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JURISDICTION-BASIS AND RANGE OF PROCESS-RECENT DEVELOPMENTS

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JURISDICTION—BASIS AND RANGE OF PROCESS—RECENT DEVELOPMENTS—Since *Pennoyer v. Neff*,[1] holding that mere notice was an insufficient basis for in personam jurisdiction, it has generally been held that an in personam judgment requires service, as distinguished from notice, on a defendant present or domiciled within the jurisdiction. With the increased tempo of interstate activities, however, it has become expedient to relax the concept of physical power as being the basis of jurisdiction, which prompted the *Pennoyer* decision. Presence has assumed a more elaborate meaning, while service has become more closely equated with adequate notice. Illustrative of this development is the recent decision of *Traveler's Health Assn. v. Virginia*,[2] where peculiar problems were presented relating to a state's ability to regulate activity carried on substantially beyond its borders, but seriously affecting those within its jurisdiction.

The case involved a Virginia Blue Sky[3] statute which required all those soliciting sales of insurance certificates to obtain permits from the State Corporation Commission. This entailed their consent to service through the Secretary of State for suits of Virginia claimants arising out of the certificates. For failure to obtain such permits, the commission was authorized to obtain an injunction ordering solicitors to cease and desist. Service for this proceeding was authorized by registered mail where the offering was done from beyond the state borders. The appellant was incorporated in Nebraska as a membership association in the mail order health insurance business, with its only office

[1] 95 U.S. 714 (1877).
[2] 339 U.S. 643, 70 S.Ct. 927 (1950).
[3] Va. Code (Michie, 1950) tit. 8, §13-128 et seq.

located in Omaha. It had solicited new members in Virginia since 1904 through the unpaid activities of its older members. For failing to obtain a permit, it was enjoined from further solicitation; it appealed, contending that jurisdiction for the order was lacking, with a consequent disregard of due process. The United States Supreme Court affirmed the order, holding that Virginia had sufficient power, consistent with notions of "fair play and substantial justice," to acquire jurisdiction in matters regarding solicitation. Moreover, service by registered mail to the nonresident defendant was constitutional.

In contending that the Virginia court did not have an adequate basis for jurisdiction, the appellant was primarily concerned with (1) lack of service on any agent within the state, and (2) insufficient business activity carried on by it in Virginia to constitute a basis on which the state's power could become operative. By refuting the arguments, the Court takes an important step in enlarging the range of in personam jurisdiction.

I. Basis of Jurisdiction and Range of Service

A. Range of Service

In regard to the contention of improper service, it is true that the Court has never before sustained service directly beyond the state's limits except in the case of domiciliaries. This exception can be traced, the Court at an early date having recognized the validity of substituted service upon a domiciliary at his residence within the state.[4] Then, in *McDonald v. Mabee*,[5] Justice Holmes declared that substituted service against a domiciliary would be supported if it were the most likely means of informing the defendant. The logical conclusion appeared in *Milliken v. Meyer*,[6] where personal delivery of service against a domiciliary outside the state was sustained, as "reasonably calculated to inform."

This development can be contrasted, however, with service upon non-domiciliaries engaged in activities within the state. The formula was developed in cases dealing with foreign corporations, where the Court was unwilling to find domicile of a foreign corporation through business activity within the state.[7] Jurisdiction was sustained consonant with

[4] Early dictum to this effect is found in Knowles v. Gaslight & Coke Co., 19 Wall. (86 U.S.) 58 (1873).

[5] 243 U.S. 90, 37 S.Ct. 343 (1917).

[6] 311 U.S. 457, 61 S.Ct. 339 (1940).

[7] This can be contrasted with the English view, finding domicile through business activity within the jurisdiction. See Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft Co., [1902] 1 K.B. 342.

Pennoyer v. Neff[8] through service on its appointed agent present within the state,[9] or an agent created by statute in default of this appointment.[10] The formula was extended to nonresident motorists,[11] and finally to nonresident individuals doing business within the state.[12] In each case, statutes requiring consent to service through a state agent were upheld on the basis of the state's power to regulate the activity concerned. "Presence," in the sense of some activity within state control, supported the state's power to require consent to service through a resident agent, rather than the state's power to serve an absent defendant directly.

While the Court has indicated in sustaining such service that the saving factor was the technical limitation on its operative effect to the state's boundaries,[13] recent decisions have indicated the Court's willingness to abandon this artificial restriction. In *International Shoe Co. v. Washington*, the Court said, "due process requires only that . . . if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[14] And in *Mullane v. Central Hanover Bank*,[15] the Court sustained jurisdiction over nonresidents without service within the state, as long as there was adequate notice, purposefully disregarding any distinction between in rem and in personam proceedings, insofar as it would be a possible limitation on the New York court's power in a suit to settle trust accounts. In the principal case, Justice Black, speaking for the majority, attaches no importance to the restriction requiring service through a resident agent, by declaring that what is said in finding an adequate basis for the state's power in the proceeding answered any contention of lack of due process. In effect, service is equated with adequate notice. Justice Minton in writing the dissent shows his con-

[8] 95 U.S. 714 (1877).

[9] Cases dealing with service on foreign corporations are Lafayette Ins. Co. v. French Strang and Fine, 18 How. 59 (U.S.) 404 (1855); Pa. Fire Ins. Co. of Phila v. Gold Issue Min. & Mill. Co., 243 U.S. 93, 37 S.Ct. 344 (1917). See also Smolik v. Phila. and Reading Coal and Iron Co., (D.C. N.Y. 1915) 222 F. 148.

[10] See State of Washington v. Superior Court, 289 U.S. 361, 53 S.Ct. 624 (1933).

[11] Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927).

[12] Doherty v. Goodman, 294 U.S. 623, 55 S.Ct. 553 (1935).

[13] See Hess v. Pawloski, 274 U.S. 352 at 355, 47 S.Ct. 632 (1927), where the Court said in supporting service against a nonresident through a state agent, "the process of a court of one state cannot run into another and summon a party there domiciled. . . . Notice sent outside the state . . . is unavailing. . . ." See also Goldey v. Morning News, 156 U.S. 518 at 521, 15 S.Ct. 559 (1895); New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 36 S.Ct. 613 (1916).

[14] 326 U.S. 310, 316, 66 S.Ct. 154 (1945).

[15] 339 U.S. 306, 70 S.Ct. 652 (1950).

cern, however, by holding that "service on an agent within the jurisdiction would seem to me indispensable to a judgment against a corporation."[16]

B. Basis of Judicial Power

As for the second contention, by holding that mere solicitation through the activities of unpaid members is sufficient to subject the appellant to a state's judicial power, the principal decision illustrates a further expansion in the Court's thinking. The case of *International Shoe Co. v. Washington*[17] was the foundation for the Court's decision. Previous authority was to the effect that solicitation in itself would be insufficient. This is illustrated by *Minnesota Assn. v. Benn*,[18] dealing with a Minnesota association, where unpaid solicitation by members in Montana was held to be insufficient basis for Montana jurisdiction in a suit to recover on the policy. Justice Black dismisses the *Benn* case as being decided on narrow grounds, a distinction not readily apparent unless the duration and scope of solicitation in the present case were held to be appreciably greater. Justice Douglas puts to one side the case where an individual wishes to bring suit and restrict the present decision to the issue of a state's power to enjoin solicitation. This distinction would not seem to be helpful, as is pointed out by the dissent, for the state is now enabled to accomplish by indirection what it formerly could not do directly. The intervening decision of *Hoopeston Canning Co. v. Cullen*[19] was also determinative, insofar as it found a basis for state control through considerations of business activity prior to actual contracting and the degree of state interest in the object to be insured. Of course, in the *Hoopeston* case, the Court had available other elements on which to base state control.[20] Finally, the majority was not swayed by the dissent's objections appreciating the distinguishing facts of the *International Shoe* case, which dealt with solicitation through regular activity of paid agents.

It is difficult to determine what the full effect of the principal decision will be. Several limitations are discernible. Justice Douglas' con-

[16] Principal case at 935.

[17] 326 U.S. 310, 66 S.Ct. 154 (1945).

[18] 261 U.S. 140, 43 S.Ct. 293 (1923). See also Green v. Chicago, Burlington, & Quincy Ry., 205 U.S. 530, 27 S.Ct. 595 (1907); People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233.

[19] 318 U.S. 313, 63 S.Ct. 602 (1943).

[20] The case deals with a state's power to condition the insuring of property within its boundaries by a foreign corporation, by requiring submission to regulations. The power to regulate was rested on business activity contemplated within the state subsequent to the insuring, as well as the initial solicitation.

cern with the nature of the state action, an injunctive procedure rather than a suit by a creditor, has already been mentioned. Justice Black takes cognizance of factors similarly used in the application of the doctrine of forum non conveniens, namely the availability of witnesses in Virginia as to possible claims, and the expense to policy holders of being required to bring suits on small claims in far off Nebraska. This is all the more interesting inasmuch as in his separate opinion supporting the *International Shoe* decision he expressly limited the applicability of notions of fair play, and rested his decision on the constitutional power of a state to afford judicial protection in the face of business activity within the state irrespective of such "emotional" appeals.[21] In addition, as was indicated in *Hess v. Pawloski*[22] and *Doherty v. Goodman*,[23] the state's power was in some measure conditioned on the subject matter's being peculiarly subject to the police power, here the security business. It cannot be said that the Court would not have found a basis were this characteristic deemed missing; yet it would seem to be required that the amount of activity within the state be proportionately greater as the state's concern with public welfare decreases.[24] In this case, protection against unscrupulous solicitation would otherwise be impossible.

II. *Further Developments*

At this point it is interesting to note a recent United States district court decision.[25] A Maryland statute[26] was involved, providing for service through a resident agent for corporations "doing business" within the state, or for "any cause of action arising out of contract made within this state or liability incurred for acts done within this state." Plaintiff brought suit against a foreign corporation in tort for personal

[21] International Shoe Co. v. Washington, 326 U.S. 310 at 325, 66 S.Ct. 154 (1945).

[22] Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927).

[23] Doherty v. Goodman, 294 U.S. 623, 55 S.Ct. 553 (1935).

[24] Of course, when dealing with jurisdiction over foreign corporations in the face of substantial activity, the additional factor of the state's power to condition the entry of such corporations, through the inapplicability of "privilege and immunity" protection which would be afforded individuals, supplants the necessity of having the subject matter within the purview of the state's police power. For a development of the various theories regarding jurisdiction, see Scott, "Jurisdiction Over Nonresidents Doing Business Within a State," 32 HARV. L. REV. 871 at 879 et seq. (1919); Culp, "Process in Actions Against Non-residents Doing Business Within a State," 32 MICH. L. REV. 909 at 919 (1934). It has been with unincorporated entities (Doherty v. Goodman, supra note 23; Hess v. Pawloski, supra note 22) or insubstantial activity within the state (International Shoe Co. v. Washington, supra note 21) that public interest in the subject matter has been a factor.

[25] Johns v. Bay State Abrasive Products Co., (D.C. Md. 1950) 89 F. Supp. 654.

[26] Md. Code Ann. (Flack 1947) art. 23, §111.

injuries resulting from defendant's misrepresentations as to the safety of the use of machinery manufactured by it. After holding that the defendant, through mere solicitation for business, could not be considered as falling within the statute as "doing business" within the state, the court upheld service under the second clause of the statute as being constitutional. The facts show that the only activity of the defendant in Maryland was the sending of the machine into the state, and the solicitation of a paid agent. Here no activity of general public concern is involved. In finding a basis for personal jurisdiction over the defendant, the court points out that solicitation lends support, although it does not constitute "doing business." The court is also concerned with the reasonableness of requiring the defendant to defend the suit in Maryland and the inconvenience which the plaintiff would otherwise be caused. The decision is commendable and points toward the position enjoyed by the English courts through statute,[27] giving a basis for personal jurisdiction for any rights arising out of tort or contract perpetrated within the jurisdiction. Professor Sunderland points out in "The Problem of Jurisdiction"[28] that there is nothing basically wrong with such a rule, while the Constitution as an original proposition would not seem to preclude this result.

Thomas Hartwell, S. Ed.

[27] Rule of the Annual Practice of the Supreme Court, order XI, r. 1. p. 87 (1934).
[28] 4 TEX. L. REV. 429 (1926).