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Conflict of Laws - Jurisdiction Over Nonresidents - Constructive Service in Tort Action Arising Outside the State

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furnish the rule most likely to prevent, in his words, the reduction of "the law of custody to a rule of seize-and-run."[12]

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CONFLICT OF LAWS—JURISDICTION OVER NONRESIDENTS—CONSTRUCTIVE SERVICE IN TORT ACTION ARISING OUTSIDE THE STATE

Suit in New York arose out of a death resulting from the crash of an airliner operated by defendant corporation. A New York statute provided that service of process could be made upon the Secretary of State as agent for nonresident owners of aircraft for the purposes of litigation arising out of accidents of any aircraft "which has landed at or departed from any airfield in this state."[1] The airliner was on a scheduled flight from New York to California and crashed in California. Defendant was served with process in New York in accordance with the statute. The application of the statute under these facts was challenged as a violation of due process. The lower court ruled that all the requirements were met.[2] On appeal, *held*, the statute was unconstitutional insofar as it was applied to accidents or collisions which occurred out of state, as the police power of the state may not be projected beyond its territorial boundaries. *Peters v. Robin Airlines*, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953).

The United States Supreme Court in 1878 in the landmark case of *Pennoyer v. Neff*[3] held that constructive service upon a nonresident defendant is ineffective to support a personal judgment. The court limited the decision by expressly excluding any opinion as to the right of states to require the appointment of agents for service of process by nonresidents "entering into a partnership or association within its limits" for actions arising out of such business.[4] Nevertheless, that case represents the high water mark in protecting nonresident defendants. The principles of *Pennoyer v. Neff* have by necessity undergone modifications.

It has long been well settled that nonresident corporations doing business within a state are subject to the jurisdiction of its

12. 345 U.S. 528, 542 (1953).
1. N.Y. GENERAL BUSINESS LAW § 250 (Cum. Supp. 1952).
2. Peters v. Robin Airlines, 118 N.Y.S.2d 238 (Sup. Ct. 1952).
3. 95 U.S. 714 (1878).
4. *Id.* at 735.

courts.[5] The reasoning employed was that since a state could exclude corporations from entering the state, it could impose conditions on their doing business.[6] But this reasoning could not be applied to individuals because of the "privileges and immunities" clause of the Federal Constitution. Hence, in 1918 in the case of *Flexner v. Farson*,[7] the United States Supreme Court held that the mere doing of business in the state by a nonresident individual could not be held to imply consent to service of process. In reply to the constitutional obstacle of "privileges and immunities," the states have retaliated with the equally powerful tool of "police power." In *Doherty & Co. v. Goodman*[8] the Supreme Court found a reasonable exercise of police power in a state statute making the conduct of the business of selling securities the basis of jurisdiction. However, since all sales of securities in the state were subjected to special regulations, the case is not authority for saying that the carrying on of an ordinary business by an individual may be the basis of jurisdiction. While the rule of the *Flexner* case has not been squarely presented to the Supreme Court for reconsideration, state courts have upheld statutes which provide that a nonresident individual doing business within the state need not be served personally, but could be served through his agent even if the latter was not specifically appointed to receive process.[9]

In Supreme Court cases prior to *Doherty & Co. v. Goodman*[10] the proposition that the police power of the state to regulate dangerous acts includes the power to require submission by the actor to its jurisdiction had included only acts which were *physically* dangerous to citizens of the state. In *Hess v. Pawloski*[11] the Supreme Court upheld a statute which permitted service of process on a nonresident by service on the Secretary of State for any cause of action arising out of an automobile accident within

5. People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917); St. Louis S.W.R.R. v. Alexander, 227 U.S. 218 (1913); Lafayette Ins. Co. v. French, Strong and Fine, 18 How. 404 (U.S. 1856).

6. See cases cited note 5 *supra*.

7. 248 U.S. 289 (1919).

8. 294 U.S. 623 (1935).

9. See, *e.g.*, Wein v. Crockett, 195 P.2d 222 (Utah 1948).

10. 294 U.S. 623 (1935).

11. 274 U.S. 352 (1927). In Louisiana, LA. R.S. § 13:3474 *et seq.* (1950) permits suit against a nonresident by service on the Secretary of State for causes arising out of automobile accidents within the state in which the nonresident is involved. The constitutionality of the statute was upheld in Moore v. Payne, 35 F.2d 232 (W.D. La. 1929). See also Roper v. Brooks, 201 La. 135, 9 So.2d 485 (1942); Galloway v. Wyatt Metal & Boiler Works, 189 La. 837, 181 So. 187 (1938); Note, 1 LOUISIANA LAW REVIEW 451 (1939).

the state. The *Doherty* case extended such rules to include activities endangering *economic* interests of the public.[12] A valid argument could be made that every business subjects the public to economic dangers. The constitutional limits on police power of the state in this area seem indefinite, to say the least.

As stated earlier, where nonresident corporations are concerned, the authority of the state to impose conditions on the "doing of business" is well established.[13] It is thus understandable that the meaning of "doing business" as that phrase is used in nonresident corporation statutes has troubled the courts for many years.[14] However, the speculation about its meaning was reduced by the Supreme Court's decision in *International Shoe Co. v. Washington.*[15] In that case, the court introduced new criteria for determining what activity by a corporation within a state subjects it to the jurisdiction of the courts of that state through the medium of substituted service. Instead of a showing that a corporation was "doing business" within a state, under the holding of the *International Shoe Co.* case, the demands of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable" for a state court to take jurisdiction.

In the cases discussed above, the causes of action arose in the state of the forum. For actions arising without the state, new complications arise. In 1907 in the case of *Old Wayne Mutual Life Association v. McDonough*[16] the Supreme Court held that a state statute providing for substituted service on foreign corporations was not applicable in causes of action arising outside the state. This apparently sweeping rule was later restricted to cases in which service is made on a public official; suit was permitted on out of state causes where service was made on an appointed agent.[17]

The recent case of *Perkins v. Benquet Consol. Mining Co.*[18] involved a suit on a cause of action arising outside the state of Ohio, where suit was brought. The defendant corporation was a "sociedad anonima" incorporated under the laws of the Philip-

12. *Cf., e.g.*, Recent Cases, 48 HARV. L. REV. 1433 (1935).
13. See cases cited note 5 *supra.*
14. Isaacs, *An Analysis of Doing Business*, 25 COL. L. REV. 1018 (1925).
15. 326 U.S. 310 (1945).
16. 204 U.S. 8 (1907).
17. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).
18. 342 U.S. 437 (1952).

pine Islands, owning gold and silver mines there. During the Japanese occupation of the Philippines the president of the corporation returned to his home in Ohio, where "he maintained an office in which he conducted his own affairs and did many things on behalf of the company," which are enumerated in the opinion.[19] The United States Supreme Court found that the Ohio courts could in this case, without violating federal due process, exercise or decline jurisdiction over the foreign corporation since personal service had been made on its president. There being personal service upon an officer of the corporation, the Court specifically distinguished the holding of the *Old Wayne* case, where service had been made upon a public official without actual notice having been received by a responsible representative of the foreign corporation.[20]

It is interesting to note that the Supreme Court has not had occasion to rule on a case involving an out-of-state cause of action where substituted service is made under a so-called "dangerous activity" type of statute. The cases discussed above involved statutes which depend upon the "doing business" theory or the modification of that theory under the *International Shoe Co.* doctrine. The lower court in the instant case applied the *International Shoe Co.* rule, holding that the requirements set forth in that case were met by the statute requiring sufficient contacts by the defendant within the state, to-wit, landing or taking off of its airplanes.[21] The Appellate Division reversed this decision, reasoning that the statute was a police power measure and not a "doing business" statute (requiring sufficient contacts within the state) and hence the court did not even refer to the *International Shoe Co.* doctrine. It is submitted, however, that had the service of process been made under a nonresident "doing business" or "sufficient contact" type of statute, the upholding of the lower court's decision would be inconsistent with the rule of the *Old Wayne* case because service had been made upon a public official and not upon an appointed agent or officer of the corporation.

In examining the problem of judicial jurisdiction historically since *Pennoyer v. Neff*,[22] it is clear that the trends have been away from the extreme position taken in that case and toward

19. *Id.* at 448.
20. *Id.* at 443-4.
21. 118 N.Y.S.2d 238 (1952).
22. See note 3 *supra.*

abolition of technical rules which give an undue advantage to nonresident defendants.[23] The plaintiff is being relieved of some of the inconveniences entailed by rules designed when business methods and transportation facilities were very different from what they are today. The decision in the *International Shoe Co.* case emphasizes the *reasonableness* test in determining whether a defendant is in fact being dealt with fairly. While it is submitted that the instant case was decided properly under present concepts of jurisdictional requirements, if we pursue the reasonableness notion, the case seems to indicate that these concepts are still in need of modification. Assuming proper notice and sufficient time to defend, could a valid argument be made that it would be unreasonable or unfair to require the defendant airline corporation to submit to suit in New York where it conducted business, where the plaintiff boarded the plane, and where he was domiciled? Is it realistic to place so much significance on the actual place of the injury? The problem when viewed in its entirety presents two sets of competing interests: first, those of the nonresident defendant who, because he had dealings outside his home state, may be put to great inconveniences in defending a suit there since even if the plaintiff has no cause for instituting action, still a defense must be made; second, those of the plaintiff who may be deprived of a real opportunity to enforce his rights if he is forced to bring his suit in a distant jurisdiction.[24] What difference should it make that the injury occurred in another state? Whether the problem be approached by defining the limits of police power or by determining what constitutes the doing of business, it would seem that principles of reasonableness and fairness should be paramount to technical niceties, many of which may be obsolete. Where the line should be drawn in balancing the inconveniences between plaintiffs and nonresident defendants is a question of great importance which should be dealt with by legislation or jurisprudence in the light of modern business and commercial trends.

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23. Note, *Conflict of Laws—Apparent Trends in Jurisdiction*, 34 KY. L.J. 139 (1945).

24. For an excellent discussion of the dual trend in jurisdictional decisions, see Note, *The Growth of the* International Shoe *Doctrine*, 16 U. OF CHI. L. REV. 523, 536 (1949).