Michigan Law Review

Volume 57 | Issue 2

1958

Civil Procedure - Jurisdiction - Service of Process on Foreign Television Corporation

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RECENT DECISIONS

CIVIL PROCEDURE—JURISDICTION—SERVICE OF PROCESS ON FOREIGN TELEVISION CORPORATION—Defendant, a West Virginia corporation, operated a television station in Huntington, West Virginia. Its telecasts regularly reached into Boyd County, Kentucky, where part of its customary viewing audience was located. During a twelve-month period in 1954-1955 the corporation derived $71,310.30 in advertising revenue from Kentucky firms, although the contracts for this advertising were made outside Kentucky. In the course of a newscast defendant published an alleged libel against plaintiff, and suit was brought in Boyd County Court. Substituted service of process was made on the Secretary of State in accordance with the Kentucky "doing business" statute,[1] and defendant then removed the action to the federal district court. That court, in finding for the plaintiff, held that it had proper diversity jurisdiction since the Boyd County Court had obtained valid personal jurisdiction over the defendant. On appeal, limited to the jurisdictional question, *held,* affirmed. The substituted service of process on defendant was authorized by the Kentucky statute and was consistent with the due process clause of the Fourteenth Amendment. *WSAZ, Inc. v. Lyons,* (6th Cir. 1958) 254 F. (2d) 242.

Two jurisdictional problems are raised by the principal case. First, does the statute of the forum authorize the assertion of jurisdiction over the defendant, and second, does the statute as applied to defendant violate the due process clause of the Fourteenth Amendment? The two are separate, though often confused, questions.[2] With regard to the statutory interpretation problem, it is clear that the statute allows a method of personal service not authorized by common law.[3] This type statute represents a typical effort by the states to expand jurisdiction in personal actions, particularly over foreign corporations.[4] What constitutes "doing business" is the difficult statutory question. In the principal case the court relied heavily upon *International Shoe Co. v. Washington* in defining the "doing

[1] Ky. Rev. Stat. (1953) §271.610(2): "Any foreign corporation that does business in this state without having complied with the provisions of KRS 271.385 as to designation of process agent shall, by such doing of business, be deemed to have made the Secretary of State its agent for the service of process in any civil action . . . involving a cause of action arising out of or connected with the doing of business by such corporation in this state. . . ."

[2] The difference between the two problems was emphasized by the court in Partin v. Michaels Art Bronze Co., (3d Cir. 1953) 202 F. (2d) 541 at 542, when it said, "Because a state may exercise jurisdiction it does not follow that it does so, much less that it must."

[3] JUDGMENTS RESTATEMENT §8, comment *b* (1942).

[4] Statutory language and the interpretation of courts vary, but it is fair to say that a statute as broad as the Kentucky statute is common. Illinois goes even further, authorizing service when the cause of action arises out of the "transaction of any business" or the "commission of any tortious act" within the state. Ill. Rev. Stat. (1953) c. 110, §17.

business" standard.[5] The court in doing this was using to resolve the interpretative question a test laid down under the due process question.[6] This was, therefore, either a decision that the Kentucky statute was intended to have the broadest possible reach within the due process limitation,[7] a determination that the doctrine of the *International Shoe Co.* case was a definition of the statutory concept of "doing business" short of the constitutional limitation,[8] or an error. If the statute is interpreted as being limited only by the due process clause, as apparently it was here, it becomes necessary to determine whether due process is satisfied. In the principal case this was done summarily by referring again to the *International Shoe* case and to *McGee v. International Life Ins. Co.*[9] In the *McGee* case the Supreme Court extended the liberal approach taken in its majority opinion in *International Shoe* to the even more liberal view there expressed in the concurring opinion of Justice Black. The servicing of one life insurance policy in the state was held sufficient to satisfy the constitutional test of due process.

In the radio-television area the courts have previously been hesitant to interpret the substituted service statutes so broadly. In a case where the only contact was solicitation of buyers through a television commercial, the court held that solicitation plus some other activity was required to constitute "doing business" and accordingly quashed service.[10] And when

[5] 326 U.S. 310 at 319 (1945). ". . . Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws. . . . That clause does not contemplate that a state may make binding a judgment *in personam* against [a] . . . defendant with which the state has no contacts, ties, or relations." Cited in principal case at 247.

[6] The Supreme Court, summarizing the issues in International Shoe Co. v. Washington, note 5 supra, said at 313, "The cause comes here on appeal . . . , appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause."

[7] The California courts have definitely taken this view, allowing service of process whenever the due process requirement is satisfied. See Eclipse Fuel Engineering Co. v. Superior Court, 148 Cal. App. (2d) 736, 307 P. (2d) 739 (1957). The court in the principal case, however, cited no Kentucky cases and made no reference to any legislative history in support of its position. The Kentucky cases which have construed this statute have not made an effort to define the minimum requirements of "doing business" under it. See Charles Zubik & Sons, Inc. v. Marine Sales & Service, (Ky. 1957) 300 S.W. (2d) 35. See also Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co., (E.D. Ky. 1951) 102 F. Supp. 258, and Brandeis Machinery & Supply Co. v. Matewan Alma Fuel Corp., (E.D. Ky. 1957) 147 F. Supp. 821.

[8] The apparent error in this type analysis was noted in Dodd v. Rahway Valley Co., (D.C. N.J. 1957) 150 F. Supp. 599 at 603: "In short, while *International Shoe* recognizes that the facts there show how little more than 'mere solicitation' will suffice for valid service [under the due process clause], that case does not say that the same is the minimal [statutory] requirement for valid service."

[9] 355 U.S. 220 (1957). Among the commentaries on this case are 36 TEX. L. REV. 658 (1958), 1958 UNIV. ILL. L. FORUM 166, and 6 UTAH L. REV. 131 (1958).

[10] McGriff v. Charles Antell, Inc., 123 Utah 166, 256 P. (2d) 703 (1953). This case differs, however, from the principal case in that here defendant was a foreign corporation soliciting over television, and in the principal case the defendant was the telecaster itself.

an insurance company solicited over radio, the court held that a policy purchased in response was related to the place of issue, not the residence of the buyer where the advertisement was heard.[11] It seems patently clear, however, that under the *McGee* rationale regular telecasting into Kentucky, without other contact, should satisfy the due process test.[12] The additional factor of advertising contracts with Kentucky firms becomes unnecessary to a decision on this question. Moreover, when this broad extension of due process is adopted the question becomes moot whether different activities of a corporation in a state can be cumulated to determine if there is the required local contact to warrant proper service of process on a cause of action arising out of only one such activity.[13] The result reached in the principal case seems desirable policy-wise, at least when applied to the broadcasting and telecasting business. Undoubtedly defendant established its advertising rates by reference to its total audience, including viewers in Kentucky. Thus part of its income was directly related to the size of its Kentucky audience. In addition, defendant was sufficiently within Kentucky in the course of its primary business operation to commit a tort which gave plaintiff a substantive right under Kentucky law. This suggests that "traditional concepts of fair play and justice" are not offended by subjecting defendant to suit in Kentucky solely because it has telecast into that state. On final analysis, it seems that whether a foreign radio or television corporation is to be subjected to local jurisdiction when its only local activity is broadcasting or telecasting depends far more on the breadth of the interpretation given the local jurisdictional statute than on constitutional limitations. To the extent that due process notions are applied in an interpretation of these statutes, foreign corporation amenability to suit will continue to expand.

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[11] Selby v. Crown Life Ins. Co., (Mo. App. 1945) 189 S.W. (2d) 135. But see Union Mutual Life Co. of Iowa v. District Court, 97 Colo. 108, 47 P. (2d) 401 (1935), and Union Mutual Life Co. of Iowa v. Bailey, 99 Colo. 570, 64 P. (2d) 1267 (1937).

[12] A factual difference is apparent between the principal case and the McGee case since the former involved a tort and the latter was a contract action. Nevertheless in each case the key point was the relation of the defendant to the state, not the type of action sued upon. If the relation is present, it should not matter if the action grew out of an obligation imposed by law or imposed by the parties themselves. Neither in the case of telecasting into a state nor in the McGee situation would the defendant have any agent physically present in the state, other than through operation of a substituted service statute. The two differ only in that in one case the contact was over the air waves and in the other was through the mail.

[13] Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 at 444-445 (1952), recognized that sometimes the relation to the state was so minimal that due process would allow only causes of action to be brought there that arose out of the corporation's activities within the state. However, the Perkins case held the other way on its facts. The cause of action in the International Shoe Co. case was related to all of defendant's activities in the state. Language in that opinion (326 U.S. at 320) suggests that there may be cumulation of activities unrelated to the cause of action. The Perkins case, at 445, suggests the contrary.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—COURTROOM PHOTOGRAPHY—Plaintiff took pictures of a notorious convicted murderer within forty feet of the courtroom to which the murderer was being taken for sentencing. The picture taking was unobtrusive but was in direct violation of a court rule.[1] The validity of the rule was upheld in the state courts.[2] Plaintiff sought to enjoin enforcement of his conviction for contempt and to have the court rule declared invalid. This relief was denied.[3] On appeal, *held,* affirmed. The free press protected by the Fourteenth Amendment does not include a right of access to information of public interest. Since banning photography bears a reasonable relation to a decorous trial, the court rule is valid. *Tribune Review Publishing Company v. Thomas,* (3d Cir. 1958) 254 F. (2d) 883.

Photography inside the courtroom raises the question whether there is a general right of access to judicial proceedings, and, if so, whether it is reasonably limited by a broad rule banning photography. A right of access could possibly rest on three constitutional grounds:[4] free speech and press, public trial, and equal protection. A right of access could be implied from free speech and press because publication of facts can be as effectively stopped by closing the source as by censorship. The public right to an open trial based on the right to know what transpires in the courts,[5] when asserted by a member of the public,[6] also might include a right of access by photographers. A third possible basis of access is that since both photographers and reporters should be on equal footing,[7] it is a denial of equal protection to admit reporters while banning photographers.[8] If there is such a right of access,[9] it must be reasonably limited by the right

[1] Rule No. 6084, Court of Common Pleas of Westmoreland County, Pennsylvania. "Taking of Photographs. (a) No pictures . . . shall be taken, immediately preceding or during sessions of this court or recesses between sessions, in any of the court rooms or at any place in the court house within forty feet of the entrance to any court room. . . . " Cited in principal case at 883.

[2] Mack Appeal, 386 Pa. 251, 126 A. (2d) 679 (1956), cert. den. 352 U.S. 1002 (1957), noted in 17 MD. L. REV. 177 (1957), 23 BROOK. L. REV. 304 (1957), 8 SYRACUSE L. REV. 286 (1957).

[3] Tribune Review Publishing Co. v. Thomas, (W.D. Pa. 1957) 153 F. Supp. 486.

[4] All of which would be protected by the Fourteenth Amendment.

[5] State v. Keeler, 52 Mont. 205, 156 P. 1080 (1916); Williamson v. Lacy, 86 Me. 80, 29 A. 943 (1893); State v. Copp, 15 N.H. 212 (1844); Kirstowsky v. Superior Court, 143 Cal. App. (2d) 745, 300 P. (2d) 163 (1956), noted in 30 So. CAL. L. REV. 340 (1957).

[6] Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E. (2d) 896 (1955), app. dismissed 164 Ohio 261, 130 N.E. (2d) 701 (1955) (even over defendant's waiver); *contra,* Matter of United Press Assn. v. Valente, 308 N.Y. 71, 123 N.E. (2d) 777 (1954).

[7] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Culinary Workers v. Court, 66 Nev. 166, 207 P. (2d) 990 (1949).

[8] See McCoy v. Providence Journal Co., (1st Cir. 1951) 190 F. (2d) 760, cert. den. 342 U.S. 894 (1951); 65 HARV. L. REV. 1258 (1952).

[9] Brannon v. State, 202 Miss. 571, 29 S. (2d) 916 (1947). But the principal case follows the weight of authority. See, e.g., Ex parte Sturm, 152 Md. 114, 136 A. 312 (1927); State v. Clifford, 162 Ohio 370, 118 N.E. (2d) 853 (1954), cert. den. 349 U.S. 929 (1955); In re

of privacy, the right to a fair trial, and preservation of the dignity and decorum of the courts. In the principal case not only was the picture taken quietly and outside the courtroom, but further the picture was of the notorious "phantom killer of the turnpike." Under these facts, the subject of the picture was newsworthy and had no protected interest in privacy.[10] Generally, a reasonably limited right of access would not destroy all privacy.[11] Since the photography was outside the courtroom[12] and the subject had already been convicted, the problem of fair trial would arise only in reference to a possible re-trial of the case.[13] In light of modern photographic techniques, it is doubtful that dignity and decorum will be disturbed even within the courtroom.[14] Nevertheless it is uniformly held that broad court rules which do not relate to individual disturbances are valid[15] although considerable opinion argues that such rules are arbitrary and should be modified.[16]

In denying a general right of access the court drew no distinction between reporters and photographers.[17] This suggests that a rule forbidding any reporter to talk to the defendant outside the courtroom, even after

Seed, 140 Misc. 681, 251 N.Y.S. 615 (1931); CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); Rule 53, Federal Rules of Criminal Procedure, 18 U.S.C. (1952); Canon 35, Canons of Judicial Ethics of the American Bar Association.

[10] A newsworthy person, including a defendant in a criminal trial, cannot get damages for invasion of his right of privacy. Elmhurst v. Pearson, (D.C. Cir. 1946) 153 F. (2d) 467; Berg v. Minneapolis Star & Tribune Co., (D.C. Minn. 1948) 79 F. Supp. 957; Coverstone v. Davies, 38 Cal. (2d) 315, 239 P. (2d) 876 (1952). But see principal case; Mack Appeal, note 2 supra; Ex parte Sturm, note 9 supra.

[11] But see the principal case at 885.

[12] One of the common issues in fair trial is the effect of photography on participants in the trial. See Brucker, "The Fair Trial v. The Free Press," 20 TEX. B. J. 438 (1957); United States v. Kleinman, (D.C. D.C. 1952) 107 F. Supp. 407; Kirstowsky v. Superior Court, note 5 supra; Shuman, "Broadcasting and Telecasting of Judicial and Legislative Proceedings," CURRENT TRENDS IN STATE LEGISLATION 1955-1956, 3 at 43 (1957). By using modern techniques pictures can be taken in the courtroom without the participant's knowledge. In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, (Colo. 1956) 296 P. (2d) 465.

[13] The most important basis of the fair trial objection is that the jury might be influenced by adverse comment in the press. E.g., In re Shortridge, 99 Cal. 526, 34 P. 227 (1893); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); Meyers v. State, 46 Ohio 473, 22 N.E. 43 (1889); State ex rel. Pulitzer Publishing Co. v. Coleman, 347 Mo. 1238, 152 S.W. (2d) 640 (1941). It is not so much the function of photography to comment, however, as to report.

[14] In re Hearings Concerning Canon 35, note 12 supra.

[15] See note 9 supra.

[16] Geis and Talley, "Cameras in the Courtroom," 47 J. CRIM. L. & CRIMINOLOGY 546 (1957); Allen, "Fair Trial and Free Press: No Fundamental Clash Between the Two," 41 A.B.A.J. 897 (1955); Miller, "Should Canon 35 Be Amended? A Question of Fair Trial and Free Information," 42 A.B.A.J. 834 (1956); Brucker, "The Fair Trial v. The Free Press," 20 TEX. B.J. 438 (1957); Hanson, "Canon 35, Press, Radio and Television Coverage of the Courts," 16 ALA. LAWYER 248 (1955); 11 FLA. L. REV. 87 (1958); In re Hearings Concerning Canon 35, note 12 supra; 8 SYRACUSE L. REV. 286 (1957).

[17] But see principal case at 885.

conviction, would be upheld.[18] In England, newspapers may not report any facts or make any comment which might possibly influence the trial.[19] In the United States the emphasis in the past has been upon free speech,[20] but the instant case might indicate a shift toward the English view which emphasizes fairness of the trial.[21] Since even the English view would thus rarely apply after trial,[22] the principal case goes far in permitting prohibition of photography after conviction.

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18 See Brannon v. State, note 9 supra, where a contempt conviction for talking to a witness outside the courtroom was reversed because there was no intent to interfere with the trial.

19 Compare Read's and Huggunson's Case, [1742] 2 Atk. 469, with Reg. v. Payne and Cooper, [1896] 1 Q.B. 577.

20 See Pennekamp v. Florida, note 13 supra; Bridges v. California, note 13 supra; Craig v. Harney, 331 U.S. 367 (1947).

21 See 17 UNIV. CHI. L. REV. 540 (1950).

22 Compare Rex v. Daily Mirror, [1927] 1 K.B. 845 with Reg. v. Grey, [1900] 2 Q.B. 36.