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Due Process -- Jurisdiction Over Non-Resident Trustees

Ralph P. Ezzo

act, authenticated by an official of a foreign religious society even if locally incorporated, would be binding upon a governmental agency.

EDWARD KAUFMAN

DUE PROCESS* — JURISDICTION OVER NON-RESIDENT TRUSTEES

A testatrix-settlor executed an inter vivos trust naming a Delaware corporate trustee. Power to alter, amend, revoke, change the trustee and receive income for life was reserved. It was further provided that the settlor had a power of appointment as to the remaining corpus, either inter vivos or testamentary. After becoming domiciled in Florida, she made her last appointment in favor of two previously created trusts in Delaware, with the remainder in favor of the executrix, the appellant. The will directed the portion appointed to the appellant be paid in equal installments to the testatrix's two daughters, the appellees. The latter sued for declaratory relief urging the invalidity of the last created trusts as an invalid disposition under the Florida statute of wills.[1] Personal service was effected upon a majority of interested persons except the Delaware trustee; however, a copy of the pleadings together with a notice to appear were sent to the trustee and notice was published locally in compliance with the Florida constructive service statute.[2] The Florida court held the trust invalid and that jurisdiction to construe the will entailed substantive jurisdiction over absent defendants even though the trust assets were not within the state.[3] The appellant-executrix brought suit in Delaware and that state's supreme court held that there had been a lack of jurisdiction and refused full faith and credit to the Florida decree.[4] On certiorari to the United States Supreme Court, *held*, Florida decree reversed (that state having had insufficient contacts to give it jurisdiction); Delaware decree affirmed. *Hanson v. Denkla*, 357 U.S. 235 (1958).

The law in regard to a forum state's jurisdiction over non-residents has passed through three major stages in its evolutionary process.[5] Stage One need only be traced back to the landmark case of *Pennoyer v. Neff*

*For a detailed discussion see Comment, this issue p. 205, *supra*.

1. FLA. STAT. § 731.07 (1957).
2. FLA. STAT. § 48.01 (1957).
3. Hanson v. Denckla, 100 So. 2d 378 (Fla. 1956).
4. Hanson v. Wilmington Trust Co., 119 A.2d 901 (Del. 1957).
5. Presence, minimum contacts, minimum contact, [seemingly from the case of McGee v. International Life Insurance Co., 355 U.S. 220 (1957)]. Consent is embraced in the presence theory, see Travelers Ass'n v. Virginia, 339 U.S. 643 (1950).

wherein the "presence theory" was clearly enunciated.[6] Presence within the forum state was absolutely necessary in order to gain personal jurisdiction over a non-resident. Any judgment rendered without personal service within the territorial limits of the forum was a clear violation of the "due process" clause of the fourteenth amendment,[7] and as such was null and void.[8] The court further stated that a state has judicial jurisdiction over property situated within its borders regardless of the domicile of the property owner. However, a person seeking relief out of the proceeds of a non-resident's property must institute in rem proceedings by first making a valid attachment and then proceed to a judgment against the property. The owner of the property was liable only to the extent of the proceeds of the attachment sale. This rigid principle became embedded in our law and remained for over fifty years.

In 1945, Stage Two, the "minimum contacts" theory appeared on our judicial scene in the case of *International Shoe Co. v. State of Washington.*[9] The State of Washington was attempting to enforce workmen's compensation contributions[10] against the non-resident corporate defendant. Service of process was made on a local salesman, and notice by registered mail was made to the corporation's home office. The corporation appeared specially to contest the jurisdiction of the Washington court contending that the personal service upon the salesman was not service upon the corporation; the corporation was not a Washington corporation, and the corporation was not doing business in the State of Washington. The Court, in a lengthy opinion, reviewed the technological developments in this country in the area of transportation, and decided to relax the rigid rule advanced in *Pennoyer v. Neff.* The Court held that sales solicitation within the state amounted to "minimum contacts" with the state so as to make the defendant amenable to litigation *arising out of that business activity within the state.*[11] This broad grant of jurisdictional power was held not to offend the traditional notions of fair play and justice. Prior to this decision states were successfully evading the strict and technical meaning of *Pennoyer v. Neff* by enacting statutes which would give the state jurisdiction over non-residents without personal service in cases involving public policy.[12] This

6. 95 U.S. 714 (1877); Prior to this case the law was based on D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850), wherein the court placed its stamp of approval upon a state court's refusal to grant full faith and credit where a *default judgment* was rendered *in personam* against a non resident of the forum state.

7. U.S. CONST. amend. XIV § 1.

8. 95 U.S. at 728.

9. 326 U.S. 310 (1945).

10. WASH. REV. STAT. § 9998-1039 (1941).

11. *But see,* Perkins, v. Benguet Cons. Min. Co., 342 U.S. 437 (1952); Missouri K. & T. R.R. v. Reynolds, 255 U.S. 565 (1920); St. Louis S.W. R.R. v. Alexander, 227 U.S. 218 (1912); Tauza v. Susquehana Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

12. E.g., FLA. STAT. § 47.29 (1957); MD. CODE Art. 66½, (1951) § 113 as amended; N.Y. VEHICLE & TRAFFIC LAW, § 52; OHIO REV. CODE § 2703.20 (1953). Constitutionality of the above type statutes upheld in Hess v. Pawloski, 274 U.S. 352 (1927).

activity, together with the *International Shoe* case, indicated a strong trend away from the Court's fear of extraterritorial jurisdiction impairing the sovereignty of sister states,[13] and toward litigating in a forum convenient to both parties.[14]

Stage Three appeared to settle the questions in the minds of the legal scholars as to the sufficiency of the contacts needed. A Texas corporation issued a reinsurance certificate in the State of California. Notices of premiums due were sent into the state, and premium payments were mailed from California to Texas. The defendant corporation had no other contact with the state. Upon the death of the insured, the insurance company refused to pay on the contract claiming that the death was a suicide. The beneficiary brought suit in California; service of process being effected by notice by registered letter sent to the Texas corporation. The court gave a judgment to the beneficiary. After receiving the California judgment, the Texas court refused to grant full faith and credit to the judgment on the basis of lack of jurisdiction.[15] The Supreme Court granted certiorari[16] and held that the Texas corporation had a "minimum contact" with the state of California sufficient to make the corporation subject to litigation arising in that state.[17] The effect of this decision caused legal writers to speculate more freely on the demise of *Pennoyer v. Neff*, and that reasonable notice and convenience of the parties was all that was necessary for a state court to take jurisdiction over a non-resident.[18]

In the instant case, the majority[19] attempted to distinguish the *McGee* case primarily on the premise that the action was not based on an *act done or consummated* in the forum state.[20] It was conceded that conducting a trust business within the state of Florida can be compared with the mailing aspect of the *McGee* case, but the Justices were unable to find a substantial contact between the forum and the Delaware trustee.[21] The court pointed out the fact that the insurance contract in *McGee*

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13. Fear of extraterritorial jurisdiction was a traditional notion among the courts as indicated in the dictum of the *Pennoyer* case. Further evidence of this is the adoption of various uniform acts by almost all states and territories. See e.g. Uniform Reciprical Enforcement of Support Act, 9c U.L.A. § 1.

14. Latimer v. S/S Industries Reunidas F. Matarazo, 175 F.2d 184 (2d Cir. 1949); Kirkpatrick v. Texas & P. R.R., 166 F.2d 788 (2d Cir. 1948); (opinions by Judge Learned Hand): Ehrenzweig, *The Transient Rule of Personal Jurisdiction, The "Power" Myth And Forum Conveniens*, 65 YALE L. J. 309 (1956); Ehrenzweig, *Pennoyer is Dead, Long Live Pennoyer*, 30 Rocky Mt. L. Rev. 285 (1958).

15. McGee v. International Life Ins. Co., 288 S.W.2d 579 (1956); (holding the judgment unconstitutional and void).

16. 352 U.S. 924 (1956).

17. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); the dictum indicated that the corporation had no right not to be sued, citing Bernheimer v. Converse 206 U.S. 516 (1906).

18. See authorities cited in note 14, *supra*.

19. Black, Burton, Brennan, and Douglas dissenting.

20. Further distinctions are: special legislation in California, Florida Statute making a trustee an indispensible party to litigation involving the trust.

21. 357 U.S. at 253.

bore a *substantial* connection with the state of California in that the state was attempting to provide redress for its residents in their dealings with non-resident insurance companies.[22] The two cases were further distinguished by stating that the appointment made in Florida was not comparable to the insurance contract entered into in California; it was the validity of the trust and not the appointment that was in issue in the case.[23] Is Chief Justice Warren suggesting that the "minimum contact" must be in issue in the case? If so, the reasoning appears fallacious. In *McGee* it was the suicide of the insured and not the insurance contract which was in issue. The Court was steadfast in its refusal to find a connection between the Delaware trustee and the state of Florida. It was stated that the trustee did not carry on a single act which would amount to "doing business" within the state. Hence, the *quality* of this contact was not comparable with the insurance policy in *McGee*.

It is on this point that criticism could reasonably be directed to the majority opinion. The settlor became domiciled in Florida in 1944, and so remained until her death in 1952. During this entire period the trustee bank had the use of her funds; a fundamental aspect of the banking business. In 1949, the last appointment was made causing one-half million dollars to be transferred to the trusts in question. Thus, for a period of four years, the trustee had a substantial amount of investment capital placed with the bank by a Florida resident. It is difficult to conceive how the Court could possibly contend that the Delaware trustee was not doing business in the state of Florida.

An analysis of the decisions which have been rendered in lower courts since the *McGee* case would seem to provide a more justifiable reason for the *Hanson* decision than the reasons advanced by the Court. A federal court in Kentucky, cited *McGee* in granting the state of Kentucky jurisdiction over a West Virginia radio corporation *whose broadcast was being carried in the border area in Kentucky*. The broadcast, together with a nominal amount of advertising sold in *one county*, formed the basis for allowing jurisdiction.[24] A federal court in Louisiana gave that state jurisdiction, citing *McGee*, where the only contact with the state and the insurance company was the occurrence of an automobile accident within the state involving the insured out-of-state vehicle.[25]

The Court's realization of the far reaching affects of the McGee case, as indicated by the cases mentioned, was the sole basis for the decision

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22. CAL. INS. CODE, §§ 1610-1620.
23. *Supra*, note 21.
24. W.S.A.Z., Inc. v. Lyons, 254 F.2d 242 (E.D. Ky. 1958). This was a *libel* action arising in a county in Kentucky. It appears that the court is placing much emphasis on the *advertising* done in this one county to form the basis for taking jurisdiction. Where is the relationship between the going business and the act complained of?
25. Pugh v. Oklahoma Farm Bureau, 159 F. Supp. 155 (E.D. Ky. 1958).

in the instant case. Its reluctance to settle this phase of the law will call for a complete reversal by the legal writers who presumed the premature demise of *Pennoyer v. Neff*.[26] Although *Hanson* did not set out the limits of personal jurisdiction for future litigants, it did establish one point directly—*Pennoyer* lingers on.

Ralph P. Ezzo

AUTOMOBILES—DANGEROUS INSTRUMENTALITY—RENTAL OWNERS

The owner of a rental automobile informed the renter that the car was not to be driven by anyone other than himself and included a clause to that effect in the contract. The bailee allowed a third party to use the car who negligently collided with the plaintiff's automobile. *Held*, the contract provision does not relieve the company of responsibility for negligent operation of the automobile by a person other than the renter. *Leonard v. Susco Car Rental Sys.*, 103 So.2d 243 (Fla. App. 1958).

The common-law generally restricts liability of an automobile owner for the negligent operation of his vehicle by another to the master-servant relationship; in the absence of such a relationship the owner who entrusts his car to a competent operator is not responsible for the operator's negligence while he is using the car for his own purposes.[1] Several states have enacted statutes which modify this common-law rule restricting liability to the doctrine of respondeat superior,[2] but only one jurisdiction, Florida, has judicially expanded the common-law by the application of the dangerous instrumentality doctrine to automobiles.[3]

The Supreme Court of Florida first applied the doctrine to an automobile in 1917,[4] and the principle has since received legislative recognition.[5] The doctrine was originally limited to master-servant and principal-agent

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1. Downs v. Norrell, 261 Ala. 430, 74 So.2d 593 (1954); Field v. Evans, 262 Mass. 315, 159 N.E. 751 (1928); Maiswinkle v. Penn Jersey Auto Supply Co., 121 N.J.L. 349, 2 A.2d 593 (Sup. Ct. 1938); Cencebaugh v. Ridley, 101 Ohio App. 233, 139 N.E.2d 57 (1953); Kantola v. Lovell Auto Co., 157 Ore. 534, 72 P.2d 61 (1937); 5a AM. JUR. *Automobiles* §576 (1956); 60 C.J.S. *Motor Vehicles* §428 (1949); Annot., 100 A.L.R. 920 (1936).

2. *E.g.*, CAL. VEHICLE CODE ANN. § 402 (Supp. 1957); D.C. CODE ANN. § 40-424 (Supp. VI, 1951); IDAHO CODE ANN. § 49-1404 (1957); IOWA CODE ANN. c. 321, § 321.493 (Supp. 1958); MICH. COMP. LAWS § 257.401 (Supp. 1956); MINN. STAT. ANN. § 170.54 (West 1945); N.Y. VEHICLE AND TRAFFIC LAW § 59; R.I. GEN. LAWS § 31-31-3 (1956).

3. Weber v. Porco, 100 So.2d 146 (Fla. 1958); Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947); 3 FLA. JUR. *Automobiles* §§ 90, 152 (1955); 2 FLORIDA LAW AND PRACTICE *Automobiles* §§ 10, 36 (1955); 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2911 (Perm. ed. 1953); Comment, 5 U. FLA. L. REV. 412 (1952).

4. Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917).

5. FLA. STAT. § 51.12 (1957).