

6-1-1949

Constitutional Law – Process – State Regulation of Business of Non-resident Individual as Basis for Jurisdiction

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Constitutional Law – Process – State Regulation of Business of Non-resident Individual as Basis for Jurisdiction, 3 U. Miami L. Rev. 623 (1949)

Available at: <https://repository.law.miami.edu/umlr/vol3/iss4/9>

This Case Note is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

CASES NOTED

CONSTITUTIONAL LAW—PROCESS—STATE REGULATION OF BUSINESS OF NON-RESIDENT INDIVIDUAL AS BASIS FOR JURISDICTION

Defendant, a resident-citizen of Tennessee, was engaged in the termite exterminating business in Mississippi. He maintained an office, of which his agent had charge, in the city of Jackson. Plaintiff brought suit alleging that the defendant had breached his contract with plaintiff to exterminate termites and beetles, and served the Secretary of State of Mississippi pursuant to a statute authorizing such service when defendant is doing business in, but is a non-resident of, the state.¹ As directed in the statute, the Secretary of State sent a copy of the summons to the defendant by mail, and the clerk who issued the summons also sent a copy by registered mail. Defendant filed a motion to dismiss for lack of jurisdiction on the grounds that the substituted-service statute violated Article IV, Section 2,² and the Fourteenth Amendment³ of the Federal Constitution. From a decree of the lower court sustaining the motion, the plaintiff appealed. *Held*, that the substituted service statute, as applied to the defendant, is not unconstitutional, since defendant is subject to state regulation under a license statute enacted to prevent "fraudulent practices,"⁴ and the cause of action arose out of business transacted within the state. Decree reversed. *Condon v. Snipes*, 38 So.2d 752 (Miss. 1949).

There are two issues to consider in substituted-service statutes: The sufficiency of notice under the Due Process Clause and, the power of a state, under the Privileges and Immunities Clause, to provide that the doing of

1. "Any non-resident, person, firm, partnership, general or limited, or any corporation not qualified under the constitution and laws of this state as to doing business herein, who shall do any business in this state, shall, by the doing of such business or the performing of such work or services, be deemed to have appointed the secretary of state . . . to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued or accruing from the doing of such business . . . or as an incident thereto by any such non-resident, or his . . . agent, servant or employee. The doing of such business or the engaging in any such work or service in this state shall be deemed a signification of such non-resident's agreement, and equivalent to an appointment by such non-resident of the secretary of state of the state of Mississippi . . . to be the true and lawful attorney or agent of such non-resident upon whom may be served all lawful process in any action or proceeding against such non-resident for any cause of action which has accrued or may accrue in this state." MISS. CODE ANN. § 1437 (1942).

2. "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

3. Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. MISS. CODE ANN. §§ 5006-5011 (1942).

business within a state by a non-resident constitutes the appointment of a statutory agent for service of process.

The constitutionality, under the Due Process Clause, of statutes providing for service of process on a state official who mails a copy of the summons to the defendant, has been upheld in cases involving non-resident automobile drivers⁵ or owners,⁶ who were legally responsible for automobile accidents. However, statutes which do not provide for notice to the non-resident defendant by the state official are invalid as a denial of due process.⁷ Actual notice to the defendant is not required, if the substituted-service statute has a provision making it reasonably certain that the defendant will receive actual notice.⁸ These "automobile" cases are based on the theory that the use of automobiles is attended by danger to the public; therefore the state may make regulations applicable to non-residents in order to promote safety on the highways.

Since the state has power to regulate, under its police power, it has the right, under the Privileges and Immunities Clause, to exclude a driver until he appoints a state official as agent for service of process.⁹ The state may declare that the use of the highway constitutes the appointment of a state official as agent upon whom process may be served.¹⁰

The "automobile" cases are usually cited for the proposition that a state may exercise jurisdiction over non-residents doing an *act*¹¹ within the state. By analogy, it would seem that a state may constitutionally exercise jurisdiction in actions in personam, over a non-resident doing *business* within a state.

The Supreme Court of the United States has recognized this analogy on the case of *Henry L. Doherty & Co. v. Goodman*.¹² In that case, service of process, pursuant to an Iowa statute, on a business agent of a non-resident individual dealer in securities was upheld on the ground that Iowa treats the business of dealing in corporate securities as an exceptional occupation and subjects it to special regulation.

It is to be noted that the Iowa statute¹³ in the *Doherty* case is somewhat different from the Mississippi statute¹⁴ in the principal case, in that: The

5. *Hess v. Pawloski*, 274 U. S. 352 (1927); *Boss v. Irvine*, 25 F. Supp. 983 (W. D. Wash. 1939); *Ray v. Richardson*, 250 Ala. 705, 36 So.2d 89 (1948); *Hendershot v. Ferkel*, 144 Ohio St. 112, 56 N. E.2d 205 (1944).

6. *Young v. Masci*, 289 U. S. 253 (1933); cf. *Morrow v. Asher*, 55 F.2d 365 (N. D. Tex. 1932).

7. *Wuchter v. Pizzutti*, 276 U. S. 13 (1928).

8. See note 5 *supra*.

9. *Kane v. New Jersey*, 242 U. S. 160 (1916).

10. *Hess v. Pawloski*, *supra*.

11. GOODRICH, *CONFLICT OF LAWS* § 70 (2d ed. 1938).

12. 294 U. S. 623 (1935).

13. "When a corporation, company, or individual has, for the transaction of *any business* an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency." (italics ours), IOWA CODE § 11079 (1927).

14. See note 1 *supra*.

Iowa statute provides for service of process on a *business agent* of the defendant, while under the Mississippi statute service is to be made on a *statutory agent*. Also, the Iowa statute is applicable to a *resident* or non-resident individual who has an office "in any county other than that in which the principal resides," while the Mississippi statute seems designed to apply only to non-residents and not to residents who have a principal office in one county and a subsidiary office in another county within the same state. Hence the Mississippi statute might be objectionable in that it discriminates against non-residents.¹⁵ This distinction between the two statutes is not mentioned in the principal case.

The only other case which has considered the same Mississippi substituted-service statute is the case of *Sugg v. Hendrix*.¹⁶ There, the non-resident defendant was engaged in the occupation of constructing levees. A workman who was injured while working on the project brought suit, service being made in the same manner as in the principal case. The constitutional validity of the statute was upheld on the ground that the state, under its police power, "had the power to enact the statute . . . for the safety and protection of persons receiving injury . . . particularly when the nature of the work is fraught with danger. . . ." The court in the principal case stated that since termite exterminating is a type of business which is subject to state regulation the substituted-service statute, *as applied to the defendant*, is constitutional.

It is to be noted that the "automobile" cases are based on statutes¹⁷ specifically mentioning non-resident automobile owners or drivers, while the *Doherty v. Goodman* case, the *Sugg* case, and the principal case are based on statutes which apply to all who do business within the state but do not specify any particular *kind* of business to which they are applicable, i.e., they apparently are enacted in order to render non-residents amenable to service, in actions in personam, no matter in what kind of business they are engaged. However, the courts, in these cases, have expressly limited their opinions to businesses which are subject to state regulation and have expressed no opinion as to the constitutionality of the substituted-service statutes if applied to businesses which are not subject to state regulation.¹⁸

15. See *Davidson v. Henry L. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700, 701 (1932) ["It (statute) places no greater or different burden upon the non-resident than upon the resident of the state. If an . . . individual resident in one county of this state maintains an office or agency in another county of the state such . . . individual may be sued under this statute in the latter county in actions in personam. . . . The latter (resident-citizen) may, under this statute, be compelled to defend a personal action in another county far removed from the county of his residence."]

16. 142 F.2d 740 (C. C. A. 5th 1944).

17. E.g., ALA. CODE ANN. tit. 7, § 199 (1940); OHIO GEN. CODE ANN. §§ 6308-2, 6308-5 (1933); N. Y. VEHICLE AND TRAFFIC LAW § 59; TEX. STAT. REV. CIV. art. 2039a (1929).

18. It is increasingly difficult to find businesses which are not subject to state regulation, hence the use of these "substituted-service" statutes will probably increase in the future.

The constitutional power of a state to bind a non-resident individual doing business within the state, by service of process upon a state official, or business agent, regardless of whether or not the business is subject to state regulation has been upheld in decisions rendered in the courts of New York,¹⁹ Iowa,²⁰ and Utah.²¹ This view is supported by the opinions of many legal writers.²² It is well established that a state may not discriminate against non-residents by forbidding them ingress to engage in lawful businesses,²³ but there seems to be no valid constitutional objection if the state imposes reasonable conditions upon the non-residents doing business within the state which render him as amenable to process as the resident business man.²⁴ Equalization of amenability to process can hardly be considered discriminatory.

With respect to the Due Process Clause, if the method of substituted-service makes it reasonably certain that the defendant will be notified²⁵ and given a reasonable time in which to appear and be heard,²⁶ then all the requirements as to jurisdiction are met. Since the United States Supreme Court has decided that substituted service in "automobile" cases, and cases dealing with businesses subject to state regulation, conforms to due process of law, there can be no constitutional difference²⁷ in substituted service involving causes of action accruing from continuous business transactions carried on within the state of the forum.²⁸

19. *Interchemical Corp. v. Mirabelli*, 269 App. Div. 224, 54 N. Y. S.2d 522 (1st Dep't 1945).

20. *Davidson v. Henry L. Doherty & Co.*, *supra*. But see, *id* at 705 (dissenting opinion).

21. *Wein v. Crockett*, 195 P.2d 222 (Utah 1948). But see, *id* at 231 (dissenting opinion).

22. Daum, *The Transaction of Business Within a State by a Nonresident as a Foundation for Jurisdiction*, 19 IOWA L. REV. 421 (1934); O'Mellia, *Jurisdiction by Implied Consent*, 29 MARQ. L. REV. 31 (1945); Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146 (1933); Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871 (1919); Notes, 40 COL. L. REV. 1105 (1940), 33 KY. L. J. 316 (1945). *Contra*: RESTATEMENT, CONFLICT OF LAWS § 85 (1934).

23. *United States v. Wheeler*, 254 U. S. 281 (1920); *Ward v. Maryland*, 12 Wall. 418 (U. S. 1871).

24. See note 22 *supra*.

25. *Wuchter v. Pizzutti*, 276 U. S. 13 (1928); *Hendershot v. Ferkel*, 144 Ohio St. 112, 56 N. E.2d 205 (1944); *Cherry v. Heffernan*, 132 Fla. 386, 182 So. 427 (1938).

26. See *Anderson National Bank v. Lockett*, 321 U. S. 233, 246 (1944) ("The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled.")

27. See *Davidson v. Henry L. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700, 704 (1932) ("What difference is there, under the due process clause of the Federal Constitution, between an action for damages for personal injury and an action for damages for fraud in the sale of stock . . . ? If jurisdiction can be obtained in one by substituted service on an agent, certainly it can be in the other. If such service is due process in one instance, it cannot be anything else in the other. There is no question of police power in either case. It is strictly and solely a question of due process of law.")

28. For a definition of "doing business within a state" under substituted service statutes see *Haire v. Mirabelli*, *supra*.