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Recent Decisions

CIVIL PROCEDURE — IN PERSONAM ACTIONS AND THE NONRESIDENT MOTORIST STATUTES

Davis v. St. Paul-Mercury Indemnity Company,
294 F.2d 641 (4th Cir. 1961)

A Texas resident permitted her son to drive her automobile to a Marine base in North Carolina. The automobile was loaned to a fellow Marine who fatally injured plaintiff's intestate. Suit was brought in a North Carolina court against the nonresident owner, service of process being in accordance with the state's nonresident motorist statute.¹ Defendant had notice of the suit, as did her insurance company, which elected not to defend. Plaintiff recovered a default judgment for \$25,000.

In a supplementary proceeding against the insurance company five years later, the plaintiff recovered the full amount of the insurance policy plus interest on the default judgment. The insurance company appealed on the ground that the default judgment was void for lack of jurisdiction over the person of the nonresident owner. It was held that North Carolina had personal jurisdiction over the nonresident automobile owner.²

The constitutionality of a nonresident motorist statute which gives reasonable notice to the defendant is no longer questioned.³ Litigation has shifted from an attack on the jurisdictional basis of the statute to questions concerning the proper construction of its terms.⁴ Generally, the state court in construing its statute will treat it as being in derogation of the common law, and therefore will not extend it by implication to persons falling outside its specific provisions.⁵ Almost all states now

1. N.C. GEN. STAT. § 1-105 (Supp. 1959). The statute provides that process may be served on a nonresident in any action ". . . growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, and under his control or direction, express or implied, of a motor vehicle on such public highways of this State . . ."

2. *Davis v. St. Paul-Mercury Indemnity Co.*, 294 F.2d 641 (4th Cir. 1961).

3. *Young v. Masci*, 289 U.S. 253 (1933) (The nonresident motorist statute was extended to a user with permission.); *Hess v. Pawloski*, 274 U.S. 352 (1927). *But see* *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (Provision must be made for notifying motorists.). Eleven years before *Hess*, in *Kane v. New Jersey*, 242 U.S. 160 (1916), the Supreme Court sustained a New Jersey statute which required *actual* appointment of a state official as the agent of the nonresident motorist as a condition to using the highways of the state.

4. See generally *Dambach, Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198, 199-211 (1958); *Stumberg, Extension of Nonresident Motorist Statute to Those Not Operators*, 44 IOWA L. REV. 286 (1959).

5. See, e.g., *Ray v. Richardson*, 250 Ala. 705, 36 So. 2d 89 (1948); *Chapman v. Davis*, 233 Minn. 62, 45 N.W.2d 822 (1951); *Harris v. Owens*, 142 Ohio St. 379, 52 N.E.2d 522 (1943); *In re Wilcox's Estate*, 137 N.E.2d 301 (Ohio Ct. App. 1955); *Pray v. Meier*, 69 Ohio App. 141, 43 N.E.2d 318 (1942) (dissenting opinion). See also *Annot.*, 53 A.L.R.2d 1164 (1957).

have such statutes, but the class of nonresident motorists affected differs.⁶

By construing its statute as applying to an automobile owner who had never come into the state personally but who had permitted another to use her automobile there, the North Carolina court raised the question whether an in personam judgment rendered in accordance with that interpretation of a nonresident motorist statute would be constitutionally valid.⁷

The United States Court of Appeals decided that a state's jurisdiction may extend to such a nonresident. The decision was based primarily upon the reasoning of *International Shoe Company v. Washington*.⁸ The court also relied upon cases in areas other than automobile litigation where the courts had re-examined the concepts underlying in personam jurisdiction.⁹

6. See Note, 44 IOWA L. REV. 384, 390-392 (1959), for listings of various nonresident motorist statutes. Only Alaska seems to have no provision for substitute service on nonresident motorists. Arizona, California, Florida, Iowa, Michigan, New York, and Washington have statutes which clearly allow for service to be made upon nonresident owners who have consented to the use of the car by another. ARIZ. REV. STAT. ANN. § 28-502 (1956); CAL. VEHICLE CODE § 404 (Supp. 1957); FLA. STAT. ANN. § 47.29 (Supp. 1960); IOWA CODE ANN. § 321.499(3) (Supp. 1960); MICH. STAT. ANN. § 9.2103 (1960); N.Y. VEHICLE & TRAFFIC LAW § 253; WASH. REV. CODE § 46.64.040 (Supp. 1959).

See OHIO REV. CODE § 2703.20 (Supp. 1961), which provides that process may be served on "Any nonresident of this state, being the operator or owner of any motor vehicle, who accepts the privilege extended by the laws of this state to nonresident operators and owners, of operating a motor vehicle or of having the same operated, within this state . . ." Cf. Parr v. Gregg, 70 Ohio App. 235, 42 N.E.2d 922 (1942) (The legislature designed the term to apply only to persons actually controlling the driving and steering mechanism.); Taylor v. Hall, 103 Ohio App. 283, 145 N.E.2d 241 (1956) (The statute was not restricted to nonresidents who caused accidents while operating the motor vehicle. Here, nonresidents injured a passing pedestrian by opening the cab door of a parked truck across the plaintiff's path.)

7. No cases have been found directly supporting such an extended construction of this type of statute. *But see* Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951) (The family purpose doctrine was employed to sustain service on a nonresident owner who had not been personally present in the state.); Cf. Kentucky v. Maryland Cas. Co., 112 F.2d 352 (6th Cir. 1940) (The court refused to allow service on nonresident aunt of minor driver because facts alleged did not bring the automobile within the family purpose doctrine.). Some courts have allowed service upon nonresident owners by using agency or employer-employee theories. See Smith v. Christian, 124 F. Supp. 201 (W.D. Mo. 1954); Lamere v. Franklin, 149 Misc. 371, 267 N.Y.S. 310 (Sup. Ct. 1933). Other courts have refused to allow an extension of nonresident motorist statutes to nonresident owners. See Larsen v. Powell, 117 F. Supp. 239 (D. Colo. 1953); Wilson v. Hazard, 145 F. Supp. 23 (D. Mass. 1956); Dalton v. Alexander, 10 Ill. App. 2d 273, 135 N.E.2d 101 (1956); Zimmerman v. First Judicial Dist. Court, 332 P.2d 654 (Nev. 1958).

8. 326 U.S. 310 (1945). Although this case involved a foreign corporation defendant, there is a general agreement among the law review writers that the Supreme Court's observations concerning the basis for judicial jurisdiction in personam were intended to apply as well to nonresident natural persons. See note 11 *infra*.

9. *E.g.*, Milliken v. Meyer, 311 U.S. 457 (1940) (domicile as basis of jurisdiction); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (nonresident's agent selling securities within the state); Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957) (single tortious act within the state).

Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (Phila. County Ct. 1938), noted in 87 U. PA. L. REV. 119 (1938), was also cited. Here, the Pennsylvania court held that ownership of realty within the forum is a basis for in personam jurisdiction over a nonresident.

International Shoe qualified the inflexible rule of *Pennoyer v. Neff*¹⁰ that personal service within the state is absolutely necessary for an in personam judgment against a nonresident. It authorized the use of substituted service in obtaining in personam jurisdiction over a foreign corporation¹¹ whenever the corporation has sufficient contact or ties with the forum to make it reasonable and just according to the "traditional concepts of fair play and substantial justice" to do so.¹²

The application of this reasoning to the controlling circumstances of the principal case would seem to justify the result.¹³ Here, the nonresident owner voluntarily sent her automobile into the state. This act outside of the state had direct and foreseeable consequences within the forum.¹⁴ The resultant injury was witnessed by North Carolina residents

Nonresident motorist statutes, of course, permit the exercise of jurisdiction over owners of automobiles under certain circumstances but the basis of this jurisdiction is not the mere ownership of the personalty. On the question of whether judicial acceptance of a nonresident due to his relation to real property within the state might allow for a further extension of jurisdiction based upon relationships to tangible personal property, see Note, 44 IOWA L. REV. 374 (1959). The author there states: "One objection might be based upon the patent difference between personal and real property — the lack of permanence of the personalty. It is perishable, but more important, it can be moved from one jurisdiction to another. But is there a logical reason for making permanency a criterion here? We assume that at the moment the cause of action arises the personalty is extant and present within the jurisdiction. If he was not responsible for its original location there, the nonresident, at least, has chosen to associate himself with the property located within the jurisdiction. Should he not be required to answer within this jurisdiction for the injurious consequences of the personalty being present to the same extent as if it had been realty? It would only seem just that he do so." *Supra*, at 381-82.

10. 95 U.S. 714 (1878). See also *McDonald v. Mabee*, 243 U.S. 90, 91 (1917), where the court said: "The foundation of jurisdiction is physical power . . ."

Some writers have proposed restricting, if not abrogating, "transient" jurisdiction. See Ehrenzweig, CONFLICT OF LAWS, 102-06 (1959); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956).

11. See Note, BROOKLYN L. REV. 291, 293-99 (1958), for a detailed analysis of the *International Shoe* opinion which indicates that the concepts apply equally to natural persons. See also Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599, 603 (1955); Ehrenzweig, *Pennoyer Is Dead — Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285, 287 (1958); Reese & Galston, *Doing an Act or Causing Consequences as Basis of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 251 (1959).

"One argument against applying *International Shoe* to individuals or for applying it differently is that the decision's contacts — interest approach flows from the states' traditional power to exclude foreign corporations or to condition their entrance upon submission to broad extraterritorial jurisdiction. Some courts have accepted this rationale and have reasoned that the absence of power to exclude individuals precludes the imposition of similarly broad jurisdiction and requires a stronger state interest before jurisdiction over natural persons may be asserted

"A more reasonable objection is based on the ease of application of the established jurisdictional tests for natural persons

"If the interest analysis is to be applied to natural persons, it should be applied with greater restraint than in the case of corporations." Note, 73 HARV. L. REV. 909, 935-36 (1960).

12. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

13. It is not necessary in all cases that the act be done in the state; the causing of reasonably foreseeable consequences in the state may be grounds for the granting of jurisdiction. See Reese & Galston, *Doing An Act or Causing Consequences as Basis of Jurisdiction*, 44 IOWA L. REV. 249, 260-64 (1959).

14. In some situations, there would seem to be sufficient state and plaintiff interests to

and is one to which North Carolina substantive law would apply.¹⁵ In balancing such factors against claims of inconvenience to the nonresident owner,¹⁶ the assertion of jurisdiction would not violate the "traditional notions of fair play and substantial justice."¹⁷ The nonresident owner allowed property capable of inflicting serious injury to be taken into another state.¹⁸ The court concluded that this may fairly be coupled with an obligation upon the owner to stand suit where the property has been taken with her consent.

This decision clearly extends a state's in personam jurisdiction from a situation where the nonresident motorist commits a tortious act¹⁹ within the state, to a situation where a non-tortious act done beyond the state's

render the application of a statute covering such a case constitutional. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Here, in a suit by an Illinois resident for injuries sustained when a water heater exploded, the Supreme Court of Illinois held that an Ohio corporation, which manufactured a safety valve that was assembled in Pennsylvania into the heater purchased by the plaintiff in Illinois, was subject to the jurisdiction of the Illinois courts.

In *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718, 721 (N.D. Ill. 1957), although an opposite result was reached on a similar factual situation, the decision in the *Gray* case was predicted in dictum. *But cf. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.* 239 F.2d 502 (4th Cir. 1956), where a North Carolina statute was held unconstitutional when applied to the particular transaction before the court, which was an action against a nonresident corporation who shipped defective goods directly into the state. See also Sobeloff, *Jurisdiction of State Courts Over Nonresidents in Our Federal System*, 43 CORNELL L.Q. 196 (1957).

15. Both North Carolina and Texas courts would have applied North Carolina law under the rule that the law of the place where the accident occurred governs. *Goode v. Barton*, 238 N.C. 492, 497, 78 S.E.2d 398, 402 (1953). See TEX. REV. CIV. STAT. ANN. art 4678 (1952).

16. The factors which a court will consider before it will allow a dismissal of a case within its jurisdiction because of inconvenience to the litigant are "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises . . . ; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

In the ordinary case, it would be possible to alleviate extreme hardships to a defendant by a removal to a federal court on the ground of diversity of citizenship. 28 U.S.C. § 14441 (1958). A motion could then be made for a change of venue pursuant to 28 U.S.C. § 1404 (a) (1958). The principle of *forum non conveniens* may also be applicable in some state courts. See *Bata v. Bata*, 304 N.Y. 151, 105 N.E.2d 623 (1952).

17. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

18. To extend this line of reasoning beyond the area of nonresident motorist litigation might prove dangerous. ". . . the property basis could constitutionally be extended to cover physical injuries arising from tangible personalty present within the state. However, the relationship between the defendant and the state created by his leaving a piece of personal property within its borders, in contrast to the permanent realty, seems too tenuous to allow the mere presence of that property within the state to be a sufficient basis for other actions in personam against the absent non-resident." Note, 73 HARV. L. REV. 909, 948 (1960).

19. Since the initial Supreme Court approval of a single act as a basis of jurisdiction in *Hess v. Pawloski*, 274 U.S. 352 (1927), the problem which faces the courts most often is whether an employer or personal representative of a driver, or an owner of an automobile, is subject to suit under a nonresident motorist statute which does not explicitly extend coverage to him. Some courts have been hesitant in allowing such an extension. See *O'Tier v. Sell*, 252 N.Y. 400, 169 N.E. 624 (1930) (This case required that the nonresident personally operate the vehicle.).