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COMMENTS

STATE JURISDICTION OVER FOREIGN CORPORATIONS

By RICHARD E. JOHNSTON*

Introduction

Is magazine or television solicitation of business sufficient to provide a state with jurisdiction over the soliciting foreign corporation?¹ Not too long ago, the answer clearly would have been no. But within the past ten or fifteen years there has been a general re-examination of the concepts providing a state in personam jurisdiction over foreign corporations. This has been accomplished by both legislative enactment and judicial interpretation. The trend is clearly a liberalizing one, permitting states and their courts greater jurisdiction. It is the purpose of this article to present the history of this aspect of jurisdiction, to give the recent Supreme Court decisions which announce the liberalizing trend, and to determine California's position in this matter.

History of the Problem

The original concept upon which judicial jurisdiction was founded appears to be that a court could summon before it only a person who could be served with the court's process within the jurisdiction in which the court sat.² Thus, an action affecting persons beyond the geographical area of control of the court was a nullity.³ These were the prevailing English concepts during the period in which our United States were being formed. The Constitution does not specify the limits of the power of the state courts, and it might be inferred that the Constitution retains the state's previous jurisdiction.⁴ This limitation of jurisdiction was a self-imposed one and was a feature of the system for almost a century. With respect to each other, the states operated largely as states of the world rather than as a union.⁵ Only when recognition of a judgment was sought in another state, under the full faith and credit clause, did the Constitution require its enforcement.⁶ But there was no direct supervisory authority or constitutional limitation until adoption of the fourteenth amendment in 1868.

The Constitutional limitations were clearly set forth in *Pennoyer v.*

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¹ "Foreign corporation" is used in the sense that the corporation was incorporated under the laws of a state other than the forum state.

² *Pennoyer v. Neff*, 95 U.S. 714 (1877).

³ *Buchan v. Rucker*, 9 East. 192 (K.B. 1808).

⁴ Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196 (1957).

⁵ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (comity between states and nations).

⁶ *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850).

Neff.⁷ It was held that a tribunal's authority is necessarily limited by the state's territorial boundaries in which it is established, any further assumption of jurisdiction being excessive. Where the object of the court action is one to determine rights and obligations of the defendant, an action in personam, constructive service is ineffectual, and it makes no difference if the process is published within the state or sent to him out of state.⁸ Thus *Pennoyer v. Neff* would require presence within the state to acquire jurisdiction in personam.⁹

A different problem arises as to foreign corporations. Under the earliest theories, a corporation could not be sued outside the state of its creation.¹⁰ But since it was also established that a foreign corporation was not entitled to the protection of the privileges and immunities clause, there developed the doctrine that a state could impose certain conditions on a foreign corporation before being privileged to do business within its borders.¹¹ A primary requirement was that the foreign corporation appoint an agent within the state for accepting service of process, thereby "consenting" to jurisdiction.¹² But a problem arose immediately if the foreign corporation was in fact doing business within the state or if it was doing only interstate business and thus not subject to being excluded by the state (since that power was given to Congress by the commerce clause), and yet had failed to appoint the agent.¹³ In *Lafayette Insurance Co. v. French*,¹⁴ the Supreme Court resolved the difficulty by the following rationale. Since a foreign corporation's right of entry to do business was conditional upon the appointment of an agent to receive process, and yet the foreign corporation was doing business, it was therefore implied that the corporation had appointed the prescribed agent. Service was then allowed upon the agent of the corporation as being effective upon the corporation under an implied consent.¹⁵

Due process limitations upon such service of foreign corporations were set forth in 1882 in *St. Clair v. Cox*.¹⁶ Since a foreign corporation was only "present" in a state through the activities of its agents and the corporation's "implied consent" to the assertion of jurisdiction was directly dependent upon business activities within the state asserting jurisdiction, due process

⁷ 95 U.S. 714 (1877).

⁸ *Id.* at 727.

⁹ *But see* Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958).

¹⁰ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (dicta).

¹¹ *Railway Express Agency v. Virginia*, 282 U.S. 440 (1931).

¹² GOODRICH, *CONFLICT OF LAWS* § 76 (3d ed. 1949).

¹³ *International Harvester v. Kentucky*, 234 U.S. 579 (1914); *Henrietta Min. & Mill. Co. v. Johnson*, 173 U.S. 221 (1899); STUMBERG, *CONFLICT OF LAWS* 86 (2d ed. 1951).

¹⁴ 59 U.S. (18 How.) 404 (1855).

¹⁵ Even though consent was implied through the use of legal fictions, "... more realistically, it may be said that those authorized acts were of such a nature as to justify the fiction." *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Also see *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S.D.N.Y. 1915).

¹⁶ 106 U.S. 350 (1882).

required that the corporation actually be *doing business* within the forum state before there is any consent implied or corporate "presence."¹⁷

Another problem situation arose where the foreign corporation had been doing business within the forum state but had withdrawn all its agents before the summons could be served. The remedy was to enact a statute providing for service of process upon a designated state official. Authority was deemed to have been given by the foreign corporation's doing business within the state.¹⁸ Under such a statute, if the cause of action arose out of the business activities within the state, service upon the specified state official was sufficient, even if there was no further attempt to notify the corporation of the pending action.¹⁹

As judicial jurisdiction over foreign corporations evolved, the state was limited only by its voluntary restrictions, either judicial or legislative, and the due process requirements of the fourteenth amendment.²⁰ These limitations were directly related to the requirement of doing business within the state. If the corporation was not doing business, no matter how adequate the notice of suit, it was an illegitimate assumption of jurisdiction. The question really became: Just what activity within the state will constitute doing business so as to render the corporation amenable to jurisdiction? The question has more significance if it is first determined for what purpose jurisdiction is sought. It might be for purposes of determining the power of the state to impose local taxation, whether the corporation is subject to the state's regulatory powers, or whether jurisdiction exists for service of process and amenability to suits within the state. Such business activity as may satisfy for one purpose may not satisfy for another.²¹

Through the United States Supreme Court the activities required to constitute "doing business" were set forth, although a definitive rule was impossible.²² It was clear that the residence of the foreign corporation's official alone would not provide jurisdiction.²³ Also jurisdiction was denied upon the service of the president-purchaser of a foreign corporation while on a buying trip in New York upon an action for breach of contract arising from a previous buying trip there.²⁴ And even though a wholly owned subsidiary sales corporation was unquestionably present within the state, an attempt to prove the parent corporation was doing business in the state

¹⁷ *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918); *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

¹⁸ See, e.g., CAL. CORP. CODE §§ 6500-6504.

¹⁹ *Washington v. Superior Court*, 289 U.S. 361 (1933).

²⁰ 23 AM. JUR., *Foreign Corporations*, § 360; 22 CAL. JUR. 2d *Foreign Corporations* § 34.

²¹ *Jeter v. Austin Trailer Equip. Co.*, 122 Cal. App. 2d 376, 265 P.2d 130 (1953); Caplin, *Doing Business in Other States*, United States Corporation Company (1959). This article concerns amenability to suit within the forum state.

²² *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914) (each case to be decided on its own facts).

²³ *Riverside and Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1923); cf. *Consolidated Textile Corporation v. Gregory*, 289 U.S. 85 (1933).

²⁴ *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923).

failed.²⁵ But jurisdiction was allowed where one person owned and operated both corporations,²⁶ or where the parent was only a holding corporation.²⁷

Another area of controversy developed over the *quantity* of business which had to be carried on by the foreign corporation before its "presence" in the state would be recognized.

When the activities had been "continuous and systematic," and gave rise to the cause of action sued on, the corporation was "present," regardless of the fact that no consent or authorization to an agent to accept service had been given.²⁸ But where there were only single or isolated acts within the state and the cause of action did not arise from such activity, it was not present or doing business so as to give the state jurisdiction.²⁹ If there were only single or isolated acts, but the cause of action was connected with such activity, the general rule might be said to be that the state gained no jurisdiction.³⁰ And while there were some cases in which continuous activity within a state was not enough to support jurisdiction of causes of actions arising elsewhere,³¹ there were others in which the activity was of such a nature, in addition to the continuous and systematic aspect, that suit against it on causes of action arising from dealings entirely distinct from these activities were allowed.³² In arriving at these decisions, the quantum approach was most evident when the primary activity of the corporation was the solicitation of business by agents. Attempting to set forth the required activity that would sustain jurisdiction, the Supreme Court developed the "solicitation plus" rule. The rule was that mere solicitation is insufficient to indicate presence within a state.³³ And where the court desired to support jurisdiction there was found "solicitation plus" other activities.³⁴

The quantitative basis for analysis of the finding of "doing business" remained until 1945.

International Shoe Doctrine

In *International Shoe v. Washington*³⁵ the Supreme Court re-examined the previous decisions concerning personal jurisdiction and then announced a more liberal concept. Here the foreign corporation was engaged in the sale

²⁵ Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).

²⁶ Cf. Henderson v. Rounds & Porter Lumber Co., 99 F. Supp. 376 (W.D. Ark. 1951).

²⁷ See, e.g., Mas v. Orange Crush Co., 99 F.2d 675 (4th Cir. 1938); Industrial Research Corp. v. General Motors Corp., 29 F.2d 623 (N.D. Ohio 1928).

²⁸ International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer, 197 U.S. 407 (1905); Connecticut Mutual Co. v. Spratley, 172 U.S. 602 (1899).

²⁹ Old Wayne Life Assn. v. McDonough, 204 U.S. 8 (1907).

³⁰ Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

³¹ Simon v. So. R. Co., 236 U.S. 115 (1915); Green v. Chicago, B. & Q. R. Co., 205 U.S. 530 (1907); cf. Davis v. Farmer's Co-operative Co., 262 U.S. 312 (1923).

³² Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

³³ Green v. Chicago, B. & Q. R. Co., 205 U.S. 530 (1907).

³⁴ International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

³⁵ 326 U.S. 310 (1945).

of shoes through the soliciting activities of eleven local salesmen. These employees were supplied with samples which they displayed to retailers sometimes in semi-permanent offices rented for this purpose. When orders were received they were transmitted to St. Louis for acceptance and the merchandise was shipped f.o.b. from points outside Washington. These salesmen did not make collections nor had they the authority to contract for the company. The State of Washington sued to recover contributions under the state Unemployment Compensation Act.

The Supreme Court upheld the state court's finding of sufficient contact to sustain jurisdiction. This result was not so surprising in itself,³⁶ but the rationale and the change in emphasis by the Court was. Hereafter, the *quality* of the acts within the state were to be analyzed and not the *quantity*. In announcing this rule the Court said:³⁷

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 . . . whether the activity . . . is a little more or a little less. [citing cases] 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. [Emphasis added.]

And speaking of the constitutional limitations when subjecting a non-resident corporation to suit, the court held:³⁸

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

The Court laid down other important ground rules. In deciding upon the "fair play" requirements, it would be relevant to "estimate the inconveniences" in requiring a foreign corporation to defend in a suit away from its home or principal place of business.³⁹ This element appears to be one aspect of the doctrine *forum non conveniens* which, in application, would act as a counterbalance to the liberalized requirements for contact within the state. The Court further reasoned when a foreign corporation exercises the privilege of conducting business activities within a state, it not only enjoys the benefits and protection of that state's laws, but incurs obligations. And if these obligations arise out of the activities within that

³⁶ Although it might be difficult to reconcile the decision with previous ones, *i.e.*, *Minnesota Commercial Men's Ass'n v. Benn*, 261 U.S. 140 (1923); *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918). *But see Frene v. Louisville Cement Co.*, 134 F.2d 511 (D.C. Cir. 1943).

³⁷ 326 U.S. at 319.

³⁸ *Id.* at 316.

³⁹ *Id.* at 317. See also Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

state, it cannot be said undue should the state enforce them by suit.⁴⁰ Thus the "presence" theory was discarded; in its stead was placed the "minimum contact" or "fair play and substantial justice" theory.⁴¹

Subsequent Supreme Court Decisions

The Supreme Court has encountered this jurisdictional problem several times since the *International Shoe* case. In *Traveler's Health Ass'n v. Virginia*⁴² the foreign corporation was engaged in the mail order health insurance business. The Association had no paid agents in Virginia but relied upon the recommendations of its members there. Upon such recommendations, the defendant would mail solicitations to the prospects and application forms for acceptance by the company in Nebraska. It had also investigated claims within the state. The state brought action under a "Blue Sky" law requiring the obtaining of a permit from the state before selling securities. Service was by registered mail. The corporation appeared specially to quash service, but the Virginia court denied the motion, and the United States Supreme Court affirmed. The Court stressed the corporation's creating of "continuing relationships and obligations with citizens of another state," the "consequences" and degree of interest the state had in the contracts, and ruled that such contact was sufficient to warrant jurisdiction.⁴³

In *Perkins v. Benguet Consolidated Mining Co.*⁴⁴ there was a suit against the foreign corporation in which the cause of the action did not arise out of the activities in that state. Defendant was a Philippine mining corporation and temporarily carrying on its general business activities, on a very reduced scale, in Ohio during the Japanese occupation of the Philippines. The activities included directors' meetings, payment of salaries, and purchasing of machinery. The Court held that the due process clause did not prohibit Ohio from asserting in personam jurisdiction over the corporation for the corporation's activities there satisfied the "fair play and substantial justice" formula.

Then the Court in 1957 demonstrated just how far, in the corporate field, due process limitations are from those set forth in *Pennoyer. McGee v. International Life Insurance Co.*⁴⁵ upheld a California statute which provided substituted service in an action against a foreign insurer of a citizen of California.⁴⁶ In that case, the solicitation by a Texas insurance company was by mail to the California resident and was the *only solicitation* within the state. The plaintiff contracted for insurance through correspondence,

⁴⁰ 326 U.S. at 319.

⁴¹ See Rutledge, J., in *Nippert v. City of Richmond*, 327 U.S. 416 (1946), in which he interprets the case as holding that regular and continuous solicitation constitutes "doing business," contrary to previous notions.

⁴² 339 U.S. 643 (1950).

⁴³ *Accord*, *Hoopston Canning Co. v. Cullen*, 318 U.S. 313 (1943); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *contra*, *Minnesota Commercial Men's Ass'n v. Benn*, 261 U.S. 140 (1923).

⁴⁴ 342 U.S. 437 (1951).

⁴⁵ 355 U.S. 220 (1957).

⁴⁶ CAL. INS. CODE §§ 1610-1620.

and premiums were all paid by mail. Upon the insured's death the beneficiary, after the company refused to pay, brought suit, serving the corporation by registered mail under the statute. Upon obtaining judgment in the California courts, the plaintiff filed the judgment in Texas. The Texas court held that the California courts did not have jurisdiction,⁴⁷ but the United States Supreme Court reversed, holding that the suit was based on a contract which had a *substantial connection* with California and was a type of transaction in which the state had a particular interest and regulatory power. As far as the decision goes in liberalizing the "minimum contact" rule, it is interesting to note that the court's opinion was unanimous.

Perhaps the *McGee* case reached the limits of due process and personal jurisdiction. The next decision on the question resulted in reversal of a Florida court which had found sufficient contact to give jurisdiction. *Hanson v. Denckla*⁴⁸ concerned a Delaware resident who established a trust with a Delaware corporation as trustee, with life estate for herself, but reserving a power of appointment either inter vivos or testamentary in the remainder. She later moved to Florida, became a resident, and subsequently exercised the power of appointment. Upon her death her will was probated in Florida. The residue of the estate, after specific grants, was devised to certain persons, but the amount of property passing under this clause depended directly upon the effectiveness of the appointment. Under Florida law it was ineffective, and the trust *res* passed by the will. However, the trustee-foreign corporation did not appear and the validity of the judgment rested upon whether there was sufficient affiliation with the state by the trustee to warrant jurisdiction. Chief Justice Warren, speaking for five members of the Court, held that the Florida courts lacked jurisdiction in personam over the trustee corporation because of insufficient contacts with the state prerequisite to the exercise of power over it.

But can this be said to be a retreat from the expansion of personal jurisdiction over non-residents? By looking at the facts upon which the Court distinguished the *McGee* case, it appears not. First, it must be remembered that the majority found that the effectiveness of the initial establishment of the trust, long before the deceased became a domiciliary of Florida, was the transaction questioned. The cause of action then did not arise "out of an act done or transaction consummated in the foreign state."⁴⁹ This might be a clue that more substantial activities are required when the cause of action arises elsewhere. Second, and perhaps more important, there was *no* solicitation of business in Florida either by mail or in person. The Court stated in this regard:⁵⁰

⁴⁷ *McGee v. International Life Ins. Co.*, 288 S.W.2d 579 (Tex. 1956). The Texas court gave much weight to the fact that the statute involved was enacted after the solicitation and the insurance was contracted.

⁴⁸ 357 U.S. 235 (1958).

⁴⁹ *Id.* at 251.

⁵⁰ *Id.* at 253.

. . . [I]t 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.

Third, the Court noticed that Florida had not enacted special legislation to indicate its "manifest interest" in protecting its citizens from non-residents' activities which the state regarded as subject to special regulation as had California in *McGee*.⁵¹ One other point should be noticed. The "minimum contact" and "estimate of conveniences" do not appear to be "either-or" tests. Both are to be satisfied. As the dissenting opinion points out, it would have been more convenient to litigate in Florida,⁵² but the majority opinion rests squarely on the first test (minimum contact) not having been satisfied.

These Supreme Court decisions allow greater freedom to the States than ever before in subjecting foreign corporations to jurisdiction by local courts. From these cases, we can garner several very general rules as to the limitations of the due process clause. The foreign corporation must first do some act within or directed toward the forum state by which it seeks a commercial transaction. This act or transaction may be by mail only. If the cause of action arises from this act or transaction, then this may be sufficient to constitute the required minimum contact. Should the cause of action arise elsewhere and independent of the act or transaction within the foreign state, more substantial activity would probably be required. And once the minimum contact with the forum state is satisfied, then there must be a weighing of the conveniences so that assumption of jurisdiction would not violate the due process tenets of "fair play and substantial justice."⁵³ But such highly generalized rules are of little value when we remember that "[t]he analysis of specific fact situations in the light of traditional rationalization continues to be essential."⁵⁴

*The California Position*⁵⁵

As seen, within the limits of the commerce and due process clauses of the Constitution, each state is free to establish its own rules regarding the competency of its courts to assume jurisdiction over foreign corporations. A state legislature may exercise its authority up to the limits or, as many seem to do, content itself with the same jurisdiction it was allowed prior to *International Shoe*.⁵⁶ Generalities on the various states' interpretations of

⁵¹ *Id.* at 252.

⁵² *Id.* at 262.

⁵³ *Cf.*, Note, 47 *Geo. L.J.* 342, 351-52 (1958).

⁵⁴ *Ehrenzweig, Conflict of Laws* § 28, p. 94 (1959).

⁵⁵ See generally, Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 *U.C.L.A.L. Rev.* 331 (1958); Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 *So. Cal. L. Rev.* 339; Comment, *Suing Foreign Corporations in California*, 5 *Stan. L. Rev.* 503 (1953).

⁵⁶ See, e.g., *Ames v. Senco Products*, 146 *N.Y.S.2d* 298 (App. Div. 1955). See also *McGriff v. Charles Antell, Inc.*, 123 *Utah* 166, 256 *P.2d* 703 (1953).

"doing business" requirements are of limited value. Therefore, consideration and study must be given to the statutory and case law in the particular jurisdiction concerned.⁵⁷

In California the bases of the competence of state courts to render valid judgments against foreign corporations are spelled out in provisions of the Code of Civil Procedure,⁵⁸ Corporations Code,⁵⁹ and Insurance Code.⁶⁰ We have already seen the application of the Insurance Code provisions in *McGee*. Application of the other Code provisions have been no less "liberal," and these applications have indicated a desire to exercise jurisdiction over foreign corporations up to the very limits allowed by the Supreme Court decisions.

The California Code of Civil Procedure provides for suit against a "foreign corporation . . . doing business in this state."⁶¹ This section has been interpreted by the California Supreme Court, in *Henry R. Jahn & Son v. Superior Court*, as embodying only such limitations as are required by the due process clause.⁶²

Therefore, the test for application of the statute is not a definition of "doing business" but rather whether there would be a violation of the due process clause if jurisdiction were allowed.

The case of *Henry R. Jahn & Son v. Superior Court*, with opinion by Justice Traynor, gives a good discussion of the application and considerations to be given the various factors outlined in *International Shoe*. In that case Jahn & Son, a New York company, was the exclusive marketing agent for American Drying Systems and another California manufacturer. Jahn ordered from American *by mail or telephone* from New York. The goods were shipped to a California forwarding company who was selected and instructed by Jahn. American brought an action in California against Jahn and the other California manufacturer alleging a conspiracy to take over his business. After quoting from *International Shoe*, the court said:⁶³

Whenever litigation arises out of business transactions conducted across state lines between parties whose principal places of business are in different states, there may be hardship to the party required to litigate away from home. There is no constitutional requirement, however, that this hardship must invariably be borne by the plaintiff whenever the defendant is not deemed present in the state of plaintiff's residence. In some circumstances there is adequate basis for jurisdiction when the defendant has elected to deal with the plaintiff even though only by mail.

⁵⁷ For a résumé of recent decisions of various states, see Caplin, *Doing Business in Other States*, United States Corporation Company (1959).

⁵⁸ CAL. CODE CIV. PROC. § 411.

⁵⁹ CAL. CORP. CODE §§ 6500-6504.

⁶⁰ CAL. INS. CODE §§ 1610-1620.

⁶¹ CAL. CODE CIV. PROC. § 411.2.

⁶² 49 Cal.2d 855, 858, 323 P.2d 437, 439 (1958). "Whatever limitation it imposed is equivalent to that of the due process clause." See also, *Eclipse Fuel Engineering Co. v. Superior Court*, 148 Cal. App.2d 736, 307 P.2d 739 (1957).

⁶³ 49 Cal.2d at 860, 323 P.2d at 441.

In *Carl F. Borgward G.M.B.H. v. Superior Court*⁶⁴ the California Supreme Court had occasion to affirm the "liberal" interpretation and application of "doing business." There the defendant German corporation shipped automobiles and parts to a California independent importer with title passing in Germany. Borgwards' agent visited California for several days three separate times within a two year period to negotiate contracts with local distributors. The Court found Borgward was "doing business" by undertaking to protect and promote its market in California through its agent, and by reaping the benefits of the local market and having access to the local courts.⁶⁵

The more recent case of *Florence Nightingale School of Nursing v. Superior Court*⁶⁶ appears to go even further in allowing jurisdiction over a foreign corporation inasmuch as all contact within the state was *only by mail*⁶⁷ and did not involve an area of special regulation as *McGee* did. The facts of that case were that the defendant foreign corporation was advertising its correspondence course of nursing in nationally circulated magazines. The advertisements solicited inquiries by mail of those interested, and in answer to such inquiries they were sent literature and application forms. When application was made, the nursing school would distribute lessons and materials to the student who, upon completing the lesson, would mail it to Chicago for correction and return. The number of California students was less than one percent of the defendant's entire enrollment. A California resident brought an action alleging unfair competition. The court took notice of the later Supreme Court decisions and in a well reasoned opinion found that the foreign corporation was "doing business" so as not to violate the "traditional notions of fair play and substantial justice."

The court noted the analogy of the facts and those in *Traveler's Health Ass'n v. Virginia, supra*. However, it must be remembered that that case dealt with one of the areas (insurance) in which a state has particular interest and the action was brought under a special regulatory statute. This does not mean to suggest the analogy was not a strong one, nevertheless. There were strong cases cited while finding that the correspondence school has its situs not only at the place at which its offices were located, but also at the location of its various students.⁶⁸

⁶⁴ 51 Cal. 2d 72, 330 P.2d 789 (1958).

⁶⁵ The court also removed doubt of § 6300 of the Cal. Corp. Code controlling §§ 6500-6504 which would have restricted § 411 of the Code of Civ. Proc. to apply only to those corporations doing intrastate business, thereby precluding service upon corporations doing interstate and foreign commerce. This had been suggested in an opinion in *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App. 2d 211, 325 P.2d 21 (1958).

⁶⁶ 168 Cal. App. 2d 74, 335 P.2d 240 (1959).

⁶⁷ "Petitioner has never had any office, postal address, telephone listing, bank account, property, agents, solicitors, or other representatives in California." 168 Cal. App. 2d at 77, 335 P.2d at 242.

⁶⁸ *International Textbook v. Figg*, 217 U.S. 91 (1910); *International Textbook v. Gillespie*, 229 Mo. 937, 129 S.W. 922 (1910); *Air Conditioning Training Corp. v. Majer*, 324 Ill. App. 387, 58 N.E.2d 294 (1944). *Contra, Reed v. LaSalle Extension University*, 156 F.2d 575 (D.C. Cir. 1946).

The "mere solicitation" or "solicitation plus" rule was discussed despite a finding that there was "solicitation plus" by the foreign corporation in arranging for and carrying out the courses of instruction. The court noted that there has been great dissatisfaction with that rule⁶⁹ and that later courts had interpreted the recent decisions as denouncing the rule.

But what might be considered the biggest step toward securing jurisdiction is the indication that it makes no difference whether the solicitation be made personally or through magazine advertising. In this regard, the court stated:⁷⁰

There is no essential difference in the activity or in the results between solicitation by agents in the state and solicitation by advertising in magazines circulated in the state. Solicitation by advertising may be more productive of business than by agents. These days it would seem that there is much more solicitation by advertising in newspapers, magazines, and over radio and television than by any other method.

Should we equate advertising by magazine, newspaper, radio, and television with the personal solicitation by agent, a large barrier will be removed from the continued expansion of the personal jurisdiction of state courts. If such advertising should result in contracts with residents of the state, it seems only just that causes of action resulting from such contracts be heard in that state at the risk of the corporation's expense, rather than the individual's.⁷¹ The corporation has initiated the contact with the state by his soliciting activities. The methods used in the solicitation should not be determinative of jurisdiction.⁷²

Another area to consider is where the cause of action does not arise out of the business activities within the forum state. The California courts passed on this question in both *Koninklijke L. M. v. Superior Court*⁷³ and *Jeter v. Austin Trailer Equipment Co.*⁷⁴ In the first of these two cases an action for damages was brought arising from a plane crash in England. KLM had offices in California both for the purchase of equipment and sale of tickets. The court held that the foreign corporation was "doing business" within the state, that it had jurisdiction over a transitory action, and that *it was immaterial* that the cause of action was unrelated to any of the business conducted here. In the second case this view was followed when there was a sale of an allegedly defective wheel manufactured by the foreign

⁶⁹ See the persuasive argument by Justice Rutledge in *Frene v. Louisville Cement Co.*, 134 F.2d 511 (D.C. Cir. 1943).

⁷⁰ 168 Cal. App. 2d at 78, 335 P.2d at 243. *Accord*, *Wanamaker v. Lewis*, 153 F. Supp. 195 (D. Md. 1957) (purchase of time on local radio station). *But see*, *Schmidt v. Esquire, Inc.*, 210 F.2d 908 (7th Cir. 1954); *McGriff v. Charles Antell, Inc.*, 123 Utah 166, 256 P.2d 703 (1953).

⁷¹ *Cf.* *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951); *Johns v. Bay State Abrasive Co.*, 89 F. Supp. 654 (D. Md. 1950); *McBaine, Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331 (1946).

⁷² See Justice Black's dissent in *Polizzi v. Cowles Magazines*, 345 U.S. 663, 667 (1953).

⁷³ 107 Cal. App. 2d 495, 237 P.2d 297 (1951).

⁷⁴ 122 Cal. App. 2d 376, 265 P.2d 130 (1953).

corporation, the cause of action arising in Arizona. The defendant had a solicitor in the state maintaining continuous and systematic activities, plus keeping merchandise in California and filling orders from local stock. The court held that the corporation was "doing business" within the state, and that "[i]t is now established that, absent serious inconvenience to defendant or other equitable considerations, there is no constitutional limitation precluding the assumption of jurisdiction over [transitory] causes of action by the courts of a state in which a foreign corporation is doing business."⁷⁵

Normally, a foreign corporation has some form of sales representative within the state by which it disposes of its product. This sales representative may appear in the form of a subsidiary corporation, an employee, an agent, or an independent wholesaler. Each may appear also with varying degrees of control exercised by the foreign corporation. Earlier cases emphasized that if the sales representative were an independent contractor, the foreign corporation was not "doing business."⁷⁶ But more recently, the California courts have held that agency is just another of the factors to consider,⁷⁷ and that the test is a comparison of the advantages of such methods of sale with those that would be achieved by the foreign corporation's own sales force.⁷⁸

The one area in which California appears to have more stringent requirements than the constitutional interpretations of due process would call for is where the foreign corporation has withdrawn from the state. The California statute⁷⁹ provides that to serve process upon a withdrawn foreign corporation it must first have transacted *intrastate* business in California⁸⁰ and, secondly, the cause of action must have arisen out of such business.⁸¹ Seemingly a foreign corporation engaged solely in interstate business would escape the state's jurisdiction if it has withdrawn before service of process. Since the expansion of state court jurisdiction is

⁷⁵ *Id.* at 389, 265 P.2d at 138. The recent case of *L. D. Reeder Contractors of Arizona v. Higgins Industries*, 265 F.2d 768 (9th Cir. 1959) does not appear to go this far. There a Louisiana corporation was held to be not doing business in California through a distributor here. A sale was made through the distributor with the goods shipped directly to Arizona. The opinion gives an excellent view of the current trends but refuses jurisdiction. There is reliance in part upon several New York decisions which are of doubtful value to California law inasmuch as New York has chosen to retain the same jurisdiction bases it had prior to *International Shoe*. *Ames v. Senco Products*, 146 N.Y.S.2d 298 (App. Div. 1955).

⁷⁶ See, e.g., *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289 (1906).

⁷⁷ *Eclipse Fuel Co. v. Superior Court*, 148 Cal. App. 2d 736, 307 P.2d 739 (1957); *Kneeland v. Ethicon Suture Laboratories*, 118 Cal. App. 2d 211, 257 P.2d 727 (1953); *Iowa Mfg. v. Superior Court*, 112 Cal. App. 2d 503, 246 P.2d 681 (1952). *Contra*, *Estwing Mfg. Co. v. Superior Court*, 128 Cal. App. 2d 259, 27 P.2d 146 (1954); *Martin Bros. Electric Co. v. Superior Court*, 121 Cal. App. 2d 790, 264 P.2d 183 (1953). And see CAL. CORP. CODE § 6301.

⁷⁸ *Sales Affiliates, Inc. v. Superior Court*, 96 Cal. App. 2d 134, 214 P.2d 727 (1950).

⁷⁹ CAL. CORP. CODE § 6504. Also see *Oro Navigation Co. v. Superior Court*, 82 Cal. App. 2d 884, 187 P.2d 444 (1947).

⁸⁰ Defined by CAL. CORP. CODE § 6203 as "entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."

⁸¹ *Confidential, Inc. v. Superior Court*, 157 Cal. App. 2d 75, 320 P.2d 546 (1958); *Holtkamp v. States Marine Corp.*, 165 Cal. App. 2d 131, 331 P.2d 679 (1958).

stymied in this area, review by the state legislature with a view toward amendment or repeal is suggested.⁸²

Another question frequently encountered is whether jurisdiction exists where the cause of action arose out of a mere isolated act committed in the state by the defendant. It has indeed been held that such contact may satisfy the requirements, particularly in suits involving motorists⁸³ and special regulatory powers.⁸⁴ Perhaps *McGee* stands for this proposition, since there is language in the opinion which is not limited to such areas.⁸⁵ However, it is questioned whether jurisdiction resulting from a single, isolated act could be maintained under the present California statutes unless the courts were to give a more flexible interpretation as to *when* the foreign corporation need be doing business within the State. If the corporation is required to be doing business at the time of service of process, as earlier cases have indicated,⁸⁶ and the contact with the state is only a single act, more than likely the corporation will have withdrawn by that time. Then, unless the court desires not to consider it as such, the corporation will fall under the demanding requirements of service upon a withdrawn corporation discussed above. If considered desirable by the legislature, passage of a statute similar to those in other states providing jurisdiction over such single, isolated acts is suggested.⁸⁷

Conclusion

From *International Shoe* to *McGee* we have witnessed a great expansion in state jurisdiction over foreign corporations or, stated conversely, a "relaxation" of the due process requirements necessary to render a valid in personam judgment. And *Hanson v. Denckla* does not appear to be a withdrawal from this trend. Whatever limitations it imposes, tremendous latitude is allowed those states which choose to expand their jurisdiction over such corporations. However, for even the most desirous states, nation-

⁸² See Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 So. CAL. L. REV. 339.

⁸³ *Hess v. Pawloski*, 274 U.S. 352 (1927).

⁸⁴ *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

⁸⁵ ". . . a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations. . . . In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 355 U.S. at 222-23.

⁸⁶ *Davenport v. Superior Court*, 183 Cal. App. 506, 191 Pac. 911 (1920); *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289 (1906). *But see* *Koninklijke L. M. v. Superior Court*, 107 Cal. App. 2d 495, 237 P.2d 297 (1951).

⁸⁷ VT. REV. STAT. § 1562 (1947), applied in *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951); MD. ANN. CODE GEN. LAWS, art. 23, § 88(d) (1951), applied in *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654 (D. Md. 1950), and *Compania de Astral, S.A. v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955); ARK. STAT. ANN. §§ 27-340 (1947); ILL. REV. STAT. c. 110, § 17 (1957).

wide service is not yet allowed as territorial lines still basically mean jurisdictional lines.⁸⁸

The argument against the continued expansion of jurisdiction over foreign corporations is the hardship placed upon the defendant who is forced to defend away from its principle place of business or "home." Some courts feel that fear of the "hardship" of defending away from home will have an adverse effect upon the business activity within a state by foreign corporations voluntarily limiting themselves to local activities or intrastate business.⁸⁹ The detrimental effect upon the states' markets is an interlinking consideration.

But the very reason for the expansion answers the plea of hardship. The "fundamental transformation of our national economy, increased nationalization of our commerce, expanded interstate business through the mails, and highly improved transportation and communication"⁹⁰ have reduced the possible inconvenience of distant litigation from the major consideration it once was. Today's distant state is as close as yesterday's adjacent county. Remembering that the first test, *i.e.*, the "minimum contact" or some deliberate act within the state by the defendant, must be satisfied, then the second test of relative hardship, through transportation and communication improvements, decreases in weight. Because of these improvements and the promise of even greater advances in these areas, even further expansion of the state courts' jurisdiction over foreign corporations can be foreseen.

⁸⁸ See *Erlanger Mills, Inc. v. Cohoes Fiber Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956).

⁸⁹ See the dissenting opinion of Schauer, J., in *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d at 863, 323 P.2d at 442. "Such a holding seems especially unfortunate and undesirable, particularly for the manufacturers and producers of California, as it must inevitably tend to deter those in the market for California products from sending to this state for them." See also Wolfe's, Ch. J., concurring opinion in *McGriff v. Charles Antell*, 123 Utah 166, 169, 256 P.2d 703, 705 (1953); Funk, *The McGee Case and the Banks*, 14 BUS. LAW. 737.

⁹⁰ Caplin, *Doing Business in Other States*, United States Corporation Company (1959).