Volume 34 | Issue 3 Article 6

April 1928

Conflict of Laws--Jurisdiction Over Nonresident Motorists

Edmund C. Dickinson
West Virginia University College of Law

EDITORIAL NOTES

CONFLICT OF LAWS—JURISDICTION OVER NONRESIDENT MOTORISTS.—A few months ago the Supreme Court of the United States in deciding the case of *Hess* v. *Pawloski*[1] upheld the constitutionality of the Massachusetts statute[2] which subjects to the jurisdiction of its courts a nonresident who is not served with process within the state but who has operated an automobile within the state. Quite recently the case of *Pizzutti* v. *Wuchter*, involving the constitutionality of a similar New Jersey statute,[3] was argued before the Supreme Court. These cases, with the numerous comments thereon in newspapers and legal periodicals,[4] have directed attention to the efforts on the part of some of our states to provide measures for fixing upon nonresident motorists financial liability for injuries caused by them[5] and convenient methods of enforcing such liability in the courts.

That the upholding of the Massachusetts law has met with almost universal approval is not surprising. To the laymen, certainly, the result seems eminently desirable. The wide use of the automobile, with the rapidly mounting number of accidents, make imperative adequate measures of control. To require one who has suffered an injury to person or property at the hands of a nonresident motorist to follow him to his own state in order to bring suit often means, practically, the denial of a remedy. To the argument that such a law works too great a hardship upon a nonresident because it requires him to come to a foreign state to defend an action which may be without merit, Judge Katzenbach of the Court of Errors and Appeals of New Jersey replies:[6] "This argument is easily answered by saying that the burden upon the nonresident is no greater than upon the citizen of a state who has suffered an injury or damage within the state of his domicile at the hands of a nonresident automobile owner or operator and who may

[1] 274 U. S. 352 (1927).
[2] MASS. GEN. LAWS (1921) c. 90 as amended by Mass. Stat. (1923) c. 431, §2.
[3] 1924 N. J. LAWS, c. 232.
[4] 76 U. OF PA. L. REV. 93; 41 HARV. L. REV. 94; 26 MICH. L. REV. 212. Meleski, "The Case of Hess v. Pawloski," 7 BOSTON U. L. REV. 243.
[5] Statute compelling owners of motor cars to provide security for possible liability for injuries to persons or property by a bond or by insurance, held constitutional. Packard v. Banton, 264 U. S. 140 (1924).
[6] In Pizzutti v. Wuchter, 134 Atl. 727 (N. J. 1926).

be obliged to go to a foreign state, as, for example, California, to institute his suit for damages for an accident which arose through the courtesy of his state in extending to a nonresident the use of the highways. Such laws as the one under consideration seem but the reasonable exercise of the rights of a state for the protection of its own citizens. If nonresidents feel the law harsh they can easily avoid its operation, so far as they are concerned, by refraining from operating their automobiles within the territorial limits of the states which have enacted such laws."

It is not unlikely that the decision of the Supreme Court of the United States sustaining the Massachusetts law will give a new impetus to legislation of this character. Statutes similar to that of Massachusetts have been enacted already in Connecticut,[7] New Hampshire,[8] New Jersey,[9] and Wisconsin.[10] The constitutionality of the Wisconsin statute has been upheld by the Supreme Court of Wisconsin in the case of *State* v. *Belden*[11] and a like result has been reached as to its statute by the Supreme Court of New Jersey.[12] With the question of its constitutionality apparently settled, many more states, it would seem, will avail themselves of the benefits of such a law. The opening of improved highways across our own state, with a resulting increase in the number of nonresident motorists within our borders, brings us face to face with the problem of protecting persons and property within the state from injury by these nonresidents. A statute of the kind under discussion would go far toward affording this protection.

The Massachusetts statute, which is typical of all such legislation and which, because its constitutionality has been settled, will likely be generally copied, is as follows:[13]

> "The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by

---

[7] 1925 CONN. PUB. ACTS, c. 122.
[8] 1925 N. H. PUB. ACTS, c. 106.
[9] 1924 N. J. LAWS, c. 232.
[10] 1925 WIS. LAWS, c. 94.
[11] 211 N. W. 916 (Wis. 1927).
[12] *Supra*, n. 6.
[13] *Supra*, n. 2.

such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; 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."

To the lawyer, the decision in the case of *Hess* v. *Pawloski*[14] has a significance not apparent to the layman. The constitutionality of statutes subjecting nonresidents operating automobiles within the state to the jurisdiction of the courts of the state has been attacked on the ground that they violate those provisions of the Fourteenth Amendment forbidding the states to deprive any person of life, liberty or property without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws. The alleged deprivation of due process is the exercise of jurisdiction over a nonresident defendant who is not personally served within the state, who is not domiciled within, nor a citizen of, the state and who has not consented to the exercise of jurisdiction. Two answers have been made by the courts to this charge of lack of jurisdiction; (1) that a motorist driving within a state having such a law, impliedly consents to the jurisdiction of its courts;[15] (2) that "it is within the power of a state to provide by law that the doing of such acts by a nonresident as the state can prohibit shall subject the nonresident doing them to the

[14] *Supra*, n. 1.
[15] Pawloski v. Hess, 253 Mass. 478, 149 N. E. 122 (1925).

jurisdiction of our courts as to such actions as arise within the territorial limits of the state."[16]

The right of a state to forbid a nonresident to operate an automobile within the state unless he first 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 was upheld by the Supreme Court of the United States in *Kane* v. *New Jersey*.[17] A New Jersey statute forbade the driving of an automobile upon a public highway of the state unless the automobile was registered under the statute; and provided that a nonresident should appoint the Secretary of State his attorney upon whom process might be served "in any action or legal proceeding caused by the operation of his registered motor vehicle, within this state, against such owner." Kane, a resident of New York, on his way from New York to Pennsylvania, was arrested while driving in New Jersey. He claimed that the statute was unconstitutional because it violated the Fourteenth Amendment and also the provision of the constitution regulating interstate commerce. The conviction was affirmed in the state courts[18] and in the Supreme Court of the United States,[19] Justice Brandeis saying:[20] "We know that 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 that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

To avoid the inconvenience resulting from requiring the nonresident to stop at the state boundary and obtain permission to enter the state, the Massachusetts statute permits a nonresident to operate his automobile upon the

[16] *Supra*, n. 6.
[17] 242 U. S. 160, 37 S. Ct. 80 (1916).
[18] Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453 (1911).
[19] *Supra*, n. 17.
[20] 242 U. S. at 167.

highways, but declares that by so doing he subjects himself to the jurisdiction of the courts of the state. May a state thus subject him to the jurisdiction of its courts in such actions although he has not expressly consented to the exercise of jurisdiction? The Supreme Court of Massachusetts answered this question in the affirmative in the case of *Hess* v. *Pawloski*[21] and its decision was affirmed by the Supreme Court of the United States.[22] Whether the latter court bases jurisdiction under the statute on implied consent or whether it rests it upon the power of reasonable regulation is not clear. This is apparent from a reading of the court's own language:[23]

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 561-562. The State's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick* v. *Maryland*, 235 U. S. 610, 622. And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane* v. *New Jersey*, 242 U. S. 160, 167. That case recognizes power of the State to exclude a non-resident until the formal appointment is made. And, having the power

[21] *Supra*, n. 15
[22] *Supra*, n. 1.
[23] 274 U. S. at 256.

so to exclude, the State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. Cf. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co., supra,* 96; *Lafayette Ins. Co.* v. *French,* 18 How. 404, 407-408. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment."

In an able article in the HARVARD LAW REVIEW[24] Professor Austin W. Scott has pointed out the undesirability of resting jurisdiction in such cases upon the theory of consent and argues that there is a basis of jurisdiction which may be stated as follows: "If a state may, without violating any constitutional limitation, forbid the doing of certain kinds of acts within the state unless and until the person doing the acts has consented to the jurisdiction of the courts of the state as to causes of action arising out of such acts, the state may validly provide that the doing of such acts shall subject him to the jurisdiction of the courts of the state as to such causes of action." This, Professor Scott believes, is the true basis upon which rests the exercise by a state of jurisdiction over foreign corporations doing business within the state. That jurisdiction is exercised over foreign corporations in the absence of real consent is admitted. Mr. Justice Holmes has said[25] "But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the states could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in."

That there is a basis other than consent for exercising jurisdiction over nonresidents is recognized by the Wisconsin[26] and New Jersey[27] courts in holding valid statutes similar to that of Massachusetts. These courts have definitely adopted the theory that the defendant has, by acting within the state, subjected himself to jurisdiction based on the power of reasonable regulation. In CONFLICT OF LAWS, RESTATEMENT No. 2, also, we find recognition of this basis of jurisdiction over an individual in the following words:[28]

[24] 39 HARV. L. REV. 563 (1926).
[25] 248 U. S. 289, 293 (1919).
[26] *Supra,* n. 11.
[27] *Supra,* n. 6.
[28] CONFLICT OF LAWS RESTATEMENT, No. 2 (Am. L. Inst. 1926) §89.

> "Except as limited in §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."

While this principle has not yet been generally accepted by our courts, it is apparently gaining favor. It is clear, however, that its application will be greatly limited by the Constitutional provisions placing limitations upon the power of the states to forbid the doing of acts within the states. If a state cannot absolutely forbid the doing of an act within the state, it cannot forbid the doing of such acts unless the person doing the acts or causing them to be done has consented to the jurisdiction of the courts of the state, even as to causes of action arising out of such acts.[29] The Restatement therefore provides:[30]

> "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."

This limitation is inapplicable to the nonresident motorist, for the state clearly has a right to make illegal the doing of acts which endanger the public safety unless the person doing the act first consents to the exercise of jurisdiction. This, the United States Supreme Court holds, is a reasonable exercise of the police power.[31] But are there not many other acts besides operating automobiles on the highways which may be made illegal under the police power unless the person doing the act first consents to jurisdiction? Service on nonresident motorists may be but the beginning of the exercise of jurisdiction over nonresidents in many more classes of cases.

An interesting local question is suggested by the follow-

[29] *Id.* "Comment" following §§89, 90.
[30] *Id.* 90.
[31] Kane *v.* New Jersey, *supra*, n. 17.

ing section of our own Code relative to service on carriers:[32]

> "In a case against any common carrier (other than a corporation) for any liability as such, it shall be sufficient to serve any process against or notice to the carrier, or any agent, or the driver, captain or conductor of any vehicle of such carrier, and to publish a copy of the process or notice as an order is published under the twelfth section of this chapter."

It is not likely that this form of service has been commonly resorted to, and the absence of annotation indicates that the question of constitutionality of the act has never been raised. Might it not be upheld on the basis of reasonable regulation? If the operating of the vehicles of the common carrier endangers public safety, then under the police power it can be regulated, and the state can provide that the doing of such acts shall subject it to the jurisdiction of the courts as to causes of action arising out of such acts. There would be a question, of course, as to whether such regulation was reasonable and whether the notice provided was sufficient. The operating of numerous auto bus lines into the state might make it desirable to resort to the form of service on nonresident common carriers, not incorporated, provided by this section, which might be upheld as a reasonable exercise of the police power.

—EDMUND C. DICKINSON.

[32] BARNES' W. VA. CODE ANN. 1923, c. 124 §9.

THE CHANGING LAW OF COMPETITION—REHABILITATION AFTER IMPEACHMENT BY CONTRADICTION.—When a witness has been impeached by testimonial contradiction, the courts do not always permit him to be rehabilitated by disproving the alleged error. But when, as in the principal case, one has been impeached by "editorial" contradiction, all the authorities, *including editorial writers*, are unanimous in favoring not only a right of rehabilitation but a "no right" of re-contradiction and a right of trial by battle in case of any attempt. Accordingly it is herein proposed to rehabilitate the policy against ruinous competition which was advocated by the writer in the last issue of this Quarterly[1] and

[1] Thomas P. Hardman, "The Changing Law of Competition in Public Service—Another Word," 34 W. VA. L. QUAR. 123 (1928).