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Constitutional Law--Due Process--What Constitutes "Doing Business"

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The instant case is the first time the Roth standards have been applied to a major literary work. Lawrence's novel represents his rebellion against the staid and proper victorian society in which he lived. It has generally been considered by critics as one of the better English novels, and is usually read by most serious students in the field of literature. In writing it the author was faced with a problem in linguistic expression. Unlike French or similar romance languages, English has no socially acceptable word or words to describe procreation. Use, by the author, of scientific terminology would have been completely out of character for the persons involved, so the author chose the words which would commonly be used by the type person he sought to depict. It is these words which aroused the furor concerning the book. This type situation is precisely what the court sought to provide for in the Roth decision. It looked to the dominant theme of the novel and found the inclusion of such words not "dirt for dirt's sake" but vital to the author's expression and purpose.

There are many to who the novel is most distasteful, indeed even shocking. To others it is the high point of D. H. Lawrence's career and one of the bright spots in the field of English expression. Because the views are varied and subjective, it appears that the court is correct in attempting to establish objective standards. By choosing a middle ground from which to attack each individual situation as it occurs and by discarding a hard and narrow rule such as the Hicklin view for one with a broader and more flexible base, the Supreme Court is now in the position to place substantial restraint upon the smut industry, all the while protecting the reading public from the over zealous censor.

J. G. V. M.

Constitutional Law—Due Process—What Constitutes “Doing Business.”—Three recent cases have considered the question of what constitutes “doing business” within a state by a foreign corporation so as to subject such corporation to personal service and the jurisdiction of state courts. In the first case, P, a Louisiana resident, brought a libel action against D, a New York magazine publisher and a foreign corporation with no offices or employees in Louisiana, which merely had contacts with representatives in the state handling subscriptions, sales, and circulation of D’s magazines. D contended that such activities did not amount to presence or “doing business”
within that state. Held, D's contacts within the state did amount to "doing business" and such a conclusion would not offend the traditional notions of fair play and substantial justice. Sonnier v. Time, Inc., 172 F. Supp. 576 (W.D. La. 1959).

The second case considered was also a libel action, wherein P, a resident of Illinois, named ten corporate and twelve individual defendants. Held, foreign corporations with no agents or property within state and having no contacts within Illinois other than sending small shipments of newspapers to Illinois newsdealers and subscribers were not "doing business" within the state. Insull v. New York World-Telegram Corp., 172 F. Supp. 615 (N.D. Ill. 1959).

The third case was an action by a stockholder to compel a declaration of dividend payments and to seek an injunction prohibiting the improper use of corporate funds by D, a South Carolina department store corporation. D had no stores or employees in North Carolina, but the corporation directors maintained offices in North Carolina and engaged in various activities of corporate business there, including exercise of executive control over corporation functions, stockholders meetings, directors' meetings, purchase of merchandise, accounting and auditing services, and other business matters. Held, activities of the corporation and directors constituted "doing business" in North Carolina. Belk v. Belk's Dept. Store of Columbia, S. C., Inc., 108 S.E.2d 131 (N.C. 1959).

"Doing business" by a foreign corporation is a question of fact determined by the peculiarities of each case. Carnegie v. Art Metal Const. Co., 191 Va. 136, 60 S.E.2d 17 (1950). The term generally means the same as "transacting", "carrying on", or "engaging in" business. Harris v. Deere & Co., 128 F. Supp. 799 (E.D. N.C. 1955). It should be clearly noted that "doing business" has varying significance according to the sense in which it is employed and the purpose of the statute using it. Jeter v. Austin Trailer Equip. Co., 122 Cal. App.2d 870, 265 P.2d 130 (1953). The popular understanding of the term "doing business" would perhaps include all acts by any employee of a foreign corporation performed during working hours, so long as the acts were of a business nature and not merely personal to the employee. Justice Black has pointed out in a penetrating opinion, "I venture to suggest that if the question [doing business] were raised anywhere except in a courtroom, it would be dismissed as ludicrous." Polizzio v. Coules Magazines, 345 U.S. 663 (1953). But to construe "doing business" in such an oversimplification is to deny the problem and to ignore the legal difficulties involved when
applying the statutory phrase to a factual situation. The issue of what constitutes "doing business" most frequently arises in conjunction with one of the following questions: (1) Do the activities of the foreign corporation meet the requirements for qualification to do business lawfully within the state? (2) Is the foreign corporation within the state for taxation purposes? (3) Questions involving other regulatory statutes of the situs over foreign corporations, and (4), the question here considered, Is the foreign corporation amenable to personal service of process? See Isaacs, An Analysis of Doing Business, 25 COLUM. L. REV. 1018 (1925); Note, 39 VA. L. REV. 841 (1953).

As to what constitutes "doing business", the answer depends upon which of the above questions is being considered. Generally, a less strict interpretation is applied where personal service and jurisdiction is in issue. Jeter v. Austin Trailer Equip. Co., supra. Transactions of a lesser magnitude meet the requirements of due process to subject a foreign corporation to an in personam judgment, while acts of a more substantial character are required to declare a foreign corporation, within a state for taxation purposes, qualification to do business, or other regulatory power. Dalton Adding Machine Co. v. Commonwealth, 118 Va. 563, 88 S.E. 167 (1916).

Returning to the three cases here being commented upon, it is found that each case comes within the purview of the International Shoe case, the bellwether of modern judicial opinion on the "doing business" issue. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The language used in the Supreme Court opinion has become the standard test for courts deciding whether or not the acts of a foreign corporation constitute "doing business" within a state so as to be subject to an inpersonam judgment within that state. The test laid down supersedes prior tests of "presence", "implied consent", and "solicitation plus". Perkins v. Louisville & N. R. Co., 94 F. Supp. 946 (S.D. Cal. 1951); Carnegie v. Art Metal Const. Co., supra; Law v. Atlantic Coast Line R. Co., 367 Pa. 170, 79 A.2d 252 (1951). In effect, the test states that the due process clause of the Fourteenth Amendment requires a foreign corporation to have "certain minimum contacts" within the territory of the forum, of such a nature that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, supra.

Before the International Shoe case, courts gave weight to a number of factors when service of process was in question. The con-
venience of the parties involved was considered, balancing on one hand the protection of citizens' rights against the hardship to the foreign corporation in defending suits outside its domicile on the other. *Boyd v. Warren Paint & Color Co.*, 254 Ala. 687, 49 So. 2d 559 (1950). Often the extent of activities carried on by the foreign corporation decided whether it was "doing business." *Howes Co. v. Milling Co.*, 277 P.2d 655 (Okla. 1954). Depending on other circumstances, a single act by a foreign corporation may or may not be held "doing business" in a state. *Favell-Utley Realty Co. v. Harbor Plywood Corp.*, 94 F. Supp. 96 (N.D. Cal. 1950). It must be kept in mind, however, there has never been a simple mathematical formula devised as a test of what constitutes "doing business." Continuance and systematic nature of the activities have been taken into account. *Star Elkhorn Coal Co. v. Red Ash Pocohontas Coal Co.*, 102 F. Supp. 258 (E.D. Ky. 1951). Other decisions have given importance to the ordinary or extraordinary character of the act and whether such act was in furtherance of the corporate function of the foreign corporation and the purposes for which it was created. *Harris v. Deere & Co.*, supra.


The above factors and many others are still considered by courts, and can be harmoniously integrated with the *International Shoe* ruling since all factors are material in determining the "fairness" and "justice" of subjecting the foreign corporation to another state's jurisdiction. *International Shoe Co. v. Washington*, supra.

West Virginia decisions on "doing business" with regard to jurisdiction and service of process are few in number. See generally *W. Va. Code* ch. 56, art. 1, § 1 (Michie 1955). Several other cases decide the question of whether a foreign corporation was "doing
business” within West Virginia in order to meet the state’s requirement that foreign corporations “doing business” in West Virginia must register with the Secretary of State. See generally W. Va. Code ch. 31, art. 1, § 79 (Michie 1955). In this line of cases it will be noted a greater degree of activity is generally required to find the foreign corporation has been “doing business” than that required in the service of process cases. Note 39 Va. L. Rev. 841 (1953).

Again returning to the three cases herein discussed, it will be observed that all three reflect the broad view laid down by the International Shoe case. An interesting distinction exists in a comparison of the Sonnier v. Time, Inc. case with the Insull v. New York World-Telegram Corp. case. In the Sonnier decision, D was held to be “doing business” within the state by merely having contacts with representatives within Louisiana for subscription, sales, and circulation purposes. While in the Insull case it was held that foreign corporations having contacts with Illinois newsdealers and subscribers were not “doing business” with the state. The cases appear contra on somewhat similar facts, but they are nevertheless reconcilable. Undoubtedly, the volume of business carried on by Time, Inc. magazines within the state of Louisiana is much greater than the volume of business engaged in by out-of-state newspapers and other publications individually sending small shipments of printed material into Illinois.

However, it is quite possible and logical that within the scope of the International Shoe test of fairness and justice, contrary holdings as to what constitutes “doing business” will result since each case is determined by its own facts and the varying application of the purpose in which “doing business” is used. Therefore, any specified act may be held “doing business” in one instance, while in another case the same act may be decided not to constitute “doing business.” The Sonnier and Insull cases are closer to the borderline than the Belk case, wherein the foreign corporation’s administrative activities within North Carolina were quite numerous.

The latitude allowed by such a broad test means simply that there is virtually no rule at all in determining which specific acts constitute “doing business” by the foreign corporation, other than the conscience of the bench. The basic requirement of a decision holding a foreign corporation to be amenable to service of process is that such a holding be reasonable and consistent with due process. International Shoe Co. v. Washington, supra. Fundamentally, it is a balancing of conflicting interests and deciding which party is to
prevail. *Id.* The strength of the *International Shoe* ruling is that it does away with former fictions and makes the only test one of reasonableness according to the peculiarities of each case. Such a test in the light of governmental and economic evolution and judicial progress fulfills our present needs while allowing for growth.

J. Mc K.

**Criminal Law—Search, Seizure and Arrest Without Warrant—Probable Cause Necessary to Justify.**—*D* illegally imported narcotics into the United States from Mexico and was waiting at a San Diego coffee shop for some of her accomplices to join her. Narcotics agents, acting upon information supplied to them by an informer whom they had not previously known, proceeded to the coffee shop and arrested *D* without a warrant. At the police station, one of the agents required *D* to surrender two rubber contraceptives containing heroin which had been concealed on her person. *D* contended that the agents did not have sufficient probable cause to arrest without a warrant; therefore, the narcotics evidence should have been suppressed because obtained by a search incident to an unlawful arrest. *Held,* affirming conviction, that narcotics agents, when relying solely upon an informant previously unknown to them, must have some reasonable grounds to believe that their informer is reliable, but the corroboration of reliability may take place up to the actual moment of arrest. The verification not only of the informer’s identity, by contacting local police authorities, but also of his story, by finding petitioner at the place where he said she would be, was sufficient to establish this reliability. *Rodgers v. United States,* 267 F.2d 79 (9th Cir. 1959).

*D* drove into a garage attached to a liquor store which had a reputation of being a supplier to dry state liquor haulers and which was at the time under surveillance by alcohol-tax agents. When *D*’s car emerged it appeared to be heavily loaded as it proceeded toward the dry state line. An examination of the car, after it was stopped by a roadblock, revealed that the overload springs were markedly compressed, although there was nothing visible through the automobile windows that could account for such compression. Upon opening the trunk the agents found twenty-six cases of liquor. *D* insisted that the evidence obtained should be suppressed as incident to an unlawful search and seizure, in that probable cause did not exist to justify such action without a warrant. *Held,* affirming con-