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## Constitutional Law - Due Process - Jurisdiction of State Court Over Nonresident Tortfeasor

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**CONSTITUTIONAL LAW—DUE PROCESS—JURISDICTION OF STATE COURT OVER NONRESIDENT TORTFEASOR**—The defendant, a resident of Wisconsin, was engaged in the business of selling appliances and sent one of his employees to deliver a gas cooking stove to the plaintiff in Illinois. Claiming that the employee had negligently injured him in unloading the stove, the plaintiff brought action in Illinois, seeking damages of \$7,500. A summons was personally served on the defendant in Wisconsin, and the defendant appeared specially, moving to quash the summons on the ground that the

Illinois statute,<sup>1</sup> providing for extraterritorial service on any person who commits a tortious act within the state, contravened the constitutions of the United States and Illinois. The lower court granted the motion quashing the service of summons. On appeal, *held*, reversed. The statute is not unconstitutional in authorizing service outside the state for a single tortious act committed within the state. *Nelson v. Miller*,<sup>2</sup> (Ill. 1957) 143 N.E. (2d) 673.

The traditional basis of state jurisdiction over the person was physical power and was considered a prerequisite to a valid judgment.<sup>3</sup> In response, however, to a changing economic climate, the Supreme Court indulged in a number of fictional concepts concerning corporations, moving from the early view that a corporation could not be sued outside the state in which it was chartered<sup>4</sup> to the later "consent"<sup>5</sup> and "presence"<sup>6</sup> theories which were devised to avoid the difficulties of the power theory of jurisdiction. In regard to jurisdiction over nonresident<sup>7</sup> individuals, similar departures

<sup>1</sup> Ill. Rev. Stat. (1957) c. 110, §§16, 17. Sec. 17 (1) is as follows: "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts: (a) The transaction of any business within this State; (b) The commission of a tortious act within this State; (c) The ownership, use, or possession of any real estate situated in this State; (d) Contracting to insure any person, property, or risk located within this State at the time of contracting."

<sup>2</sup> The court was initially faced with defendant's contention that because the cause of action arose before the effective date of the statute it could not constitutionally apply to him. The court concluded, however, that retroactive application was possible since extension of jurisdiction under the statute did not rest upon the implied consent of the defendant. The court further stated that the application of the statute to the defendant was not a violation of the due process clause of the Fourteenth Amendment since there was no creation of new liability for past acts, the statute relating only to procedure. Principal case at 675-676. Compare *Ogdon v. Gianakos*, 415 Ill. 591, 114 N.E. (2d) 686 (1953) with *Gillioz v. Kincannon*, 213 Ark. 1010 at 1018, 208 S.W. (2d) 997 (1948). See *McGee v. International Life Ins. Co.*, (U.S. 1957) 26 U.S. Law Week 4073 at 4074, holding that retroactive application of a similar statute does not impair the obligation of contracts, as it did not affect substantive rights.

<sup>3</sup> *Dodd*, "Jurisdiction in Personal Actions," 23 Ill. L. Rev. 427 (1929). This view was reasserted by Justice Holmes when he stated that the "foundation of jurisdiction is physical power," *McDonald v. Mabee*, 243 U.S. 90 at 91 (1917). This concept had previously been elevated to a constitutional status under the due process clause of the Fourteenth Amendment in *Pennoyer v. Neff*, 95 U.S. 714 (1877). However, a recent discussion of the physical power doctrine suggests that it was not in fact derived from a common law background as previously expounded. *Ehrenzweig*, "The Transient Rule of Personal Jurisdiction: the 'Power' Myth and Forum Conveniens," 65 YALE L. J. 289 (1956).

<sup>4</sup> See *GOODRICH*, *CONFLICT OF LAWS*, 3d ed., 209 (1949). See also *Bank of Augusta v. Earle*, 13 Pet. (38 U.S.) 519 (1839).

<sup>5</sup> *Lafayette Ins. Co. v. French*, 18 How. (59 U.S.) 404 (1855). See *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U.S. 602 (1899).

<sup>6</sup> *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914). See *Bank of America v. Whitney Central Nat. Bank*, 261 U.S. 171 (1923); *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917).

<sup>7</sup> As to resident defendants, the crumbling of the power theory is illustrated by a case in which domicile in the state was alone considered sufficient to bring an absent

from the power theory were signalled by cases involving nonresident motorist statutes<sup>8</sup> and nonresidents engaged in state-regulated securities transactions.<sup>9</sup> With this background of fictive analysis of state jurisdiction as illustrated by decisions involving both corporations and individuals, a more practical concept was developed in *International Shoe Co. v. Washington*.<sup>10</sup> The Court explicitly discarded the "consent"<sup>11</sup> and "presence" theories for a less mechanical and more flexible concept which stressed a test of reasonableness and fairness, balancing the inconvenience of a suit to the defendant against the necessity of protecting the residents of the state.<sup>12</sup> The question left unanswered by *International Shoe* is whether a single act within the state is a sufficient basis for jurisdiction when it is neither dangerous nor one which the state has a particular interest in regulating.<sup>13</sup> While dicta in that case suggests that it is not,<sup>14</sup> the result in the principal case is to be preferred. The tort allegedly committed in Illinois would seem to be a sufficient "minimum contact" with that state to bring the "fairness" test of *International Shoe* into play.<sup>15</sup> Moreover, while the Supreme Court decisions finding jurisdiction over nonresidents based on operation of automobiles,<sup>16</sup> sale of securities,<sup>17</sup> and sale of insurance<sup>18</sup> can be explained as based on dangerous acts or ones which

defendant within the reach of the state's jurisdiction. *Milliken v. Meyer*, Admx., 311 U.S. 457 (1940).

<sup>8</sup> *Kane v. New Jersey*, 242 U.S. 160 (1916); *Hess v. Pawloski*, 274 U.S. 352 (1927).

<sup>9</sup> *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935). Compare *Flexner v. Farson*, 248 U.S. 289 (1919).

<sup>10</sup> 326 U.S. 310 (1945). Although this case dealt with the activities of a foreign corporation within the state, the language is sufficiently broad to indicate that it would also apply to the activities of individuals. Cleary and Seder, "Extended Jurisdictional Bases for the Illinois Courts," 50 N.W. UNIV. L. REV. 599 at 603 (1955); note, 16 UNIV. CHI. L. REV. 523 at 534 (1949).

<sup>11</sup> See also *Olberding v. Illinois Central R. Co.*, 346 U.S. 338 at 341 (1953), soundly criticizing the "consent" theory where nonresident motorist statute and question of venue in the federal courts were involved.

<sup>12</sup> This test of fairness may be no easier in its application than the "presence" theory, but at least it places the determination of jurisdiction on a more realistic basis.

<sup>13</sup> See, generally, note, "Single Act Statutes and Jurisdiction Over Foreign Corporations," 43 VA. L. REV. 1105 (1957).

<sup>14</sup> "Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it . . . other such acts, because of their *nature and quality* and the *circumstances of their commission*, may be deemed sufficient to render the corporation liable to suit. . ." (emphasis added). *International Shoe Co. v. Washington*, note 10 supra, at 318.

<sup>15</sup> See Cleary and Seder, "Extended Jurisdictional Bases for the Illinois Courts," 50 N.W. UNIV. L. REV. 599 at 607 (1955); Joiner, "Let's Have Michigan Torts Decided in Michigan Courts," 31 MICH. STATE B. J. 5 at 10 (Jan. 1952).

<sup>16</sup> *Kane v. New Jersey*, *Hess v. Pawloski*, note 8 supra.

<sup>17</sup> *Henry L. Doherty & Co. v. Goodman*, note 9 supra.

<sup>18</sup> *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1950). The Court's recent decision in *McGee v. Intl. Life Ins. Co.*, note 2 supra, was not based on any special state interest in regulating insurance and probably represents the final extension of *Pennoyer v. Neff*. In the *McGee* case it was held that California could exert jurisdiction over a Texas in-

the state has a particular interest in regulating,<sup>19</sup> other courts have found the commission of a tort<sup>20</sup> or the making of a contract<sup>21</sup> sufficient, and these cases cannot be explained on any such basis. They seem proper because the degree to which a nonresident's activity endangers the inhabitants of Illinois would not seem to be the controlling factor in determining the fairness of subjecting the nonresident to suit.<sup>22</sup> The extent of contact the defendant had with the state, the benefit and protection he derived from the laws of the state, the relative extent of his inconvenience,<sup>23</sup> the location of the witnesses, and the law which will govern in determining liability, more than the degree of danger involved in the nonresident's activity, would seem to be some of the relevant factors in determining the fairness and reasonableness of extending jurisdiction to cover the defendant.<sup>24</sup> Moreover, just as the above factors should determine the due process question, they also bear on the convenience of the forum,<sup>25</sup> and any case in which due process would be found would also be a case which would most conveniently be tried in Illinois. Since plaintiff's claim was apparently in good faith for a substantial sum, since defendant resided in an adjoining state,<sup>26</sup> since part of his income was derived from sales in Illinois, since Illinois law would control, and since all witnesses except the employee would presumably be Illinois residents, both due process and convenience would seem to be satisfied by Illinois suit against this nonresident.

insurance company whose sole contact with California was to issue an insurance policy to one of its residents.

<sup>19</sup> *Dubin v. Philadelphia*, 34 Pa. D. & C. 61 (1938) (ownership of property) can also be explained on this basis. See also *Peters v. Robin Air Lines*, 281 App. Div. 903, 120 N.Y.S. (2d) 1 (1953) (operation of aircraft).

<sup>20</sup> *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. (2d) 664 (1951). See also *Gillioz v. Kincannon*, note 2 supra. But see *Johns v. Bay State Abrasive Products Co.*, (D.C. Md. 1950) 89 F. Supp. 654, where the court felt it was necessary to find more than a single isolated act unless the single act was subject to the police power.

<sup>21</sup> *Compania de Astral, S. A. v. Boston Metals Co.*, 205 Md. 237, 107 A. (2d) 357 (1954), cert. den. 348 U.S. 943 (1955).

<sup>22</sup> In *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863 at 884, 50 S. (2d) 615 (1951), the court stated that "any distinction between jurisdiction founded upon doing business in a state which involves danger to life or property or state regulation, and on the other hand contractual obligations arising out of such business, is artificial and not consistent with the principle or policy of the statutes and foregoing decisions." Although this case did not involve a single isolated act within the state, it is significant in respect to the rejection of the view that a dangerous activity was necessary to support jurisdiction.

<sup>23</sup> Query: Suppose plaintiff's claim had been for \$75 rather than \$7,500 and defendant had resided in California rather than Wisconsin?

<sup>24</sup> Cf. factors considered in *McGee v. International Life Ins. Co.*, note 2 supra; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 at 510 (1947).

<sup>25</sup> See *Gulf Oil Corp. v. Gilbert*, note 24 supra, at 510. See also Joiner, "Let's Have Michigan Torts Decided in Michigan Courts," 31 MICH. STATE B. J. 5 at 11-12 (Jan. 1952).

<sup>26</sup> Since defendant apparently never left Wisconsin, jurisdiction over him was based solely on the application of *respondere superior*. It might be argued that this factor should at least go on the constitutional scales as one element of the "fairness" of subjecting him to Illinois jurisdiction. The court inferentially rejected the argument by not mentioning it.

It is clear, however, that this decision does not predicate jurisdiction on the fact of defendant's liability in tort, but rather interprets the statutory words, "commission of a tortious act," as basing jurisdiction on the acts or omissions of a defendant from which liability may or may not ultimately be found.<sup>27</sup> Such an interpretation is necessary, for if a tort itself were the basis of jurisdiction, after being found liable in Illinois the defendant could relitigate the entire question of liability in a challenge of the Illinois court's jurisdiction when plaintiff brought suit on his judgment in Wisconsin.<sup>28</sup> By avoiding this construction and by applying the "fairness" test in upholding the constitutionality of the statute as applied to defendant, the court provided a formidable protection for the residents of Illinois against the possibility that they will be deprived of adequate redress when non-resident defendants leave the state.<sup>29</sup>

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<sup>27</sup> Principal case at 681. See also *Smyth v. Twin State Improvement Corp.*, note 20 *supra*, where the court appeared to construe the statutory words "commits a tort" as not basing jurisdiction on the ultimate fact of liability in tort.

<sup>28</sup> The Full Faith and Credit Clause permits a collateral attack on the jurisdictional basis of a sister state's judgment. *Thompson v. Whitman*, 18 Wall. (85 U.S.) 457 (1873).

<sup>29</sup> See generally O'Connor and Goff, "Expanded Concepts of State Jurisdiction over Non-Residents: The Illinois Revised Practice Act," 31 NOTRE DAME LAWYER 223 (1956).