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# Jurisdiction of a State Court Over a Foreign Railroad Company on a Foreign Cause of Action Arising Under the Federal Employers' Liability Act

Edward W. Hinton

statute so provided it was constitutional to permit a verdict under the federal Employers' Liability Act by a non-unanimous jury. However, where a state statute, as here construed by the state courts of Kentucky, attempts to confer a federal right, which would not exist but for the application of the state statute, the federal Supreme Court is justified, on the authorities, in holding that it has no application to suits under the federal Employers' Liability Act. The federal act requires proof of negligence as a basis of tort liability, except where violation of a Federal Safety Act by the employer contributes in whole or in part to the injury inflicted or death sustained. To read into the Federal Act the applicability of a state statute as to what fact must be, or is negligence, would be greatly extending the federal Employers' Liability Act beyond its wording, and would, moreover, confer upon the several states unwarranted constitutional power. That act is to be general and uniform in scope, and to hold otherwise would open the door to the conflicting vagaries of the various state laws in suits under it. The court had earlier held, in the *Horton* case,[4] that a state statute relating to assumption of risk under the federal Employers' Liability Act was inapplicable; and a short time later, in the *Winfield* case[5] had further held that even though a state statute could without conflict cover a gap in the federal Employers' Liability Act, it was inapplicable on the ground that the federal act covered the entire subject matter.

There appears to be a tendency to extend state laws as to what is negligence over into federal domain, the idea being probably that the fact of negligence is often difficult of proof, being dependent largely upon circumstances. The same tendency is noticeable in procedure under state workmen's compensation acts, where certain inferences as to what is an injury "arising out of and in the course of employment" are made, in the interests of protection to the employe. However humane such movements may be, they can not be supported on constitutional grounds where conflict with the fundamental document is patent and clear. In the instant case, the holding seems inescapable and sound, from the standpoint of constitutional law and well-established practice under the federal Employers' Liability Act.[6] It would seem the Court of Appeals of Kentucky, in thus being reversed, should have known better.

E. F. ALBERTSWORTH.

CONSTITUTIONAL LAW—JURISDICTION OF A STATE COURT OVER A FOREIGN RAILROAD CORPORATION ON A FOREIGN CAUSE OF ACTION ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.[1]—

4. (1914) 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062.
5. (1917) 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045.
6. The leading cases are collected, as well as annotated, in the author's "Cases on Industrial Law," pp. 40-96.

1. For a discussion of the general problem of jurisdiction over foreign corporations, see "Due Process, Jurisdiction over Corporations, and the Commerce Clause" 42 Harv. Law Rev. 1062, to which the present writer is indebted for an extensive collection of the cases.

[United States] The *Mix* case,[2] recently decided by the Supreme Court, suggests several very perplexing questions. The facts of the case, as stated in the opinion, were these:

"Thomas Doyle, a switchman employed by the Michigan Central Railroad, was killed in Michigan in the performance of his duties. He was then a resident of Lansing in that state, and there his wife, Augusta, lived with him until his death. Shortly after she removed to Missouri, was appointed administratrix of his estate at St. Louis, and, as such, brought in the circuit court of that city an action for damages against the railroad under the Federal Safety Appliance Act (45 U. S. C. A., Sections 1-46) and the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59). The railroad is a Michigan corporation. No part of its line runs into Missouri. It has not consented to be sued there, has never been admitted to do business there, and has never done any business there *except soliciting freight for transportation in interstate commerce over its lines in other states.* For this limited purpose it maintains an office in St. Louis. Upon its agent[3] in charge of that office the sheriff made service of the summons.

The railroad appearing specially filed a petition for removal of the cause to the federal court. This the state court denied. Thereupon the railroad filed a transcript of the record in the federal court and moved there to quash the summons. Upon objection of the administratrix, that court declined to pass on the motion and remanded the case to the state court. It did so apparently on the ground that the suit was one under the Federal Employers' Liability Act.[4] The railroad again appearing specially pressed in the state court the motion to quash. It was denied on the authority of *State* ex rel. *Texas Portland Cement Co.* v. *Sale* 232 Mo. 166, 132 S. W. 1119, and *Davis* v. *Jacksonville Southeastern Line* 126 Mo. 69, 28 S. W. 965, which hold that service upon a soliciting freight agent confers jurisdiction and that a petition to remove to the federal court is equivalent to a general appearance. After denial of the motion to quash the summons this application for a writ of prohibition was filed by the railroad, in the highest court of the state, in accordance with what appears to be the appropriate local practice. . . . The application for the writ of prohibition was denied without opinion."

On review by writ of certiorari the Supreme Court reversed the judgment of the state supreme court refusing the writ of prohibition.

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2. *Michigan Central Railroad Co.* v. *Mix* (1929) 278 U. S. 492, 49 Sup. Ct. Rep. 207.

3. The Missouri statute provides for service of process on foreign corporations having an office within the state by delivery of a copy to the officer or agent in charge of such office: Mo. R. S. 1919 sec. 1186.

4. "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, *or in which the defendant shall be doing business* at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States." 45 U. S. C. A., sec. 56. (Italics ours.)

If the court had reached this result on the theory that the mere solicitation of freight by the railroad for transportation over its lines outside of the state did not amount to "doing business" so as to enable the state court to acquire jurisdiction over it to enforce a foreign liability in no wise connected with the local freight solicitation, the case would scarcely require comment. The latest cases settle the proposition that a foreign corporation which has not done any business whatever in a state is not subject to process from the courts of that state, though service may be made on its officers or agents while within the state, whether for some personal or corporate purpose.[5]

It is unnecessary to consider what activities in general may amount to doing business so as to subject the corporation to local process, for it is expressly stated that this railroad was not doing any business except the solicitation of freight for transportation on its lines elsewhere, and the authorities are now pretty well agreed that mere solicitation of such business does not constitute "doing business" within the meaning of the rule.[6] The opinion, however, ignores this feature of the case, and seems to assume that the state court might have had jurisdiction but for the effect of the "commerce" clause of the Constitution.

After making a statement of the facts, as above set out, the opinion of Mr. Justice Brandeis proceeds:

"The railroad claims that it was not subject to suit in Missouri, among other reasons, because to maintain it would violate the commerce clause. In order to show that trial of the action for damages in Missouri would entail a heavy burden upon, and unreasonably obstruct interstate commerce, it set forth facts substantially identical with those held sufficient for that purpose in *Davis* v. *Farmers' Cooperative Co.* 262 U. S. 312. . . . The mere fact that she [plaintiff] had acquired a residence within Missouri before commencing the action does not make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a state remote from that in which the accident occurred and in which both parties resided at the time."

The balance of the opinion is devoted to pointing out distinctions between the case in question and others in which the jurisdiction had been sustained, and in disposing of the plaintiff's contention that certain steps taken by the defendant amounted to a general appearance or a waiver of objection to the jurisdiction. In this connection the opinion further emphasizes the commerce objection.

5. *Goldey* v. *Morning News* (1894) 156 U. S. 518; *Philadelphia & Reading Ry. Co.* v. *McKibben* (1917) 243 U. S. 264; *Rosenberg Bros* v. *Curtis Brown Co.* (1923) 260 U. S. 516; *Bank of North America* v. *Whitney National Bank* (1923) 261 U. S. 171; *James-Dickinson Mortgage Co.* v. *Harry* (1927) 273 U. S. 119.

6. *Green* v. *C. B. & Q. Ry. Co.* (1907) 205 U. S. 530; *Minnesota Commercial Men's Ass'n* v. *Benn* (1923) 261 U. S. 140; *Thurman* v. *C. M. & St. Paul Ry. Co.* (1926) 254 Mass. 569.

Plaintiff contended that by the local practice a motion to quash the summons amounted to a general appearance, and that such a rule did not violate the "due process" clause according to the doctrine of *York* v. *Texas*.[7]

The opinion answers this argument by the statement:

"We have no occasion to inquire into the local practice. The constitutional clause sustained in *Davis* v. *Farmers' Cooperative Co.* 262 U. S. 302, was not under the Fourteenth Amendment as in *Rosenberg Bros. Co.* v. *Curtis Brown Co.* 260 U. S. 516. It was assumed that the carrier was found within the state. The judgment was reversed on the ground that to compel it to try the cause there would burden interstate commerce and, hence, would violate the commerce clause. No local rule of practice can prevent the carrier from laying the appropriate foundation for the enforcement of its constitutional rights by making a seasonable motion."

It would seem that the opinion must be taken to stand for the proposition that an action in a state court, based on the Federal Employers' Liability Act, is governed by the rule in *Davis* v. *Farmers' Cooperative Co.*,[8] though the latter case involved a common law liability for the loss of goods in transit.[9]

It is to be regretted, therefore, that the opinion fails to notice the provisions of 45 U. S. C. A. sec. 56,[10] which might have led to a different result.

It will be noted that sec. 56 of the Employers' Liability Act expressly provides that the action may be brought in the district court of the United States, "in the district of the residence of the defendant, or in which the cause of action arose, *or in which the defendant shall be doing business at the time of commencing such action,*" (italics ours) and that the jurisdiction shall be concurrent with that of the courts of the several states. The commerce clause[11] is not in terms a restriction on the power of Congress, but a grant of power, i. e., "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Under this grant of power Congress may certainly impose burdens on interstate commerce, which would be unreasonable if imposed by the state because inconsistent with the scheme of national control. If this action had been brought in the United States District Court for the Eastern District of Missouri, as expressly authorized by the Liability Act, assuming that the maintenance of an office in St. Louis amounted to doing business within the meaning of the Act, there can be little doubt that the jurisdiction would have been sustained. The court would hardly have substituted its conception of reasonableness for that of Congress. It is extremely unlikely that it would have held it beyond the power of Congress to

7. *York* v. *Texas* (1890) 137 U. S. 15.
8. *Davis* v. *Farmers' Cooperative Co.* (1923) 262 U. S. 312.
9. See *Farmers' Cooperative Co.* v. *Payne* (1921) 150 Minn. 534.
10. Reprinted in supra, note 4.
11. Art. I, sec. 8, of the Constitution.

subject the carrier to suit in a district where it was doing business, because in some cases it might increase the expense of litigation. It seems fair to assume that the jurisdiction would be sustained in case of a suit in a federal court in a district where the railroad was doing business, though the cause of action accrued elsewhere, and the expense of the litigation would be increased. In a much weaker case[12] the Court of Appeals of the District of Columbia sustained an action against a foreign interstate carrier, doing business in the District, on a transitory cause of action arising out of a shipment from Florida to Michigan, because the act of Congress regulating the courts of the District provided for suits against foreign corporations doing business therein.

The provisions of the Liability Act for suits in the United States district court for a district in which the defendant is doing business do not include state courts, and the clause, declaring the jurisdiction conferred on the federal courts concurrent with the courts of the several states, may not confer jurisdiction on the corresponding state courts. But it is certainly arguable that the act contemplated suits in the corresponding state courts, and therefore that the commerce objection is inapplicable. The burden on interstate commerce is no greater when the action is brought in a state court than where it is brought in the corresponding federal court, and if that is sanctioned by the act of Congress there can be no more objection to a suit in the state court than to one in the federal court in the same district. It is true that this view might be answered by saying that Congress has expressly sanctioned the burden on interstate commerce involved in an action in the federal court of the district in which the defendant is doing business, and therefore the commerce objection is inapplicable, while in the absence of such express sanction for actions in the corresponding court, the commerce objection remains as in other actions.

This problem deserves more consideration than it received in the opinion, and might receive a different solution when fully presented. But assuming that the commerce objection is applicable to actions in a state court under the Employers' Liability Act, a procedural difficulty arises in the means adopted to enforce it.

Where a court attempts to acquire jurisdiction by process or means which violate the "due process" clause, the attempt is futile. Jurisdiction does not attach in such cases, and the judgment is a nullity and collaterally attackable.

For example, where it is sought to obtain jurisdiction of an absent non-resident through service by publication to enforce an ordinary personal liability,[13] or of a foreign corporation not doing business in the state, by service on some public officer,[14] the judgment is void and subject to collateral attack. For the same reason

12. *Harris* v. *American Ry. Express Co.* (1926) 12 Fed. (2d) 487.
13. *Pennoyer* v. *Neff* (1877) 95 U. S. 714.
14. *Simon* v. *Southern Ry. Co.* (1915) 236 U. S. 115.

a writ of prohibition would lie to prevent the court from proceeding where it has no jurisdiction.[15]

But does the commerce objection in such a case as this affect jurisdiction in the same way as a lack of due process? Does it really do anything more than make it erroneous for the trial court to proceed against the defendant's objection, with a case where an unreasonable burden would be imposed thereby on interstate commerce?

If the commerce objection has merely the latter effect, then prohibition would seem to be an inappropriate remedy. The writ of prohibition is not a substitute for a writ of error or of certiorari.

"A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It can not be made to serve the purpose of a writ of error or certiorari, to correct mistakes of that court in deciding questions of law or fact within its jurisdiction."[16]

The granting of the writ is a matter of sound discretion.[17] It will be denied where the inferior court is not clearly without jurisdiction.[18] And since it does not serve the purpose of a writ of error, it will not be issued where the trial court has jurisdiction to pass on objections to its jurisdiction, or to the exercise of its jurisdiction.[19] Thus in Ex parte *C. R. I. & P. Ry. Company* the writ was denied because the trial court had jurisdiction to determine whether certain steps taken by the petitioned without objection in an equity suit amounted to a general appearance.

And in Ex parte *Transportes Maritimos* supra, where a ship had been seized in a proceeding in admiralty, and the claim was set up that it was exempt from seizure because owned by a foreign sovereignty, the writ was denied because the court had jurisdiction to pass on this claim, and an erroneous determination was subject to correction by appeal.

The precise legal effect of the commerce clause, therefore, becomes important. The doctrine of *Davis* v. *Farmers' Cooperative Company*[20] settled the proposition that a statute attempting to subject a foreign interstate carrier to suit in Minnesota on a foreign cause of action not connected with any local activities was unconstitutional because imposing an unreasonable burden on interstate commerce. That case was reviewed on writ of error and hence does not touch the question whether the trial court in the *Mix* case had jurisdiction to pass on the objection raised under the commerce clause. The interstate carrier has an immunity from suit in certain courts on certain causes of action. But that immunity from suit does not seem to differ from any other legal immunity from suit. The fact that it is conferred by the construction of a provision of the Con-

15. *Order of Railway Conductors* v. *Bandy* (1928) 8 S. W. (2d) 448.
16. *Smith* v. *Whitney* (1885) 116 U. S. 167, loc. 176.
17. Ex parte *Hussein Lufti Bay* (1920) 256 U. S. 616.
18. Ex parte *Davis* (1922) 262 U. S. 274.
19. In re *C. R. I. & P. Ry. Co.* (1920) 255 U. S. 273; Ex parte *Transportes Maritimos* (1924) 264 U. S. 105.
20. *Davis* v. *Farmers' Cooperative Co.* (1923) 262 U. S. 312.

stitution puts it beyond the power of state legislative diminution, but does not otherwise give it any greater effect than any other legal immunity.

In general an immunity from suit in a given court is a defense in abatement to be passed on in the first instance by the trial court, and the determination is binding until reversed by appellate proceedings.

For example, many state statutes provide for suit against a resident defendant in the county in which the plaintiff resides and the defendant may be found, or in the county in which the defendant resides.

Such a statute would clearly give the defendant a right not to be sued in a county in which neither of the parties resided, but it would not be contended that prohibition would be the appropriate remedy to enforce that right. It is fairly certain that he would be left to his plea in abatement, and his writ of error in case of an erroneous determination of the plea.

In order to eliminate all question of due process which is almost inseparably connected with suits against a foreign corporation in a state in which it is not doing business,[21] suppose the defendant were a natural person engaged in interstate transportation by air, and that while in a remote state he was sued and served with process in a transitory cause of action for an injury to an employee. The commerce clause would doubtless give him the same immunity from suit as that conferred upon a corporate carrier, but it seems highly probable that he would be compelled to set up his claim in the trial court and that it would have jurisdiction to pass on it. The same situation would arise in case of a suit against an interstate railroad in its home state on a foreign transitory cause of action, if the commerce clause applied to that situation.[22]

The corporation would be "found" in the state, and the service would be unobjectionable from the standpoint of due process, and the sole question would be whether the trial court had jurisdiction to pass on the commerce objection to the exercise of its jurisdiction.

If the admiralty court had jurisdiction to pass on the objection to the exercise of jurisdiction as against the claim of immunity because the res was the property of a foreign sovereignity, it is difficult to see why the Missouri trial court did not have jurisdiction to pass on the claim of immunity because of the burden on interstate commerce.

21. There is a line of cases which seem to hold that under the due process clause, "doing business" in a state by a foreign corporation does not subject it to the jurisdiction of the courts of that state on all transitory causes of action, but only of such as arise out of, or are connected with its local activities. This view was apparently adopted by the court in *L. & N. Ry. Co.* v. *Chatters* (1929) 279 U. S. 320, 49 Sup. Ct. Rep. 329. But in that event the action probably does not violate the commerce restriction.

22. The fact that under the ruling in *Hoffman* v. *Missouri* (1927) 274 U. S. 21, such actions are permitted by the commerce clause does not affect the validity of the assumption for the purpose for which it is made.

The doctrine of *Davis* v. *Farmers' Cooperative Company* does not lay down a hard and fast rule that the action can never be entertained by the courts of a state in which the cause of action did not accrue.

Jurisdiction was sustained, for example, for failure to deliver a shipment in the state.[23] The place of the suit seems to be objectionable only where an unreasonable burden is thereby imposed. Suppose an accident occurred on a special excursion train where all the witnesses resided in a state distant from the place of the accident. In such a case an action brought in the state where the witness resided and the carrier was doing business clearly would not in fact impose an unreasonable burden on the carrier. If then the immunity from suit is based on the fact that an unreasonable burden is imposed under the particular circumstances, then according to the usual method of dealing with similar problems, the validity of the claim of immunity would be a matter for the trial court to determine in the first instance, subject only to appellate review. It is true that the refusal of a writ of prohibition has been reviewed in several instances, but in all of the cases which have come to the writer's attention the jurisdiction of the trial court was sustained, and hence the question of whether the writ of prohibition was an appropriate remedy to enforce a claim to immunity from suit was not discussed.

There is one case[24] sustaining a collateral attack on a judgment because in violation of the commerce clause, but the facts are quite different from those presented in the principal case. In the *Wells* case a non-resident plaintiff brought suit by attachment against a foreign interstate carrier, not doing business in the state, to enforce a foreign transitory claim. Under the writ property of the defendant was seized and notice given by publication. The defendant did not appear and judgment was rendered by default. The defendant then filed a bill in the federal court to enjoin the enforcement of the judgment. In sustaining the bill the Supreme Court observed:

> "The garnishment was void because seizure of the rolling stock and credits for the purpose of compelling the Santa Fe to submit to the jurisdiction of the court in the Wells suit interfered unreasonably with interstate commerce. The Santa Fe was not obliged to assert its rights in the courts of Texas."

This case goes a long way, but it does not decide that a person served with ordinary personal process in a transitory cause of action is not compelled to assert his rights in the court to which the process was returnable.

In the one case the seizure of the property interfered with the freedom of interstate commerce. In the other there would be no burden on interstate commerce unless the court erroneously

23. *State* ex rel. *St. L. B. & M. Ry. Co.* v. *Taylor* (1924) 266 U. S. 200.

24. *A. T. & S. F. Ry. Co.* v. *Wells* (1924) 265 U. S. 101.

entertained the case after the claim of right had been established.

It would seem that the constitutional immunity may be waived. For example, if the carrier elected to defend the case on its merits without protest on this ground, the judgment would not be subject to collateral attack. Unless the Supreme Court is prepared to hold that the claim of immunity need never be presented to the state court, it may be waived by a failure to comply with *reasonable* rules for its presentation. By the local practice in some states such an objection to jurisdiction is required to be presented by plea in abatement, and a failure so to plead would operate as a waiver. Such a rule does not seem to violate the federal rule that local practice can not *unreasonably* hamper or restrict the assertion of a claim under the laws of the United States.

Therefore it would seem that the trial court had jurisdiction to determine whether there had been such a waiver according to the doctrine of In re *C. R. I. & P. Ry. Company.*[25] In short, it seems to the writer that the Supreme Court of Missouri may well have been justified in refusing the writ of prohibition, and that so doubtful and important a question ought not to be foreclosed without discussion.

E. W. HINTON.

TAXATION—STATING ITEMS AND AMOUNTS SEPARATELY.—[Illinois] The revenue act of Illinois provides relative to tax levies for county purposes[1] that the amount for each purpose shall be separately stated. The Cities, Villages and Towns Act provides[2] that the levy for corporate purposes shall specify in detail the purpose for which the appropriations are made and the sum or amount appropriated for each purpose. The two requirements are similar and have been so treated by the authorities.[3]

The language has been construed as intended to give the taxpayer an opportunity to present objections to the levy of an unjust assessment[4] and it is held that the fact the levy takes the form of a gross sum for several purposes is no objection to it under this language, so long as the levy is "properly embraced" within some general designation.[5]

Following out that sense of the application of the language, a levy of a certain sum for officers' and employees' fees and salaries was held invalid because the fees and salaries of officers and those of employees, could well be stated separately[6], whereas a county

25. Supra, note 19.

1. (1929) Ill. Sts. ch. 120, sec. 121.

2. (1929) Ill. Sts. ch. 24, art. 8, sec. 1.

3. *People* v. *Vogt* (1914) 262 Ill. 170, 171, 172: Art. 7, sec. 2 of the Statutes is also referred to as containing a similar provision affecting the annual appropriation ordinance.

4. *People* v. *C., B. & Q. R. R. Co.* (1914) 266 Ill. 196-197.

5. *People* v. *I. C. R. R. Co.* (1916) 273 Ill. 541-542: Fees and salaries and clerk hire of the various county officers.

6. *People* v. *Vogt* supra, note 3.