ABSTRACTS

Due Process—Service of Process on Foreign Corporations

Petitioner, an Ohio corporation, was made a defendant in an action for breach of contract by a resident of West Virginia. The dispute resulted from an independent oral contract made to supplement a written contract previously entered into in Ohio. The oral contract was made by phone; petitioner making the offer in Ohio and plaintiff accepting in this state. The contract was to be performed in West Virginia. Petitioner had never qualified to do business in this state, and none of its agents or officers entered this state in connection with either the written or oral contract. Service of process in the civil action was effected by delivery to the state auditor. Petitioner sought to prevent the civil action from proceeding to trial, claiming the court lacked personal jurisdiction. *Held,* writ denied. A corporation doing business in this state is subject to the jurisdiction of the courts of this state. A corporation is doing business in this state when it enters into a contract to be performed in whole or in part in this state. W. VA. CODE ch. 31, art. 1, § 71 (Michie 1961). The constitutional requirements of due process are met when a foreign corporation has had contacts with a state sufficient to make jurisdiction by that state reasonable. Petitioner, by virtue of the contract in question, had sufficient contact to place itself within the personal jurisdiction of the West Virginia court. *State ex rel. Coral Pools, Inc. v. Knapp,* 131 S.E.2d 81 (W. Va. 1963).

In addition to granting jurisdiction based on contracts entered into, the statute grants jurisdiction where a nonresident corporation has committed a tort in whole or in part in the state.

This statute is representative of the latest stage in the evolution of the requirements for personal jurisdiction over nonresidents. The progress of this evolution was carefully examined in *Gavenda Bros. v. Elkins Limestone Co.,* 145 W. Va. 732, 116 S.E.2d 910 (1960). The present state of the evolution recognizes the right of a state to exercise in personam jurisdiction over defendants who have had minimum contact with the state. This contact must be "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U. S. 310, 316 (1945). In the instant case the court used the "fair play and substantial justice" rule in deciding that the

respondent, having entered into the contract to be performed in this state, had sufficient contact. This finding is in accord with *McGee v. International Life Ins. Co.* 355 U. S. 220, 223 (1957), where the court said that personal jurisdiction based on "a contract which had substantial connection" with the state satisfied the requirements of due process.

The essence of the present view, basing jurisdiction on minimum contact, is contained in the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03 as prepared by the National Conference of Commissioners on Uniform State Laws. Section 1.03 provides for more expansive jurisdiction than that expressed by our statute in that it applies to individuals, partnerships, etc., as well as to corporations.

Section 1.03 is identified in the comments to the act as having been derived "from the Illinois Act." It is interesting to note that the Illinois Act was the subject of *Gavenda Bros. v. Elkins Limestone Co., supra.* In that case the court was called upon to decide whether an Illinois judgment, based on the provisions of their statute should be given full faith and credit. The court recognized the validity of the judgment and said "the public policy of this state, though less comprehensive in scope is in harmony with the public policy evidenced by the Illinois statute."

West Virginia is in accord with the weight of authority in this country in holding that entering into a contract to be performed in this state subjects a nonresident corporation to the personal jurisdiction of our courts.

Labor Relations—Walsh-Healey Public Contracts Act

The United States brings this suit against *D,* a coal dealer, for alleged violations of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 (1936). The act requires that government contracts in excess of 10,000 dollars be awarded only to contractors who comply with certain minimum wage and safety requirements for persons employed by the contractor. It was undisputed that some of *D's* suppliers, West Virginia mines, failed to comply with the requirements of the act. The controversy turned on whether "persons employed by the contractor" included those persons employed by the contractor's suppliers. The United States contended that "employed" was

intended to be synonymous with "utilized" and the suppliers were, consequently, included. The trial court dismissed the suit and the United States appealed. *Held,* affirmed. The court was guided in the statutory construction by the literal meaning of the words used and legislative intent and history. Clearly the contractor was not intended to be made responsible for its suppliers' compliance with the act. *United States v. New England Coal & Coke Co.,* 318 F.2d 138 (1st Cir. 1963).

The court gave great weight to the legislative history of the act in arriving at its decision in this case. It appeared that the act had undergone substantial redrafting of the area in question. The original bill required the contractor's suppliers to agree to conform to the standards of the act. S. 3055, 74th Cong., 1st Sess. § 1-A (1935). The House revision made the contractor liable for it suppliers' compliance, but provided that the contractor could shift liability by giving the suppliers actual notice of the representations of the contract. H.R. 11554, 74th Cong., 2d Sess. § 2 (1936). This revision was so opposed by the Secretary of Labor and representatives of labor and business that the bill was again revised. The bill in its final form was accompanied by the House Report which provided that "the bill . . . has not attempted to . . . lay down conditions for persons furnishing supplies to public contractors." H.R. Rep. No. 2946, 74th Cong., 2d Sess. 4 (1936).

The United States relied heavily on two provisions of the regulations and rulings. The "substitute manufacturer" provision makes the contractor jointly liable with a supplier, to whom all or part of the contract is shifted, for the latter's failure to adhere to the standards of the act. C.C.H., 2 Wage & Hour Serv. § 26,300.032 (a) (1963).

The application of this provision is limited, by its language, to manufacturing contracts. The second provision is the "direct shipment" provision. Under this provision a regular dealer's supplier, who ships the goods contracted for directly to the government, is made liable. This is true even though the supplier is not a party to the contract. C.C.H., 2 Wage & Hour Serv. § 26,300.034 (a) (1963).

The two provisions are clearly inapplicable to the factual situation in this case and were cited by the United States only to show a consistant application of the requisites of the act to the contractor's

suppliers. The court limited the applicability of the two to instances where the contractor was attempting to avoid his duties under the act. In the instant case, *D's* dealings with its suppliers were in the ordinary course of business for such a contractor. No claim that the mines were utilized by New England to avoid its duties under the act was made or proven.

The impact on West Virginia of a contrary holding in this case is readily apparent. Dealers who contemplated contracts with the government would of necessity avoid coal produced in non-complying mines. The only alternative open to dealers would be segregation of the coal from complying and non-complying mines, an alternative replete with practical difficulties.

Trade Regulation—Trade Names, Trade-marks, Service Marks

P, the operator of a local insurance agency, brought suit to enjoin *D,* a nationally known insurance company, from using the word "Securance" in the conduct of its business. *P,* in 1956, had incorporated as "Securance Services, Inc." and had continuously utilized the word "Securance" in its insurance business. This business was conducted predominately within Sandusky County, Ohio. In 1960 *D* began to use "Securance" in its national advertising campaign. The trial court dismissed *P's* suit. The court of appeals enjoined *D's* use of the word in Sandusky County. *Held,* judgment modified. *P* had, by prior use, acquired qualified property rights in the word "Securance." These rights were entitled to protection not only in the territory where *P's* business was conducted, but also throughout the state where, in the probable expansion of business, he might reasonably expect to attract customers. *Younker v. Nationwide Mut. Ins. Co.,* 191 N.E.2d 145 (Ohio 1963).

In the principal case *P* sought to protect the word "Securance" as a trade name and as a service mark. The court described a service mark as a trade-mark identifying a service rather than a product. Ohio considers trade names, trade-marks and service marks as being based on the same principles and subject to the same laws. The Ohio statutes prescribing the procedure for registration of such names and marks do not in and of themselves create any rights in the names or marks. Property rights in the names and marks and the right to protection of those rights arise as a matter of common law from their use in connection with a trade or business.

West Virginia has a statute providing for the registration of trade-marks. W. VA. CODE ch. 47, art. 2 (Michie 1961). This statute, like those in Ohio, creates no rights to the mark registered. Property rights in the trade-mark arise from usage and are based on common law. *W. E. Long Co. v. Burdett,* 126 S.E.2d 181, 186 (W. Va. 1962) (dictum). There are no such statutes for trade names or service marks in West Virginia. Our court has pointed out that the statute applying to trade-marks is not applicable to trade names. In this state rights to a trade name arise through the use of the name in a trade or business. Protection of a trade name is effected by a suit to enjoin unfair competition at common law. *Gluck v. Kaufman,* 117 W. Va. 685, 186 S.E. 615 (1936).

As noted, the Ohio court did not hesitate to correlate trade names, trade-marks and service marks. If the West Virginia court were to pursue a similar line of thought it seems a fair assumption that the rationale of *Gluck v. Kaufman, supra,* would be expansive enough to embrace service marks.

Ohio holds that rights to trade names, trade-marks and service marks arise as a matter of common law through usage. These rights are extended to those areas where it is probable that the user will expand his business. In West Virginia, however, these rights are not extended protection or legal recognition on the basis of anticipated expansion. The rule appears to be that the rights extend only to those areas where the user can show he has customers who are being confused by the duplicity or similarity of trade names. *Gluck v. Kaufman, supra.*

Richard Marion Alker