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Foreign Corporations--Service of Process on Auditor After Withdrawal in Tort Case--Cause of Action Arose After Withdrawal

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88 Misc. 433, 150 N.Y.S. 738 (Sur. Ct. 1914), the facts were similar to those in the principal case. There the judge allowed a recovery, holding that the death should have been produced by the accused intentionally and for the purpose of affecting the descent and distribution of the deceased's estate before a recovery is denied. This decision was criticised in *In re Sparks' Estate,* 172 Misc. 642, 14 N.Y.S.2d 926 (Sur. Ct. 1939). In that case the husband killed his wife intentionally and was found guilty of manslaughter. He relied upon the *Wolfe* case, since he did not intend to affect the descent and distribution of his wife's estate. The court found against him, but this does not overrule the *Wolf* case in which there was no intent to kill the wife.

From a consideration of these cases it would seem that the maxim would not apply where the accused acted deliberately but produced results which were unintentional. South Carolina has a direct holding to this effect in the principal case; New York has a direct holding which has been criticized; and Michigan has dicta which supports the reasoning.

W. A. K.

FOREIGN CORPORATIONS—SERVICE OF PROCESS ON AUDITOR AFTER WITHDRAWAL IN TORT CASE—CAUSE OF ACTION AROSE AFTER WITHDRAWAL.—Action against a foreign corporation for injury to property resulting from flow of water and accumulation of debris allegedly caused by *D*'s negligence. The circuit court dismissed the action on the ground that it had no jurisdiction, saying that service on the auditor was void since *D* had been issued a withdrawal certificate from the state one year prior to the injury. *P* brought error. *Held,* that the statutory authority of the auditor to accept service of process as attorney in fact for foreign corporations did not extend to a tort case based upon a cause of action which did not arise until after the corporation had been properly issued a withdrawal certificate from the state. Affirmed, with one dissent. *DeBoard v. B. Perini & Sons,* 87 S.E.2d 462 (W. Va. 1955).

When a foreign corporation undertakes to do business in West Virginia, it is required to comply with certain regulations. Among them is the automatic appointment of the state auditor as its attorney in fact, giving him the authority "to accept service of notice and process on behalf of" every such corporation. W. VA. CODE c. 31, art. 1, § 71 (Michie 1955). When the foreign corporation leaves the state, it must procure a withdrawal certificate, but

this certificate does not end the powers of the auditor to accept service of process for the corporation. As long as the corporation has any debt or obligation due from it to the state or to any resident thereof, the auditor can accept service. W. VA. CODE c. 31, art. 1, § 84 (Michie 1955). This authority of the auditor is a power coupled with an interest, and, therefore, irrevocable as long as an interest in the subject of the power continues. The corporation, by withdrawing from the state, cannot escape liability for acts done during the period when the corporation was doing business in the state. *Hunter v. Mutual Reserve Life Ins. Co.,* 218 U.S. 573 (1910); *Frazier v. Steel & Tube Co. of America,* 101 W. Va 327, 132 S.E. 723 (1926); *Moore v. Mutual Reserve Fund Life Ass'n,* 129 N.C. 31, 39 S.E. 637 (1901).

The auditor is definitely authorized to accept service of process for a withdrawn foreign corporation in a contract action where the contract was entered into before the corporation left the state. *Frazier v. Steel & Tube Co. of America, supra.* In that case, the code provisions under consideration in the instant case were fully examined, and the court expressed what it believed to be the legislative intent thereof: To provide a citizen of our state a means for prosecuting a suit against a foreign corporation not owning property in the state, when the corporation has no permanent agent here, and where an *obligation* has been incurred by *contract* made while the foreign corporation was actually doing business in the state. There is no mention of tort liability in the *Frazier* case. By dicta, the instant case indicates that the *Frazier* case might now be extended to include a tort wherein the cause of action arose before the defendant corporation left the state. This is indeed progress, but why did the court stop short of complete protection for the citizens of West Virginia?

Such statutes as are being considered here have always been to protect the citizens of the home state, often to the prejudice of the foreign corporation. It has been considered to be against state policy to compel a citizen to resort to a foreign state to collect his due when the cause of action arose in his home state. *Mut. Res. Fund Life Ass'n v. Phelps,* 190 U.S. 147 (1903); *Billmyer Lumber Co. v. Merchant's Coal Co.,* 66 W. Va. 696, 66 S.E. 1073 (1910). In the instant case, *P*'s only relief would be to transport himself and his witnesses to Massachusetts, the home of *D* corporation, or to some other state where *D* was authorized to do business. Such an injustice is obviously undesirable, but perhaps, it is the only practical solution.

D was under a duty to use his land in strip mining so as not to damage *P*'s land. His duty was to confine and restrain debris and to place debris in such a position that it could not reasonably be expected to be washed into a stream and on *P*'s land. *Oresta v. Romano Bros.*, 137 W. Va. 633, 73 S.E.2d 622 (1952). *D* ceased mining operations in 1950, withdrew from the state in 1951, and the debris was not washed onto *P*'s land until more than a year later, in August, 1952. The fact that the cause of action was so long in accruing must have influenced the court's decision. After all, West Virginia is interested in getting more foreign businesses to locate in the state, not drive them away because of the fear that some day in the dim future after leaving the state, they will be held liable to defend a suit in an area where they have severed connections.

P. B. H.

INSURANCE—AUTHORITY OF AGENT TO WAIVE CONDITIONS OF POLICY.—Action by widow who had been designated as beneficiary in a life insurance policy. The policy application contained a clause that if the premium was paid when application was made, the policy would become effective and protect the applicant when the company approved the application and that otherwise, no insurance would be in force under the application unless and until a policy had been issued and delivered, and the full first premium stipulated in the policy was actually paid to, and accepted by, the company during the life time and insurability of the applicant. However, the company increased the premium after the physical examination and in a telephone conversation with the agent, the applicant agreed to accept the policy with the increased premium and the agent agreed to deliver the policy the next morning. However, the applicant died the following morning before the policy was delivered. *Held,* affirming judgment for *P,* that there was a constructive unconditional delivery of the policy and that the agent had authority to waive, and did waive, the premium. *Gurley v. Life & Casualty Ins. Co. of Tennessee,* 132 F. Supp. 289 (M.D.N.C. 1955).

It is axiomatic that the provisions or conditions precedent of an insurance policy must be either complied with or waived before a binding contract of insurance is created. The principal case turns on the performance of two such conditions, existing in a factual situation worthy of a law professor's ingenuity. They are: first; the prepayment of the first premium during the life of the insured and, second; the delivery of the insurance policy, and are basic to almost every life insurance policy.