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Practice and Procedure -- Service Upon Foreign Corporations -- Corporate Presence

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Defendant railroad, a foreign corporation which had no tracks or other property in North Carolina, employed a traveling freight and passenger agent, who maintained an office at Winston-Salem. His job was to solicit business by inducing the manufacturers in the western part of the state to route their shipments to other parts of the country in such a way that defendant would be one of the connecting carriers. To further his employer's interests, the agent entertained a group of shippers' representatives, one of whom was plaintiff's intestate. The party was transported in an automobile belonging to the agent, and as a result of his negligence an accident resulted, in which plaintiff's intestate was killed. Suit was brought in North Carolina, the defendant being summoned by service on the agent. The corporation appeared specially and moved for dismissal on the ground that the service was void because the soliciting agent was not an agent for service of process within the purview of the statute governing service upon non-residents.[1] A denial of this motion by the lower court was reversed on appeal. The Supreme Court of North Carolina held that a foreign corporation could not be served with process unless it was found within the state, exercising some of the functions for which it was created ("doing business"). Solicitation of interstate shipments, the court ruled, was an activity which was purely incidental to the business of a common carrier. It was not sufficient to constitute "doing business" so as to make the corporation amenable to the jurisdiction of the local courts.[2]

This decision is a clear example of the application of the "corporate presence" test, which was conceived by the United States Supreme Court as a means of determining the jurisdictional status of a foreign corporation in regard to local suit,[3] and which has, for some years,[4] become firmly entrenched in both the state and federal courts.[5] Under this test, it is said that if the corporation is carrying on sufficient activities within the state to constitute "doing business," it is "present" there and consequently subject to local process. Whether the company is

[1] Service was made under N. C. GEN. STAT. §1-97 (1943).

[2] Lambert v. Schell, 235 N. C. 21, 69 S. E. 2d 11 (1952).

[3] Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264 (1917); International Harvester Co. v. Kentucky, 234 U. S. 579 (1897).

[4] The "corporate presence" test appears outmoded in the light of the language of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

[5] *E.g.*, Allentown Record Co., Inc. v. Agrashell, Inc., 101 F. Supp. 790 (E. D. Penn. 1951); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917); C. T. H. Corp. v. Maxwell, 212 N. C. 803, 195 S. E. 36 (1938); Ivey River Land and Timber Co. v. National Fire and Marine Ins. Co., 192 N. C. 115, 133 S. E. 424 (1926); Shambe v. Delaware and H. R. Co., 288 Pa. 240, 246, 135 Atl. 755, 757 (1927).

"doing business" is decided upon all the facts of each case.[6] The amount of activity implied by the term "doing business" may vary with the context, for "licensing and taxing laws have been held to contemplate more extensive activities than would be required . . . to bring a corporation into the jurisdiction of the court."[7] If the rationale of the "corporate presence" rule is to be consistently adhered to, the origin and nature of the cause of action would appear to be immaterial for the purpose of service, once the "presence" of the corporation has been established. Some courts therefore have held that causes of action arising from activities which took place outside the state and which were unrelated to the acts which occurred within the forum could fall within the jurisdiction of the local courts.[8] Others have refused to allow service of process in such cases.[9]

The activities performed within the state must be some substantial part of the ordinary business of the corporation;[10] mere isolated acts or transitory actions will not suffice.[11] Solicitation of business, which

[6] People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 87 (1918); Toothill v. Raymond Laboratories, 100 F. Supp. 350 (E. D. N. Y. 1951); Harrison v. Corley, 226 N. C. 184, 37 S. E. 2d 489 (1946); Ivey River Land and Timber Co. v. National Fire and Marine Ins. Co., 192 N. C. 115, 133 S. E. 424 (1926).

[7] State Highway and Public Works Commission v. Diamond Steamship Corp., 225 N. C. 198, 202, 34 S. E. 2d 78, 80 (1945). *Cf.* Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951); C. T. H. Corp. v. Maxwell, 212 N. C. 803, 195 S. E. 36 (1938). For a discussion of this "double standard," see 45 MICH. L. REV. 218 (1946).

[8] Missouri K. & T. Ry. Co. v. Reynolds, 255 U. S. 565 (1921); Perkins v. Louisville & N. R. Co., 94 F. Supp. 946 (S. D. Cal. 1951); Steele v. Western Union Telegraph Co., 206 N. C. 220, 173 S. E. 583 (1934) Subsequent decisions of the North Carolina Supreme Court, in King v. Robinson Transfer Motor Lines. 219 N. C. 223, 13 S. E. 2d 233 (1941); Hamilton v. Atlantic Greyhound Corp., 220 N. C. 815, 18 S. E. 2d 367 (1942); and Central Motor Lines v. Brooks Transportation Co., 225 N. C. 733, 36 S. E. 2d 271 (1945), have distinguished this case, and it would appear to be no longer sound authority. For an extreme decision, see Koninklijke Luchtvaart Maatschappij v. Superior Court, 237 P. 2d 297 (Dist. Ct. App. Cal. 1951), where the California court asserted jurisdiction over the foreign corporation, although the cause of action arose in England.

[9] Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 204 U. S. 8 (1907); Central Motor Lines v. Brooks Transportation Co., 225 N. C. 733, 36 S. E. 2d 271 (1945); Hamilton v. Atlantic Greyhound Corp., 220 N. C. 815, 18 S. E. 2d 367 (1942); King v. Robinson Transfer Motor Lines, 219 N. C. 223, 13 S. E. 2d 233 (1941). *But cf.* Perkins v. Benguet Consolidated Mining Co., 72 S. Ct. 413 (1952). See also Note, 29 COL. L. REV. 187, 190 (1929).

[10] Perkins v. Louisville & N. R. Co., 94 F. Supp. 946 (S. D. Cal. 1951); Harrison v. Corley, 226 N. C. 184, 37 S. E. 2d 489 (1946); Ruark v. Virginia Trust Co., 206 N. C. 564, 174 S. E. 441 (1934). However, the mere shipment of products into the state in interstate commerce is not "doing business." Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333 (1925).

[11] *E.g.*, Rosenburg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516 (1923) (president of the company was in New York briefly to purchase stock); Schoenith, Inc. v. Adrian X-Ray Manufacturing Co., 220 N. C. 390, 17 S. E. 2d 350 (1941) (director, at plaintiff's request, serviced the machine which his company had sold to plaintiff). *But cf.* State Highway and Public Works Commission v. Diamond Steamship Transportation Corp., 225 N. C. 198, 202, 34 S. E. 2d 78, 80 (1945), where, in holding that a single extended trip by defendant's ship constituted "doing business," the court stated: "The nature of the activities themselves, their magni-

is generally considered by the "corporate presence" requirement to be merely incidental to the main functions of a corporation, is not "doing business."[12] However, when the company conducts other activities in addition to solicitation, it may become amenable to the local jurisdiction.[13] The court in the instant case, having found no corporate activity within the forum except solicitation, was clearly in accord with well-established precedent in refusing to hold the service valid.

The standard applied by the court should be compared, however, with the rule formulated by the United States Supreme Court in *International Shoe Co. v. Washington.*[14] There, the foreign corporation had engaged in enough acts in addition to solicitations to be considered "present" and thus to be subject to the state unemployment compensation tax.[15] Yet, the Supreme Court did not employ the "corporate presence" test. Rather, it ruled that jurisdictional requirements can be met if the corporation's "operations establish sufficient contacts or

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tude, the multiplicity of contacts, the possibility that incidents may occur and liabilities be created—especially where the entrance into the state is in the ordinary prosecution of the business which the corporation is chartered to carry on and is carrying on; and which definitely regards the state as a theater for future transactions of a like sort as often as occasion might arise—these are important considerations in determining whether a corporation is, in a given instance, doing business in the state. On a single visitation to the state the matter in hand may explode into a multitude of transactions of far-reaching importance." *Accord:* Lindner v. Plastic Toys, Inc., 96 N. Y. S. 2d 513 (City Ct. 1949) (company's president maintained a hotel room for thirteen days to accept orders for his product, and this was held to be "doing business").

[12] Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 530 (1907); Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N. C. 287, 59 S. E. 2d 779 (1950); Schoenith, Inc. v. Adrian X-Ray Manufacturing Co., 220 N. C. 390, 17 S. E. 2d 350 (1941); Plott v. Michael, 214 N. C. 665, 200 S. E. 429 (1939); Carnegie v. Art Metal Construction Co., 191 Va. 136, 60 S. E. 2d 17 (1950). But cf. Koninklijke Luchtvaart Maatschappij v. Superior Court, 237 P. 2d 297 (Dist. Ct. App. Cal. 1951) (continuous solicitation is sufficient); American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N. W. 28 (1928) (continuous solicitation resulting in deliveries within the state will support jurisdiction). *Accord:* Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917).

[13] International Harvester Co. v. Kentucky, 205 U. S. 530 (1914) (agents received payment in either money or notes); Barnett v. Texas & Pacific Ry., 145 F. 2d 800 (2d Cir. 1944) (agents sold tickets and issued bills of lading); State v. Winsted, 66 Idaho 504, 162 P. 2d 894 (1945) (agents used cars owned and licensed by the company); Lindner v. Plastic Toys, Inc., 96 N. Y. S. 2d 513 (City Ct. 1949) (agent's acceptance of orders was binding on the company); Parris v. Fischer & Co., 219 N. C. 292, 13 S. E. 2d 540 (1941) (agent signed a conditional sales contract in behalf of the company, visited plaintiff's residence twice to collect back payments, and repossessed the machine on the second visit); Mauney v. Luzier's, Inc., 212 N. C. 634, 194 S. E. 323 (1937) (agent collected payment for the goods). *But cf.* Davega v. Lincoln Furniture Co., 29 F. 2d 164 (3d Cir. 1928); Pellegrini v. Roux Distributing Co., 170 Pa. Super. 68, 84 A. 2d 222 (1951). See also Comment, 3 RUTGERS L. REV. 298 (1949).

[14] 326 U. S. 310 (1945).

[15] International Shoe Co. v. State, 22 Wash. 2d 146, 154 P. 2d 801 (shoe company had from eleven to thirteen salesmen who resided in Washington, displayed samples, occasionally rented permanent sample rooms or temporary space in hotels and business buildings, and transmitted orders to the home office for acceptance).

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 . . . [the company] . . . has incurred there."[16] The court indicated that the nature of the particular suit being brought is to be considered, and that "an estimate of the inconveniences which would result to the corporation from a trial away from its . . . principal place of business is relevant in this connection."[17]

Three basic differences between the "fair play and substantial justice" rule of the *International Shoe* case and the older "corporate presence" test can be detected. First, the newer rule provides a more direct and realistic method of determining whether or not jurisdiction can be asserted. Instead of following the circuitous route of deciding that the corporation's activities are sufficient to constitute "doing business," which in turn manifests the "presence" of the company and makes it amenable to local process, the "fair play and substantial justice" test merely requires examination of the corporation's contacts with the forum to decide whether they justify jurisdiction over the suit in question.[18]

A second difference is that the new rule makes allowance for the origin of the cause of action. A dictum in the *International Shoe* case suggests that a court can take jurisdiction over a foreign corporation regardless of where or how the cause of action originated. It is indicated however, that a greater amount of corporate activity within the forum is necessary to meet constitutional requirements where the cause of action arises outside of the forum than where the suit is based on acts of the company within the state.[19] A recent decision by the Supreme Court has since made the dictum law.[20]

[16] International Shoe Co. v. Washington, 326 U. S. 310, 320 (1945).

[17] 326 U. S. at 317. "[This] question is certainly indistinguishable from the issue of 'forum non conveniens.'" Kilpatrick v. Texas & P. Ry. Co., 166 F. 2d 788 (2d Cir. 1948), criticized in 61 HARV. L. REV. 1254, 1255 (1948).

[18] "Since the corporate personality is a fiction, although a fiction intended to be acted upin as though it were a fact, . . . it is clear that unlike an individual its 'presence' . . . can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." 326 U. S. at 316.

[19] "While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . , there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U. S. at 318.

[20] Perkins v. Benguet Consolidated Mining Co., 72 S. Ct. 413 (1952). Defendant, a Philippine mining company, had been displaced by the Japanese invasion and had transferred its limited wartime activities to Ohio, where its president and

The third difference is that the "fair play and substantial justice" test would seem to indicate that courts may now exercise wider jurisdiction over foreign corporations.[21] Although not specifically overruled in *International Shoe Co. v. Washington*, the "mere solicitation" rule seems abrogated by the new test. In modern business, solicitation is a substantial and vital part of the activities of a corporation.[22] Further-

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general manager resided. It maintained two bank accounts in Ohio, carried on correspondence, and held several directors' meetings there. Nevertheless, the Ohio courts refused to accept jurisdiction over it in a suit for unpaid dividends and damages caused by failure to issue stock certificates because the cause of action arose outside of the state. In vacating judgment and remanding for further proceedings, the United States Supreme Court ruled that, although it could not order the Ohio courts to take jurisdiction, it could not prevent them from summoning the corporation, because the activities in Ohio were sufficient to justify jurisdiction, even where the cause of action arose from outside, unrelated conduct. The decision did not indicate, however, what minimum of activity would be required before jurisdiction over such a cause of action would be constitutional; and the unusual magnitude of the defendant's forum operations in the case casts no light on this point.

[21] The "minimum contacts" requirement appears to demand a lesser degree of forum activity than is indicated by the term "corporate presence." In addition, it seems significant that the court stressed the fact that service on the agent in the case being considered would certainly give the corporation sufficient notice of the suit. See International Shoe Co. v. Washington, 326 U. S. 310, 320 (1945). Also *compare* Travelers Health Ass'n v. Virginia, 339 U. S. 643 (1950) *with* Minnesota Commercial Men's Ass'n v. Benn, 261 U. S. 140 (1923) (a decision under the "corporate presence" rule). See Comment, 41 ILL. L. REV. 228, 236 (1946); Note, 16 U. OF CHI. L. REV. 523, 525 (1949); 3 RUTGERS L. REV. 298, 300 (1949).

There is argument that "fair play" requires subjection of the foreign corporation to the jurisdiction whenever it commits a tort within the state against a resident, or breaches a contract which is to be performed in whole or in part within the forum. See McBaine, *Jurisdiction Over Foreign Corporations; Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331, 336 (1946); Note, 39 KY. L. J. 357, 362 (1951). Such a rule, it is said, would be less vague than either of the present rules, and therefore would be easier to apply. Furthermore, due process would be observed as long as the court made certain that the corporation received actual notice. The non-resident motorist statutes are cited in support of this point. See Hess v. Pawloski, 274 U. S. 352 (1927). Normally, no hardship would result under the proposed rule, it is said, since usually most of the witnesses will reside within the forum. In the few cases where the foreign corporation would suffer unduly from suit away from its "home," the doctrine of *forum non conveniens* might be applied. Two state courts have applied rules, based upon local statutes, which come close to adopting this attitude. See Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950), discussed in Comment, 64 HARV. L. REV. 500 (1951) and Note, 20 U. OF CIN. L. REV. 129 (1951). *Cf.* Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. 2d 664 (1951).

While there is as yet no indication that the United States Supreme Court will allow such broad jurisdiction, the language of the Vermont court appears significant: "We recognize that there is a dual trend in jurisdictional decisions: in defining the court with jurisdiction, a trend away from the court with immediate power over the defendant to the court where both parties may most conveniently settle their dispute; and in defining due process of law, a trend from emphasis on the territorial limitations of courts to emphasis on providing notice and opportunity to be heard. The implications of *International Shoe Co v. State of Washington* are a part of this dual trend. Its broad standard we expect will prevail. Any change will be, most likely, a further extension." 116 Vt. at 575, 80 A. 2d at 668.

[22] "Solicitation without . . . additional activities . . . may be more sustained,

more, under the older rule it may be possible for a corporation, by merely making all orders obtained by its agents subject to approval at the home office, to procure a large amount of business from a state, while remaining immune from suit in the local courts.[23] Gradually, the courts appear to be reaching the conclusion that "fair play" requires that the corporation submit to the jurisdiction where the solicitation conducted by it is extensive.[24]

The distinction between continuous activities and isolated acts is preserved in the "fair play and substanital justice" test, which holds that isolated activities ordinarily do not furnish sufficient contacts.[25] However, the language in the *International Shoe* decision did leave the possibility open that certain isolated acts "because of their nature and quality and the circumstances, may be deemed sufficient to render the corporation liable to suit."[26] Also, it is possible that the broader exercise of jurisdiction possible under the new rule may influence courts to be less willing to label a corporation's forum activity as "isolated acts."

The broad language of the "fair play and substantial justice rule is

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more insistent, more productive of business than it is with them. Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not doing business. The merchant or manufacturer considers these things the heart of business." Frene v. Louisville Cement Co., 134 F. 2d 511, 516 (D. C. Cir. 1943).

[23] In Lutz v. Foster & Kester Co., 367 Pa. 125, 79 A. 2d 222 (1951), the defendant company rented, equipped, and maintained an office in Philadelphia, employing a staff of six persons, including a district sales manager. In addition to soliciting business, the office transmtted complaints to the home office in Connecticut and contacted it to expedite local deliveries. Defendant's customers cancelled orders through this branch office, called there to transact business, and sent drawings and blueprints to it. The branch office also handled settlement of difficulties created by shipment of defective materials, exhibited samples of defendant's products, and processed all orders received from defendant's local distributors. Yet, because all orders taken at the branch office were subject to final approval at the Connecticut office, the Pennsylvania court refused to allow jurisdiction, ruling: "The criterion is . . . whether the local solicitors have authority to bind the corporation by which they are employed." 367 Pa. at 129, 79 A. 2d at 224. See also Pellegrini v. Roux Distributing Co., 170 Pa. Super. 68, 84 A. 2d 222 (1951).

[24] Kilpatrick v. Texas & P. Ry. Co., 166 F. 2d 788 (2d Cir.), *cert. den.*, 335 U. S. 814 (1948); Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co., 102 F. Supp. 258 (E. D. Ky. 1951); Perkins v. Louisville & N. R. Co., 94 F. Supp. 946 (S. D. Cal. 1951); Western Smelting & Refining Co. v. Pennsylvania R. Co., 81 F. Supp. 494 (D. C. 1948); Schmikler v. Petersine Insulator Co., 77 F. Supp. 11 (D. Mass. 1948); Boyd v. Warren Paint & Color Co., 254 Ala. 687, 49 So. 2d 559 (1950). *But cf.* Toothill v. Raymond Laboratories, Inc., 100 F. Supp. 350 (E. D. N. Y. 1951); Anderson v. Page & Hill Homes, Inc., 88 F. Supp. 408 (D. N. D. 1950); Bomze v. Nardis Sportswear, Inc., 68 F. Supp. 156 (S. D. N. Y. 1946) ("This case is a step backward from the implications of *International Shoe Co. v. Washington.*" 60 HARV. L. REV. 654 (1947)); Jacobs v. Horan Engraving Co., 137 N. J. L. 520, 61 A. 2d 22 (Sup. Ct. 1948); Cohen v. Gulf, Mobile & Ohio R. Co., 95 N. Y. S. 2d 633 (Sup. Ct. 1950); Law v. Atlantic Coast Line R. Co., 367 Pa. 170, 79 A. 2d 252 (1951); Hoffman v. D. Landreth Seed Co., 66 S. E. 2d 813 (S. C. 1951).

[25] International Shoe Co. v. Washington, 326 U. S. 310, 317 (1945).

[26] 326 U. S. at 318.

vague, and therefore may well form the basis for disagreements as to the result of its application in specific situations. Indeed, the decision in the instant case might easily have been the same had the new rule been used by the court. But it would seem that, although the North Carolina Supreme Court is not alone in speaking in terms of "corporate presence" and "mere solicitation,"[27] it would have a fairer and more effective means of approaching future cases of this type if it employed the rule and language of the *International Shoe* case.

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Sheriffs—Relationship to and Liability for Deputy

The office of deputy sheriff is ". . . coeval in point of antiquity with the sheriff"[1] and as such is one of the oldest in the common law system of jurisprudence.[2] Although some states provide for deputies sheriff by statute,[3] in North Carolina it remains a common law office.[4]

The exact relationship between the sheriff and his deputy was not clearly defined until *Styers v. Forsyth County*,[5] in which Stacy, C. J. stated:

> "Under our law a deputy is authorized to act only in ministerial matters, and in respect of these matters he acts as vice principal or alter ego of the sheriff, for the sheriff 'and his deputy be, in the contemplation of law, one person.' . . . In short, a deputy is a lieutenant, the sheriff's right hand man. . . . To call him an under sheriff . . . is more nearly correct than to style him an employee."[6]

[27] *E.g.*, Westerdale v. Kaiser-Frazer Corp., 6 N. J. 571, 80 A. 2d 91 (Sup. Ct. 1951); Vassallo v. Slomin, 105 N. Y. S. 2d 60, 278 App. Div. 949 (2d Dept. 1951); Allentown Record Co., Inc. v. Agrashell, Inc., 101 F. Supp. 790 (E. D. Penn. 1951). See also note 24 *supra*.

[1] Lanier v. Greenville, 174 N. C. 311, 316, 93 S. E. 850, 853 (1917).

[2] 1 ANDERSON ON SHERIFFS §2 (1st ed. 1941); Boland, *The Ancient Office of Sheriff*, 211 L. T. 177 (1951), ". . . the office of sheriff is, except for kingship, the oldest office in the country and the only secular office remaining from Saxon times."

[3] 47 AM. JUR. §154 (1943); 1 ANDERSON ON SHERIFFS §60 (1st ed. 1941).

[4] There is no provision for the office of deputy sheriff in either the constitution (Gowans v. Alamance County, 216 N. C. 107, 3 S. E. 2d 339 (1939)), or the statutes (Borders v. Cline, 212 N. C. 472, 193 S. E. 286 (1937); Jamesville & Washington R.R. v. Fisher, 109 N. C. 1, 13 S. E. 698 (1891)), except where modified by public-local law. See note 10 *infra*.

[5] 212 N. C. 558, 194 S. E. 305 (1937).

[6] 212 N. C. at 564, 194 S. E. 308. The court describes the deputy by four terms, the total of which would seem to embrace the definition of the office: ". . . he acts as 'vice-principal'" (one to whom the employer has confided the entire charge of the business or a district branch of it, or one to whom the master has delegated a duty of his own which is a direct personal and absolute obligation. Black's Law Dictionary (4th ed., 1951)); "alter ego" ("second self." Webster's Collegiate Dictionary, 5th ed. (1945)); "a lieutenant" ("one who holds the post or office of another, in the place and stead of the latter." Black's Law Dictionary (4th ed., 1951)); "the sheriff's right hand man" ("one chiefly relied on." Webster's Collegiate Dictionary (5th ed., 1945.)).