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# Process - Statute Subjecting Non-Resident Defendant to Jurisdiction Upon Committing Tortious Act Within State Held Constitutional

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purpose. . . . Congress designed to hamper non-conforming unions and to discriminate against them by denying them rights deemed of the utmost importance to trade unions. This being so, I find it rather difficult to conclude that while visiting such consequences upon a nonconforming union in the federal domain of law enforcement, the Congress has impliedly withdrawn from the States the power to regulate such a union.[9]

Nonetheless, the court is, in the instant case, placing upon the Labor Board the burden of finding for the non-complying union an avenue for achieving recognition instead of placing upon the union the onus of removing the disability it has voluntarily incurred.

[9] Ibid., at 78.

## PROCESS–STATUTE SUBJECTING NON-RESIDENT DEFENDANT TO JURISDICTION UPON COMMITTING TORTIOUS ACT WITHIN STATE HELD CONSTITUTIONAL

On June 3, 1954, defendant, a resident of Wisconsin, sent one of his employees to deliver a gas stove to the plaintiff in Pecatonica, Illinois. At the request of the employee, the plaintiff assisted in unloading the stove from the truck. The employee negligently pushed the stove thereby injuring the plaintiff. The complaint was filed in April, 1955, and two attempts to serve summons failed because the defendant was not found in Illinois. In February of 1956, summons was served personally on the defendant in Wisconsin. The defendant appeared specially and moved to quash the summons on the grounds that the provisions of the Illinois Civil Practice Act contravene both the United States and Illinois Constitutions. The Circuit Court of Winnebago County granted this motion and the plaintiff appealed. The Supreme Court of Illinois upheld the service, ruling that since the defendant submitted to the jurisdiction of the courts of Illinois, the requirements of due process were met. *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957).

Section 17 of the Illinois Civil Practice Act provides:

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said actions:
> (a) The transaction of any business within this State;
> (b) The commission of a tortious act within this State;
> (c) The ownership, use, or possession of any real estate situated in this State;
> (d) Contracting to insure any person, property or risk located within this State at the time of contracting.[1]

Defendant argued that in order to attack the service of process by special appearance, he would have to disprove the commission of a tortious act

[1] Ill. Rev. Stat. (1957) c. 110, § 17.

thereby putting the burden of proof of the merits of the case upon himself whereas the burden of proof should be upon the plaintiff. The *Nelson* case held that, "An act or omision within the State, in person or by an agent, is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort."[2]

Another contention of the defendant was that the provisions of the statute did not apply to him because the cause of action arose before the effective date thereof. The court held the claim without merit, citing *Chicago and Western Indiana Railroad Company v. Ossian Guthrie*, where the Illinois Supreme Court said, "[W]hen the change [of law] merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law."[3]

The main contention of the defendant, however, was that Section 17 denied him due process of law.[4] The relationship of service of process upon a nonresident defendant and due process of law has had a long and varied history in this country. The first major case dealing with the matter was *Pennoyer v. Neff*,[5] a case dealing with an Oregon statute which provided for service by publication where an action is brought against a non-resident defendant, who has property within the state. The statute also provided for the attachment of the property of the non-resident, where the action is for the recovery of money or damages. The plaintiff sued for the recovery of property not attached but sold under an execution. Field, J. said, "No State can exercise direct jurisdiction and authority over persons or property without its territory."[6]

The next expression from the United States Supreme Court on this subject appeared in *McDonald v. Mabee*.[7] In that case, Justice Holmes said, "The foundation of jurisdiction is physical power at the start."[8] In order for a state to have physical power at the start, the defendant must be present within the state; therefore, this case is consistent with *Pennoyer v. Neff*.[9]

The first case to ignore the concept of physical presence as a requisite of jurisdiction was *Hess v. Pawloski*,[10] which dealt with the constitutionality of the non-resident motorist statute of Massachusetts. The Supreme Court of the United States held that a statute permitting service of process to be made upon the Secretary of State as the agent of a non-resident

[2] 11 Ill. 2d 378, 393, 143 N.E. 2d 673, 681 (1957).
[3] 192 Ill. 579, 581, 61 N.E. 658, 659 (1901).
[4] U.S. Const. Amend. 14, Ill. Const. Art. 2, § 2 (1870).
[5] 95 U.S. 714 (1877).
[6] Ibid., at 722.
[7] 243 U.S. 90 (1917).
[8] Ibid., at 91.
[9] 95 U.S. 714 (1877).
[10] 274 U.S. 352 (1927).

motorist is constitutional. The court said, "It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents."[11] In *Olberding v. Illinois Central Railroad Company*,[12] also dealing with a non-resident motorist statute, the Supreme Court said, "The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself.[13] The court in the preceding two cases did not contradict *Pennoyer v. Neff*[14] but based their decision upon the power of the State to control its roads; therefore, jurisdiction was based upon the police power of the state.

In *Milliken v. Meyer*,[15] a summons was issued from a Wyoming court and served upon a Wyoming resident in Colorado. The defendant instituted suit in a Colorado court to enjoin the plaintiff from enforcing the judgment obtained in Wyoming. Justice Douglas said, "Domicile in the State is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[16] This case does not contradict *Pennoyer v. Neff*,[17] but carves out an exception to the rule, by stating that a court has jurisdiction over its residents whether they are within or without the state.

*International Shoe Company v. Washington*[18] deals with a state exercising jurisdiction over a foreign corporation. The corporation had no office in the state—only salesmen who solicited orders. Chief Justice Stone said, "Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[19] The court held that the facts established contacts with the forum sufficient to meet requirements of fair play and substantial justice. However, that case dealt with a foreign corporation and not with an individual as does the *Nelson* case.[20] A state can regulate all the activities of a corporation because it only exists by reason of state statutes; whereas, a state cannot so regulate the activities of an individual.

The Joint Committee which drafted the Illinois Civil Practice Act

[11] Ibid., at 356.
[12] 346 U.S. 338 (1953).
[13] Ibid., at 341.
[14] 95 U.S. 714 (1877).
[15] 311 U.S. 457 (1940).
[16] Ibid., at 462.
[17] 95 U.S. 714 (1877).
[18] 326 U.S. 310 (1945).
[19] Ibid., at 316.

[20] For the latest expression by the Supreme Court of the United States on foreign corporations see McGee v. International Life Insurance Co., 355 U.S. 220 (1957). 7 De Paul L. Rev. 252 (1958).

referred to several statutes[21] in their comments. All of these statutes pertain to service of process upon a foreign corporation and not to service upon an individual. Most of these statutes also provide for service of process to be made upon the Secretary of State of the forum and not upon the foreign corporation itself.[22] However, these statutes do not cover service of process upon a non-resident individual. Therefore, the statutes which were the basis for Section 17 of the Illinois Act and which have been held constitutional[23] do not deal with the problem of service of process upon a non-resident individual defendant. The *Nelson* case rationalizes the situation as follows:

> While he [employee] was here, the employee and the defendant enjoyed the benefit and protection of the laws of Illinois, including the right to resort to our courts. In the course of his stay here, the employee performed acts that gave rise to an injury. The law of Illinois will govern the substantive rights and duties stemming from the incident. Witnesses, other than the defendant's employee, are likely to be found here, and not in Wisconsin. In such circumstances, it is not unreasonable to require the defendant to make his defense here. If, in a particular case, trial in an Illinois court will be unduly burdensome to the non-resident defendant, the doctrine of *forum non conveniens* is available. . . . We hold that the requirements of due process of law have been met.[24]

Section 17 of the Civil Practice Act extends the doctrine of the *International Shoe Co.* case to non-resident natural persons. The holding in the *Nelson* case apparently sanctions the actions of a state in reaching out beyond its geographical borders to subject non-residents to the jurisdiction of the state. Whether the other portions of Section 17 will be likewise upheld or whether judgments entered in cases arising under the provision are entitled to full faith and credit remains to be seen.

[21] Ala. Code (1940) Title 7, § 199(1) (Supp., 1953); Ark. Stat. Ann. (1947) § 27-340; Fla. Stat. (1951) § 47.16; N.J. Stat. Ann. (1955) § 34:15-55.1; Md. Code (1951) c. 23, § 88(d); Vt. Stat. (1947) c. 72, § 1562.

[22] Vt. Stat. (1947) c. 72, § 1562. "If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporation and shall be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of Vermont . . . to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against such foreign corporation arising from or growing out of such contract or tort."

[23] Compania de Astral, S.A. v. Boston Metal Co., 205 Md. 237, 107 A. 2d 357 (1954); Smyth v. Twin Cities Improvement Corp., 116 Vt. 569, 80 A. 2d 664 (1951).

[24] 11 Ill. 2d 378, 390, 143 N.E. 2d 673, 680 (1957).