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Edward W. Hinton

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#### Recommended Citation

Edward W. Hinton, "Substituted Service on Non-Residents," 20 Illinois Law Review 1 (1924).

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# ILLINOIS LAW REVIEW

Volume XX

MAY, 1925

Number 1

## SUBSTITUTED SERVICE ON NON-RESIDENTS

BY EDWARD W. HINTON\*

A statute<sup>1</sup> of Massachusetts provided, in substance, that the operation by a non-resident of a motor vehicle on a public way in the commonwealth should be equivalent to the appointment by such non-resident of the registrar of motor vehicles as his attorney on whom process might be served in any action growing out of any accident in which such non-resident might be involved while operating a motor vehicle on such public highway. The act also provided for notice to the defendant by registered mail. The plaintiff brought an action for personal injuries alleged to have been caused by the negligent operation of an automobile by a non-resident on a highway in Massachusetts, and obtained the substituted service, and gave notice by mail in conformity with the statute.

The defendant, a resident of Pennsylvania, appeared specially, and by motion to dismiss and a plea in abatement attacked the validity of the statutory service to give jurisdiction over his person. The trial court denied the motion and overruled the plea; and these rulings were affirmed by the Supreme Judicial Court.<sup>2</sup>

If the statute should be sustained by the Supreme Court of the United States, it will solve the jurisdictional<sup>3</sup> difficulties in dealing

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\*[Professor of Law at the University of Chicago.]

1. G. L. c. 90, as amended by the statutes of 1923 c. 431 s. 2.

2. *Pawlosky v. Hess* (1924) 144 N. E. (Mass.) 760.

3. The cases bearing on the problem of jurisdiction have been collected in a number of recent articles and comments to which the writer is indebted. See *Scott* "Jurisdiction over Nonresidents" (1919) Har. L. Rev. 32:871; *Burdick* "Service as a Requirement of Due Process" (1922) Mich. L. Rev. 20:422; Comment, "Jurisdiction over Nonresidents in Personal Actions" (1925) Columbia L. Rev. 25:204; Comment, "Jurisdiction over Nonresidents" (1925) Pennsylvania L. Rev. 73:171; Comment, "Service of Process on Nonresidents" (1925) Yale L. Jour. 34:415.

with the non-resident motorist who does not tarry long enough after an accident for process to be served on him.

If Massachusetts were an independent sovereignty, unhampered by the federal Constitution, there could be no question about jurisdiction from an internal standpoint. The legislature could confer power on its courts to render judgments on constructive notice to residents and non-residents, whether present or absent, and such judgments would be enforced in Massachusetts.

If suit were brought on such a judgment elsewhere, or it should be set up as a defense, its validity might, or might not, be recognized.

The question of jurisdiction from an external standpoint would then arise.

If the court passing on the validity of the judgment should reach the conclusion that the Massachusetts court had jurisdiction of the defendant's person under the rules in the field of conflict of laws, it would sustain the judgment. But if the second tribunal reached the opposite conclusion as to the jurisdiction of the Massachusetts court, it would not recognize or enforce the judgment, though it might be perfectly valid where rendered.<sup>4</sup> Another set of problems arises because of the "due process" clause, and the "full faith and credit" clause of the Constitution of the United States. If, according to the external standards set by the Supreme Court of the United States, the Massachusetts court failed to acquire jurisdiction of the person of the defendant, either because he was beyond the reach of its process,<sup>5</sup> or because the process was insufficient,<sup>6</sup> a personal judgment against him would not be entitled to protection under the "full faith and credit" clause of the Constitution.<sup>7</sup>

It may also be assumed that in such cases the enforcement of the judgment, either in the state where rendered, or in another state, would violate the "due process" clause.<sup>8</sup>

While a number of the cases in which due process is discussed do not involve the effect of the Fourteenth Amendment on a judg-

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4. *Smith v. Grady* (1887) 68 Wis. 215 (suit in Wisconsin on a judgment of a Canadian Court against a nonresident British subject without personal service).

5. *Pennoyer v. Neff* (1877) 95 U. S. 714; *Bank of Jasper v. First National Bank* (1922) 258 U. S. 112; *New York Life Ins. Co. v. Dunlevy* (1916) 241 U. S. 518.

6. *McDonald v. Maybee* (1917) 243 U. S. 90.

7. *St. Clair v. Cox* (1882) 106 U. S. 350; *Old Wayne Life Ins. Co. v. McDonough* (1906) 204 U. S. 8; *New York Life Ins. Co. v. Dunlevy* (1916) 241 U. S. 518; *Baker v. Baker* (1917) 242 U. S. 394; *Fleener v. Farson* (1919) 248 U. S. 289.

8. *Pennoyer v. Neff* (1877) 95 U. S. 714; *McDonald v. Maybee* (1917) 243 U. S. 90; *Minnesota Ass'n v. Benn* (1923) 261 U. S. 140.

ment rendered against a defendant beyond the reach of the court's process, the case of *Minnesota Assn. v. Benn* seems squarely in point.

There a judgment was rendered in Montana against a foreign corporation on constructive notice. The plaintiff sued on this judgment in Minnesota, the home state of the corporation, and recovered. The judgment of the Supreme Court of Minnesota, sustaining the Montana judgment, was reversed by the Supreme Court of the United States on the ground that the Montana court had no jurisdiction over the person of the defendant because it was not doing business there.

Hence, if the case of *Pawlosky v. Hess* can be supported, some satisfactory theory of personal jurisdiction must be found.

As a general rule personal jurisdiction over a non-resident cannot be acquired except by consent, appearance, or actual<sup>9</sup> service of process within the state.<sup>10</sup>

The cases of consent are clear enough, and may be illustrated by the acceptance of service,<sup>11</sup> and by the appointment of an agent on whom process may be served.<sup>12</sup>

A general appearance to contest the merits of an action is everywhere regarded as a submission of the person to the jurisdiction of the court.

And so a local rule or statute may give the same effect to a special appearance, though made for the sole purpose of objecting to jurisdiction.<sup>13</sup>

Jurisdiction by actual service of process on a non-resident<sup>14</sup> while within the state needs no illustration.

9. It can hardly be doubted that some forms of constructive service would be treated as equivalent to actual personal service. For example, one might be technically a nonresident of a state, though actually living there with his family for a considerable period. In such a case the common provision for service by delivery of a copy to a member of the family at the defendant's place of abode, etc., would in all probability be held just as affective as in the case of a resident.

10. *Pennoyer v. Neff* (1877) note 8.

11. *Jones v. Merrill* (1897) 113 Mich. 433.

12. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.* (1917) 243 U. S. 93. In such cases the consent may be broader than the party actually intended to give.

13. *York v. Texas* (1892) 137 U. S. 15; *Western Life Ins. Co. v. Rupp* (1914) 235 U. S. 261. It is held in these cases that such rules do not violate the "due process" clause. But they may be ineffective where they unreasonably hamper the assertion of a federal immunity from process or suit in a given district. *Davis v. Wechsler* (1923) 263 U. S. 22; *Davis v. O'Hara* (1924) 45 Sup. Ct. Rep. 104.

14. A non-resident may be immune from service while within the state for certain purposes; for example, while attending judicial proceedings as a witness: *Person v. Grier* 66 N. Y. 124, or as a party, *Stewart v. Ramsay* 242 U. S. 128; *Page Company v. McDonald* (1916) 261 U. S. 446 (1923). This

Are there any exceptions to the general rule that personal jurisdiction must be based on consent or on actual service of process on the defendant while within the state?

In the case of foreign corporations exceptions have undoubtedly been made, though thinly disguised by convenient fictions.

A review of the development of the rules as to jurisdiction over foreign corporations may throw some light on a somewhat similar evolution that appears to be in progress in the case of natural persons.

A foreign corporation which has done nothing to subject itself to the local jurisdiction is as much beyond the reach of the local process as the individual.

In that case personal jurisdiction cannot be obtained by service on a state officer as its statutory representative;<sup>15</sup> nor by service on the president or other corporate officer who happens to be in the state;<sup>16</sup> nor by service on an agent of the corporation who may be in the state for some corporate purpose.<sup>17</sup>

Formerly it was apparently impossible to obtain jurisdiction of a foreign corporation without its consent, because a corporation was thought incapable of going beyond the boundaries of the state chartering it, and the process of another state could not reach it. The state line was an insuperable barrier to the egress of the corporation and the ingress of process.<sup>18</sup>

But though the corporation could not migrate, it might, as held in *Bank of Augusta v. Earle*, make contracts and transact business outside by means of agents. It was intolerable that a corporation carrying on its activities outside of its home state should not be subject to the process of the state where it did business. Accordingly jurisdiction came to be recognized. In an early case<sup>19</sup> the theory invoked was the power of a state to exclude a foreign corporation from doing business, and therefore to prescribe the terms upon which it might do business, and that by doing business under such conditions it must be *deemed* to have consented to be bound by

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does not mean that the court would not acquire jurisdiction, but merely that it would be error to deny the claim of immunity.

15. *Minnesota Ass'n v. Benn* (1923) 261 U. S. 140.

16. *Golday v. Morning News* (1894) 156 U. S. 518.

17. *Green v. C. B. & Q. Ry.* (1907) 205 U. S. 530.

18. Mr. Chief Justice Taney in *Bank of Augusta v. Earle* (1839) 13 Pet. 519: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and can not migrate to another sovereignty."

19. *Lafayette Ins. Co. v. French* (1855) 18 How. 404.

service on the representatives whom it sent there to transact its business.

This theory of implied consent has also been invoked where the local statute required the appointment of a local agent on whom process might be served, and provided for service on some public officer where the appointment was not made. Now the implied consent in such cases is as much a fiction as the implied promise in general assumpsit. Mr. Justice Holmes, a judicial realist, has pointed out the fiction of implied consent in several cases.

"Of course, as stated by Learned Hand, J. (in 222 Fed. Rep. 148, 151), this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction."<sup>20</sup>

"But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the states could exclude foreign corporations altogether, and therefore could establish their *obligation* as a condition to letting them in."<sup>21</sup>

But the state cannot always exclude the foreign corporation. It cannot exclude it from interstate commerce.<sup>22</sup>

And yet the fact that a foreign corporation is engaged exclusively in interstate commerce does not put it beyond the reach of the process of a state where it carries on its activities.<sup>23</sup> Though a state may not, because of the "commerce" clause, require foreign corporations exclusively engaged in interstate commerce to submit themselves to the local jurisdiction on foreign causes of action not arising out of the business in the state,<sup>24</sup> it may and can acquire jurisdiction on causes of action arising in the state or out of the business done there, by service of process on a corporate agent, or on some statutory representative. It cannot be seriously contended that the foreign corporation is *actually* in the state. That is as much a fiction as the implied consent.

Disregarding fictions, the courts have evolved this simple rule that when a foreign corporation does business in a state, it is subject to the process of that state for certain purposes.<sup>25</sup> And the only

20. *Penn. Fire Ins. Co. v. Gold Issue Mining Co.* (1916) 243 U. S. 93.

21. *Flexner v. Farson* (1918) 248 U. S. 289.

22. *Dahnke-Walker Milling Co. v. Bondurant* (1921) 257 U. S. 282.

23. *Internat'l Harvester Co. v. Kentucky* (1914) 234 U. S. 579.

24. *Davis v. Farmers Co-op. Co.* (1923) 262 U. S. 313.

25. No social or economic policy makes it necessary for a state to be able to obtain jurisdiction of a foreign corporation on a foreign transitory cause of action not arising out of the business carried on in such state and hence the doctrine of "implied consent" is not applied to such cases.

*Old Wayne Mutual Life Ins. Co. v. McDonough* (1907) 204 U. S. 8; *Simon v. Southern Ry. Co.* (1914) 236 U. S. 115. If the corporation *volun-*

real basis of the rule that it is socially desirable that it should be subject to the state's process.

The problem of acquiring jurisdiction over the non-resident<sup>26</sup> individual presents greater difficulties, partly because of the traditional view that jurisdiction of the person is based on physical<sup>27</sup> control, and partly because the corporation has always been disfavored as compared with the natural person.

"The case [service of process on the agent of a foreign corporation] is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but corporations can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created."<sup>28</sup>

The power of the state to exclude the foreign corporation could not be applied to the individual because he had constitutional rights and privileges not shared by the corporation.<sup>29</sup> But in *Pennoyer v. Neff*, Mr. Justice Field made a guarded suggestion as to the possibility of acquiring jurisdiction of the non-resident individual:

"Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice of legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-resident both within and without the state."

A statute of Kentucky attempted to provide for jurisdiction over a non-resident in such cases by service on his local agent.

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tarily appoints a representative on whom process may be served in any case, it is bound by the consent thus given: *Penn. Fire Ins. Co. v. Gold Issue Mining Co.* (1917) 243 U. S. 93.

26. In the case of resident individuals, constructive service has been recognized for a long time: *Becquet v. McCarthy* (1831) 2 Barn. & Adol. 951; *Bickerdike v. Allen* 157 Ill. 95 (1895); *McDonald v. Maybee* (1917) 243 U. S. 90.

27. *McDonald v. Maybee* (1917) 243 U. S. 90.

At common law even service of process on a defendant would not confer jurisdiction. Nothing short of his appearance would serve the purpose, until the statutes of 12 G. II, c. 29, and 5 G II, c. 27, enabled a plaintiff to enter an appearance for a defendant on whom process had been served. Thus the fiction of appearance persisted after it had lost its significance.

28. *St. Clair v. Cox* (1882) 106 U. S. 350.

29. *Flexner v. Farson* (1919) 248 U. S. 289.

An action was brought in Illinois on a judgment rendered in Kentucky on the basis of service on the agent of the non-resident. In the Illinois court the defendant filed a number of pleas attacking the jurisdiction of the Kentucky court; one of these pleas was to the effect that the person served was not the agent of the defendant. On general demurrer judgment was rendered for defendant, and was affirmed by the Supreme Court of Illinois.<sup>30</sup>

On writ of error the Supreme Court of the United States affirmed the judgment of the Supreme Court of Illinois.<sup>31</sup> The general demurrer to the defendant's pleas was properly overruled and judgment entered for the defendant, because the plea that the person served was not defendant's agent was unquestionably good, and one good plea entitles the defendant to judgment.<sup>32</sup> The court might very well have affirmed the case on this ground, but the opinion discusses the question of jurisdiction at large and denies the validity of the Kentucky statute because the state could not exclude a natural person as it could a corporation.

Whether the general discussion was necessary or not, the case of *Flexner v. Farson* must be taken as indicating that the court is not yet willing to concede jurisdiction of the non-resident individual without personal service, merely because he did business in the state by a local agent. Such cases are infrequent as compared with corporate activities, and the need for local control not so great. But this result is not necessarily decisive of the question of jurisdiction in such a case as *Pawlosky v. Hess*.

The New Jersey Automobile Act prohibited driving motor vehicles on its highways without a license and required non-residents to file an instrument appointing the secretary of state as attorney on whom process might be served, etc.

A resident of New York was prosecuted and convicted for driving an automobile without complying with the provisions of this act. On writ of error the Supreme Court sustained the statute as within the constitutional power of the state.<sup>33</sup>

In respect to the provision requiring the appointment of the secretary of state as attorney on whom process could be served, Mr. Justice Brandeis observed:

"The Maryland law<sup>34</sup> did not require the non-resident to appoint an agent within the state upon whom process may be served. But it was

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30. *Flexner v. Farson* (1915) 268 Ill. 435.

31. *Flexner v. Farson* (1919) 248 U. S. 289.

32. *Coke v. Sayre* (1759) 2 Wilson 85.

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

34. Upheld in *Hendrick v. Maryland* (1915) 235 U. S. 610.

recognized in discussing it, that the 'movement of motor vehicles over the highways is attended with constant and serious dangers to the public.' We know that the ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of non-resident owners, was essential to public safety . . . It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary it puts non-resident owners upon an equality with resident owners."

In this situation the non-resident motorist and the foreign corporation engaged in interstate commerce seem to be very much in the same position.

The state cannot exclude either, but it can require each to appoint an agent on whom process may be served so that jurisdiction may be obtained, in the one case on claims arising out of the business done in the state, and in the other, on claims arising out of the operation of his automobile within the state.

In the case of the foreign corporation engaged in interstate commerce, it is clear that the state may make a public officer its statutory representative on whom process may be served in a proper case so long as provision is made for reasonable notice to the defendant.

If, as held in *Kane v. New Jersey*, the state may lawfully require the foreign motorist to appoint a service agent and impose a criminal liability for a failure so to do, there is hardly room for doubt that the state could designate a public officer as his statutory representative in case he failed to make the appointment. But if so, is there any reason why the statute should take the alternative form?

The Supreme Court has recognized that public safety makes it reasonable and desirable in the case of the foreign motorist that jurisdiction may be obtained without personal service, where that is impossible. In that event due process seems to require nothing more than fair notice.