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NOTES

WHAT CONSTITUTES TRANSPORTATION OF INTOXICATING LIQUORS

Transportation of intoxicating liquors is a separate criminal offense under both federal and state prohibition laws. What constitutes transportation is difficult to determine because of the multiplicity of constructions made in cases discussing the question. The United States Supreme Court has defined transportation as any carrying from one place to another.¹ This definition is simple and fairly clear. When such a general proposition is applied to the facts of a large number of cases, no two of which are alike, confusion is almost certain to result.

The following cases show typical fact situations which have been decided by the courts:

¹ *Cunard S. S. Co. v. Mellon* (1922) 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306, quoted with approval in *State v. McAllister* (1923) 187 N. C. 400, 404, 131 S. E. 739, 741.

In *Rush v. Commonwealth*,² the defendant, who had been shot, appeared at the home of a Mrs. Huddleston and asked her to fix a bed for him and to call a doctor. She found on the floor at his bedside a pint bottle containing a clear white liquid about two inches deep. Defendant was sick and vomited, and an odor of liquor was noticed. The bottle disappeared when Rush went away. His explanation was that he had left home with the bottle to get liquor, but, not finding any, he put some water in the bottle, and the disagreeable odor was from California beer which he had drunk before leaving home. The judgment of guilty was reversed because "carrying liquor within one's stomach is not transportation within the meaning of the Prohibition Act."

In *Ivey v. State*,³ the defendant had spent the day on his farm with his tenant, digging a ditch. Defendant phoned for a taxi driver to take him home and the car broke down, whereupon defendant went to a nearby farmhouse for help. The taxi driver was found drunk, officers were called, and on their approach defendant threw a jar containing whiskey into the ditch by the roadside. Did he transport it? The trial judge instructed that any transportation, however slight, is sufficient. The jury found defendant guilty, which judgment was reversed on appeal, since throwing the jar into the ditch would not constitute an illegal conveyance "from one place within this state to another place therein."

² *Rush v. Commonwealth* (Ky.-1924) 266 S. W. 1046. See also comment on this case in 13 Ky. L. Jour. 309 (May 1925). This decision is sound but the reason for it is not clear. It may be based on the fact that the liquor undergoes a chemical change in the stomach, but the real reason seems to be that the liquor is no longer fit for beverage purposes. See Blakemore on Prohibition, 2nd ed. (1926) p. 212. Of course liquor in a man's stomach is incapable of delivery at the end of the transportation.

³ *Ivey v. State* (Okla.-1926) 246 Pac. 908. See also *Chapman v. State* (Okla. Cr. App.-1924) 230 Pac. 283, where a conviction of illegal transportation was affirmed when the liquor was taken from an automobile into a house and handed to someone at the back door who went about eighty-five feet with it. And see *De Graff v. State* (Okla. Cr.-1909) 103 Pac. 538, where a conviction was reversed, partly on constitutional grounds, and also because conveying liquor from one room in a building to another room in the same building would not be sufficient. The court agreed with defendant's contention that "the Legislature did not mean to create an offense . . . for removing liquor for a distance, however insignificant. If this is the law we commit the offense when we change a bottle from one pocket to another." And the court adds that if this were the law "a citizen commits an offense every time he takes a drink, for in so doing he removes the liquor from the bottle or glass to his stomach by way of his mouth."

In *State v. Sigmon*,⁴ the defendant moved for a nonsuit, which was not allowed. Thus the question involved is whether the evidence was sufficient to go to the jury. The most damaging evidence against defendant was that his car was off the main road with three odorless empty jugs beside it. A funnel nearby smelled of whiskey and so did the rear of the car. Defendant was absent when the officers found the car, but he returned in a few moments and was arrested. These facts were held to be "more than a scintilla and sufficient to be submitted to the jury" on the question of the defendant's transportation of liquor. The North Carolina court adopted the accepted definition of transportation as the act of carrying or conveying from one place to another. Although the evidence was circumstantial, the court concluded that the trial court was justified in submitting the case to the jury because the defendant's cap was on the rear of the car; empty jugs were beside it; a funnel nearby smelled of whiskey; there was no whiskey in the car, but the rear of the car smelled of it. In its opinion the court discussed the danger of intoxicants, quoting from the Bible and Shakespeare and stating the statutory rule of construction that the prohibition law should be liberally construed so as to prevent the use of intoxicating liquors as a beverage.

The desire of the courts generally is to give such effect to the prohibition law as will tend to break up the illegal liquor traffic. In *Harris v. Commonwealth*,⁵ the Virginia court said that "The prime object of the Prohibition Act was to break up and prevent the use of ardent spirits." In this case Harris, the defendant, made wine on his farm, which was occupied by his daughter, and started back with it to his home in town, when he was arrested. He relied upon the proviso in the act which said that it should not be construed "to prevent any person from manufacturing for his domestic consumption

⁴ *State v. Sigmon* (1925) 190 N. C. 684, 130 S. E. 854; cf. holding evidence sufficient to go to the jury, *State v. Adams* (1926) 191 N. C. 526, 132 S. E. 281; *State v. Smith* (1922) 183 N. C. 725, 110 S. E. 654; *State v. McMillan* (1920) 180 N. C. 741, 105 S. E. 403; *State v. Killian* (1919) 178 N. C. 753, 101 S. E. 109.

Compare with *State v. Sigmon*, the case of *Burke v. State* (Okla.-1925) 241 Pac. 829, where the following evidence was held insufficient: Defendant was arrested in a Ford car but no whiskey found in or at the car. A funnel was found in the car and about 150 feet away several pints and near the road in the weeds an alcohically malodorous jug, and the surface of the grass showed signs of "tromping around."

Testimony of witnesses as to odor of whiskey held competent, *State v. Buck* (1926) 191 N. C. 528, 132 S. E. 151.

⁵ *Harris v. Commonwealth* (Va.-1925) 128 S. E. 578.

at his home . . . wine or cider from fruit of his own raising. . . ." Does this mean he must manufacture it at home, in which case defendant would be guilty, or only that he must consume it at home? The verdict of guilty was affirmed. Note that there are no punctuation marks within the above-quoted statute. If there had been a comma after "manufacturing" and one after "home," it would probably have indicated, in the opinion of the court, that "at his home" applied to the consumption. But punctuation is a fallible standard of construction, and lack of it worse, so that the court resorts to a construction that will make the whole statute "harmonious and consistent," influenced somewhat, apparently, by the fear that another construction might allow one to "own a vineyard in Wise county, make an unlimited quantity of wine there, keep it in his country home, and from time to time transport it to his home in the city of Richmond." This is too much. If he drinks it all in Wise county, well and good, but not in Richmond.

It is argued in a number of the cases mentioned above that where there is possession of intoxicating liquor there must also be transportation. But this is clearly wrong, and the case of *Earl v. United States*⁶ holds to the contrary. The act of transportation involves the defendant's consciousness. Consequently, if the transportation is without his knowledge the defendant cannot be held guilty.⁷

How far must liquor be moved before it will constitute illegal transportation? In *Berry v. State*⁸ the defendant drove up in an automobile, got a sack with liquor, went 15 or 20 feet, and was stopped by officers. Defendant was held guilty of transporting liquor, the court saying that transportation was carrying from place to place, the distance being immaterial. But in *Hammell v. State*,⁹ a different rule appears. There the owner of a house and lot carried a quantity of whiskey from a shed on the premises to the attic of the house, a matter of some 30 feet. It was held that this was not an unlawful transportation, the decision being based on the view that transporting from place to place meant from one's own premises to some distinct area belonging to another. That is, transportation

⁶ *Earl v. United States* (1925) 4 Fed. (2nd) 532.

⁷ *Nettles v. Commonwealth* (Va.-1924) 122 S. E. 111. See note on this case in 11 Va. L. Rev. 79. Also *Young v. State* (Ga.-1926) 132 S. E. 453, defendant picked up a friend who had a suit-case containing liquor, but this was not known to the defendant.

⁸ *Berry v. State* (Ind.-1925) 148 N. E. 143.

⁹ *Hammell v. State* (Ind.-1926) 152 N. E. 161.

involves crossing boundaries of ownership. Consequently, moving liquor on one's own premises was not unlawful transportation and is quite a different matter from moving liquor along highways or over boundary lines. A note in the *Virginia Law Review*¹⁰ suggested that this is a reasonable rule and would do away with much confusion.

The mere transfer from one person to another is not transportation,¹¹ but in the case where the defendant carried the whiskey 20 feet after receiving it, it was held that it was a carrying from one place to another.¹² The evidence must show more movement than is necessary to complete a sale, but if the buyer after taking the liquor from the hand of the seller actually moves the liquor for only a few feet there would be a transportation. However, evidence that the defendant's tracks show that he was walking toward a quart of liquor is not sufficient on which to base a verdict of guilty.¹³ Neither is it sufficient evidence where a defendant throws away a catsup bottle the contents of which smell like "rotten" corn liquor.¹⁴

¹⁰ 13 Va. L. Rev. 46.

¹¹ *Cunard S. S. v. Mellon* (1922) 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894; 33 C. J. 493; cf. *Shirley v. State* (Okla.-1925) 237 Pac. 627, holding the distance immaterial.

¹² *State v. Redmond* (Mont.-1925) 237 Pac. 486.

¹³ *Brennan v. State* (Okla.-1925) 240 Pac. 1084.

¹⁴ *Youngblood v. State* (Okla.-1925) 240 Pac. 1100.

In the following cases evidence was held insufficient to warrant a conviction: *La Grone v. State* (Okla.-1925) 239 Pac. 928. In accord with this view is *State v. Ridge* (Mo.-1925) 275 S. W. 59. The court held against defendant's demurrer as to "white mule whiskey" being intoxicating, but was unwilling to allow a conviction to stand on evidence that only raised a strong suspicion of transportation. Accord, *Riddle v. State* (Tex.-1925) 272 S. W. 165; *Riojas v. State* (Tex.-1925) 277 S. W. 640. Note that in all the above cases the jury would have convicted, if allowed to do so.

In the following cases the evidence held sufficient to warrant a conviction: *Reynolds v. State* (Okla.-1925) 234 Pac. 656; *O'Quinn v. State* (Okla.-1925) 235 Pac. 247; *Brooks v. State* (Okla.-1925) 235 Pac. 560; *Qualls v. State* (Okla.-1925) 236 Pac. 446 (defendant ran about 30 feet); *Castleberry v. State* (Okla.-1925) 236 Pac. 910; *Soberberg v. State* (Okla.-1925) 237 Pac. 467; *Johnson v. State* (Tex.-1925) 270 S. W. 167; *Murray v. State* (Tex.-1925) 270 S. W. 1030; *Rodriguez v. State* (Tex.-1925) 271 S. W. 380; *Smalley v. State* (Tex.-1925) 271 S. W. 909; *Jerman v. State* (Tex.-1925) 272 S. W. 449; *Torres v. State* (Tex.-1925) 272 S. W. 460; *Odneal v. State* (Tex.-1925) 272 S. W. 784; *Weaver v. Commonwealth* (Ky.-1925) 277 S. W. 1021; *Winters v. State* (Tex.-1924) 275 S. W. 1015; *Davis v. State* (Tex.-1925) 275 S. W. 1042; *Wood v. State* (Tex.-1925) 276 S. W. 286; *Anderson v. State* (Tex.-1925) 276 S. W. 906; *Ames v. State* (Tex.-1925) 277 S. W. 661, guilty even though the court did not define "transport," because defendant did not present request to court before reading of the general charge; *Simpson v. State* (Ind.-1925) 149 N. E. 50; *Jameson v. State* (Ind.-1925) 149 N. E. 51; *Budreau v. State* (Ind.-1925) 149 N. E. 442. But cf. *Burnett v. State* (Ind.-1925) 149 N. E. 440 (insufficient evidence); *State v. Habel* (S. C.-1926) 132 S. E. 838,

The method of transportation is immaterial. The carrying may be for hire or may be gratuitous. The liquor may be carried personally or in a vehicle. The transportation may be by means of one's own conveyance or by means of a public carrier.¹⁵ An intention of delivering the liquor to another person is not essential to transportation. But there must be a real carrying from one place to another, and the courts construe the prohibition law liberally so as to prevent the use of intoxicants. The actual movement from one place to another is the important thing, although the decisions which have been discussed indicate a great confusion in the decided cases.

P. H. WINSTON.

ADMINISTRATIVE LAW—POWER OF STATE HIGHWAY COMMISSION

What is the legal status of the State Highway Commission? Two cases of wide prominence recently decided by the North Carolina Supreme Court present the question squarely.

The first of these is the case of the *Town of Newton v. State Highway Commission*.¹ Two routes were surveyed for the location of a state highway from Statesville, county seat of Iredell County, to Newton, county seat of Catawba County. The southern route, which has been maintained as a link in route No. 10 of the state highway system, enters Newton in the southeastern portion and passes by the court house and along the principal street through the center of the town, and thence to Hickory over the present hard-surfaced road running from Newton to Hickory. The northern route, which the commission proposed to build and adopt as a link in route No. 10 in place of the present southern route, would enter Newton just inside the corporate limits on the northern side, about 1½ miles from the court house; would be shorter than the southern route; and would be less expensive, but would necessitate the erection of an expensive bridge over the Catawba River. Plaintiff brought action to restrain defendant from building the northern route.

pouring liquor from car; *State v. La Due* (Minn.-1925) 205 N. W. 450; *Curtion v. State* (Okla.-1925) 240 Pac. 142; *Murray v. State* (Okla.-1925) 240 Pac. 146; *Fisher et al v. State* (Okla.-1925) 240 Pac. 655; *Glass v. State* (Okla.-1925) 240 Pac. 752; *Hicks v. State* (Okla.-1925) 240 Pac. 1088.

¹⁵ *Cunard S. S. Co. v. Mellon* (1922) 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306, quoted with approval in *State v. McAllister* (1923) 187 N. C. 400, 404, 131 S. E. 739, 741; *Commonwealth v. Dzewizcin* (Mass.-1925) 147 N. E. 582, transportation by airplane.

¹ *Town of Newton v. State Highway Commission* (1926) 192 N. C. 54, 133 S. E. 522.

The section of the statute² under which the action was brought provides that the state highway system should connect all county seats, all principal towns, state parks, and principal state institutions; that the roads should be laid out according to the routes shown on a map adopted by the Legislature as a part of the statute; that "the roads so shown can be changed, altered, added to or discontinued by the State Highway Commission [created by the same act]: Provided, no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, state or national parks or forest reserves, principal state institutions, and highway systems of other states."

The trial judge rendered his decision for the plaintiffs, and the defendant appealed.

The Supreme Court refused to apply the principal, "That courts may not interfere with discretionary powers conferred upon administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion,"³ saying through Justice Brogden, that the statute in express language refuses to allow the exercise of discretion by the commission as to county seats, and further, that the proposed route, running to a point just inside the corporate limits of the county seat and not through the town as formerly, did not connect the town with the state highway system, as required by the Road Act with its attached map; therefore, the Commission was without authority to adopt such a route.

Chief Justice Stacy, with whom Justice Adams concurred, dissented from the majority view. He reasoned that the Commission is an agency of the State, created by the Legislature under authority granted by the Constitution; that the act creating the Commission restricted its power in locating roads only in so far as to prohibit the disconnecting of county seats, etc.; that the courts cannot control the exercise of that power except when it is abused; and that physical connection of a highway with the paved street system of a county seat is such substantial compliance with the statute and the map made a part thereof that plaintiff failed to make out a case calling for judicial interference. Justice Stacy asks, "How can it be said, *as a matter of law*, that the two county seats will be discon-

² Pub. Laws 1921, ch. 2, s. 7; Vol. III, C. S. 3846 (c).

³ *Brodnax v. Groom* (1870) 64 N. C. 244.

nected by the proposed change, when in fact they will still be connected by the highway . . . by making physical contact with the street systems of the two places?"

The second case is that of *Carlyle v. State Highway Commission*.⁴ The facts are as follows: Route No. 20 leads westward from Laurinburg through Pates and Pembroke and by McNeill's Bridge into Lumberton, and is paved. Route No. 70 leads north-westward from Raeford, the county seat of Hoke County, through Red Springs, by Philadelphus Church, and by McNeill's Bridge, where it connects with and follows route No. 20 into Lumberton. A third route lies several miles north of No. 70, and leads from Red Springs to Lumberton. The Commission adopted, some five years ago, route No. 70 as a link in the State system of highways, complying with the statutory provisions⁵ therefor by posting at the court house door in Lumberton a map showing route No. 70 as that selected by the Commission between Raeford and Lumberton, and by notifying the proper county officials of such selection; no objection was made during the sixty days following the posting of the map, this being the time allowed by law for the filing of objections.

The Commission decided to pave route No. 70 from Red Springs to Lumberton (the section from Raeford to Red Springs being already paved); but it proposed to run the road from Red Springs to Philadelphus Church, and then to bend obliquely to the right (south) and run the road down to Pates, near Pembroke, and thence along route No. 20 by McNeill's Bridge into Lumberton, thus abandoning that portion of the present route No. 70 which lies between Philadelphus Church and McNeill's Bridge. The distance from Philadelphus Church to Lumberton by the proposed route is three miles longer than the distance over the present route, but the cost of construction will be approximately \$225,000 less, by reason of the connection made by the proposed route with route No. 20 at Pates, near Pembroke, the road from Pates to Lumberton being already paved.

Plaintiff sought an injunction restraining defendant from constructing the proposed route, and an order for the paving of the present route No. 70 from Red Springs to Lumberton.

⁴ *Carlyle v. State Highway Commission* (1927) 193 N. C. 36.

⁵ Note 2, *supra*.

Certain persons who were allowed to intervene in the suit also sought an injunction restraining defendant from constructing the proposed route, and an order for the construction of the road from Red Springs to Lumberton along the route which lies several miles to the north of the present route No. 70; this petition was based upon the contention that, according to the legislative map, this route was the one to be followed.

Defendant admitted that the proposed route is not in accord with the legislative map.

The trial judge ruled that the Commission was without power to abandon a portion of route No. 70 and build a road along the proposed route, and granted the restraining order. Defendant appealed.

Justice Brogden, writing for the majority of the court, said that "the statute means that when an existing highway has been designated, mapped, selected, established and accepted by the State Highway Commission as the sole and independent connection between two county seats in compliance with the formalities prescribed by the statute that this is a location of the road as a permanent link of the State System of Highways. . . . We are of opinion that any radical or substantial departure therefrom would constitute a disconnection." The opinion then proceeds to a discussion of the three reasons urged by defendant for not upholding the decision of the trial court. (1) The proposed road, by terminating at Pates, near Pembroke, thirteen miles from Lumberton, would not "run to" and "connect" the two county seats, Raeford and Lumberton. (2) The Moore's Crossing case⁶ was held not to apply; the Cameron case⁷ presented no propositions decisive of the Lumberton case; the Newton case⁸ held "that the defendant was without power to make radical changes and departures from the connection so established." (3) The principle laid down in *Brodnax v. Groom*⁹ was not applicable, as the legislature left no discretion to the State Highway Commission after the Commission had adopted a road, but expressly made that selected route a part of the state system; the statute was mandatory in its terms.

⁶ *Road Commissioners v. Highway Commission* (1923) 185 N. C. 56, 115 S. E. 886.

⁷ *Cameron v. Highway Commission* (1924) 188 N. C. 84, 123 S. E. 465, discussed in 3 N. C. L. Rev. 77.

⁸ Note 1, *supra*.

⁹ Note 3, *supra*.

Justice Clarkson wrote a concurring opinion because "it may not be amiss to call attention to a few errors that the Chief Justice [with Justice Adams] has fallen into in his dissenting opinion. . . . How many times did the statute contemplate that the defendant could exercise its discretion (in locating a road)? It claims the right to exercise it in the same matter twice. If twice, why not a dozen times? . . . Is there any reason why the Legislature could not locate a road by legislative decree? . . . The Court holds that it has the right to determine when a highway runs to a county seat, and also to determine whether a county seat has been disconnected. . . . If route No. 70 does not terminate at Pates, where it intersects route No. 20, what becomes of it? Not another inch of grading or excavation can be done upon it. Not an inch of paving could be laid upon it beyond that point. It becomes a lost road. Does it take to the air at Pates or is it in the contemplation of the mind deemed to continue an intangible ghostlike existence with No. 20? Aside from fine metaphysical distinctions, I think the road as a practical proposition terminates at Pates."

In the leading dissenting opinion, Chief Justice Stacy makes the following points: (1) Quoting from the opinion of Justice Adams in the Cameron case, the Commission "was vested with the specific right 'to change or relocate any existing roads that it may now own or may acquire,'" subject to the limitations of the proviso. (2) "The fundamental error in this case lies in the fact that the court is undertaking to deal with a matter which properly belongs to another tribunal. The location of the road in question has been determined by the State Highway Commission in the exercise of authority conferred upon it by statute. There is no suggestion of any arbitrary action or abuse of discretion on its part. We are, therefore, concerned solely with the lawfulness of the proposed change, and nothing else." (3) Cites many other examples of more than one route marked along the same road, including the three mile stretch from McNeill's Bridge to Lumberton, over which both No. 20 and No. 70 now run. (4) "The case, in its final analysis, presents but a single question. It is this: Has the location of all the highways, going to make up the State System, been settled in advance by legislative fiat, or is this a matter to be determined by the State Highway Commission? . . . I think the Legislature has wisely committed this question to the decision of the State Highway Commission in the exercise of a sound but not arbitrary judgment." (5) "Enough has already been said to demonstrate the necessity of further legislative

action in order that the State Highway Commission may proceed, in some workable way, with the construction of the state highways."

Justice Adams, also dissenting, makes three points: (1) That a deflection of the road so as to have it connect with No. 20 at Pembroke instead of McNeill's Bridge is not a disconnection of the two county seats involved. (2) That the Commission should not be held unalterably to a decision once made, for stated reasons, chiefly those raised by necessity. (3) That the exercise of discretion by the Commission is restricted by the opinion "to such a narrow compass as to make it exercise for practical purposes well-nigh a nullity. . . . The Court up to this time has never made a decision which limits discretionary power of any similar administrative and governmental agency as the present decision limits the discretionary power of the defendant."

The words of the statute limit the power of the State Highway Commission only in one respect, viz., that county seats, etc., may not be "disconnected." The construction of that word as used in the statute is a matter of law, to be decided by the courts. Brogden, J., says, "The whole proposition, therefore, resolves itself, in the final analysis, to a determination of the question of whether or not the proposed road . . . is in effect disconnecting the county seat."¹⁰ And the decision in both cases given above is that the county seats are disconnected.

In the Newton case, it was said: "We hold that the spirit of the Road Act contemplated that all county seats should be served by the highway system substantially as designated on the map, and that the road, as proposed by the defendant, is not a substantial compliance with the true intent and meaning of the road law." In the Lumberton case, it was said: "We hold, upon the facts as disclosed by this record: 1. That the defendant is without power to divert No. 70 and terminate it at Pates, 13 miles from Lumberton, because it has been mapped, established, accepted and incorporated as it exists as a permanent link or part of the State Highway System. 2. That the road, as proposed, does not run to and connect Lumberton as contemplated by the statute, and this requirement was mandatory, and therefore excluded any exercise of discretion in that particular."

As to this matter of substantial compliance and discretionary power, in a Nebraska case¹¹ the court said: "In *Howard v. County*

¹⁰ *Newton v. Highway Commission* (1926) 192 N. C. 54, 60, 133 S. E. 522, 526.

¹¹ *Throener v. Board of Supervisors* (1908) 82 Neb. 453, 118 N. W. 92.

Board of Supervisors, 54 Neb. 443, 74 N. W. 953, it was held: 'The propriety or necessity of opening and working a section line road is committed to the sound discretion of the county board, and its decision is not subject to review.' In *Otto v. Conroy*, 76 Neb. 517, 107 N.W. 752, it was held that the action of the county board in their decision of the expediency of establishing a public road was not subject to judicial review. Although both cases cited apply the rule to public roads established upon section lines, the rule is equally applicable to any proposed road, and the courts have no more right to interfere by injunction than by an appeal from the decision of the county board."

In a South Carolina case,¹² the facts were these: The road act required road No. 4 to terminate in the city of Anderson. The route selected by the road supervisor connected with road No. 5 about a mile from Anderson. The court said: "There is no more reason to say that road No. 4 terminates at road No. 5 than to say that road No. 5 terminates at road No. 4. . . . This short piece [of one mile along road No. 5 into Anderson] was to be used jointly by both roads and was as much a part of one road as the other. . . . In order for a road to be considered a public highway, it must extend from one public place to another public place, and permit public use all the way. As soon as there is an obstruction, then communication is cut off, and the public character of its use is destroyed. There is nothing to even delay a traveler in going from Williamston to Anderson when he reaches the junction of the two roads." And in the cases under discussion, there is nothing to hinder a traveler in going to Newton when he reaches the corporate limits of the town, or in going to Lumberton when he reaches Pates.

In an Alabama case,¹³ the court said: "Obviously, the statute commits the location of the highways to be constructed and maintained by it to the discretion of the commission. The location of such highways is not a function of the courts. In that matter the commission . . . exercises an administrative and quasi legislative function which when free from fraud or corruption, cannot be reviewed by the courts."

In an Ohio case,¹⁴ the location of a road was held valid, although a special statute authorizing the road was only substantially followed.

¹² *Pruitt v. King* (1920) 114 S. C. 525; 104 S. E. 191.

¹³ *Bouchelle v. State Highway Commission* (1924) 211 Ala. 474, 100 So. 884.

¹⁴ *State v. Hamilton*, 8 Ohio Dec. (Reprint) 457.

By a provision¹⁵ of the road act passed in 1923, the decisions and determinations of the Highway Commission may be reviewed by the courts according to the same procedure under which the decisions and determinations of the corporation commission are reviewed.¹⁶ The topic of "Judicial Review of the North Carolina Corporation Commission" has been discussed in an exhaustive and able article in the *NORTH CAROLINA LAW REVIEW*,¹⁷ in which two instances are given when the courts will set aside the orders of an administrative commission: "(a) Where the order was beyond its constitutional powers. This includes the proposition whether the commission could constitutionally exercise the power; likewise, whether the order was within its statutory powers. (b) Where the order was unreasonable. This includes the question whether the order was so unreasonable or arbitrary as to amount to an invasion of the constitutional rights of the complaining party; likewise, whether there was sufficient evidence to support the order."¹⁸

In the exercise of powers, the corporation commission and the highway commission are in practically the same situation: the former fixes rates; the latter locates roads.

As the Road Act has been held constitutional, it must be conceded that the highway commission may constitutionally exercise the right of locating roads. As to whether the location of the proposed roads was within the statutory powers of the commission, is another question, and is, it seems, the question over which the North Carolina Supreme Court split. The majority opinions hold to the proposition that the Highway Commission had no statutory authority to locate the proposed roads except in strict accord with the routes as laid out on the legislative map, with slight deviations permitted in the interests of the regulation of traffic or other controlling problems of engineering. The minority opinions clearly demonstrate the position that the Commission had the expressly granted authority, to be used reasonably in the exercise of a sound discretion, and subject only to review in case of arbitrary or corrupt abuse of power.

It appears, from the definitely settled attitude of the courts in regard to the corporation commission, and from the clearly parallel powers of that commission to the powers of the Highway Com-

¹⁵ Vol. III, C. S. 3846 (p).

¹⁶ C. S. 1090-1104.

¹⁷ Nichols: "Judicial Review of the North Carolina Corporation Commission," 2 N. C. L. Rev. 69.

¹⁸ 2 N. C. L. Rev. 69, 76.

mission, that the minority opinions present the better view, the prevailing view, and the view of the weight of authority both generally and in North Carolina. The Highway Commission is an expert body of capable men; it has at its finger tips the greatest facilities for making decisions which will conform not only to the public needs, but substantially enough to the legislative directions. "In determining the question of public necessity, utility, and convenience, the officers or tribunal having the matter in hand may properly consider the topography of the country, and the wants and wishes of the people; the condition of the population, the location of public places, the location of railroads, and *location of highways already established* or proposed . . . the extent of travel, and the expense. . . ." ¹⁹ Is it within the usual realm of law making bodies to consider that by the simple expedient of drawing lines on a map they can decide with any degree of expertness such necessary and inevitable propositions as those mentioned above—things which are an integral part of every scientifically constructed highway intended to serve the greatest number of the taxpayers with the greatest convenience?

"The powers and duties committed to the jurisdiction of the commission are exclusive and cannot be exercised or accomplished by the courts of the state.²⁰ But, acting upon their own independent judgment, the courts can and will set aside the commission's order when such order is beyond its constitutional powers or when it is unreasonable."²¹ Although this statement was made with reference to the corporation commission, it applies with equal force to the highway commission. The minority opinions admit the power of the State Highway Commission, and can wring no unreasonableness from the acts of that body. But as to the majority opinions, the question arises: Is the State Highway Commission an expert body of ten men, with whom is placed that discretionary power usually conferred upon expert bodies for the expedition and dispatch of detailed affairs, or is it composed of a body of subordinates subject to superintendence by courts, who are not experts in highway construction?

It is quite worthy of note that one of the recent bills introduced in the present Legislature is aimed at a clarification of the law as it is now interpreted by the Supreme Court. This bill would place

¹⁹ 37 Cyc. 49, s. (C).

²⁰ *Service Co. v. Power Co.* (1919) 179 N. C. 330, 334, 102 S. E. 625.

²¹ 2 N. C. L. Rev. 69, 77.

North Carolina back in line with its own former decisions, and with the decisions of the courts of the nation generally, by allowing to the Highway Commission as an administrative body that discretion which should rightly be theirs—not only as a legal matter but by reason of their splendid accomplishments in building the North Carolina road system.

HILL YARBOROUGH.

JURISDICTION OVER NON-RESIDENT CORPORATIONS

What is the present tendency of the courts in regard to assuming jurisdiction over non-resident corporations? A recent opinion of the North Carolina Supreme Court brings us face to face with this question in the case of *Ivy River Land and Timber Co., et. al., v. National Fire and Marine Insurance Company of Elizabeth, N. J.*¹ This was an action on an insurance policy to recover damages for fire loss. By application through a New York broker, a policy of fire insurance on property situated in North Carolina was issued to the plaintiffs, being executed and delivered in New Jersey, by an insurance company incorporated under the laws of New Jersey. The first premium on the policy was paid in New Jersey, and shortly thereafter the plaintiffs' property was destroyed by fire. No adjuster for the insurance company was sent to North Carolina; no agent had been appointed upon whom process could be served; and the insurance company had never been admitted nor licensed to do business in North Carolina as required by statute. The insurance company had theretofore issued two other policies in North Carolina, one being still in effect, although nothing appears concerning the methods of issuing these policies. Service was made—in the case at bar—on the Secretary of State, according to a statute providing for such service on non-resident corporations doing business in the state. He mailed a copy to the insurance company in New Jersey. The insurance company appeared specially and moved to strike out the return of service and dismiss the complaint for lack of jurisdiction. The trial court having found as a fact that the insurance company was not doing business in North Carolina ruled accordingly, and on appeal this was affirmed.

No further facts appearing, the case is obviously in accord with the overwhelming weight of authority: that a state court acquires no jurisdiction over a non-resident corporation which has neither

¹ *Timber Co. v. Insurance Co.* (1926) 192 N. C. 57, 133 S. E. 424.

(1) consented to service of process,² (2) nor been present within the state,³ (3) nor carried on business in the state.⁴ Under the facts as found, the insurance company had specially appeared and denied consenting to any service, and there certainly are no words to show that it did consent; the insurance company had never been present within the state, being domiciled in New Jersey and having no agent nor place of business of any sort in North Carolina; and, finally, the insurance company had never performed a single act of business in this state, for we must presume that the other two policies issued to citizens in North Carolina were issued under circumstances similar to those in the instant case.

However, it is suggested that, had further facts, quite possible under the circumstances, appeared, the decision might well have been different. Let us suppose that the two other policies issued by this insurance company to citizens of North Carolina had been issued so as to become enforceable upon the performance of a condition by the insured in the state of North Carolina, such as mailing a cheque in payment of the first premium or what not. In such circumstances, these two insurance contracts would have been made in North Carolina, for delivery of an insurance policy is the last act necessary to make the policy effectual.⁵

Conceding that the insurance company (defendant) had issued the other two policies to take effect in North Carolina, it would have performed two business transactions within the state.⁶ Would this have been enough to give the courts of North Carolina jurisdiction? C. S. 1137 gives jurisdiction to North Carolina over a foreign corporation "doing business" therein, provided service be made upon the Secretary of State, who is bound to mail a copy to an officer of the corporation. Such statutes have been held to be constitutional under the "Due Process" clause of the Fourteenth Amendment.⁷ And here we are forced to consider two questions: what is "doing business"; how are such statutes reconcilable with the "Due Process" clause?

² *Lafayette Ins. Co. v. French* (1855) 18 How. 404.

³ *Moulin v. Ins. Co.* (1855) 25 N. J. L. 57.

⁴ *Haskell v. Aluminum Co. of America* (1926) 14 F. (2nd) 864.

⁵ *Dawson v. Ins. Co.* (1926) 192 N. C. 313, 135 S. E. 34; Williston on Contracts, sec. 97.

⁶ *Indemnity Co. v. Jarman* (1902) 187 U. S. 197, 204, by Brown, J.: "A man does business when he contracts obligations—he ceases to do business when he discharges them." *Baring v. Comm'rs.* (1898) 1 Q. B. D. 78.

⁷ *R. R. Co. v. Cobb* (1925) 190 N. C. 375, 129 S. E. 828; *Lumberman's Ins. Co. v. Meyer* (1905) 197 U. S. 407.

The term "doing business" has been variously defined by the courts of the different states. The general trend of the decisions and the method of legal reasoning may be seen from the case of *Haskell v. Aluminum Co. of America*.⁸ There a non-resident corporation had a sales office in the state where the action was brought and also a sales-manager who had only power to solicit orders to be approved at the home office of the defendant insurance company, but *did* have the general power of making and performing contracts for the maintenance of the office, *viz.*, for lights, water, *etc.* The federal district court held that this constituted sufficient "doing business" by the insurance company to subject it to the jurisdiction of the court, saying, ". . . the activities carried on by the defendant through its New England district sales office constituted the carrying on of business in Massachusetts to such an extent, and were of such a nature, that it must be held that the defendant was 'found' within the district of Massachusetts, within the meaning of that word as used in the Clayton Act."⁹ And where an agent is sent into the state for the corporation to adjust claims, that is held to be "doing business" therein so as to subject the corporation to the state courts.¹⁰

Now, how do the courts reconcile such decisions upon state statutes giving the state courts jurisdiction over foreign corporations during business in these states? In answering this question jurists differ, though all agree that such statutes are constitutional. There are two theories upon which such extraterritorial jurisdiction is based: (1) Consent by the corporation to service and (2) Presence of the corporation within the state.

The Consent Theory is advocated by Professor Beale who says, ". . . the act of doing business in acceptance of a conditional offer is equally an act of consent to the terms of the offer thus accepted."¹¹ The cold logic of this theory grows colder, however, when it is realized that this theory requires no actual consent but only a statute laying down some condition for "doing business" in the state, such as the appointment of a statutory agent for service of process. He may be appointed by statute but need not be duty-bound

⁸ *Haskell v. Aluminum Co. of America* (1926) 14 F. (2nd) 864.

⁹ Comp. St. 8835k, that an action could be brought against a corporation not only in the judicial district where it is an inhabitant, but in any judicial district where it may be found or transacts business.

¹⁰ *Insurance Co. v. Meyer* (1904) 197 U. S. 407.

¹¹ Beale on Foreign Corporations, par. 266.

to notify the defendant, inasmuch as the defendant has consented to service on any agent as provided by statute. But such process the courts hold unconstitutional, as this statutory method is not reasonably calculated to give notice to defendant corporation.¹² Professor Beale further says, "Since consent is given by acts, not by mere thoughts or words, this implied consent ('doing business' in state when a statute regulates the condition) is as real as consent expressed by spoken or written words."¹³ But even this cannot be true, for "if a corporation does business, all the while protesting that it does not authorize anyone to accept process on its behalf, there is no consent in the external sense. The *ensemble* of acts and words conveys a clear impression of non-consent."¹⁴ It is merely an attempt to conceal the fiction of consent and seems unsatisfactory, for "the constitution is not to be satisfied with a fiction."¹⁵

The Presence Theory of jurisdiction over foreign corporations is enunciated in *Moulin v. Trenton, etc., Ins. Co.*,¹⁶ where the court held that a corporation which establishes an office in the state is actually present within the jurisdiction, the court saying: "It has, then, existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised." But just the opposite rule was laid down by Taney, C. J., in *Bank of Augusta v. Earle*;¹⁷ he said: ". . . and this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in the contemplation of the law, and by force of the law, and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation." And the United States Supreme Court upheld this doctrine in 1891,¹⁸ later refusing to repudiate it, but choosing to place jurisdiction on the Consent Theory in *Barrow Steamship Co. v. Kane*.¹⁹ But Judge Learned Hand, in *Smolik v. Philadelphia & Reading Coal Co.*,²⁰ doing away with the theories of constructive presence and consent, frankly states the reason for jurisdiction:

¹² *Reserve Asso. v. Phelps* (1902) 190 U. S. 147; *Church v. Church Asso.* (Calif.-1910) 107 Pac. 633.

¹³ Note 11, *supra*.

¹⁴ Henderson, *Position of Foreign Corporations in American Constitutional Law*, p. 95.

¹⁵ Holmes, J., in *Hyde v. U. S.* (1912) 225 U. S. 347, 390.

¹⁶ *Moulin v. Ins. Co.* (1855) 25 N. J. L. 57.

¹⁷ *Bank of Augusta v. Earle* (1839) 13 Peters 519.

¹⁸ *Shaw v. Mining Co.* (1891) 145 U. S. 444.

¹⁹ *Steamship Co. v. Kane* (1898) 170 U. S. 100.

²⁰ *Smolik v. Coal & Iron Co.* (1915) 222 Fed. 148.

"The court in the interest of justice imputes results to the voluntary act of doing business within the foreign state quite independently of any intent (to consent). The limits of that intent are as independent of any actual intent as the consent itself."

This statement by Judge Hand and the decisions of many of the courts seem to discard both these fictitious theories of jurisdiction. They proceed to give the courts of a state jurisdiction over a foreign corporation on "doing business" statutes, if service, as required, is reasonably bound to give notice; and, further, if the corporation is performing such acts of its business in the state so as to have a material effect upon its citizens. The Court says, in *Haskell v. Aluminum Co.*, *supra*,²¹ to reiterate: "My conclusion, therefore, is that the activities carried on by the defendant through its New England district sales office constituted the carrying on of business in Massachusetts to such an extent, and were of such a nature, that it must be held that defendant was 'found' within the district of Massachusetts." This idea of a corporation's being "found" within a foreign state would be contrary to Chief Justice Taney's single locality doctrine to which the courts of the United States are wedded. It is, therefore, improbable that the Court meant to say more than that the acts of the corporations in the state have such a material effect upon citizens that the state's laws should govern its activities therein. The Indiana court has held that writing insurance on property of residents in the state is doing business therein so as to render the corporation subject to process, though not licensed and having no office there.²² Another court has held that "although the record in each case disclosed but one transaction of the corporation, that transaction was not merely incidental or casual. It was a part of the very business to perform which the corporation existed. It did distinctly indicate a purpose on the part of the corporation to engage in business within the state and to make Kansas a part of its field of operation."²³ Here the court is obviously exercising jurisdiction over a foreign corporation upon the theory submitted, *supra*, to allow the citizens protection of the state laws to prevent imposition of fraud or injustice.

The Minnesota Court has even gone so far as to say: "The Supreme Court of the United States has not decided that a foreign insurance company is not amenable to process of the courts in an

²¹ *Haskell v. Aluminum Co.* (1926) 14 F. (2nd) 864.

²² *McCord v. Insurance Co.* (Ind.-1911) 94 N. E. 1053, 1054.

²³ *Mason, J., in Plow Co. v. Wyland* (Kans.-1904) 76 Pac. 863.

action brought upon insurance policies issued to citizens of that state covering property situate in that state, or that such a company is not doing business in the state to such an extent which subjects it to service of such process, when it appears that it had issued other policies covering other property within the state. We, therefore, hold that the appellant failed to establish immunity from service made in these cases by merely showing that the contract of insurance was not executed in this state and that they (the corporation) had no office nor agent nor place of business in Minnesota, and had not appointed the Insurance Commissioner as their attorney-in-fact to receive service of process."²⁴ It is, however, said in *Bank of America v. Whitney Bank*:²⁵ "The jurisdiction taken of foreign corporations, in the absence of statutory requirements or express consent, does not rest upon a fiction of constructive presence, like 'qui facit per alium facit per se.' It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its *actual presence* there is established." Yet this decision taken literally would be *contra* to the single-presence theory of Taney, C. J., which the court has regularly followed.

Could the court here mean only to say that the effect of the foreign corporation's act in the state upon the citizens is the same as though the corporation were actually present, so far as service of process and jurisdiction be concerned?

It is submitted, then: if the facts in the instant case had shown that the other two policies were so issued as to indicate an intent to carry on operations in North Carolina²⁶—and these three policies were all issued to citizens of this state on property therein within the space of a year and a half—then the opinion of the court might have been different on the theory that the corporation by its acts of business in this state²⁷ was affecting and intending further to affect citizens to such an extent as to be "found" in North Carolina for the purposes of jurisdiction.²⁸

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²⁴ *Massey S. S. Co. v. Insurance Co.* (Minn.-1922) 189 N. W. 714, 717.

²⁵ *Bank of America v. Whitney Bank* (1922) 261 U. S. 171.

²⁶ *Colliers Co. v. McKeever* (1905) 183 N. Y. 98.

²⁷ *Hoffstater v. Jewell* (Idaho-1921) 196 Pac. 194; *Beard v. Pub. Co.* (1881) 71 Ala. 60.

²⁸ Holmes, J., in *Palmetto Fire Ins. Co. v. Conn.* (1926) 47 Sup. Ct. 88: "It is true that the obligation arose from a contract made under the law of another state, but the act was done in Ohio, and the capacity to do it came from the law of Ohio, so that the coöperation of that law was necessary to the obligation imposed."