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CML- Procedure - Jurisdiction - Recent Legislation Asserting Jurisdiction Over Nonresident Tort-Feasors

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RECENT LEGISLATION

CIVIL PROCEDURE—JURISDICTION—RECENT LEGISLATION ASSERTING JURISDICTION OVER NONRESIDENT TORT-FEASORS—A recent Illinois statute provides *inter alia*¹ that a nonresident person who commits a tortious act within the state submits to the jurisdiction of the state as to any cause of action arising out of such act.² The statute provides that process personally served on the defendant outside the state shall have the same force and effect as though the summons had been personally served within the state.³ Ill. Rev. Stat. (1955) c. 110, § 17.

The traditional basis of jurisdiction was physical power over the defendant⁴ and the concept of state sovereignty rendered a state powerless to reach outside its borders and assert jurisdiction over a nonresident.⁵ However, in *Hess v. Pawloski*,⁶ it was recognized that a state could, without violating due process, assert jurisdiction over a nonresident motorist who was not served with process within the state and who did not consent⁷ by actually appointing an agent in the state. The Court stressed the dangers inherent in the operation of a car and justified the assertion of jurisdiction as a necessary and reasonable exercise of the state's power to promote

¹ The statute also provides that any person who transacts business within the state or contracts to insure any person, property, or risk located within the state is subject to the jurisdiction of the state as to causes of action arising out of these acts. Nonresident business statutes are common and have been held to be constitutional. *Wein v. Crockett*, 113 Utah 301, 195 P. (2d) 222 (1948). Provision is also made for jurisdiction over non-residents who own, use or possess real estate within the state. Only Pennsylvania has a similar statute. Pa. Stat. Ann. (Purdon 1945) tit. 12, §331, upheld in *Dubin v. Philadelphia*, 34 Pa. D. & C. 61 (1938). Ownership or use of real estate within the state certainly provides the necessary minimum contacts to satisfy due process. See note 8 *infra* and adjacent text.

² Due process requires that the jurisdiction over the nonresident be limited to causes of action arising out of the designated acts. See *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632 (1927); JUDGMENTS RESTATEMENT §23 (1942).

³ However, the statute preserves the right to use other methods of service of process provided by law, such as service under the Nonresident Motorist Act, Ill. Rev. Stat. (1955) c. 95½, §23.

⁴ See Dodd, "Jurisdiction in Personal Actions," 23 ILL. L. REV. 427 (1929). For a critical view of the physical power theory, see Ehrenzweig, "The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens," 65 YALE L. J. 289 (1956), where it is asserted that the transient rule of jurisdiction is unsupported by authority and functionally inadequate.

⁵ *Pennoyer v. Neff*, 95 U.S. 714 (1877); *McDonald v. Mabee*, 243 U.S. 90, 37 S.Ct. 343 (1917).

⁶ 274 U.S. 352, 47 S.Ct. 632 (1927). Nonresident motorist statutes have been adopted by most states. For a general discussion, see Culp, "Process in Actions Against Nonresident Motorists," 32 MICH. L. REV. 325 (1934). A Pennsylvania statute also provides for jurisdiction over nonresident owners and operations of aircraft flown above the state. Pa. Stat. Ann. (Purdon, 1945; Supp. 1954) tit. 2, §1410.

⁷ Though the Court spoke of implied consent, subsequent decisions have expressly recognized that the consent is wholly fictional and not the basis of the jurisdiction. *Martin v. Fischbach Trucking Co.*, (1st Cir. 1950) 183 F. (2d) 53; *Oiberding v. Illinois Central R. Co.*, 346 U.S. 338, 74 S.Ct. 83 (1953); *Plopa v. DuPre*, 327 Mich. 660, 42 N.W. (2d) 777 (1950).

safety in the use of its highways. There is no logical reason to limit the exercise of police power over nonresidents to motorists or those doing business within the state, for certainly the state is equally interested and justified in protecting its citizens against all kinds of tortious acts committed by nonresidents. While slander or misrepresentation are not thought to be as inherently dangerous to life and property as the operation of a car, they can result in just as much damage and injury. In a relatively recent decision on the subject, *International Shoe Co. v. Washington*,⁸ the Supreme Court held that due process requires only that the defendant have enough contacts or ties with the state so that the assertion of jurisdiction over him would not violate the traditional concept of fair play and substantial justice. Although it noted the continuous nature of the defendant's activities within the state, the Court said that the quality and nature of the nonresident's activities determines whether jurisdiction may be asserted over claims arising from such acts.⁹ In light of the nonresident motorist cases, the commission of a tortious act would seem to constitute the minimum contact required by the rule of the *International Shoe* case. Relying on the doctrine of *International Shoe*, courts have upheld statutes¹⁰ which provide for jurisdiction over foreign corporations for tortious acts committed in the state, although such corporations may not be doing business there. These decisions were not based upon the power of the state to exclude corporations¹¹ or upon its power to regulate inherently dangerous acts, but rather upon general notions of fair play which require that nonresidents who receive the benefits and protection afforded all residents should be amenable to suit within the state for their tortious acts. There is no logical reason why the minimum contacts theory as expressed in these decisions should not be extended to include nonresident individuals as well as foreign corporations.¹² Modern means of transportation and communication have made it common-place to travel, do business, and own property in another state. State lines have become impractical as boundaries for purposes of jurisdiction since a nonresident can get out of a state with relative ease before process is served, thereby escaping, in some cases, all liability for an unlawful act. In addition, the state in which the cause of action arose is undoubtedly the best qualified to reach a just decision since its own laws generally apply and the witnesses necessary to a proper

⁸ 326 U.S. 310, 66 S.Ct. 154 (1945). The "minimum contacts" theory was reaffirmed in *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 70 S.Ct. 927 (1950). Though the language of the *International Shoe* case is broad enough to apply to nonresident individuals, only a foreign corporation was involved in the case.

⁹ 326 U.S. 310 at 319, 66 S.Ct. 154 (1945).

¹⁰ Vt. Stat. (1947) §1562, upheld in *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. (2d) 664 (1951); Md. Code Ann. (Flack, 1951) art. 23, §88 (d), upheld in *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654 (1950).

¹¹ The "power-to-exclude" theory is not broad enough to provide the basis for jurisdiction in all cases. *International Harvester Co. v. Kentucky*, 234 U.S. 579, 34 S.Ct. 944 (1914); GOODRICH, *CONFLICT OF LAWS*, 3d ed., §76 (1949).

¹² See 38 COL. L. REV. 1060 at 1076 (1938).

determination of the facts are likely to be found in that state.¹³ It is clear from the cases that these factors of convenience and public policy are important in deciding whether jurisdiction may be asserted over the defendant.

While notions of fair play swing the scales in the direction of the resident plaintiff, care must also be taken to protect the rights of the non-resident defendant. In providing for personal service of process upon the defendant outside the state, the statute clearly satisfies the due process requirement that the defendant be given notice reasonably calculated to advise him of the claim brought against him.¹⁴ However, adequate protection against spurious and malicious suits is not provided. The plaintiff with an ill-founded claim may wait until the defendant has gone home before bringing suit, hoping to get a default judgment. Although the early nonresident motorist statutes were upheld despite the absence of specific provisions designed to protect the nonresident,¹⁵ some of the more recent statutes require the plaintiff to deposit as security a bond sufficient to cover costs, and others permit the court to include in costs the defendant's traveling expenses.¹⁶ To the extent that the nonresident defendant is left unprotected against this type of spurious claim, the Illinois statute is subject to legitimate criticism. In general, though, the statute, in providing that tort claims be tried where they arise,¹⁷ represents a bold step in the development of the concept of jurisdiction which is consistent with due process and supported by considerations of justice and convenience.

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¹³ See *Smyth v. Twin State Improvement Co.*, note 10 supra. See also Culp, "Process in Actions Against Nonresident Motorists," 32 MICH. L. REV. 325 (1934).

¹⁴ *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259 (1928); *Millikin v. Meyer*, 311 U.S. 457, 61 S.Ct. 339 (1940).

¹⁵ *Wuchter v. Pizzutti*, note 14 supra.

¹⁶ Me. Rev. Stat. (1954) c. 22, §71; Mich. Comp. Laws (1948) §256.522. For a general discussion, see Culp, "Process in Actions Against Nonresident Motorists," 32 MICH. L. REV. 325 (1934).

¹⁷ Such a rule has been suggested. See Joiner, "Let's Have Michigan Torts Decided in Michigan Courts," 31 MICH. S. B. J. 5-12 (Jan. 1952); Goodrich, "Yielding Place to New: Rest Versus Motion in the Conflict of Laws," 50 COL. L. REV. 881 (1950).