NEW-YORK LAW REVIEW

Editor
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Volume V | DECEMBER, 1927 | Number 12

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WHAT PRICE "DUE PROCESS"?

THE ease with which the foreign corporation is "doing business" within our state for the purpose of trade, and at the same time manages not to be "doing business" so as to be sued here, is attested by the number of cases in which service of process is nullified. How many cases are abandoned by counsel before suit can only be guessed at.

This modern corporate practice of self-effacement in the presence of the process server, however effective the debtor's presence has been for trading purposes, seems to be an adaptation of the practices of our English ancestor debtors, so interestingly reviewed under the caption—"Escaping the Creditor in the Middle Ages," in the *Law Quarterly Review* (London) of April, 1927.

Flight from the jurisdiction has ever been one of a debtor's best defenses. Mr. Trieman, in the *Review* referred to, points out that it was the first legally recognized "act of bankruptcy" and is still one of them under the English Act.

A contemporaneous, and more artistic method of escaping suit, was evolved by the English debtor of the sixteenth century. Was not his home his castle? Did not the law of the realm prohibit intrusion therein with civil process? Hence, if flight was too expensive or inconvenient, the alternative was to stay very much at home! Presumably, the choice of

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method depended somewhat upon the domestic atmosphere. At any rate, the debtor's practice of keeping within the walls of his common-law castle to avoid service was so prevalent that it became commonly and tolerantly referred to as "keeping house." The reviewer gives a graphic account of the grief and shock of foreign merchants who journeyed to the tight little isle to collect their bills and were obliged to stand without their debtor's castle, though they might see him within, disposing of the unpaid-for-goods to those whom he chose to admit.

But these devices were too crude for the American business genius. Absconding has disadvantages and "keeping house" has its discomforts.

The corporation was a device that in itself afforded a shield from all except limited liability and was originally granted as a favor of the sovereign, to large railroad, trading or colonizing enterprises of a semi-public nature. Incorporation has now become in America a matter of course, for enterprises large and tiny, and every haberdashery is a chartered enterprise.

Forty-eight separate jurisdictions, overlaid with the federal judicial system, afford such overlappings of jurisdiction that the corporation may choose the most favorable law under which to exist and limit the forums to which it will submit. All of these corporate creatures of the imagination of many states insist upon "due process of law" and are building up a body of decisions that enables them to duplicate in effect the old practice of "keeping house," without any of its discomforts.

The recent reiteration by the United States Supreme Court (*James Dickinson Farm Mortgage Company* v. *Harry*, 71 L. ed. 362), that it is a denial of due process to serve a foreign corporation in a state where it has no place of business "and is not found," though the service be upon an executive officer temporarily therein, "even if he is there on the business of the company," reveals the persistence of the foreign company's game of hide-and-seek with state jurisdiction. How to "find" a corporation for service when the presence of an executive officer on its business is not a manifestation of corporate presence will continue to puzzle the profession. When we learn also that purchasing by a foreign corporation in New York "from time to time of a large part of the merchandise to be sold at its store in Tulsa" is not "doing business" and does not help "find" the corporation here (*Rosenberg* v. *Curtiss*, 260 U. S. 516, 67 L. ed. 372), it appears that the usual acts of trade do not submit it to state jurisdiction and that it can scarcely be "found" except by its express invitation.

How to "find" a foreign corporation among the legal shades and shadows is important to lawyers in trading centers. Civil immunity of corporations which send their officers to our trade expositions and markets to create obligations has about reached the point where "due process" means "no process."

There are cases where, unquestionably, lawyers and clients sought to

take advantage of foreign corporations and the protection of federal law was necessary.

There is the case where citizens of New York go to other jurisdictions to invest or to ply their trade but seek to bring their foreign-born controversies home for settlement by getting service of process here. There is also the case where the foreign corporation is sought to be hauled from its domicile by service upon some officer who chances to be in the state on his own affairs. The profession will readily concede that the due process clause is properly construed to protect the corporation from service under these circumstances.

But there is another and different class of cases, where the application is debatable. Buyers on behalf of foreign corporations come with regularity to our many markets. Wholly in this state they create obligations by purchases from our citizens. When again here on the same mission are they subject to process?

Such a typical case arose in the Fourth Department. The defendant foreign corporation had no office or property in this state, no permission to do business here and no resident officer or manager. But it had regularly sent its treasurer to buy merchandise at a semi-yearly furniture exhibition. The treasurer, while here to buy on behalf of his corporation, was served with process in an action to recover for goods bought by his company through him at the previous show. Upon application to set aside service, Mr. Justice Wheeler, at Special Term, wrote:

"We deem it repugnant to our sense of common right and justice to hold that a foreign corporation may incur obligations to our own citizens by contracts made by it here and in the next breath say 'you cannot call us to account in your own court for a breach of contract'" (*National Furniture Co.* v. *Speigelman*, 116 Misc. 53).

The Appellate Division, Fourth Department, took the view that buying in the state was doing business just as much as selling, and said:

"A corporation coming here by its officers to examine goods, and making a contract to purchase goods, for which it afterwards refused to pay, is doing business here. It would be doing a very profitable business if the seller could not compel payment where the contract was made when the defendant came on another business errand of the same character. Because justice requires that the plaintiff should be permitted to sue in our courts on a contract made in the state by a foreign corporation doing business here, and in the absence of controlling authority to the contrary, we must hold that the service was good and that the order should be affirmed" (198 App. Div. 672).

Substantially the same doctrine and reasoning had been previously declared by the First Department in *Fleischman Construction Co.* v. *Blauner* (190 App. Div. 95).

About a year later, however, a decision of the United States Supreme Court seems to have overturned this doctrine. The defendant, an Oklahoma

corporation, was operating a retail clothing store in Tulsa. It had no permission to do business in New York and had no property here. The Court said:

"Its only connection with New York appears to have been the purchase there from time to time of a large part of the merchandise to be sold at its store in Tulsa. The purchases were made sometimes by correspondence, sometimes through visits to New York of one of its officers. * * * * * * The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals would not warrant the inference that the corporation was present within the jurisdiction of the state. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial" (*Rosenberg Bros.* v. *Curtis Brown*, 260 U. S. 516, 67 L. ed. 372).

Buying, it seems, is not "doing business," even though "occurring at regular intervals." That would be news to the trading fraternity. No longer is the foreign corporation confronted with the problem "to be or not to be" —it can both be and not be! It is here to buy but not to pay; here to get the goods; not to be "found" when the bill is due. Such legalism transplants the venerable shell game from the county fair to jurisprudence.

If it is denial of due process to a defendant to entrap it here and compel it to submit to our adjudication of foreign controversies, is it not equally a denial of due process to a resident plaintiff to close the doors of his own courts to him, to exile him to a foreign jurisdiction where he would have all of the disadvantages of being a non-resident plaintiff in order to enforce contracts which he made in his home jurisdiction?

We do not feel that due process of law should be construed to mean that non-resident traders shall be at liberty to seek our markets and to avoid our courts. While we are properly prohibited from seizing a defendant who has not submitted itself in some manner to our jurisdiction, we should not be compelled to banish a citizen plaintiff to an alien jurisdiction that he has never submitted himself to in order that he may pursue a cause of action arising here. Sound public policy requires that our law shall still extend to the market place, and that he who comes here to negotiate a purchase may reasonably be asked to come here to negotiate a settlement.

The courts of New York state ever since the *Rosenberg* decision, *supra*, have sensed the danger and injustice of the situation. It was recently stated by the Appellate Term, First Department, in the following language:

"A foreign corporation present under the circumstances here disclosed, may well be said to be dealing with merchants in this state upon the implied assurance that any controversy arising will not have to be determined in a foreign forum. If our citizens, lulled into the belief that they can safely transact business with such foreign corporations, should come to the realization that they must proceed to a distant state to enforce their claims, they will very likely cease to do business with these concerns. It requires no serious reflection to appreciate just what this might mean not only to the

commerce of the state, but of the nation as well. For of what profit could it be to merchants to do very substantial business with foreign corporations which regularly visit here, if they should be unable to collect the avails of their sales in the event of controversy, without the difficulty and expense of enforcing their rights at distant points?" (*Hartstein* v. *Seidenbach's, Inc.*, 129 Misc. 687).

The United States Supreme Court having, however, in the *Rosenberg* case, *supra*, closed the front door of local courts to residents and opened the back door for foreign corporations to step out, and being unlikely to adjudge itself in error in so doing, the remedy is not simple. But it seems timely to call to the attention of the profession that "due process" to foreign corporations may be at the price of denying it to residents, and constitute a really serious denial to our own citizens of a right of access to our own courts.

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