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Constitutional Law—Jurisdiction over Foreign Corporation—Sales to an Independent Distributor Within the Forum.—Sanders Associates, Inc. v. Galion Iron Works

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70e[16] if an actual subsequent creditor existed under circumstances similar to those in the present situation. If such a creditor actually exists the trustee can "step into his shoes" under the provisions of 70e which provide that any transfer voidable under state or federal law by *any* creditor of the debtor having a provable claim under the Bankruptcy Act shall be null and void as to the trustee. Since under the rule of the principal case, if an actual creditor exists, 70c will automatically give the trustee a lien of that creditor, exercise of 70e powers in a similar situation would be impractical.[17] To return vitality to 70e the interpretation of 70c found in the *Lewis* case would seem to be correct.

Once one has accepted the above positions the result reached in the instant case seems clearly wrong. The trustee's hypothetical creditor, since he is considered to have extended credit on the date of bankruptcy, would have to be considered a subsequent creditor and as such would, under the Washington statute, have the power to avoid the contract here in question.[18]

It is significant to note that under the Uniform Commercial Code a court which properly construed 70c would give the trustee in bankruptcy rights superior to those of the conditional contract holder in circumstances similar to those in the instant case.[19]

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Constitutional Law—Jurisdiction over Foreign Corporation—Sales to an Independent Distributor within the Forum.—***Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.***[1]—Sanders, a Delaware corporation with its principal place of business in New Hampshire, contracted with Galion, an Ohio corporation, to develop an automatic attachment for the latter's road grading equipment. Sanders brought an action in the United States District Court for New Hampshire against Galion for breach of the contract. In addition to this contract, Galion's only other contacts with the state arose

[16] Bankruptcy Act § 70e, 66 Stat. 429 (1952), 11 U.S.C. § 110e (1958).

[17] Under section 70e, transactions are not automatically void as to the trustee. This section merely creates a power of avoidance which the trustee must exercise in a proper court. Collier, Bankruptcy Manual §§ 70.46 to .50 (2d ed. 1961). Under section 70c, the trustee automatically acquires a lien without any court action. Id. § 70.30.

[18] See Comment, 55 Nw. U.L. Rev. 783 (1961), where there is a discussion of the *Lewis* case as applied to a Washington statute which is similar to the one involved in the instant case.

[19] UCC § 9-302(1)(d) provides in part:

> (1) a financing statement must be filed to perfect all security interests except the following . . .
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> (d) a purchase money security interest in consumer goods; but filing is required . . . for a motor vehicle required to be licensed. . . .

UCC § 9-301(2) gives the secured party 10 days after the collateral comes into possession of the debtor to file and thus perfect his interest.

This result, however, would not be reached under the Massachusetts Uniform Commercial Code (Mass. Gen. Laws Ann. ch. 106, § 9-302) (1958) which does not require filing to perfect security interests in consumer goods, and makes no exception for motor vehicles required to be licensed.

[1] 304 F.2d 915 (1st Cir. 1962).

from its dealings with its exclusive New Hampshire distributor, R. G. Hazleton Co., Inc. Galion owns no Hazleton stock and all sales to Hazleton are made f.o.b. Galion, Ohio. However, by virtue of the distributorship contract, Hazleton was subject to substantial control over its business in Galion equipment. Galion determined the retail price, established requirements as to the maintenance of a sales force, proscribed the sales of comparable products of competitors and prescribed the employment of accounting and reporting procedures and personnel acceptable to it. The District Court dismissed for want of jurisdiction over Galion, holding that while Galion's activities in New Hampshire may have been sufficient to subject it to suit by Hazleton or its customers, they were not such as would allow Galion to be sued by a third party on a matter collateral to the "mainstream" of intercourse between Galion and Hazleton. HELD: Galion's contacts with New Hampshire are such as to render it liable to suit, both as to claims connected and unconnected with the central course of conduct involving Galion and Hazleton.

Limitations on the exercise by a state of in personam jurisdiction over a foreign corporation are found in the due process clause of the Fourteenth Amendment and in the interpretation by the state courts of the local statutes providing for the jurisdiction.[2] The due process limitations have been set forth by the United States Supreme Court in two oft-cited cases: *International Shoe Co. v. Washington* and *Perkins v. Benquet Consol. Mining Co. S. A.*[3] In *International Shoe* the Court held that a foreign corporation could be subjected to in personam jurisdiction when it had "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there."[4]

However, the holding in *International Shoe* could be restricted by its facts to jurisdiction over the enforcement of obligations arising out of or connected with the activities of the foreign corporation within the state. In *Perkins*[5] the Court held that the due process clause of the Fourteenth Amendment does not prohibit a state from entertaining proceedings against a foreign corporation which is doing business in the state, even though the cause of action sought to be enforced does not arise out of the corporation's activities within the forum.

The New Hampshire Supreme Court has indicated that it would exercise to the fullest the jurisdiction permitted by the due process clause. In *La Bonte v. American Mercury Co.*,[6] the court cited with approval the "fair play and

[2] "There are two parts to the question whether a foreign corporation can be held subject to a suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? . . . If the state has purported to exercise jurisdiction over the foreign corporation, the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution." Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948).

[3] 326 U.S. 310 (1945); 342 U.S. 437 (1951).

[4] Id. at 320.

[5] 342 U.S. 437 (1951).

[6] 98 N.H. 163, 96 A.2d 200 (1953).

substantial justice" rule formulated in *International Shoe*. Chief Justice Kenison in *Benson v. Brattleboro Retreat*[7] wrote: "We shall continue to follow the rule laid down in *La Bonte* both in the spirit as well as the letter to the fullest extent permitted by due process and statutory requirements."[8] The Court of Appeals in the instant case, after finding that it was the objective of the local statute to provide for the exercise of jurisdiction to the constitutional limit, applied the *International Shoe* standard, as expanded by *Perkins* to the activities of Galion in New Hampshire, and found it amenable to jurisdiction.

It has been held that more than mere sales of goods to independent distributors within the forum are needed to provide a basis of jurisdiction over a foreign corporation.[9] In addition to such sales there must be some other activity on the part of the corporation to meet the "sufficient contacts" test of *International Shoe*. In *Kneeland v. Ethicon Suture Laboratories, Inc.*[10] and *Taylor v. Klenzade Prod. Co.*,[11] in addition to sales to local distributors, the corporations employed agents to solicit business and stimulate demand for their products in the state. In both cases it was held that the corporations were amenable to jurisdiction.[12] Jurisdiction is also obtainable over foreign corporations selling to local distributors when they maintain inventories within the forum[13] or sell their products by consignment.[14]

Another possible area of activity by the foreign corporation which may subject it to local jurisdiction may be termed the economic benefit theory of sufficient contacts. Its applicability arises when the corporation exercises such a degree of control over the operations of the local distributor that it derives the same economic benefits that it would have obtained had it established its own branch outlet in the state. However, the courts endorsing this theory generally base their finding of the availability of jurisdiction on a further finding that the distributor was the actual agent of the corporation with respect to some activity carried on by the distributor. In *Sales Affiliates, Inc. v. Superior Court*[15] the court stated:

> Every factual situation where the question arises calls for a comparison of the business advantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through its own offices or paid agents in the state. If the representation which the petitioner maintained in the state gave

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[7] 103 N.H. 28, 164 A.2d 560 (1960).

[8] Id. at 30, 164 A.2d at 562.

[9] Schmidt v. Esquire, Inc., 210 F.2d 908 (7th Cir. 1954); Favell-Utley Realty Corp. v. Harbor Plywood Corp., 95 F. Supp. 96 (N.D. Cal. 1954).

[10] 18 Cal. App. 2d 211, 257 P.2d 727 (1953).

[11] 97 N.H. 517, 92 A.2d 910 (1952).

[12] These cases represent an application of the "solicitation plus" test. See also Fannin v. Chesapeake & Ohio Ry., 204 F. Supp. 154 (W.D. Pa. 1962); Moore v. Atlantic Coast Line R.R., 98 F. Supp. 375 (E.D. Pa. 1951) and Long v. Victor Prod. Corp., 297 F.2d 577 (8th Cir. 1961)

[13] Becker v. General Motors Corp., 167 F. Supp. 164 (D. Md. 1958).

[14] Thew Shovel Co. v. Superior Court, 35 Cal. App. 2d 183, 95 P.2d 149 (1939); Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P.2d 968 (1952).

[15] 96 Cal. App. 2d 134, 214 P.2d 541 (1950).

> it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.[16]

However, the court went further and based its jurisdiction on a finding that "with respect to the solicitation of operators to enter into licensing agreements with petitioner, the jobbers clearly act as agents of petitioner."[17]

The court in the instant case recited the instances of control exercised by Galion over Hazleton and, in these words, stated the economic benefit theory:

> . . . Galion had actually obtained all the economic benefits that could have been derived from establishing its own distribution outlet in New Hampshire and derived this economic benefit without incurring the burden of capital outlay to establish its own distribution force. We believe that the degree of control and leverage which it exercised over Hazleton negates any due process objection on the face of this record.[18]

However, the court was unwilling to make its decision depend upon this reasoning alone. It alternatively found that maintenance of agents within the state for the purpose of investigating and satisfying customer complaints will subject the foreign corporation to the jurisdiction of that state.[19] The court then noted that Hazleton serviced any complaints stemming from the sale of Galion equipment and added, "While . . . Hazleton apparently bore the cost of this activity, the activity was undoubtedly calculated to inure to Galion's benefit and undertaken at its direction."[20] This language carries with it a strong implication that the court felt that with respect to the handling of complaints, Hazleton was the agent of Galion. If so, the agency relationship alone would have been sufficient to satisfy the minimum contacts necessary for the court's jurisdiction over Galion.

Thus, because the court felt it necessary to bolster its decision on the further finding that in one respect Hazleton had actually acted as Galion's agent, *Sanders* cannot be cited with complete confidence as authority for the proposition that a foreign corporation should be amenable to jurisdiction on an economic benefit theory when it exercises substantial control over the business of a local distributor. It is submitted that such a result would be within the permissible limits of *International Shoe*.

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[16] Id. at 136, 214 P.2d at 542.

[17] Id. at 137, 214 P.2d at 543. See also Kahn v. Maico Co., 216 F.2d 233 (4th Cir. 1954), where the court found that the distributor unquestionably acted as the corporation's agent when it gave the corporation's guaranty to its customers and adjusted complaints made under the guaranty.

[18] Supra note 1, at 921.

[19] The court followed this finding by citations to Wyshak v. Anaconda Copper Mining Co., 328 Mass. 219, 103 N.E.2d 230 (1952) and Jet Mfg. Co. v. Sanford Ink Co., 330 Mass. 173, 112 N.E.2d 252 (1953).

[20] Supra note 1, at 922.