the state[12] and that the activities carried on through these representatives must be substantial and continuous.[13]

The first requirement is probably best expressed in the case of *West Publishing Co. v. Superior Court* where the court says:[14]

> [To be doing business, the corporation's] . . . 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* . . . . (Emphasis added.)

The application of this rule is well illustrated in *Fielding v. Superior Court*.[15] The defendant corporation manufactured pharmaceuticals and operated locally through an independent California distributor under a contract which provided that the corporation would retain title until the goods were sold, set prices and pay advertising costs. The fact that the corporation's representative in California was an independent contractor and not an agent was held to be immaterial. The presence of the corporation was the essential factor, whether this presence was provided through the activities of an independent contractor, agents or employees.[16]

The requirement that the activities be continuous is clearly expressed in *Jeter v. Austin Trailer Equipment Co.*[17] The Austin company retained the

[11] Fielding v. Superior Court, 111 Cal. App. 2d 490, 494, 244 P.2d 968, 970 (1952), *cert. denied*, 344 U.S. 897 (1953). See also McClanahan v. Trans-America Ins. Co., 149 Cal. App. 2d 171, 307 P.2d 1023 (1957); Iowa Mfg. Co. v. Superior Court, 112 Cal. App. 2d 503, 246 P.2d 681 (1952).

[12] Perkins v. Louisville & N. R.R. Co., 94 F. Supp. 946 (S.D. Cal. 1951); Estwing Mfg. Co. v. Superior Court, 128 Cal. App. 2d 259, 275 P.2d 146 (1954); Smith and Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673, 289 P.2d 26 (1955); Martin Brothers Elec. Co. v. Superior Court, 121 Cal. App. 2d 790, 264 P.2d 183 (1953); Milbank v. Standard Motor Constr. Co., 132 Cal. App. 67, 22 P.2d 271 (1933).

[13] Duraladd Prods. Corp. v. Superior Court, 134 Cal. App. 2d 226, 285 P.2d 699 (1955); Proctor and Schwarz, Inc. v. Superior Court, 99 Cal. App. 2d 376, 221 P.2d 972 (1950); Oro Nav. Co. v. Superior Court, 82 Cal. App. 2d 884, 187 P.2d 444 (1947). *But see* McClanahan v. Trans-America Ins. Co., 149 Cal. App. 2d 171, 307 P.2d 1023 (1957); Eclipse Fuel Eng'r. Co. v. Superior Court, 148 Cal. App. 2d 736, 307 P.2d 739 (1957).

[14] 20 Cal. 2d 720, 728, 128 P.2d 777, 781 (1942), *cert. denied*, 317 U.S. 700 (1943).

[15] 111 Cal. App. 2d 490, 244 P.2d 968 (1952), *cert. denied*, 344 U.S. 897 (1952).

[16] See also Gray v. Montgomery Ward, Inc., 155 Cal. App. 2d 55, 317 P.2d 114 (1957); Thew Shovel Co. v. Superior Court, 35 Cal. App. 2d 183, 95 P.2d 149 (1939).

[17] 122 Cal. App. 2d 376, 265 P.2d 130 (1953).

services of an independent commission salesman who systematically solicited orders for their trailer parts. His acts were deemed a doing of business by Austin, since the requirements of due process were met if the corporation maintained substantial contacts with the state[18]

> . . . through a course of regularly established and systematic business activity, distinguished from casual, isolated, or insubstantial contacts or transactions . . . .

Although these two decisions establish the two fundamental requirements for a finding that a corporation is doing business in this state, they also leave two distinct questions—(1) Is the person within the state (whether agent, employee or independent contractor) acting as the personal representative of the corporation? (2) If so, are his activities sufficient to make jurisdiction over the corporation fair and equitable?

The case of *Sales Affiliates, Inc. v. Superior Court*[19] provides the test which is used to answer both of these questions. The only California contact of the corporation, which manufactures beauty products, was the outright sale of the products to independent jobbers. The jobbers, however, made contracts with beauty shops, licensing use of the corporation's products in return for a small fee and an agreement to honor the corporation's minimum prices and to refrain from using competing products. The court found the corporation to be doing business in California, basing this conclusion on the proposition that:[20]

> If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.

Both the fact of representation in the state and the sufficiency of the representative's activities were found to depend on the *receipt of a benefit* by the corporation from such activities.

The rule that emerges from the California decisions is that for jurisdiction over a foreign corporation the corporation must be present through the *continuous* activities of some *representative* within the state and receive a *benefit* from such activities.

In the *McGee case,* we find the requirements of due process satisfied if the suit is "based on a *contract* which had substantial connection with (the) state." The obvious conclusion is that due process, as interpreted by the United States Supreme Court, does not demand as essential for jurisdiction over foreign corporations either continuous activities or a personal representative within the state. Neither, of course, was present in the *McGee* case.

What effect should we expect this federal interpretation of due process to have on jurisdiction in California? The *McGee* case would seem to remove two of the requirements thought necessary until now for finding a foreign corporation is doing business in California, and thus subject to jurisdiction. An obstacle to

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[18] *Id.* at 388, 244 P.2d at 137.

[19] 96 Cal. App. 2d 134, 214 P.2d 541 (1950).

[20] *Id.* at 136, 214 P.2d at 542. See also Eclipse Fuel Co. v. Superior Court, 148 Cal. App. 2d 736, 307 P.2d 739 (1957); Duraladd Prods. Corp. v. Superior Court, 134 Cal. App. 2d 226, 285 P.2d 699 (1955); Jeter v. Austin Trailer Equip. Co., 122 Cal. App. 2d 376, 265 P.2d 130 (1953); Iowa Mfg. Co. v. Superior Court, 112 Cal. App. 2d 503, 246 P.2d 681 (1952); Thew Shovel Co. v. Superior Court, 35 Cal. App. 2d 183, 95 P.2d 149 (1939).

this result is found in California Corporation Code where the phrase "transact intrastate business" is defined as:[21]

> . . . . [E]ntering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce.

This section is followed by sections 6400 to 6410 relating to "Qualification for Transaction of Intrastate Business" by a foreign corporation. It would seem reasonable that the effect of this definition could be limited to determining when a foreign corporation is doing sufficient business in California to subject it to *state regulation* and not to set binding requirements as to the amount of business necessary to *render the corporation amenable to jurisdiction.* This conclusion would seem to find support in the *Jeter v. Austin Trailer* case, where the court says:[22]

> A less strict meaning may be attributed to the phrase "doing business" where the question relates simply to whether a state court has jurisdiction than where taxation or regulatory statutes are involved.

In the *McGee* case, the fact that it was a suit based upon a contract which had substantial connection with the state was sufficient to displace the heretofore required "presence" and "continuous activity." What else will be sufficient to displace these two requirements must be decided in future litigation. However, an acceptance of the jurisdictional expansion authorized by the *McGee* case would in no way destroy the validity of the California "benefit" test. Rather, it would be given added importance since its application would not be hampered by requiring that the advantage or benefit result from continuous activities carried on by a representative within the state.[23] Until some more concrete rule is announced by the federal courts, the ultimate test for California jurisdiction would continue to be the receipt of a benefit. The *McGee* case does not supply any absolute rule. If the benefit the corporation derives from its transactions with the state is sufficiently great to make it appear fair and equitable to require the corporation to defend here, formal requirements of "presence" through natural persons and of continuous activities should not be necessary.[24]

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[21] CAL. CORP. CODE § 6203.

[22] 122 Cal. App. 2d 376, 381, 265 P.2d 130, 133 (1953).

[23] See Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958); Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d ....., 325 P.2d 21 (1958).

[24] *Cf.* Hanson v. Denckla, 357 U.S. 235, 253 (1958), where the court says: "The application of that rule [jurisdiction based on contact with forum state] will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." See also Borgward v. Superior Court, 160 Cal. App. 2d ....., 325 P.2d 137 (1958).