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Recent Cases

RECENT CASES

CRIMINAL LAW — GRAND JURY INVESTIGATION OF PRISON CONDITIONS

Grand jury investigation into general conditions at a state institution forming a branch of the executive department of the Commonwealth was prevented recently by the Pennsylvania Superior Court in *In re Grand Jury Investigation of Conditions at the Western State Penitentiary.*[1]

The case began with a petition by the District Attorney of Allegheny County, presented to the court of quarter sessions of that county, setting forth a recent prison break and general riot among the inmates of Western State Penitentiary at Pittsburgh, and requesting the court to call a grand jury to investigate conditions "presently and heretofore existing" in the prison. The court granted the district attorney's petition, and refused a petition by the Attorney General requesting that the investigation be limited to crimes committed in Allegheny County. On appeal the Superior Court granted the petition of the Attorney General.

Although the Attorney General's petition emphasized that the court of quarter sessions had no lawful authority to direct a grand jury investigation of the executive branch of the state government, the Superior Court's decision is not based upon any immunity of members of the executive branch from proper investigation by the grand jury, but rather upon the legal insufficiency of the district attorney's petition to support the proposed investigation of the executive branch. For, in its opinion by President Judge Rhodes, the court said a petition for grand jury investigation must be self-sustaining, and pointed out that the subject petition did not allege commission of crimes by executive personnel but limited the allegation of criminal acts to inmates of the institution.

On this basis, the decision is in line with earlier Pennsylvania cases cited by the court. Grand jury investigation involving various officials of the executive branch of the Commonwealth was permitted by the Pennsylvania Supreme Court in *In re Investigation by Dauphin County Grand Jury.*[2]

There, a petition by the District Attorney of Dauphin County for grand jury investigation included various charges of unlawful irregularities in purchase of materials by Commonwealth officials, unlawful use of Commonwealth materials and workers so as to cheat the Commonwealth, and unlawful payments to certain named Commonwealth officers for influencing enactment of legislation. Although the petition was first found defective for failure to allege any specific crime, when it was amended so as to state that the district attorney was in possession of evidence and trustworthy information obtained from reliable sources, showing that the matters alleged constituted a system of crime, the Attorney General's petition for a writ of prohibition was refused and the investigation was allowed to continue.

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[1] 96 A. 2d 189 (1953).
[2] 332 Pa. 289, 2 A. 2d 783, 120 A.L.R. 414 (1938).

The court did not suggest that members of the executive branch should be immune from criminal prosecution, but said: "Everyone knows, or should know, that no citizen of our state or public officer is above the law. All may be punished for criminal violations." Investigation by the grand jury was permitted as an aid to such prosecution, since the grand jury is an arm of the criminal court, as our Supreme Court had previously stated in *McNair's Petition.*[3]

As a formula for petitions requesting grand jury investigations the court stated, in the *Dauphin County* case, ". . . there must be at least one specific crime charged as part of a system of related crimes for discovery of which it is necessary to have the grand jury's assistance."

In regard to investigation of government officials, the court commented in the same case, "An investigation which properly concerns itself with violations of the criminal laws in matters incidental to the conduct of government, and does not merely inquire into the official acts of the governing power, is within the power of the grand jury."

Hudson Bowlby
Member of the Senior Class

CRIMINAL LAW — PRACTICE — WAIVER OF RIGHT TO UNANIMOUS VERDICT

Can one accused of a crime waive the right, inherent in the constitutional right of a trial by jury, to a unanimous verdict? This question was recently presented to the Supreme Court of the United States in the case of *Hibdon v. United States.*[1]

The Court, in answering this question in the negative, reversed the finding of the lower court that such right could be waived.

The facts in the case were these: The defendant had been indicted on two counts, and the jury, after having deliberated for twenty-seven minutes, reported that they were unable to reach a verdict. The court inquired of the parties as to whether a majority verdict would be acceptable to them. All agreed that it would. The jury thereupon again retired and brought in a verdict of guilty on both counts; nine to three on one, ten to two on the other. The defendant then moved to vacate the sentence. This appeal followed upon the denial of his motion, thus presenting this particular question for the first time to the Supreme Court of the United States.

The lower court had based their decision primarily upon the decisions in the cases of *Patton v. United States*[2] and *Adams v. United States.*[3]

[3] 324 Pa. 48, 187 A. 498, 503 (1936).

[1] 204 F.2d 834 (1953).
[2] 281 U.S. 226, 50 S. Ct. 253 (1930).
[3] 317 U.S. 269, 63 S. Ct. 236 (1942).

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In the former case, the United States Supreme Court had affirmed the unquestioned right to trial by jury citing the third clause of Article 3, section 2 of the United States Constitution as augmented by the Sixth Amendment thereto. The Court listed the component elements of a trial by jury as: (1) The jury should consist of twelve persons, neither more nor less; (2) the trial should be in the presence of and under the superintendence of a judge having power to instruct them as to the law and to advise them in respect of the facts; and (3) that the verdict should be unanimous. It was held, however, in that case, that the defendant could validly consent to a trial by a jury of less than twelve men. Two grounds were given for so finding. The first was that while the Constitution guaranteed the right to trial by a jury of twelve men, it did not preclude an express waiver of this right. Secondly, that the reasons making mandatory a trial by a jury of twelve under the old English common law, no longer existed. Thus the right remains as one of which the defendant might avail himself if he so chooses. Consequently, should he choose to waive this right, the court is competent to accept such waiver.

In the latter case, it was also decided that a defendant could consent to a trial without a jury if he did so knowingly and intelligently.

The government relying on these two cases urged that the Court apply their reasoning to the instant case, thereby upholding the decision of the lower court that, since a trial by a jury of twelve could be waived and, in fact, the right to trial by jury could be waived completely, then this component element of the constitutional right to jury trial (i.e. the right to unanimous verdict) could also be waived.

The Court, however, refused to accept this reasoning and it set aside the verdict of the lower court saying:

> "The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the verdict by less than all of the jurors is to destroy this test of proof beyond a reasonable doubt, if one or more jurors remain reasonably in doubt as to his guilt. We are of the view that the right to a unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt."

Since, as we have seen, the right to trial by jury can be waived completely, it would seem apparent that one of its elements would be capable of being waived. Yet the Supreme Court, seeming to ignore this, finds to the contrary.

Another point worthy of note in this case and one which possibly may have influenced the decision was the fact that the waiver of a unanimous verdict was suggested by the judge. The defendant at the time of trial was already in prison serving another sentence and, if he were found guilty of the crimes charged in this case, he would have to face the court for sentence by the judge who suggested

the majority verdict to him. Under these conditions, it is obviously conceivable that the consent was not freely given as is required by the cases for the waiver of this right to jury trial.

It may have been this consideration which persuaded the Supreme Court to overlook the reasoning of the *Patton* and *Adams* cases.

James M. Reinert
Member of the Senior Class

PROCEDURE — SERVICE OF PROCESS ON FOREIGN CORPORATION — DOING BUSINESS WITHIN THE STATE — MERE SOLICITATION

In the recent case of *McGriff v. Charles Antell, Inc. et al*,[1] the Supreme Court of Utah held that mere solicitation—through the medium of television—by a foreign corporation, did not constitute "doing business" within the meaning of the Utah Rules of Civil Procedure, relating to service of process on a foreign corporation doing business in that state.[2]

The facts of this case are briefly as follows: At the end of certain television programs, the defendant's spokesman invited televiewers to place orders for the defendant's hair application by phoning the local television station. The orders were then mailed from the local station to the defendant corporation without any charge other than the regular advertising fee. The plaintiff, who had seen the advertisement, responded to such invitation and received the corporation's hair application, by mail (c.o.d.), from out of state. Plaintiff alleged that she suffered injuries as a result of the use of this hair application. She served process on the local television station's manager on the assumption that he or the station (from which the defendant, a foreign corporation, purchased advertising time) was either doing the business of or was in charge of defendant's office or place of business in Utah within the meaning of that portion of rule 4 (e) (4), Rules of Civil Procedure, relating to service of process on foreign corporations *doing business* in the state.[3]

In affirming the order of the trial court quashing service of process, the Supreme Court of Utah stated *inter alia* as follows:

> "A hard and fast formula cannot determine algebraically every case. Common sense must dictate the result. The law, in our opinion, would be a faithless servant if today it demanded that solicitation of business in and of itself subjected a foreign corporation to the local forum. Of equal disservice to the common good would be the rule that solicitation of business by television, radio, the press or in periodicals—

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1 ——Utah——, 256 P.2d 703 (1953).

2 Utah R.C.P. 4 (e) (4): "Upon any corporation, not herein otherwise provided for . . . . If no such officer or agent can be found in the state, and the defendant . . . *does business* in this state, then upon the person doing such business or in charge of such office or place of business."

3 For the Pennsylvania R.C.P. in point see R.C.P. 2179 (a).

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with nothing more, clothed such medium of advertising with the raiment of a process agent.[4]. . . This is not to say that in a proper case solicitation plus something else, or use of radio plus something else, could not constitute doing business in the jurisdictional sense, or could not ascribe to such advertising medium the role of process agent under our rules. The test goes to the 'something else.' Somewhere a line is to be drawn and the courts judiciously must mark it. To date the pattern, which in a changing world is ever changing, excludes solicitation alone as justifying jurisdiction conferred. Beyond such solicitation the activity to confer jurisdiction must be of sufficient substance and of such scope and variety as would lead a court of last resort to conclude that immunization of the foreign corporation against the power of our forum would be unrealistic, unreasonable and a vehicle for oppressing or meting out injustice to our own local citizens."[5]

This case is in accord with the majority view. The authorities support the holding that mere solicitation of business in a state by agents of a foreign corporation does not constitute "doing business" therein.[6] This is true, according to the majority view, whether the solicitation is only casual or occasional or is regular and long continued.[7] On the other hand, some courts contend that foreign corporations should not be exempt from service of process where the solicitation of business is continuous and systematic.[8] *Leo Frene et al v. Louisville Cement Company*[9] is illustrative of this view. In that case, the United States Court of Appeals for the District of Columbia stated the following by way of dictum:

"It would seem, therefore that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business. . . . It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. Although the rule has not been clearly and expressly repudiated by the Supreme Court, its integrity has been much impaired by the decisions which sustain jurisdiction when very little more than 'mere solicitation' is done."[10]

The Pennsylvania courts are in accord with the rule that mere solicitation of business does not constitute "doing business" even where such solicitation is continuous and has extended over a long period of time. In the recent case of *Pellegrini et ux v. Roux Distributing Co., Inc.*,[11] our Superior Court reiterated the

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4 256 P.2d at p. 704.

5 256 P.2d at p. 704, 705.

6 23 Am. Jur. § 381 at p. 380; 146 A.L.R. 941; 101 A.L.R. 126, 133; 60 A.L.R. 994, 1030; 95 A.L.R. 1478; 46 A.L.R. 583; 18 Fordham L.R. 204; 45 Mich. L.R. 218; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 62 L.Ed. 587, 38 S. Ct. 232.

7 Green v. Chicago B. & Q. R. Co., 205 U. S. 530, 51 L. Ed. 916, 27 S. Ct. 595; People's Tobacco Company, Ltd. v. American Tobacco Company, supra n. 6, 62 L. Ed. at p. 590; Mas v. Owens-Illinois Glass Co., 34 F. Supp. 415; 146 A.L.R. 941.

8 International Harvester Company of America v. Kentucky, 234 U.S. 579, 58 L. Ed. 1479; 60 A.L.R. 994, 1030; 46 A.L.R. 570, 572; 101 A.L.R. 122; see also: 39 Ill. L.R. 424; 29 Va. L.R. 950; 39 Ky. L.J. 357.

9 134 F.2d 511 (1943).

10 134 F.2d at p. 516; 146 A.L.R. at p. 933.

11 170 Pa. Super. 68, 84 A.2d 222 (1951).

Pennsylvania rule as it had been set forth by the Pennsylvania Supreme Court in *Lutz v. Foster & Kester Co.*,:[12]

> "There must be 'other activities' in addition to the solicitation of business to make a foreign corporation's conduct the *doing of business* within the Commonwealth. . . . Such 'other activities' do not consist of acts of courtesy performed by business solicitors without compulsion, in order to satisfy or accommodate customers. Nor do they reside in the number of solicitors employed or the character and extent of the facilities provided them for carrying on their solicitation. . . . .The criterion is, rather, whether the local solicitors have authority to bind the foreign corporation by which they are employed."[13]

The above statement of criterion was supported by further statements of the Pennsylvania Supreme Court in the *Lutz* case. The Pennsylvania Supreme Court pointed out that the important factor in *Shambe v. Delaware & Hudson R. R. Co.*[14] and *Lutz v. Foster & Kester Co.* was that the orders obtained by the defendant's (foreign corporation) solicitors were not binding on the company until they were received and accepted by *it* at its home office outside of the state.

The problems presented by the above cases are not limited to the situation where an out-of-state corporation sends solicitors into Pennsylvania; these problems also manifest themselves when a corporation domiciled in one county of Pennsylvania sends solicitors into another county of this state. In *Philadelphia Gear Works v. Read Machinery Co., Inc.*,[15] the Superior Court held that a corporation's mere solicitation of orders and renting of an office for salesmen soliciting orders or patronage for it in another county other than that of its legal domicile does not constitute such "doing of business" as to render the corporation subject to process in such other county.

As we have already seen, some courts contend that the "mere solicitation" rule should be abandoned where the soliciting activity is a "regular, continuous and sustained course of business."[16] This dissatisfaction is manifested even in the opinions of some of the states which follow the majority rule.[17] Despite this expression of dissatisfaction, the majority view (as illustrated by this case—*McGriff v. Charles Antell, Inc. et al*) seems to be firmly established as the rule in Pennsylvania.[18]

Donald C. Taylor
Member of the Senior Class

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12 367 Pa. 125, 79 A.2d 222 (1951).
13 84 A.2d at p. 224 quoting from 367 Pa. at p. 129, 79 A.2d at p. 224.
14 288 Pa. 240, 135 A. 755 (1927).
15 139 Pa. Super. 584, 12 A.2d 793 (1940).
16 For an interesting discussion of what constitutes "doing business" for service of process as contrasted with domestication requirements, see 45 Mich. L.R. 218; see 61 Harv. L.R. 1254 for the situation under the F.E.L.A.
17 See the concurring opinion of Wade, J. in this case (McGriff v. Charles Antell, Inc. et al) 256 P.2d at p. 705.
18 Other fairly recent Pa. cases in point: Otto A. C. Hagen Corporation v. Empire Sheet & Tin Plate Co., 337 Pa. 212, 11 A.2d 144, (1940); New v. Robinson-Houchin Optical Co., 357 Pa. 47, 53 A.2d 79 (1947), 52 Dick. L. Rev. 76; Law v. Atlantic Coast Line R. Co., 367 Pa. 170, 79 A.2d 252 (1951).