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The Problem of the Transient Nonresident Motorist

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payment from the same fund; the more alert will be successful. Section 5f presupposes that all the parties have been adjudged bankrupt, in which situation the rule of marshalling of assets is applied. Therefore where a firm is adjudged bankrupt irrespective of the individual partners, whether Section 5f, which clearly is favorable to them is to apply, depends on the vigilance of creditors of the individual partners who likewise have been adjudged bankrupt.

For a clearer understanding of the above, which at most is a mere forecast as to what the Supreme Court will hold when the issue arises, it must be remembered that before a person may be adjudged bankrupt, he must be proved insolvent. Although the entity of a partnership in bankruptcy had been recognized by the weight of authority prior to the decision of *Bank v. Bear*, nevertheless, it was held, that before a firm could be proved insolvent, the individual property of the partners plus the property of the firm had to be insufficient to pay firm debts, and a firm was never held to be bankrupt, as long as one of the members was solvent. But to this holding there was a real objection on the ground that the firm was an entity, and hence the separate property of the partners could not be taken into cognizance.¹⁴ This objection may gain recognition in the light of *Bank v. Bear*, which finally settled the question of the partnership as an entity in bankruptcy. If it does gain recognition, the intricate question of the administration of the separate assets of the non-bankrupt, solvent partner, will arise. But this is anticipating too far and has no place in this article.

The long period of oscillating decisions is over and the Supreme Court has decided once and for all that a partnership is an entity in bankruptcy, which may be adjudicated a bankrupt irrespective of the partners composing it. This decision is in harmony with the earlier leading case of *Francis v. McNeal*, and both cases are in perfect harmony with Section 5f of the Bankruptcy Act, in the light of its present interpretation.

STANLEY WEISS, '29.

THE PROBLEM OF THE TRANSIENT NONRESIDENT MOTORIST

A question of increasing importance, especially in this age of almost universal use of the automobile, recently has been presented to the courts. It is as follows: May a state subject to

¹⁴ Collier on Bankruptcy 12th Ed. p. 172 and cases thereunder; Remington 2nd Ed., Section 1348.

the jurisdiction of its courts a nonresident, absent defendant who has not consented to its jurisdiction nor been served with process within the state, but who has operated an automobile within the borders of the state in consequence of which he caused personal injury or property damage to a local citizen?

To take a concrete example, suppose A, a resident of Pennsylvania, while motoring through Massachusetts on his way to a summer home in Maine, negligently runs into and injures B, a resident of Massachusetts. A leaves Massachusetts before B has an opportunity to serve him with process. Must B pursue A into Maine, or wherever he goes, until he can secure personal service upon him? Again suppose that A is a resident of California, and that B has not the means or time to follow him until jurisdiction is obtained. Must B suffer at the hands of the non-resident visitor who has enjoyed the privileges which B and other fellow-citizens made possible? Has B no remedy through the Massachusetts courts unless he catches A within the boundaries of the State?

Before treating this subject, a few introductory remarks must be made to enable a clearer understanding of the discussion given. It must be pointed out that there is an important distinction between what is known as jurisdiction on the one hand, and what is known as due process on the other hand. These two terms are often confused in cases. In regard to the word jurisdiction, we find that there are several senses in which it alone is used. It may refer to the internal jurisdiction of a court, that is, the competency of one court of a state rather than another to assume judicial power over a controversy. Another sense, and the one in which the word will be used in this article, is the power of a state to create rights which under the principles of the common law will be recognized as valid in other states.¹ Or as stated in an English case:² "A court may, firstly, have jurisdiction in such cases that in conformity with general jurisprudence and ordinary international law or usage, the courts of other states will regard its judgments as binding, and will, with certain exceptions, enforce the judgment within their own states." When does a state through its courts have jurisdiction over an individual? There are a number of bases for a valid exercise of jurisdiction, common ones being the physical presence of the defendant within the state; or the fact that he has his domicile within the state; or that he is a citizen or subject owing allegiance to the state (this basis, however, is not true as among the states of the Union, they not being recognized as inde-

¹ This definition is found in Section 43 of Restatement No. 2 of Conflict of laws of the American Law Institute.

² *Turnbull v. Walker*, 67 L. T. R. 767, 769.

pendent nations); or the fact that the defendant has consented to the exercise of jurisdiction by either appearance or contract.

Considering the term due process, we find that it refers to certain limitations, perhaps they may be called guarantees, preserved by the Constitution of the United States. Due process acts as a limitation upon the exercise of jurisdiction. It is essentially an Anglo-American conception, not having a place in Continental law. Generally, it may be said that due process requires not only that the state rendering the judgment shall have some basis for securing jurisdiction over the defendant, but also that the defendant shall be given notice of the suit and a reasonable opportunity to be heard. Viewing the two terms together, it may be said that jurisdiction goes to the existence of the power, whereas due process prescribes the method in which this power shall be used. Without due process the exercise of jurisdiction is unavailing. Perhaps an illustration will bring out the distinction. Suppose A is a resident of St. Louis and is at a known address where he can be personally served with process. This clearly gives the proper Missouri court for the particular action jurisdiction over A, he being physically present. If, however, a statute were passed in Missouri declaring that as to resident defendants whose address is known, jurisdiction could be obtained by publication in a daily newspaper, it would probably violate due process which declares that a man is entitled to the best notice possible under the circumstances.

In discussing the exercise of jurisdiction over nonresident, transient motorists, an effort will be made to keep distinct, as far as practicable, this distinction between jurisdiction and due process. This note is therefore being divided into two parts. First a brief review will be given of the development of the law in dealing with the question stated at the outset of this article and then a treatment of the jurisdictional aspects with a view to determining the real basis of jurisdiction in these cases. And secondly, an examination will be made into the due process requirements involved.

A. THE JURISDICTIONAL ASPECTS

In the leading case of *Pennoyer v. Neff*,³ the rules are laid down that the authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established, that personal jurisdiction is not obtained through service by publication, or by actual service on the defendant outside the state, and that in order to acquire personal jurisdiction over nonresident defendants, there must be a service of process within the state or voluntary appearance by the defendant.

³ (1877), 95 U. S. 714, 24 L. Ed. 565.

A strict adherence to these principles would preclude, in many cases, any successful attempt to acquire jurisdiction over non-resident defendants. We find, however, that with the marked growth of corporate organizations often conducting business in foreign states, the ever increasing use of the automobile, and the great volume of interstate commerce and travel over highways, there is a tendency on the part of the courts to relax from the rigid enforcement of these requirements and search about for some new basis of jurisdiction.

Apparently the first statute⁴ covering the situation presented at the outset was passed by the Legislature of New Jersey in 1908. It provides in substance that a nonresident motorist, on entering the state, shall register his machine and also shall file an instrument appointing the Secretary of State as his attorney upon whom process may be served in any action growing out of the operation of his motor vehicle within the state. Notice of such service is to be given to the defendant by letter directed to his postoffice address which he has supplied. Penalties are prescribed for violations of the statute.

In 1909 the case of *Cleary v. Johnson*⁵ upheld the constitutionality of this statute, against an attack that it violated the fourteenth amendment. In the decision the court says:

“Assuming that the right to use the highways belongs to such nonresident owner, yet it is obviously not an absolute right. The stringent legislative restrictions upon the use of the highways by automobiles . . . exhibit that the automobile is regarded as a dangerous engine.

“Resident owners can be reached by service of process within this state, while nonresident owners, of course, unless by voluntary appearance, are immune . . . in the absence of a provision like the one in question, such enforcement would mean numerous suits in other states in the Union, from New York to California, or, perhaps, in other continents.”

The court finally declares that the statute is neither unconstitutional nor unreasonable, adding that “both residents and nonresidents are placed upon the same footing. Both are made amenable to the laws of the state whose highways they are using.”

In 1911 the constitutionality of the New Jersey statute was again challenged in *Kane v. State*.⁶ Here the defendant Kane,

⁴ N. J. P. L. 1908, p. 613. Section 4 of Auto Act of 1908.

⁵ (1909), 79 N. J. L. 49, 74 Atl. 538.

⁶ (1911), 81 N. J. L. 594, 80 A. 453, L. R. A. 1917B 553, Ann. Cas. 1912D 237.

a resident of New York, had failed to comply with the statute, and was arrested in New Jersey while driving his automobile from New York to Pennsylvania. He claimed that the statute was invalid as to him, because it violated the Constitution and the laws of the United States regulating interstate commerce, and also because it violated the fourteenth amendment. These contentions were overruled, and he was fined. The case was taken to the United States Supreme Court, which affirmed the judgment and held the statute constitutional.⁷ Mr. Justice Brandeis, after referring to the well-recognized dangers to the public incidental to the operation of motor vehicles over highways, said:

“We know the ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of nonresident owners, was essential to public safety. There is nothing to show the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law.”

From these cases it appears that a state may constitutionally forbid a nonresident to operate an automobile within the state, unless he has *expressly*⁸ authorized a state official to receive service of process in actions brought against him arising out of the operation of the automobile within the state. As is apparent, however, this form of statute necessitates the nonresident motorist entering a state to stop at the boundary line and sign the proper form of power of attorney appointing a state official his agent for process. It also imposes some expense upon the state in maintaining officers to carry on this work on the numerous highways that lead into a state. Devices to avoid such expenses raised new issues. One such issue was whether a state might go a step farther, and provide that voluntary entrance upon its highways shall operate as constructive consent to be sued within the state and be equivalent to appointing a state official as attorney in fact, upon whom service of process may be made in any controversies arising out of the operation of the motor vehicle within the state.

Massachusetts first experimented in this field of legislation, its statute⁹ providing that the operation by a nonresident of a motor

⁷ (1916), 242 U. S. 160, 61 L. Ed. 22, 37 S. Ct. 30.

⁸ Italics are writer's throughout article.

⁹ Mass. Gen. Laws, Chap. 90, as amended by Stat. 1923, Chap. 431, Sec. 2.

vehicle within the state "shall be equivalent to an appointment" by him of a public officer as his attorney for service of process. Notice of service and a copy of process are to be sent to the defendant by registered mail, etc. Continuances may be ordered to afford the defendant reasonable opportunity to defend his action.

Soon after the enactment of this statute one Hess, a resident of Pennsylvania, while driving through Massachusetts struck and injured one Pawloski, a resident of Massachusetts. Service was made as provided by the statute. The constitutionality of the statute was assailed on the ground that it purported to subject a nonresident to local jurisdiction without personal service, which was expressly prohibited by *Pennoyer v. Neff*. The court held the statute valid,¹⁰ noting little difference in constitutional aspects from the New Jersey statute considered in *Kane v. State* where express, written appointment was required, and the Massachusetts statute then under consideration. The court mentioned that the statute is "plainly enacted in the exercise of the police power," but relies mainly upon the theory that the nonresident, by operating his automobile within the state, constructively consented to the mode of service prescribed. "The case at bar rests upon the implied consent of the defendant, arising from the facts already stated. That principle, as a basis for jurisdiction, is recognized in *Pennoyer v. Neff*, 95 U. S. at page 735, 24 L. Ed. 573." The case was later affirmed by the Supreme Judicial Court of Massachusetts,¹¹ and by the Supreme Court of the United States in May, 1927.¹²

These decisions in thus sustaining a new and broader conception of jurisdiction undoubtedly are of considerable significance and probably have influenced legislatures in the enactment of laws governing nonresident motorist cases. Statutes substantially like the Massachusetts one are found at the present time in Wisconsin,¹³ Connecticut,¹⁴ New Hampshire,¹⁵ New York,¹⁶ and it is the present form of the New Jersey statute.¹⁷ The statutes of each of these states differ somewhat in the requirement as to the giving of notice to the defendant, although the New Jersey statute has no provision for this. How this affects the matter will appear later.

The constitutionality of the Wisconsin statute was challenged

¹⁰ *Pawloski v. Hess* (1924), 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945.

¹¹ *Pawloski v. Hess* (1925), 253 Mass. 478, 149 N. E. 122.

¹² *Hess v. Pawloski* (1927), 274 U. S. 352, 71 L. Ed. 1091, 47 S. Ct. 632.

¹³ Wis. St. 1927, Sec. 85.15, Subs. 3.

¹⁴ Conn. Laws 1925, Chap. 122.

¹⁵ N. H. Laws 1926, Chap. 100, Secs. 32-5.

¹⁶ By Amendment to Highway Law, known as Sec. 285a (1928).

¹⁷ N. J. P. L. 1924, Chap. 232.

in *State ex rel. Cronkhite v. Belden*.¹⁸ Here the defendant, a resident of Chicago, had collided with the Wisconsin plaintiffs in their state, and service was had upon him in compliance with the statute. The defendant relied upon *Pennoyer v. Neff* and *Flechner v. Farson*.¹⁹ Because of the importance of this last case, in that it seems to be an obstacle to the securing of jurisdiction over nonresidents, it is well to leave the Wisconsin case temporarily and examine its facts and decision.

In *Flechner v. Farson*, personal judgment was rendered in Kentucky against two nonresident partners doing business in that state. Service of process was not made upon them personally, but upon an agent in charge of their business in Kentucky, in accordance with the terms of a statute permitting such service. The defendants defended upon the grounds that they did not themselves reside in Kentucky; that their agent, as a matter of fact, had ceased to represent them at the time of service upon him; that the statute was unconstitutional; and that therefore the Kentucky court had no jurisdiction and the judgment was void. On the part of the plaintiff it was argued that the defendants, by voluntarily coming within the borders of the state to do business, thereby consented to be bound by service made in accordance with the provisions of the Kentucky statute. The decision was for the defendants, the court reasoning substantially as follows: A state can regulate foreign corporations doing intrastate business, this power springing from the "fiction that the state could exclude foreign corporations altogether," and therefore can prescribe such reasonable conditions as it desires, among them being that it shall appoint a local agent for service of process. But a state cannot exclude individuals. (Article IV, Section 2, Constitution of the United States.) Hence, the state cannot impose as a condition to the doing of business within its borders the compulsory appointment of a local agent for service of process or declare that actual service upon the local agent conducting the business shall be equivalent to service on the nonresident, absent principals. The court does not rely upon the fact that the agency relationship had been in fact terminated at the time of the service, but apparently seems to think that jurisdiction is based upon the power to exclude, and that without such power it can have no basis of jurisdiction over the person. Is this a just conclusion?

Returning to *State v. Belden*,²⁰ we find it disposing of the case in these words:

"While *Flechner v. Farson* holds that implied consent is

¹⁸ (1927), 193 Wis. 145, 211 N. W. 916.

¹⁹ (1918), 248 U. S. 289, 63 L. Ed. 250, 39 S. Ct. 97.

²⁰ *Supra*, note 18.

based upon the power to exclude and that without such power the fiction of consent cannot be indulged, we cannot think it was intended by that decision to overrule another line of cases in which it was held that *power to regulate* may also be a basis of jurisdiction over a nonresident as held in *Kane v. New Jersey*. . . . The statute under consideration in *Flexner v. Farson* was not designated to regulate or affect the conduct of a nonresident. It made the mere presence of an agent in the state transacting business a basis of jurisdiction."

Flexner v. Farson is cited in subsequent cases as authority for the proposition that a statute cannot confer jurisdiction over the nonresident members of a partnership doing business within the state by authorizing service of process on their agent in charge of the business. The fact that the principals are not present themselves, but only by agent, seems to be the keynote. Now consider the wording of the present New Jersey nonresident motorist statute²¹ which begins: "From and after the passage of this act any chauffeur, operator or owner of any motor vehicle . . . who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle . . . shall . . . make and constitute the Secretary of State . . . agent for the acceptance of process. . . ." When the case arises, which has not as yet, where the owner of an automobile sends his chauffeur into a foreign state with a statute on the order of the New Jersey one, and the chauffeur there injures someone, and service is had upon the owner according to the statute, what will be the result? If it is held that jurisdiction is secured, it will be directly *contra* to *Flexner v. Farson*. Which will be correct? *Flexner v. Farson* has found considerable criticism among legal writers. It gives privileges and immunities to nonresident principals which were never intended by the Constitution. And because of the fact that the agency had in fact terminated in that case, there may be grounds for overruling the case when the time comes.²² A real basis of jurisdiction, however, can be inferred from this case which will be discussed in another connection.

²¹ *Supra*, note 17.

²² Austin W. Scott in "Jurisdiction Over Nonresidents Doing Business Within a State," 32 Harv. L. Rev. 786, at page 890:

"There is, however, a ground upon which *Flexner v. Farson* may be supported. The Kentucky statute provided for service upon an agent in charge of the business. The person served in *Flexner v. Farson* has ceased to be an agent at the time when process was served upon him. Service therefore was not in accordance with the terms of the statute, and hence was insufficient. . . . The decision is therefore reconcilable . . . and it is to

Before continuing with the nonresident motorist problem, it is well to pause a moment and consider the general nature of jurisdiction and what the cases up to this point would lead one to believe. "The foundation of jurisdiction is physical power. . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind."²³ This extension of the means of acquiring jurisdiction has been aptly called "one of the decencies of civilization."²⁴ But how far can these means be extended?

It is sometimes said that the possible bases of jurisdiction over a person are four: (1) the physical presence of the defendant within the state; (2) the domicile of the defendant within the state; (3) the allegiance of the defendant to the state, although not generally recognized within the states of the Union; and (4) the consent of the defendant. However, it is never asserted that these are the only bases, and often the cases are finding it necessary to resort to fiction in finding a "true" one.²⁵

Looking at the cases discussed above, *State v. Johnson*²⁶ and *Kane v. New Jersey*^{26a} can probably be placed in class four, but it is submitted that this is not the only basis of jurisdiction. *Pawloski v. Hess*²⁷ presents a harder problem. We do not know, but it is very unlikely that the defendant Hess consented in fact to the jurisdiction. He may not even have known of the statute. The court seems to rest its decision primarily upon "implied consent," but is not this but fiction if the defendant did not consent in fact? Surely jurisdiction, which goes to the very heart of every lawsuit, should not rest on such a flimsy foundation. Denying consent, can the basis be presence? Probably a state could hold the nonresident until it has determined whether he was involved in any accidents or not, but obviously this is not practicable nor consistent with the "decencies of civilization." Classes two and three of the bases of jurisdiction above mentioned are clearly inapplicable. What have we then, unless we resort to fiction?

be hoped that the Supreme Court of the United States will not feel that it is precluded by the decision from holding that a state may validly provide for service of process upon nonresidents doing business within the state, by service upon an agent, in actions arising in the state out of the business carried on within the state."

²³ Justice Holmes in *McDonald v. Mabee* (1917), 243 U. S. 90, 61 L. Ed. 608, 37 S. Ct. 343, L. R. A. 1917F 458.

²⁴ Justice Holmes in *Michigan Trust Co. v. Ferry* (1913), 228 U. S. 346, 57 L. Ed. 867, 33 S. Ct. 550.

²⁵ See Austin W. Scott, *Jurisdiction Over Nonresident Motorists*, 39 Harv. L. Rev. 563.

²⁶ *Supra*, note 5.

^{26a} *Supra*, notes 6 and 7.

²⁷ *Supra*, notes 10, 11 and 12.

In this dilemma, it is appropriate to examine the reasoning in the Wisconsin case, *State v. Belden*.²⁸ The court declares that although the decision in *Pawloski v. Hess* rests upon "implied consent," that it thinks that it may be supported on another theory. It argues by analogy to the foreign corporation cases, first quoting from *Smolick v. Philadelphia Coal & Iron Co.*²⁹ Here Judge Learned Hand, in speaking of "implied consent" by a foreign corporation, said:

"When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is no equivalent to consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, *imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.*"

*International Harvester Co. v. Kentucky*³⁰ is also relied upon. Here it was held that a foreign corporation doing a strictly interstate business which could not for that reason be prohibited from coming into the state, nevertheless by the transaction of such interstate business was doing business within the state and was therefore subject to the jurisdiction of the state.

The Wisconsin court then declares that foreign motorists are entitled to no greater constitutional protection. It sums up the point poignantly in these words:

"The power to prohibit is not the sole basis of jurisdiction. *Power to regulate is a basis of jurisdiction of equal dignity*, and if as an incidental to the exercise of that power the licensing state requires the foreign motorists to submit himself to the jurisdiction of the state and provides for service upon him in a manner reasonably calculated to bring home to him notice of the pendency of the suit, the regulation is reasonable and valid."

In other words, it may be said that a state in the exercise of its police power can regulate conduct within its territorial limits and acts in contravention thereof furnish *per se* a basis of ju-

²⁸ *Supra*, note 18.

²⁹ (1915), 222 Fed. 148.

³⁰ (1913), 234 U. S. 579, 58 L. Ed. 1479, 34 S. Ct. 944.

risdiction. Of course, it is a rule that the police power must be exercised reasonably and that due process requirements be satisfied. This is treated later. But have we not here a basis of jurisdiction for *Fleener v. Farson*? The "privileges and immunities" clause of the Federal Constitution was never intended to exclude nonresidents doing business within a foreign state from that state's exercise of its general police power.³¹

Professor Goodrich, in his *Hornbook on CONFLICT OF LAWS*, commenting upon *Pawloski v. Hess*, says:³²

"It is not accurate to speak of this jurisdiction as based on consent. It may be doubtful if the out of the state visitor even knows of the provision, much less consents to it. It must be said that when one does acts (at least some kinds of acts) in a state, it lies within the power of that state to make him amenable to its courts in litigation arising from those acts."

Austin W. Scott gives this excellent explanation of the foreign corporation cases, which it is submitted applies equally well to the nonresident motorist cases:

"A state may then in the exercise of its police power impose reasonable conditions upon nonresidents wishing to do acts within the state. The mere fact that the state may not prevent the doing of such acts does not preclude it from imposing such conditions. The police power is not confined to regulations of public health, moral safety, and the like. It affects economic as well as social conditions. . . . The conditions, to be sure, must be such as fairly fall within the proper scope of the police power, and such as do not violate any rights guaranteed by the Federal Constitution."^{32a}

In the Restatement of the Law of Conflicts too, there is a fifth basis of jurisdiction recognized. Section 82 as proposed reads:

"The exercise of jurisdiction by a state through its courts over an individual may be based upon any one of the following facts:

- (a) He is personally present within the state;
- (b) He has his domicile within the state;

³¹ Professor Beale in the Restatement of Conflict of Laws offers the following proposition as Section 91: "A partnership or other unincorporated association by doing business in a state in which the partnership or association may be sued as a legal person subjects itself to the jurisdiction of the state as to causes of action arising out of the business."

³² Goodrich, *HANDBOOK ON CONFLICT OF LAWS*, p. 143.

^{32a} 32 Harv. L. Rev. 886.

- (c) He is a citizen or subject owing allegiance to the state;
- (d) He has consented to the exercise of jurisdiction;
- (e) He has by acts done or caused to be done by him within the state subjected himself to the jurisdiction."

Section 89 is an expansion of the last enumerated basis. It reads:

"Except as limited in Section 90, a state may exercise through its courts jurisdiction over an individual who has done or caused to be done acts within the state, as to causes of action arising out of such acts, if by the law of the state at the time the acts were done a person by doing the acts or causing them to be done subjects himself to the jurisdiction of the state as to such causes of action."

This principle, as Section 90³³ states, is limited in the United States by provisions in our Constitution.

It is worth while noticing that Section 89 makes no distinction between partners or individuals, between personal or representative conduct. Therefore, there seems to be no reason why this rule could not govern *Flexner v. Farson*. Professor Beale in charge of this Restatement so believes.³⁴

Of course, regarding this rule it should be pointed out that the doing of acts within a jurisdiction may be a basis of jurisdiction,

³³ Section 90: If a state of the United States cannot, without violating some constitutional limitation, make the doing of certain kinds of acts within the state illegal unless and until the person doing the acts or causing them to be done has consented to the jurisdiction of the courts of the state as to causes of action arising out of such acts, the state cannot validly provide that the doing of the acts shall subject him to the jurisdiction of the courts of the state.

³⁴ This comment is found under Section 90: It is believed that it is reasonable and expedient that a state should have power to forbid a nonresident to engage in business within the state unless he has consented to the exercise of jurisdiction by the courts of the state as to causes of action arising out of the business, although under the provisions of Article IV, Section 2 to the Constitution of the United States, a state cannot absolutely forbid citizens of other states to do business within the state. From the language used in *Flexner v. Farson* . . . it might be gathered that the state cannot under the Constitution exercise even this qualified power of exclusion. But this view is inconsistent with decisions of the Supreme Court to the effect that a foreign corporation can be forced to submit to the jurisdiction of the courts of a state if it seeks to do business within the state even though the corporation seeks to engage only in interstate commerce and cannot therefore be excluded from the state. *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). This view is also inconsistent with a decision . . . *Kane v. New Jersey*, 242 U. S. 160 (1916).

cannot apply in all cases—for instance, the making of a contract within a state is the doing of an act, but obviously this should not be the basis of jurisdiction over a nonresident party to the contract, and a statute providing that would be void. This would not be within the police power. On the other hand, a state may make illegal the doing of acts which endanger the public safety, such as the driving of automobiles, unless the person doing the acts first consents to the exercise of local jurisdiction for causes of action arising therefrom. Can a state make it illegal for a nonresident to engage in business unless he has consented to local jurisdiction and pass a statute declaring that the doing of business within the state shall subject the nonresidents to its courts, etc.? Certainly these acts can endanger the public welfare, morals, safety, although perhaps not as directly as in the case of nonresident motorists. But as has appeared before, there is strong authority supporting this proposition.

In concluding the treatment of the jurisdictional aspects, it appears that it is possible for a state in some cases to exercise jurisdiction over a person not served with process within the state, not domiciled therein, and not actually consenting to the exercise of jurisdiction by that state. More specifically, it seems that a state may subject to the jurisdiction of its courts a nonresident motorist who has operated an automobile within its borders, causing injury or damage to a local citizen. It is submitted that the real basis of jurisdiction in such cases lies in the power of a state as a sovereign body to declare that when one does certain kinds of acts within its borders, for controversies arising as a consequence, its courts shall have jurisdiction. Of course, as noted before, this principle is limited by the fact that constitutional limitations must be observed. This leads us to our second problem.

B. DUE PROCESS REQUIREMENTS

Equally important with the fact that a court must have jurisdiction over the defendant in order to render a valid decree is the fact that the due process requirements of notice and an opportunity to be heard be given to the defendant. A case decided quite recently in the United States Supreme Court,³⁵ holding the present New Jersey statute unconstitutional as being in contravention of the fourteenth amendment to the Federal Constitution, will undoubtedly make legislatures more cautious in enacting similar statutes.

It is worth while to investigate the statutes in the cases discussed above, as they will tend to shed some light upon what due

³⁵ *Wuchter v. Pizzutti*, (1928), 72 L. Ed. 313, 48 S. Ct. 259.

process actually requires. Only the portions relating to notice and opportunity to be heard will be quoted.

The New Jersey statute involved in *Cleary v. Johnson* and *Kane v. State* provided:

“ . . . Said commissioner of motor vehicles shall forthwith notify such owner of such service by letter directed to him at the postoffice address stated in his application.”

The Massachusetts statute in *Pawloski v. Hess* provided:

“ . . . Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.”

The Wisconsin statute provides:

“ . . . Provided, that notice of such service and a copy of the process are within ten days thereafter sent by mail by the plaintiff to the defendant, at his last known address, and that the plaintiff's affidavit of compliance herewith is appended to the summons. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action, not exceeding ninety days from the date of the filing of the action in such court.”

It will be remembered that the constitutionality of these statutes was upheld.

The present New York statute, which just became effective on July 1 of this year, provides:

“ . . . Service of such summons shall be made by leaving a copy thereof, with a fee of two dollars, with the Secretary of State, or in his office, and such service shall be sufficient service upon such nonresident provided that notice of such service and a copy of the summons are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt, the plaintiff's affidavit of compliance herewith, and a copy of the summons and complaint are filed with the Clerk of the Court in which the action is pending. The Court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action.”

This is followed by a section which is unique. For the pro-

tection of nonresidents against nuisance suits, it provides that the plaintiff shall give security to the defendant in the sum of \$250 for the payment of costs and that the attorney for the plaintiff shall be liable to the defendant for the costs up to \$100 unless and until the security is furnished. Such a provision is obviously valuable.

One cannot help but be impressed with the safeguards that are provided in these statutes. The provision for notice seems amply safe. In those statutes in which the burden is placed upon the plaintiff to mail notice to the defendant, there is the requirement that the defendant's return receipt and plaintiff's affidavit of compliance be filed along with the pleadings of the case. And as one case pointed out, the plaintiff in investigating to see whether the defendant is financially responsible and whether a suit will be worth while, must necessarily learn the correct address of the defendant. The former New Jersey statute had an effective means of securing the defendant's address in requiring that he furnish the same on entering the state. The Wisconsin statute was judicially construed in *State v. Welden* in these words:

"The law as enacted is calculated to give the defendant adequate notice of the pendency of the proceeding. We know of nothing more likely to apprise the defendant of the pendency of the action than the mailing of a copy of the summons and complaint to his last known address. This must mean not his last known address known to the plaintiff, but plaintiff is required to ascertain *at his peril* the last known address of the defendant as a matter of fact, and his failure to do so will amount to a failure to comply with the statute and render the service invalid."

This does not seem too harsh, because unless the notice is sent to the defendant's actual address, we find an evasion of the law. The New York provision for the giving of security is undoubtedly an excellent safeguard in this regard.

With the foregoing in mind, let us examine the New Jersey statute as the United States Supreme Court found it in February, 1928, in the case of *Wuchter v. Pizzutti*.³⁶ The only section respecting service is as follows:

"From and after the passage of this act any chauffeur, operator or owner of any motor vehicle . . . shall . . . by the operation of such automobile within the state of New Jersey, make and constitute the Secretary of State . . . agent for the acceptance of process in any civil suit . . . in which . . . such motor vehicle is involved."

³⁶ *Supra*, note 35.

No provision is made for giving notice to the defendant. Hence the question was presented to the court of "whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the nonresident defendant who is sued." And Chief Justice Taft, delivering the opinion of the court, held that such a provision was necessary, saying that "the enforced acceptance of the service of process on a state officer by the defendant *would not be fair or due process* unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice."

The whole decision of the court is very instructive on the matter of due process, and one or two passages deserve quoting. After saying that there would not be due process unless some actual notice is received or it is made reasonably probable that notice will be received, the Court continues:

"Otherwise, where the service of summons is limited to a service of the Secretary of State or some officer of the state, without more, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service upon the state official obtain a default judgment against a nonresident who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law."

The Massachusetts statute and former New Jersey statute are commented upon also:

"The Massachusetts statute considered in *Hess v. Pawloski* really made necessary actual personal service to be evidenced by the written admission of the defendant. In *Kane v. New Jersey*, the service provided for by statute was by mail to the necessarily known registered address of the licensed defendant."

And in regard to the proper form of a statute, the court says:

"Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the postoffice address or residence of the defendant being sued, and should impose either on the plaintiff him-

self or upon the official receiving service or some other, the duty of communication with the defendant."³⁷

In conclusion, one may venture to say that if a state in the Union will enact a statute reasonably calculated to give the defendant knowledge of the action and an opportunity to be heard, it will be safely within the constitutional limitations. However, the possibilities are far from being exhausted, and we can await with interest new developments in this field, such as for instance what will be decided when a chauffeur alone injures a person in a foreign state having a statute covering chauffeurs and agents as well as the owners of the motor vehicles.

D. A. MACPHERSON, JR., '29.

³⁷ Although, according to the facts of the case, which were that a Pennsylvania defendant was sued by a New Jersey resident for damages caused by running into the plaintiff's wagon on a New Jersey highway, the defendant had actual notice by service out of New Jersey in Pennsylvania, yet such service was not directed by the statute, it was held not to supply constitutional validity to the statute or to the service under it.