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APPLICABILITY OF LEX LOCI CONTRACTUS TO IMPOSE PARTNERSHIP LIABILITY ON STOCKHOLDERS OF AN UNREGISTERED FOREIGN CORPORATION.

The broad assertion of text-writers, frequently made, that the individual liability for corporate debts is to be determined exclusively by the law of the state of incorporation,[1] does not appear to be fully justified by an adequate analysis of the problem involved or a more complete survey of the authorities relating thereto.[2] The decision reached in a recent Tennessee case, *Cunnyngham v. Shelby*,[3] is directly in point. The defendants

[1] Westlake, *Priv. Int. Law* (5th ed., 1912) pp. 407-408; Beale, *Foreign Corporations*, sec. 442; but see Clark, *Corporations* (ed. Wormser, 1916) pp. 736-738.

[2] Prof. Wesley N. Hohfeld, The Individual Liability of Stockholders and the Conflict of Laws (1910) 10 COL. L. REV. 294, n. 24.

[3] (1916) 188 S. W. (Tenn.) 1147.

were stockholders in a Delaware corporation which had carried on business in Tennessee without having attempted to comply with the statutory requirements as to foreign corporations. The plaintiffs, who had been employed by the corporation, sought to hold the stockholders liable as partners. The courts of Tennessee sustained this claim.

At the outset of an analysis of the problem involved, it is important to note that we are not now concerned with the *internal* affairs of the foreign corporation, or with the rights, privileges, powers and immunities of the stockholders in relation "to the corporation." When we remove the fiction or veil of "corporate entity," such relations prove to be in reality the jural relations of the stockholders *inter se*. The internal organization and government of foreign corporations are, of course, to be regulated according to the law of the place of incorporation.[4] It would seem equally clear that the extent and nature of the stockholders' jural relations to one another should be determined by the same law; that is, the law under which the corporate agreement was made and the conditions of membership fixed.[5]

The obligations and liabilities of stockholders "to the corporation," i. e., *inter se,* to pay the amount of an assessment, or to pay their ratable share of a corporate debt under an individual liability to contribution in favor of other stockholders

[4] *Miles v. Woodward* (1896) 115 Cal. 308, 311; see *Williams v. Gaylord* (1902) 186 U. S. 157, 165, affirming s. c. (1900) 102 Fed. 372, 375; *London, etc., Bank v. Aronstein* (1902) 117 Fed. 601, 609.

[5] *Nashua Savings Bank v. Anglo-American, etc., Co.* (1903) 189 U. S. 221; *Allen v. Fairbanks* (1891) 45 Fed. 445; *Morris v. Glen* (1888) 87 Ala. 628; *Lewisohn v. Stoddard* (1906) 78 Conn. 575. These cases all relate to internal matters or to the obligations and liabilities of the stockholders "to the corporation"; but they are sometimes erroneously cited for the (broad) proposition that the law of the place of incorporation determines the existence (or non-existence), nature, and extent of stockholders' individual obligations to corporation creditors.

Compare Morawetz, *Priv. Corp.* (2d ed.) Vol. II, sec. 967: "The word 'charter' is here used to signify the agreement between the shareholders of the corporation, whether this agreement be in a special act of the legislature, or in articles of association, or in either of these taken in connection with certain general laws of the state. . . . The laws of the state where the corporation was formed by the agreement of the corporators are regarded only so far as they determine the scope and validity of this agreement itself. The same rule would apply to a general or limited partnership formed by agreement in one state for the purpose of carrying on business in other states."

are fundamentally different from direct obligations and liabilities to corporation creditors, whether the obligation and liabilities be corporate so-called (i. e., "quasi-joint")[6] or individual (several). Courts and text-writers have not infrequently overlooked these distinctions. The problem in all cases similar to *Cunnyngham v. Shelby,* the Tennessee case under review, is: According to what rule of law should be determined the stockholders' *direct individual* obligations and liabilities to *corporation creditors?*[7] The crucial question here is not an internal one.[8] The common-law rule of partnership liability declared by the Tennessee court to be applicable to the stockholders in an unregistered foreign corporation is analogous to California's statutory rule of proportional individual liability—the latter applying equally to *all* corporations actually doing business there. Cases decided under such a statute, therefore, are, so far as the fundamental problem of the conflict of laws is concerned, persuasive and important precedents. With a single exception, *Risdon Iron and Locomotive Works v. Furness,*[9] the decisions under such statutes hold the stockholders individually liable.[10]

It is well settled as a general common-law principle that if the law of the place of incorporation imposes no direct individual

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[6] For a discussion of the nature of stockholders' corporate (or "quasi-joint") obligations, commonly designated the obligations "of the corporation," see Prof. Wesley N. Hohfeld, Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 COL. L. REV. 285, 301-308.

[7] For the conflicting rules, see (1909) 9 COL. L. REV. 499-505.

[8] See note 6.

[9] [1905] 2 K. B. 304; affirmed [1906] 1 K. B. 49; criticised (1910) 10 COL. L. REV. 283; (1910) 10 COL. L. REV. 520.

[10] *Pinney v. Nelson* (1901) 183 U. S. 144. A corporation was formed in Colorado with only a limited liability. By the express terms of the charter, the corporation could do business in California. Business was done in that state; and the court held that the stockholder became bound by the laws of the state *specifically mentioned* in the charter; that he would be held individually liable for his proportionate share of the debts of the corporation according to the California statute.

Peck v. Noee (1908) 154 Cal. 351, reached a similar result involving a California stockholder in a Nevada corporation doing business in California.

Thomas v. Wenthworth Hotel Co. (1910) 158 Cal. 275, sustained the same proposition for an Arizona corporation.

Thomas v. Matthiessen (1914) 232 U. S. 221. In this case the corporation by its articles was authorized to do business in California as well as elsewhere, and the defendant stockholder, a citizen and resident of

obligation whatever, the *lex loci contractus,* even if deemed controlling in the first instance, will in fact impose on the stockholders of a foreign or extra-state corporation neither partnership obligations nor any other individual obligations, but on the contrary merely "corporate" or "quasi-joint" obligations.[11] This represents what the common law generally does; but even the common law may, whenever the adoption of the law of the place of incorporation be repugnant to its policy or prejudicial to its interests, depart from the general rule of "comity" and hold the stockholders to unlimited partnership obligations. This, it is submitted, is the chief, if not the only, *ratio decidendi* of a few cases.[12]

New York, was held liable for his proportionate share of the corporation debts; the action having been brought in the U. S. District Court of New York.

The most recent case decided under this statute is *Provident Gold Mining Co. v. Haynes* (1916) 159 Pac. (Cal.) 155. See a comment in (1916) 26 YALE LAW JOURNAL, 143. This case marks a further step, for no *specific provision* was made for the corporation to do business in California as was made for the four previous cases; nevertheless, a general authorization to do business in the state was given, the corporation being organized to do business in Arizona, or "in any other state or territory as the board of directors may from time to time deem necessary and expedient."

The general question raised by the California statute is becoming of increasing importance. Two cases involving statutes fundamentally similar are: *Leyner Engineering Works v. Kempner* (1908) 163 Fed. 605, decided under a Colorado statute providing for individual liability of stockholders of a foreign corporation because of failure to file a copy of articles of incorporation, etc., and *Chesley v. Soo Lignite Coal Co.* (1909) 121 N. W. (N. D.) 73, decided under a similar state of facts.

[11] See *Bateman v. Service* (1881) L. R. 5 App. Cas. 386, 389, *per* Sir Richard Couch: "But it was contended that the Legislature of Western Australia . . . . enacted that unless a foreign corporation, carrying on business in Western Australia, complied with this Ordinance and was registered according to its provisions, its individual members should be liable to be sued for its debts. It was stated, and properly, that the real question in the case was whether the Western Australian Legislature so enacted.

"In considering that question we may first look at the principle which is laid down by Story. . . . 'In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.'"

[12] (1910) 10 COL. L. REV. 520, 536; *Cleaton v. Emery* (1892) 49 Mo. App. 345 (Corporation chartered in Colorado intending to do business exclusively, or almost exclusively, in Missouri). Gill, J.: "The state

It has been held in some cases that where the corporate existence is effected in another state purely for the purpose of defeating personal liability, the foreign incorporation will be disregarded, so far as individual liability is concerned, in a state where business is transacted.[13]

Somewhat related to this class of cases are those in which a foreign corporation has failed to register, or file its articles, according to state registration statutes, although otherwise not violating the laws or policy of the state in which business is transacted. At least some authorities are inferentially inclined against the principal case, which falls within the class last mentioned, holding, under various registration statutes and sets of facts, that the stockholders are not liable as partners on contracts executed in the name of the corporation.[14] A statute might impose such a liability.[15]

In *Morton v. Haff*[16] an agent who had actually entered into contract for a corporation having, because of failure to file copy of articles, etc., no power to transact business within the state was held personally liable on the ground that the corporation having no power could delegate none to the defendant. In *Cunnyngham v. Shelby,* the stockholder was held liable not as an agent but as a principal. This case, decided apart from

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of Colorado attempted here by this incorporation to create and send out to another state this organized entity, not to do business within its own realm, but to carry on such business altogether in another state. . . . To concede its validity and recognize its existence is to admit authority in another state to direct this commonwealth: in short to yield to Colorado the partial exercise of our state's sovereignty." *Empire Mills v. Olston Grocery Co.* (1891) 15 S. W. (Tex.) 200; *Taylor v. Branham* (1898) 35 Fla. 297; cf. *Merrick v. Brainard* (1860) 38 Barb. (N. Y.) 574 (This case was reversed in 34 N. Y. 208, not on the ground that there was any absence of "power" on part of the *lex loci delicti,* but on grounds of the rules of "comity," etc.).

[13] *Davidson v. Hobson* (1894) 59 Mo. App. 130; see also *Hill v. Beach* (1858) 12 N. J. Eq. 31; *Montgomery v. Forbes* (1889) 148 Mass. 249; *Cleaton v. Emery* (1892) 49 Mo. App. 345.

[14] See *Nat'l Bank v. Spot Cash Coal Co.* (1911) 98 Ark. 59; opinion of Kirby, J. in *Tribble v. Halbert* (1910) 143 Mo. App. 524.

[15] Cf. Va. Code, sec. 1105: "The officers, agents, and employees of any such corporation doing business in this state without a license shall be personally liable to the state for any fines imposed on it, and to any resident of the state having a claim against such a corporation." See also cases cited in note 10, last paragraph.

[16] (1890) 88 Tenn. 427; see also *Raff v. Isham* (1912) 235 Pa. St. 347; *Lasher v. Stinson* (1892) 145 Pa. St. 30.

any statute imposing partnership liability, extends the stockholders' obligations and liabilities a step farther than the agency cases. However, so far as the doctrines of the conflicts of laws are concerned, the principal case is not inconsistent with the principles developed in the evolution of the law governing stockholders' liabilities, inasmuch as the Tennessee court, the *lex loci contractus* and the *lex fori* being identical, pursued its own policy and applied its own fundamental common-law rules, regardless of any rules of "comity" and of the laws of Delaware.

G. S., JR.

TORT ARISING FROM ATTEMPTED FULFILMENT OF CONTRACT.

A recent Minnesota decision[1] presents an interesting question in the tort liability assumed by one who undertakes an employment. The defendant detective agency, being employed to obtain information concerning the conduct of the plaintiff's wife, negligently shadowed another woman, and falsely reported to the plaintiff that his wife's conduct was immoral. The plaintiff in reliance thereon charged his wife with such misconduct, whereupon she left him definitely. The plaintiff now seeks to recover damages for the alienation of his wife's affections resulting from such negligence, expressly waiving recovery of the sum paid for services. The court decided that, in order to recover from a third party for alienating the affections of a spouse, the plaintiff must show active and intentional conduct of defendant in causing such estrangement, and that the modified complaint here stated no cause of action.

Without question the proposition on which the court grounds the dismissal of the suit is correct.[2] Mere negligence is not sufficient to give an action for the common-law tort of alienation of a wife's affections. Yet it is open to question whether the complaint does not state a good cause of action for negligent misfeasance, into which such alienation would enter as a damage element. The plaintiff, says the court, "grounds his action wholly upon the claim that defendant was negligent in the performance of duties which plaintiff employed it to perform."

Whether a duty be undertaken gratuitously or for hire, one

[1] *Lilligren v. Burns International Detective Agency* (1916) 160 N. W. (Minn.) 203.

[2] See *Tasker v. Stanley* (1891) 153 Mass. 148, and cases cited.

undertaking, renders himself liable in case of misfeasance to an action on the case.[3] This action is distinct from that on the contract proper, if there be such: it will not lie for failure to begin performance at all[4] but will for misdoing, either by irrevocable completion in a wrong fashion,[5] or by failure to complete an act once undertaken[6]; it may lie where a contract action could not be maintained, as where in England a servant, carried by a common carrier on a contract with his master, sues in his own name to recover for damage to his baggage[7]; it is founded on the general duty of every man to use due care to do whatever he may begin in such manner as not to injure his neighbor. The test seems to be, whether, disregarding the contract, there would still be a legal duty on the defendant.[8] In the principal case we have that relation between plaintiff and defendant which has been called an *undertaking:* a relation arising out of a voluntary act by one whereby he undertakes a duty to another not dependent, as is a contract, on a promise supported by consideration.[9] Here the voluntary act was the investigation and report to plaintiff of the supposed conduct of his wife. The defendant was liable for his negligence in not employing such skill as he had,[10] or even, it would seem, such skill as he held himself out to have.[11] Nor are the fact and amount of consideration of importance, except as evidencing the duty to employ that skill.[12]

This being a special action on the case, special damage must be proved[13]—in this case of alienation of the wife's affections. Inasmuch as the plaintiff's own voluntary act of accusation intervened before the damage was done, the question arises whether it was not remote or avoidable. The true test would seem to be whether the act of the intervening agency was such as was to be expected to happen on the defendant's act: if it was so to be

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[3] *Coggs v. Bernard* (1703) 2 Ld. Raym. 909.

[4] *Elsee v. Gatward* (1793) 5 T. R. 143; *Courtenay v. Earle* (1850) 10 C. B. 73.

[5] *Elsee v. Gatward, supra; Brown v. Boorman* (1844) 11 Cl. and F. 1.

[6] *Bagaglio v. Paolino* (1913) 35 R. I. 171.

[7] *Marshall v. York, Newcastle and Berwick Ry. Co.* (1851) 11 C. B. 655; *Kelly v. Metrop. Ry. Co.* [1895] 1 Q. B. 944.

[8] *Turner v. Stallibrass* [1898] 1 Q. B. 56.

[9] See (1891) 5 HARV. L. REV. 222.

[10] See *Shiells v. Blackbourne* (1789) 1 H. Bl. 158.

[11] Cf. *Walker v. Goodman* (1852) 21 Ala. 647.

[12] *Coggs v. Bernard, supra.*

[13] Cf. *Harrow School v. Alderton* (1800) 2 Bos. & P. 86.

expected, the result is not a remote consequence. In the case of a human agency the result will generally be of a sort not to be expected.[14] Yet, whereas the loss of credit, for instance, incident to an injury to a merchant's stock in trade, is too remote for recovery,[15] similar loss of credit following a blow at a merchant's credit has been held a proximate damage.[16] It is submitted that the blow here directed at plaintiff's family life was thus direct: the most natural, and as shown by the event, the intended purpose of the information in question was the revelation of it to the plaintiff's wife, or the use of it in some other way, as in a divorce court, to the dissolution of the plaintiff's household. Such a dissolution followed from the use of the false information. In concentrating their attention on the supposed tort action for alienation of affections, then, the court may well have overlooked the true, and valid, theory of the plaintiff's complaint.

K. N. L.

THE RIGHT OF A PAYEE OF A STOLEN CERTIFIED CHECK WHO HAS GIVEN VALUE FOR IT.

An interesting question involving an interpretation of the N. I. L. was recently answered by the New York Supreme Court in a decision holding that a payee who received a check from one who stole it from the drawer's agent and who, pretending to be such agent, obtained value to the amount of the check, was not a holder in due course under section 91 and hence could not recover on the instrument.[1]

The facts of the case show that a stock brokerage firm drew its check on the defendant bank payable to the order of the plaintiff trust company. The check was handed to a clerk who was instructed to have it certified and to deliver it to the payee in payment for revenue stamps. Immediately after the check was certified, it was either stolen or erroneously handed to some party other than the clerk by the bank officer. This party, representing himself as a messenger from the drawer firm, delivered the check to the plaintiff-payee, and received the amount in

[14] Sedgwick, *Damages* (8th ed.) Vol. I, p. 186.
[15] *Lowenstein v. Monroe* (1880) 55 Ia. 82.
[16] *Larios v. Bonany* (1873) L. R. 5 P. C. 346.
[1] *Empire Trust Company v. Manhattan Co.* (1917) 162 N. Y. S. (App. Div.) 629.

revenue stamps. It further appeared that the party who presented the check to the plaintiff produced a necessary requisition, on which was forged the signature of the drawer of the check. In determining that the plaintiff trust company could not recover against the certifying bank, the court decided that the plaintiff-payee was not a holder in due course, but, on the contrary, was an immediate party both to the check and the transaction within the meaning of section 35[2] of the N. I. L.

Prior to the adoption of the N. I. L., many cases held that an instrument in the form of a negotiable promissory note, which had never been delivered by the alleged maker, had no legal existence as a promissory note; and the party sought to be charged upon it might always, unless estopped by his negligence, defend successfully against it, without regard to the time when, or the circumstances under which, it was acquired by the holder.[3] Other courts, however, recognized the necessity of sustaining the circulation and credit of negotiable paper and held that delivery was not essential to the validity of an instrument in the hands of a holder in due course.[4]

Whatever conflict of authority or uncertainty may have existed before the enactment of the N. I. L. has been entirely eliminated by the clear and decisive language of section 35,[5] which provides, in part: "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." As

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[2] The N. I. L., Art. III, sec. 35, provides that: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

[3] *Burson v. Huntington* (1870) 21 Mich. 415; *Cline v. Guthrie* (1873) 42 Ind. 227; *Roberts v. McGrath* (1875) 38 Wis. 52.

[4] *Worsham v. State* (1909) 56 Tex. Crim. 253; *Kinyon v. Wohlford* (1871) 17 Minn. 239; *Shipley v. Carroll* (1867) 45 Ill. 285.

[5] See note 2.

the instrument in the principal case was never delivered by the drawer, it necessarily rests upon the plaintiff to bring himself within the phrase "holder in due course," in order to maintain his action.

There is some conflict in the decisions as to whether a payee may be a holder in due course under the N. I. L. It has been held in Alabama,[6] Massachusetts,[7] and New York,[8] that he may, while in Iowa,[9] Missouri,[10] Oregon,[11] and Washington,[12] a contrary conclusion has been reached. In New York, however, it seems that the payee of a negotiable instrument may claim the prerogatives of a holder in due course under section 91 of the N. I. L. The court in the principal case, however, waived this point and held that even if this was the correct interpretation of the statute, the plaintiff would not be considered a holder in due course in this case.

The N. I. L.[13] defines a holder in due course as a holder who has taken the instrument under the following conditions: (1) that it is complete and regular on its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title from the person negotiating it.

The following section[14] expressly provides that the holder of an instrument payable on demand, negotiated an unreasonable length of time after its issue, shall not be regarded as a holder in due course. In the absence of this express provision, such a party would have been a holder in due course under the preceding section. It would seem, therefore, that when the statute defines generally who shall be holders in due course and makes an express exception of a particular class, who would otherwise

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[6] *Ex parte Goldberg & Lewis* (1914) 67 So. (Ala.) 839.
[7] *Liberty Trust Co. v. Tilton* (1914) 217 Mass. 462.
[8] *Brown v. Rowan* (1915) 154 N. Y. S. 1098.
[9] *Vander Ploeg v. Van Zuuk* (1907) 135 Ia. 350.
[10] *St. Charles Sav. Bank v. Edwards* (1912) 243 Mo. 553.
[11] *Gresham Bank v. Walch* (1915) 76 Or. 272.
[12] *Bowles Co. v. Clark* (1910) 59 Wash. 336.
[13] Art. VI, sec. 91.
[14] The N. I. L., Art. VI, sec. 92, provides that: "where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

be embraced, the exception negatives the idea that any other class was to be excluded, in accordance with the maxim, *Expressio unius est exclusio alterius.*

The court distinguished the present case from those cases in which the maker has given an instrument to a third party and has authorized him to transfer title to the payee by delivery, when certain conditions of which the payee has no notice are fulfilled.[15] A payee who purchases a note under such circumstances admittedly comes within the protection afforded a holder in due course. In the principal case, however, it was argued that the maker never had any transactions with the party who attempted to transfer the note and that the thief never claimed to have the power to deliver the note to the payee, except as agent for the maker in payment of stamps sold to the latter. It was accordingly concluded that the check was never *negotiated* and that the payee was not a purchaser of the check, nor a remote party, either to the instrument or to the transaction; but, on the contrary, his claim of title to the instrument rested upon a transfer from one who, at best, appeared to have authority to deliver it and make a valid contract only for a consideration which the plaintiff has failed to perform.

In answer to the court's argument that the check was never *negotiated,* it must be noted that section 60 of the N. I. L. states that an instrument is *negotiated* when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.[16] A holder is defined as the payee or indorsee of a bill or note who is in possession of it or the bearer thereof.[17] It can hardly be maintained that the concluding sentence of section 60, viz., "If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery," was intended to include all the modes in which an instrument might be negotiated, or to restrict the comprehensive terms of the preceding sentence. If that

[15] Cf. *Boston Steel & Iron Co. v. Steuer* (1903) 183 Mass. 140; *Liberty Trust Co. v. Tilton, supra; Vander Ploeg v. Van Zuuk, supra.*

[16] The N. I. L., Art. V, sec. 60, says: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

[17] The N. I. L., Art. I, sec. 2, defines a holder as: "'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof."

inference be attached to this provision, it is clear that in neither of the above cases can the payee be a holder in due course, which is contrary to the doctrine apparently established in New York. It is also clear that if the plaintiff can be brought within the phrase, "holder in due course," it is of no consequence that the drawer of the check received no consideration.

Adopting the court's assumption that, when the improper negotiation is by an agent, the payee may be a holder in due course, it would seem necessarily to follow that when the improper negotiation is by a thief, representing himself to be an agent, the conclusion must be the same. Surely, the payee must be considered as much "on notice" in the former case as in the latter. While the two cases are clearly distinguishable in fact, yet the language of the N. I. L. would seem to be sufficiently comprehensive to include both.

S. F. D.

SERVICE BY PUBLICATION TO OBTAIN PERSONAL JURISDICTION OVER A RESIDENT WHO CANNOT BE FOUND

The problem of acquiring such jurisdiction as will validate a personal judgment against one who is a resident of the state issuing process, but who is not to be found therein, is complicated, in most decisions, by uncertainty of distinction as to the restrictions upon such a proceeding. Although it was perhaps true at common law that as a rule jurisdiction had to be based on the fact that the person or the thing was within the territory,[1] this requirement was not a necessary element of our legal scheme and has been abrogated by statute in many common-law jurisdictions. Even in an action *in rem,* where service by publication is universally recognized as valid, the jural relations of the absent owner are altered so far as his connection with the *res* is concerned. The step from such an adjudication to one which imposes a general liability or duty on a person absent from the jurisdiction is but a matter of degree and one which common-law tribunals have found themselves, under appropriate statutes, perfectly able to take. For example, an English court has no difficulty, in a divorce suit brought in England, in giving a judgment for money damages

[1] Story, *Conflict of Laws,* sec. 539.

against the co-respondent who is in, and a resident of, Scotland.[2] A New Zealand law allowing the court at discretion to proceed to a personal judgment against an absentee, on a contract to be performed in New Zealand, is considered quite in harmony with fundamental principles of justice.[3] Under these statutes service is usually had by the giving of actual notice outside the jurisdiction, rather than by publication within the jurisdiction. In our own country, before the War Amendments to the Constitution, many cases recognized the power to give such a judgment, binding in the state where it was rendered even though denied validity abroad.[4] These decisions involved both defendants who were residents or citizens of the state rendering the judgment and defendants who resided in other states or countries. It would seem, then, that aside from express constitutional restrictions, or those assumed to be implied from the nature of our government, there is no lack of power in a state court to render a personal judgment, valid within the state, against a defendant—be he resident, citizen or neither—who was not, at the time of trial, personally served within the jurisdiction. In so far as the dicta of *Pennoyer v. Neff*,[5] the explicit rulings in a few decisions such as *De La Montanya v. De La Montanya*,[6] and an occasional author seek to propound some natural law which would, aside from constitutional limitations, prevent such a judgment from being binding within the state, they cannot be sustained.

It is undeniably true, on the other hand, that since the enactment of the Fourteenth Amendment want of due process has to a certain extent invalidated personal judgments not based on personal service within the state. It is well settled that if the absent defendant is not domiciled within the state, no such judg-

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[2] *Rayment v. Rayment & Stuart; Chapman v. Chapman & Buist* [1910] P. 271.

[3] *Asbury v. Ellis* [1893] A. C. 339.

[4] *Thompson v. Emmert* (1846) 4 McLean, 96; *Kane v. Cook* (1857) 8 Cal. 449; *Middlesex Bank v. Butman* (1848) 29 Me. 19; *Phelps v. Brewer* (1852) 9 Cush. (Mass.) 390; *Woodward v. Tremere* (1828) 6 Pick. (Mass.) 354; *Bigger v. Hutchings* (1830) 2 Stew. (Ala.) 445; *Downer v. Shaw* (1851) 22 N. H. 277; *Davidson v. Sharpe* (1845) 28 N. C. 14; *Price v. Hickok* 39 Vt. 292; *Butterworth v. Kinsey* (1855) 14 Tex. 500; *contra, Barkman v. Hopkins* (1850) 11 Ark. 157; *Dearing v. Bank of Charleston* (1848) 5 Ga. 497.

[5] (1877) 95 U. S. 714, 733.

[6] (1896) 112 Cal. 101, 110.

ment can be given after service by publication merely, inasmuch as sufficient notice and a reasonable opportunity to be heard, have supposedly not been given. The decision will not be binding even in the state where it is given,[7] and may be attacked on the same ground as a denial of due process of law at home or abroad.[8] Whether this interpretation of due process is to be viewed merely as the crystallization of a rule assumed by some courts to be impliedly inherent in our constitutional structure, or as a distinct addition thereto, is now relatively unimportant. The fact that *Pennoyer v. Neff*, though decided in 1877, passes upon an Oregon judgment rendered in 1866, two years before the Fourteenth Amendment was proclaimed to be in force, would tend to indicate that the former is the true position.[9] It is not the purpose here to discuss the wisdom of such a rule as regards non-citizens, but, assuming it, to determine whether its extension to the case of residents or citizens temporarily absent, is warranted. The field is somewhat further narrowed by the fairly prevalent view that if the defendant resident can be found within the state to be personally served, nothing else will constitute due process.[10] From the standpoint of a court so deciding, it may be argued that it is somewhat difficult to understand how service by publication becomes sufficient to satisfy the requirement merely because the defendant is not within the jurisdiction. The argument based upon lack of notice and reasonable opportunity to be

[7] *Griffith v. Milwaukee Harvester Co.* (1894) 92 Ia. 634; *Lanning v. Twining* (1906) 71 N. J. Eq. 573; *Winfree v. Bagley* (1889) 102 N. C. 515; *Farmers, etc., Bank v. Carter* (1889) 88 Tenn. 279; *Thurston v. Thurston* (1894) 58 Minn. 279; *Arnold v. Kahn* (1885) 67 Cal. 472; *Denny v. Ashley* (1888) 12 Col. 165; *Cloyd v. Trotter* (1886) 118 Ill. 391.

[8] *Pennoyer v. Neff, supra; Louisville & N. R. Co. v. Nash* (1897) 118 Ala. 477; *Anderson v. Goff* (1887) 72 Cal. 65; *Marten v. Kittredge* (1887) 144 Mass. 13; *McKinney v. Collins* (1882) 88 N. Y. 217.

[9] It should be noted that the decision in *Pennoyer v. Neff*, on the facts of the case, determines merely that the Circuit Court of the United States was not bound to recognize the validity of the Oregon proceedings. Whether the courts of Oregon itself were bound by the Constitution to treat the judgment and proceedings under it as void was not involved, although, of course, the opinion discusses the question.

[10] *Arnold v. Boggs* (1915) 129 Minn. 270; *McNamara v. Casserly* (1895) 61 Minn. 335; *Bardwell v. Collins* (1890) 44 Minn. 97; *Hockaday v. Jones* (1899) 8 Okl. 156; *Friedman v. First Nat. Bank of Cleveland* (1913) 135 Pac. (Okl.) 1069; *Insurance Co. v. Robbins* (1897) 53 Neb. 44; *Bixby v. Bailey* (1873) 11 Kan. 359; *Brown v. Woody* (1877) 64 Mo. 547.

heard, however, does not apply to service by actual notice given to the defendant outside the jurisdiction, as in the English cases cited above. Here the only question is whether to expect the defendant to defend the suit is, under the circumstances, so arbitrary and unreasonable as not to be due process of law. Again, approaching the problem with our first assumption in mind, is there sufficient difference in the status of an absent resident, or citizen even, from that of a non-resident, so that the former must be held reasonably to contemplate the rendition of personal judgments against him without actual notice, while the latter need not? Geographically the resident may be as far removed as the non-resident. If the incidents of domicile or citizenship are sufficient to direct his attention so that publication will be due notice, why is it not all the more true when he is again within his home state? The courts which deny that jurisdiction over the absent resident may be obtained by publication are perhaps the more consistent,[11] although it may fairly be said, on the other hand, that due process means the doing of what is reasonable under the circumstances, and that personal service is required where it may easily be had, as where the defendant can be found in the state. For the reason last stated, a substantial number of states will recognize as binding a personal judgment based on service by publication or service without the state, whether the defendant resident who cannot be found is in fact within the state[12] or outside.[13] To such courts the actual location of the defendant need cause no concern. That the man sought was known to be within the state borders was for this reason apparently not a necessary factor in the recent case of *Roberts v. Roberts*,[14] which decided for Minnesota for the

[11] *Pinney v. Providence Loan and Investment Co.* (1900) 106 Wis. 396 (*semble*); *De La Montanya v. De La Montanya, supra; Raher v. Raher* (1911) 129 N. W. (Ia.) 494; *Bernhardt v. Brown* (1896) 118 N. C. 700. Cf. *Bickerdike v. Allen* (1895) 157 Ill. 95 (*scire facias* to revive a judgment; publication void, though service by mailing held equivalent to personal service).

[12] *Betancourt v. Eberlin* (1882) 71 Ala. 461; *Harryman v. Roberts* (1879) 52 Md. 65; *Northcraft v. Oliver* (1889) 74 Tex. 162.

[13] *Hamill v. Talbott* (1897) 72 Mo. App. 27; (1899) 81 Mo. App. 210; *Hervey v. Hervey* (1897) 56 N. J. Eq. 166; *Fernandez v. Casey & Swazey* (1890) 77 Tex. 452; *Henderson v. Staniford* (1870) 105 Mass. 504; *Martin v. Burns, Walker & Co.* (1891) 80 Tex. 676.

[14] (1917) 161 N. W. (Minn.) 148.

first time the validity of a personal judgment when against a resident of the state where service was had by publication for the reason that the defendant could not be found, although known to be within the state. It might prove a turning point with courts which deny the availability of publication against residents absent from the state. Certainly the effectiveness of such notice would in all probability be greater against one within the state. In general, however, such courts have broadly repudiated the entire validity of the type statute[15] providing for service by publication where the resident defendant cannot be found.

C. B.

THE ADAMSON ACT

In the recent test case before the Supreme Court of the United States[1] the constitutionality of the Adamson Eight Hour Service Act was upheld by a vote of five to four. In a vigorous opinion Chief Justice White held the act to be within the powers of Congress under its authority to regulate interstate commerce.

It is important to note that at the outset the Chief Justice conceded that the act prescribed a minimum rate of wages and that the right to fix a standard of wages is primarily private and, as such, guaranteed against invasion by Congress. Thus it became necessary to justify the exercise of power primarily on the authority vested in Congress to regulate interstate commerce and, secondarily, on the policy of the government that the public interests of society in the continued operation and promotion of interstate transportation subjects those engaged therein to a public power of regulation.[2] The court held that the power to regulate interstate commerce fundamentally included the power to preserve an uninterrupted flow through its channels and to guard against cessation threatened by the failure of carriers and employees to agree upon the terms of a contract of employment.

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[15] (1913) Minn. Gen. Sts., sec. 7738.

[1] *Wilson v. New and Ferris, Receivers* (March 19, 1917) U. S. Sup. Ct., Oct. Term, 1916, No. 797. This article is merely a statement of the substance of the decision.

[2] In *Munn v. Illinois* (1877) 94 U. S. 113, the court held: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

The power to prescribe rates,[3] to regulate the relation between carriers and employees,[4] to limit the right of contract among carriers and with the public in the protection of public interest,[5] and to compel the carrier to provide efficient service[6] had been frequently sustained, and the power to provide by appropriate legislation for the continuance of interstate commerce follows in logical sequence. The Chief Justice disposes of the contention, based on the case of *Ex parte Milligan*,[7] that a public emergency cannot give rise to powers which otherwise do not exist, by saying that, though this be true, a public emergency might furnish the occasion for an exercise by Congress of powers which were in existence. Indeed, it was essential that such a situation should exist, or there would have been no necessity to limit private rights of contract.[8] Speaking of the private right of the parties to fix the terms on which they should contract, the court said:

> "The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from the failure to exercise the private right."

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[3] *Chicago, Burlington & Quincy R. R. Co. v. Iowa* (1877) 94 U. S. 155, 161; *Stone v. Farmers' Loan & Trust Co.* (1886) 116 U. S. 307; *Interstate Commerce Commission v. Chicago, Rock Island & Pacific R. R. Co.* (1910) 218 U. S. 88; *Minnesota Rate Cases* (1913) 230 U. S. 352.

[4] *Employers' Liability Cases* (1908) 207 U. S. 463; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission* (1911) 221 U. S. 612; *Southern Ry. Co. v. U. S.* (1911) 222 U. S. 20; *Mondou v. New York, New Haven & Hartford R. R. Co.* (1912) 223 U. S. 1.

[5] *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission* (1906) 200 U. S. 361; *Atlantic Coast Line v. Riverside Mills* (1910) 219 U. S. 136; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426; *Adams Express Co. v. Croninger* (1913) 226 U. S. 491; *Boston & Maine R. R. Co. v. Hooker* (1912) 223 U. S. 97.

[6] *Atlantic Coast Line v. North Carolina Corporation Commission* (1907) 206 U. S. 1, 26; *Missouri Pacific Ry. v. Kansas* (1910) 216 U. S. 262, 278.

[7] (1866) 4 Wall. 2.

[8] To quote from the opinion: "If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where by reason of the dispute there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it."

Passing to the contention of the railroad companies that the act was in violation of the Fifth Amendment, the court held that the exemption of certain short lines and of certain classes of employees from its operation did not destroy its equality, and that there was adequate basis for classification. With reference to the claim that, because of the hasty, thoughtless and improvident manner in which the act was passed and the wanton disregard of the rights of the carriers, the statute lacked that due process of law contemplated in the Fifth Amendment, the court said that the facts leading up to the legislation, the controversy between employers and employees, the interposition of the President, the public nature of the dispute and the call upon Congress all demonstrated that action was taken after ample consideration. The court also expressed the view that the fact that the demands of the employees were in important respects limited shows that an arbitrary concession to their demands was not made.

It remains to state briefly the basic grounds of the dissenting opinions of Mr. Justice Pitney and Mr. Justice Day. The former dissented on the fundamental contention that the act bore no relation to interstate commerce. It will be observed that his argument is practically an embodiment of the opinion of the Court in *Adair v. United States*,[9] and proceeds on the theory that the power of Congress extends only to regulation of the use of the property devoted to interstate commerce and not to the property itself or to the purely internal control of that property. Mr. Justice Pitney also agreed with the dissenting opinion of Mr. Justice Day. The latter was based on the due process clause of the Fifth Amendment. The learned Justice claimed that this amendment was violated both because the act involved an arbitrary bestowal by Congress without previous investigation or consideration of millions of dollars belonging to the carriers upon the employees by way of experiment and because provision was not made for remuneration if the experiment proved a failure. Mr. Justice Day concurred in that portion of the opinion of the

[9] (1908) 208 U. S. 161. In this case the court held that it was not competent for Congress to enact that no railroad engaged in interstate commerce should discharge an employee solely because of his affiliation with a labor union, for the reason that membership in a labor union bears no relation to interstate commerce. The act was passed through fear of a possible uprising by union members.

court which recognized the general power of Congress over the subject.

Mr. Justice McReynolds, who dissented from the opinion of the court in a short statement, concluded by saying that, considering the doctrine adopted by the majority of the court as established, it follows, as of course, that Congress has power to fix a maximum as well as a minimum wage, to require compulsory arbitration of labor disputes, and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners or strangers.

C. B. J.