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Conflict of Laws -- In Personam Jurisdiction Over Non-Resident Individuals -- Doing Business Test

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The dissenting opinion in the instant case relies heavily on the decision in *Stowell v. Santoro*[19] which prevented village trustees from convicting the petitioner (police chief) of a bribery charge after a previous acquittal on the same specification. The dissenters are fearful that a grant of retrial power to the police department could result in endless vexation for members of the force. The majority of the court makes a weak attempt to distinguish the facts of the *Stowell* case but is primarily concerned with the necessity for a decision on the merits. Since *whatever evidence was offered* at the first hearing was directed to the guilt or innocence of the accused, it is difficult to support this emphasis.

However, since a court of law will relax the res judicata doctrine to further the ends of justice,[20] administrative agencies, with their greater flexibility,[21] should have the same power. Even in a criminal case, the refusal of a witness to testify may result in a mistrial so that the defendant can be retried.[22] Removal proceedings are not criminal actions,[23] although they are penal in nature,[24] and it appears illogical to extend to defendants in a departmental trial greater protection from jeopardy than a criminal proceeding might afford them. It is further suggested that ". . . in proceedings for the removal or discharge of a policeman the protection of the public is a matter of paramount importance, exceeding perhaps the individual interests of the policeman concerned."[25]

Fred Patrox

CONFLICT OF LAWS—IN PERSONAM JURISDICTION OVER NON-RESIDENT INDIVIDUALS—DOING BUSINESS TEST

Defendants, out of state owners of a Florida orange grove, listed the grove for sale with a real estate broker in Florida. In a suit for the broker's

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of their judicial acts, except as qualified by statute. This function arises by necessary implication to serve the statutory policy . . . . The denial to such tribunals of the authority to correct error and injustice and to revise its judgments for good and sufficient cause would run counter to the public interest . . . . *The power of correction and revision, the better to serve the statutory policy, is of the very nature of such governmental agencies. (Italics supplied.)*

19. 256 App. Div. 934, 9 N.Y.S.2d 866 (2nd Dep't 1939).
20. Universal Const. Co. v. Ft. Lauderdale, 68 So.2d 366 (Fla. 1953).
21. See note 10 *supra*.
22. United States v. Coolidge, 25 Fed. Cas. 622, No. 14,858 (C. C. D. Mass. 1815).
23. Sullivan v. Mun. Ct. of Roxbury Dist., 322 Mass. 566, 78 N.E.2d 618 (1948); McGillicuddy v. Monaghan, 201 Misc. 650, 112 N.Y.S.2d 786 (Sup. Ct.) *aff'd on other grounds*, 280 App. Div. 144, 112 N.Y.S.2d 792 (1st Dep't 1952).
24. Fort Wayne v. Bishop, 228 Ind. 304, 92 N.E.2d 544 (1950).
25. City of Gary v. Yaksich, 120 Ind. App. 121, 127, 90 N.E.2d 509, 511 (1950).

commission the defendants were served under the statute[1] authorizing substituted service upon a non-resident by service of process on the Florida Secretary of State. *Held*, the defendants' listing of the grove with a Florida broker was not a "transaction or operation connected with or incidental to" defendants' business in Florida within the statute, but that defendants' purchase of the grove and the listing of it for sale did amount to engaging in a "business venture" within the statute and thus service upon defendants was valid. *State* ex rel. *Weber v. Register*, 67 So.2d 619 (Fla. 1953).

It is generally held that process of a court of one state cannot reach into another, and that notice sent outside the state to a non-resident is unavailing to give in personam jurisdiction to courts of the state issuing the process.[2] There must be actual service within the state upon the defendant, or upon one authorized to accept service for him.[3]

As early as 1878, the Supreme Court in *Pennoyer v. Neff*[4] recognized the right of the states to pass legislation providing for service upon non-resident defendants under certain situations.[5] In response to this view of the court, some 40 states enacted statutes providing for substituted service in actions arising out of transactions within the state by non-residents.[6]

In 1918, a statute of this type was declared invalid by the Supreme Court in the landmark case of *Flexner v. Farson*.[7] The language[8] of the court in this case has had the effect of checking the use of substituted service upon non-residents through service on their agent in the state where business is transacted.[9] However, departures from the holding in *Flexner v. Farson* may be found in the (1) non-resident motorist

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1. FLA. STAT. § 46.17 (1951) ". . . operate, conduct, engage in, or carry on a business or business venture, in the State of Florida, . . . in any action, suit or proceeding . . . arising out of any transaction or operation connected with or incidental to such business or business venture . . . ."

2. Pennoyer v. Neff, 95 U.S. 714 (1878).

3. Goldey v. Morning News, 156 U.S. 518 (1895).

4. See note 2 *supra*.

5. Mr. Justice Field speaking for the court:

> Neither do we mean to assert that a State may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process . . . or to designate such place that service may be made upon a public officer designated for that purpose . . . .

6. Culp, *Process In Actions Against Non-Residents Doing Business Within a State*, 32 MICH. L. REV. 909 (1934).

7. 248 U.S. 289 (1918).

8. Mr. Justice Holmes distinguished the analogy of substituted service upon corporations by explaining that ". . . the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the state could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in . . . ." He went on to point out that the state could not so exclude the individual.

9. Culp, *Process In Actions Against Non-Residents Doing Business Within a State*, 32 MICH. L. REV. 909 (1934); Scott, *Jurisdiction Over Nonresidents Doing Business Within The State*, 32 HARV. L. REV. 871 (1919).

cases,[10] (2) cases involving the sale of securities within a state,[11] and (3) cases involving the conduct of operations within the state where such operations are "fraught with danger."[12] These cases, however, were predicated on police power grounds.[13] They did not establish that the "doing of business" *in itself* confers in personam jurisdiction over non-residents.

In 1945, the Supreme Court in *International Shoe Co. v. Washington*[14] re-examined the fictional approaches[15] upon which the validity of the substituted service statutes rested and formulated a new approach for supporting actions in personam against foreign corporations. The court established a new test consisting of *minimum contacts* with the forum state so that the maintenance of a suit would not offend *traditional notions of fair play and substantial justice.* By the use of *minimum contacts* the court offers a basis for further jurisdictional expansion beyond the traditional "doing business" concept and while anything said about jurisdiction over individuals in *International Shoe* is necessarily dictum, the rationale (minimum contacts, fair play and substantial justice) seems also applicable to the non-resident individual or unincorporated business unit.[16]

While the court in *International Shoe* was silent on the traditional basis for obtaining jurisdiction of "doing business,"[17] nonetheless, some courts relying on the "doing business" test have taken cognizance of the court's "minimum contacts" broader view and have apparently proceeded on the basis that "doing business" in itself, regardless of the nature of the business, is sufficient ground for in personam jurisdiction.[18] But regardless of this development, it does not appear that a majority of the courts have as yet substantially expanded the "doing business" concept beyond its traditional confines in regard to the question of which activities amount to "doing business."[19]

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10. Hess v. Pawloski, 274 U.S. 352 (1927).
11. Doherty v. Goodman, 294 U.S. 623 (1934).
12. Sugg v. Hendrix, 142 F.2d 740 (5th Cir. 1944).
13. For an interesting extension of police power, see Dubin v. Philadelphia, 34 Pa. D. & C. 61 (1938).
14. 326 U.S. 310 (1945).
15. The fictions are the *presence theory* as stated in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); the *implied consent theory* as stated in Lafayette Ins. Co. v. French, 18 How. 404 (U.S. 1855).
16. See discussion in Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d 212 (1948); McDaniels v. Textile Workers Union of America, 254 S.W.2d 1 (Tenn. App. 1952).
17. Yet the court apparently did away with the rule established in Green v. Chicago, Burlington & Quincy Ry, 205 U.S. 530 (1907); Minnesota Ass'n v. Benn, 261 U.S. 140 (1923), that *mere solicitation* is not doing business. For a recent case rejecting the *mere solicitation rule* see Traveler's Health Ass'n v. Virginia, 339 U.S. 643 (1950).
18. Interchemical v. Mirabelli, 269 App. Div. 224, 54 N.Y.S.2d 522 (1st Dep't 1948); Pine v. McConnell, 298 N.Y. 27, 80 N.E.2d 137 (1945).
19. American Casualty Co. v. Harrison, 96 F. Supp. 537 (W.D. Ark. 1951) (nonresident subcontractor who agreed with contractor to perform remodeling on store—doing business); Kaffenberger v. Kremer 63 F. Supp. 924 (E.D. Pa. 1944)

In the instant case, the court distinguished between "a business" and a "business venture" and reasoned that the purchase of the grove was a "business venture" and that the listing of it amounted to a "transaction connected with or incidental to the business venture." In upholding the constitutionality of Florida Statutes Section 46.17, the court *apparently* rejected the argument that for the statute to be constitutional the "business" or "business venture" engaged in must involve hazard, health or similar matters[20] which traditionally have been regulated under the police power. In conclusion the court cited and quoted *International Shoe*,[21] with its "minimum contacts" language.

It does appear, as was contended by the dissent,[22] that the court in the instant case gave an excessively broad interpretation to the term "business venture" in light of what has classically been held to be "doing business."[23]

(advertising and goodwill operations—not doing business); Pine v. McConnell, 298 N.Y. 27, 80 N.E.2d 137 (1945)(Ohio partnership represented in New York by domestic and foreign sales agents—doing business); O'Hagan v. Caballero, 52 N.Y.S.2d 863, *aff'd without opinion*, 269 App. Div. 981, 59 N.Y.S.2d 300 (1st Dep't 1945) and Debrey v. Hanna, 182 Misc. 824, 45 N.Y.S.2d 247 (Surr. Ct. 1941)(mere solicitation is not doing business). *Contra*: Miller v. Swann, 176 Misc. 607, 28 N.Y.S.2d 247 (N.Y. City Ct. 1941). See Smith v. Cook, 43 Pa. D. & C. 608 (1941); Stafford v. Wood, 234 N.. 622, 68 S.E.2d 268 (1951)(fact that nonresident unincorporated labor union had affiliated local union within state does not show that union was doing business); Alward v. Green, 245 P.2d 855 (Utah 1952) (performer who had power of attorney from nonresident defendant, a person engaged in scheduling performances for various performers in order to enable him to cash checks received for his own services is not doing business in state for defendant).

It has been generally accepted that to constitute doing business the activities must be substantial, continuous, and regular as distinguished from casual, single, or isolated acts. Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949), *cert. denied*, 399 U.S. 947 (1950). However, some recent cases appear to hold the opposite. Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951)(jurisdiction over a foreign corporation may be acquired by virtue of a single act, a tort, committed within the state). For a stautory expansion of jurisdiction consistent with the approach in *International Shoe* see, Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950) (upholding the validity of a Maryland statute extending jurisdiction over foreign corporations ". . . on any cause of action arising out of a contract made within this state or liability incurred for acts done within this state, *whether or not such foreign corporation is doing or has done business in this state* . . . ." [Italics supplied]. While the court admitted that the acts of solicitation of defendant would not amount to doing business, they were sufficient to make defendant amenable to local suit under the statute). Could not the same theory, under an appropriate statute, apply to nonresident individuals having such minimum contacts?

20. Cochran v. Lewis, 118 Fla. 536, 159 So. 792 (1935) (nonresident motorists); Rorick v. Stilwell, 101 Fla. 4, 133 So. 609 (1931)(the sale of securities to the public).

21. 326 U.S. 310 (1945).

22. See Stern, *Conflict of Laws*, 9 MIAMI L.Q. 209, 214-216 (1953).

23. *What constitutes doing business.* In the case of an individual, as in the case of partnerships or other unincorporated associations . . . and in the case of corporations . . . doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object or doing a single act for such purpose with the intention of thereby initiating a series of such acts. RESTATEMENT, JUDGMENTS § 22 (1942).

It is perhaps unfortunate that the otherwise valid statute was distorted so as to include the present fact situation, but it may also be possible to reconcile the court's reasoning in view of the broad rationale in *International Shoe Co. v. Washington.*[24]

Eugene Parker

CONFLICT OF LAWS—INTERGOVERNMENTAL IMMUNITY

Plaintiff seeks damages for the alleged tortious conduct of defendant in inducing the Sovereign Republic of Peru to issue scrip certificates to the current holders. The bonds were received in exchange for an original bond issue. *Held*, defense that adjudication of claim would require court to pass upon validity of act of a sovereign foreign government, was good. *Frazier v. Foreign Bondholders Protective Council, Inc.*, 125 N.Y.S.2d 900 (Sup. Ct. 1953).

All cases agree that where the law of the situs of the transaction is statutory or involves judicial constructions of statutory law, the courts of the forum will follow such law and determine the rights of the parties by that law.[1] The earliest American judicial opinion in point was made by the illustrious authority on international law, Justice Marshall.[2] Although in *Underhill v. Hernandez*,[3] the court might have rested its decision on the ground that there is no individual liability abroad for acts performed by persons in the exercise of governmental authority within their own states, the broader rule, enunciated that international law requires each state to respect the validity of sovereign state acts, in the sense of refusing to permit its courts to sit in judgment on the legality or constitutionality of an act of a foreign state, has been followed in innumerable cases.[4]

24. 326 U.S. 310 (1945).

1. Supreme Council, C.K.A. v. Logsdon, 183 Ind. 183, 108 N.E. 587 (1915); Njus v. Chicago M. St. P. Ry., 47 Minn. 92, 49 N.W. 527 (1891); Lane v. Watson, 51 N.J.L. 186, 17 Atl. 117 (1889).

2. Hudson v. Guestier, 4 Cranch 293 (U.S. 1808).

3. 168 U.S. 250 (1897).

4. *E.g.*, Ricaud v. American Metal Company, 246 U.S. 304 (1918) (The fact that property seized and sold by the authorities of a foreign government belonged to an American citizen not residing in the foreign country at the time, does not empower a court of this country to reexamine and modify their action); Bernstein v. Van Huyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947) (New York District court had no power to determine plaintiff's claim which was: that by means of duress Nazi officials compelled plaintiff in Germany to transfer property to a Nazi designee and that defendant, a Belgian Corporation acquired property with punitive notice of duress.); Union Shipping and Trading Co. v. United States, 127 F.2d 771 (2d Cir. 1942) (Courts of another foreign power will accept as lawful official acts of another foreign sovereign and will *not* undertake to examine the validity under the local law.); Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438 (2d Cir. 1940) (Federal courts will not examine the acts of a foreign sovereign within its own borders in order to determine whether those acts were legal under the municipal