Notre Dame Law Review

Volume 34 | Issue 1 Article 9

12-1-1958

Legislation and Administration: Admiralty -- Jurisdiction -- Michigan Declines to Include Great Lakes and Connecting Waters in Act Extending Owner's Liability and Non-Resident Service to Watercraft

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LEGISLATION AND ADMINISTRATION

ADMIRALTY—JURISDICTION—MICHIGAN DECLINES TO INCLUDE GREAT LAKES AND CONNECTING WATERS IN ACT EXTENDING OWNER'S LIABILITY AND NON-RESIDENT SERVICE TO WATERCRAFT. A 1957 Michigan statute designed to regulate watercraft throughout the state, except on the Great Lakes and connecting waters thereof, provides that the owner of watercraft shall be liable for any injury occasioned by the negligent operation of such craft if it is being used with the owner's expressed or implied consent. The act further provides that operation of watercraft on the waters of the state by a non-resident shall be deemed equivalent to the appointment by such non-resident of the secretary of state as attorney for service of process in any action against him resulting from a watercraft accident. MICH. COMP. LAWS §§ 281.571-95 (Supp. 1958).

The power of a state to impose the appointment of the secretary of state for service of process on a non-resident using the state highway was held not violative of due process in the landmark case of *Hess v. Pawloski*.[1] In *Hess* the Court reasoned that since a state possessed the power to exclude non-residents from its highways, it could admit them on the condition that the secretary of state would be their agent for the purpose of service. The essential requirement in such statutes is that it must be reasonably probable that notice of service will be communicated to the non-resident defendent.[2] Similar statutes enacted in other states have been held not to be violative of due process.[3] The authorization by state law of a state official as an agent for service of process has been held valid in other situations where an element of police power is involved.[4]

Courts have also upheld the validity of statutes imposing liability on the owner of an automobile for injuries to third persons caused by the negligence of another using the vehicle with the owner's express or implied consent.[5] Likewise a statute that the consent of the owner shall be conclusively presumed where the vehicle is being operated by a member of his family has been sustained by the Michigan Supreme Court.[6]

It appears that the basic question propounded by this act does not deal with the validity of what it includes, but rather, the power of a state to regulate that which it expressly excluded: the navigable waters of the United States.

The district courts of the United States were originally given power to decide "all cases of admiralty and maritime jurisdiction" by the Constitution.[7] Congress implemented this constitutional grant by providing that the district courts shall have exclusive jurisdiction in "any case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[8]

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1 274 U.S. 352 (1927).

2 Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928).

3 Morrow v. Asher, 55 F.2d 365 (N.D. Tex. 1932); Cohen v. Plutschak, 40 F.2d 727 (D.C.N.J. 1930).

4 Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Davis v. Nugent, 90 F.Supp. 522 (S.D. Miss. 1950).

5 Young v. Masci, 289 U.S. 253 (1933); Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N.W. 520 (1917); Downing v. City of New York, 220 N.Y.S. 76, *aff'd*, 245 N.Y. 597, 157 N.E. 873 (1927) (*dictum*).

6 Bowerman v. Sheehan, 242 Mich. 95, 219 N.W. 69 (1928). Consent will be presumed under the present statute if the craft is operated by the owner's son or daughter. MICH. COMP. LAWS § 281.580 (Supp. 1958).

7 U.S. CONST. art III, § 2.

8 28 U.S.C. § 1333 (1) (1949). It is interesting to note this section appeared first in the Judiciary Act of 1789, sec. 9, 1 Stat. 76 (1789). The original wording differed in that it stated, ". . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

At one time the extent of admiralty jurisdiction was thought to be limited to waters subject to the "ebb and flow of the tide."[9] By subsequent Congressional enactment this admiralty jurisdiction was extended to include the Great Lakes.[10] When the validity of the act was questioned as an unauthorized extension of jurisdiction of the United States courts, the Supreme Court in *The Genesee Chief v. Fitshugh*,[11] held the act constitutional on the ground that all navigable waters were within the scope of admiralty jurisdiction when the Constitution was adopted. The Court also indicated, however, that the exclusive admiralty jurisdiction of the United States courts would not impair the right of the states to adjudicate controversies arising on navigable waters when maritime law would not be applicable. Refering to the jurisdictional problems presented by that act, the Court said: ". . . the act of 1845 extends only to such vessels when they are engaged in commerce between different states. . . . And the state courts within the limits embraced by this law exercise a concurrent jurisdiction in all cases arising within their respective territories. . . ."[12]

Mr. Justice Holmes extended this position in *The Hamilton*[13] reasoning that if the state courts have the power to decide admiralty cases by common law remedies, changing them from time to time, "it would be strange if the State might not make changes by its other mouthpiece the legislature."[14]

States, however, may not institute a change providing a remedy which the common law was not competent to give.[15] Thus, a state statute which allowed the injured party to proceed by an action in rem was declared unconstitutional on grounds that such a proceeding was not recognized at common law.[16] Conversely, a state law providing an action in personam was upheld against a defense that this infringed upon the exclusive admiralty jurisdiction of the United States Courts.[17] That federal courts do not have exclusive jurisdiction of suits in personam growing out of collision on navigable waters seems to be admitted.[18]

Where a person employed to unload ships was fatally injured while on board the docked vessel the Court held a state workman's compensation law would not apply because the tort was within admiralty jurisdiction.[19] Against a vigorous and famous dissent, the majority asserted that the state law as applied to maritime controversies was unconstitutional on the grounds of a needed uniformity of admiralty law.[20] In the more recent case of *Pope & Talbot, Inc. v. Hawn*[21] the Supreme Court declared that admiralty law should govern a maritime tort even though the injured party was seeking to enforce a state-created remedy. The Court then went on to state: "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."[22]

The import of state maritime law may be seen in the subsequent case of *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[23] The Supreme Court held that where principles of admiralty law are absent in a situation maritime by nature the judiciary will not fashion one, but rather, permit the controversy to be decided by applicable state law.

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9 DeLovio v. Boit, 7 Fed.Cas. 418 (No. 3776) (C.C.D. Mass. 1815).
10 5 Stat. 726 (1845) (now 28 U.S.C. § 1873 (1950)).
11 53 U.S. (12 How.) 443 (1851).
12 *Id.* at 458.
13 207 U.S. 398 (1907).
14 *Id.* at 404.
15 See note 11 *supra.*
16 The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866); *accord,* Young v. Clyde S.S. Co., 294 Fed 549 (S.D. Fla. 1923). *But see* Leon v. Galceran, 78 U.S. (11 Wall.) 185 (1870).
17 Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1873).
18 See Schoonmaker v. Gilmore, 102 U.S. 118 (1880); Carstens v. Great Lakes Towing Co., 71 F.Supp. 394 (N.D. Ohio 1945).
19 Southern Pacific R.R. Co. v. Jensen, 244 U.S. 205 (1917).
20 *Id.* at 217.
21 346 U.S. 406 (1953).
22 *Id.* at 409-10.
23 348 U.S. 310 (1954).

It is readily apparent that the primary concern of Congress and the courts in dealing with these problems is an adherence to the constitutional mandate of exclusive jurisdiction of the United States courts in admiralty matters, which necessitates a uniform application of law.[24] The jurisdictional character of controversies involving vessels engaged in maritime commerce is twofold, however, for it involves the commerce power in addition to the general problem of admiralty jurisdiction. If the act in question were extended to include the Great Lakes the commerce objection could have been negated by the purpose of the statute, since it is designed primarily to deal with the ever-increasing problem of small watercraft. To that end it is essentially a police action, which has received constitutional sanction when exercised concurrently with the commerce power in analogus situations.[25] Similarly, the line of demarcation between state and general maritime law has been drawn by the Supreme Court in *Grant Smith-Porter Co. v. Rohde*:[26] "As to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes."[27] Accepting this statement of concurrent jurisdiction, two other states have enacted similar legislation[28] extending to the navigable waters within their jurisdictions and both have been held constitutional on the district court level.[29]

It thus appears the courts are likely to declare a state law unconstitutional as infringing on the exclusive admiralty jurisdiction of the federal courts where the relief for the injured party is not a remedy provided by the common law, or where the law controverts the existing maritime law for shipping and commercial trade, vitiating the required uniformity. It would seem then, that were this act extended to the navigable waters of the state it would not violate the exclusive jurisdiction of the federal courts in admiralty. This is because the remedy provided is in personam and since the act is not designed to affect commerce, but merely to regulate watercraft of a local nature, the statute represents a valid exercise of the state's police power. Furthermore, since there are no existing federal laws regarding service or imputed negligence, the rule of *Wilburn Boat* will apply.

The problem of collision and injury from negligent use of small watercraft is becoming increasingly paramount. This act takes a needed step forward to insure the individual so injured a remedy in his own courts. There is no valid reason to withold such procedures from the Great Lakes.

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24 See Judiciary Act of 1789, § 9, 1 Stat. 76 (1789) which places particular import on vessels of "ten or more tons"; 5 Stat. 726 (1845) (now 28 U.S.C. § 1873 (1950) which specifically included only vessels "of twenty tons or upward . . . employed in the business of commerce . . . ." Thus, the limits imposed by the legislature on admiralty jurisdiction on the Great Lakes were designed to exclude small watercraft. See also the concurring opinion by Mr. Justice Frankfurter in Wilburn Boat Co. v. Fireman's Ins. Co., *supra* note 23, at 323, where he is concerned over the application of the Court's opinion to "ocean-going vessels in international trade." 28 U.S.C. § 1873 (1950).

25 Wuchter v. Pizzutti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 352 (1927).

26 257 U.S. 469 (1921).

27 *Id.* at 477.

28 LA. REV. STAT. ANN. § 13:3479 (1951); ILL. STAT. ANN. c. 110, § 263 (a-c) (Smith-Hurd 1956).

29 Franklin v. Tomlinson Fleet Corp., 158 F.Supp. 850 (N.D. Ill. 1957); Galtzman v. Rougeot, 122 F.Supp. 700 (W.D. La. 1954).

PROPERTY — RULE AGAINST PERPETUITIES — NEW YORK ABOLISHES "TWO-LIFE RULE." — On September 1, 1958, a new rule against perpetuities, marking an historic departure from the "two-life rule" went into effect in New York State. This new rule, which applies to both real and personal property, as did the old rule, permits alienability to be suspended for any number of lives in being (instead of only two lives in being as under the old rule) so long as their end is not unreasonably difficult to ascertain. Under the old rule, a man with three children could not set up one trust to last for the lives of these three children,[1] since alienability would thereby be suspended for more than two lives. The new rule permits such trusts by allowing any number of lives in being at the time the trust is created to be used in measuring the duration of the trust. N.Y. REAL PROP. LAW § 42 (McKinney Supp. 1958) and N.Y. PERS. PROP. LAW § 11 (McKinney Supp. 1958).

Although several states followed the example of New York in adopting the "two-life rule," the difficulties to which it gave rise finally led to its abandonment, either in whole or in part, by these states.[2] As a result, the "two-life rule," when applicable to both real and personal property, was found only in New York prior to this recent change.

The "two-life rule" has been criticized by legal scholars for a multitude of reasons. It has been described as being needlessly restrictive by frustrating the reasonable intentions of testators.[3] It has been charged with giving rise to an enormous amount of litigation, thus forcing the courts to expend their time and energy working out methods of avoiding the rigors of the rule, and making the work of the bar unnecessarily difficult.[4] It has been accused of causing a diversion of trust business to other states,[5] of causing an unequal federal estate tax burden in that the estate tax could not be postponed beyond the end of two lives,[6] and of creating diversity in the law.[7] Opposition to change came from those who feared that the average duration of spendthrift trusts would thereby be lengthened.[8]

The dissatisfaction of the courts with the "two-life rule" is evident in the refinements, fictions and strained constructions designed to circumvent it. One of the devices used by the courts to save certain trusts was to view them as separable — that is, capable of being sustained as separate trusts if not as a single trust — whenever it could be found that the income was payable in shares, and portions of the corpus were to be released at some point at or before the termination of two lives.[9] It was also held that separability was dependent upon the testator's dominant purpose as found by the court.[10] Finally, where the suspension of alienability would have

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1 See *In re* Borneman's Estate, 68 N.Y.S.2d 358 (Surr. Ct. 1946).

2 Powell, *Statutory Change in the New York Rule Against Perpetuities*, 139 N.Y.L.J. 58, 59, p.4, col. 1 (March 25, 26, 1958), reprinted in 1 N.Y. REAL PROP. LAW 35, 37-38 (McKinney Supp. 1958) hereinafter cited as Powell, *Statutory Change*. The states which adopted and then discarded the "two-life rule" are: North Dakota (abolished in 1877), Wisconsin (1927), Mississippi (1930), and Michigan (1949).

3 See 1936 N.Y. Law Revision Commission 475, 477, and GRAY, THE RULE AGAINST PERPETUITIES 687 (4th ed. 1942) (" . . . in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York.")

4 1936 N.Y. Law Revision Commission 475, 479. See also GRAY, *op. cit. supra* note 3, at 687, stating that from the pasage of the "two-life rule" in 1830 until 1941 there had been over 800 cases litigated in the various New York courts on the problem.

5 See Governor's Memorandum, in McKinney's Sess. Laws of N.Y. A-150 (1958).

6 Looker, *Practical Effects of Differences in the Rule Against Perpetuities*, 90 TRUSTS & ESTATES 653 (1951).

7 *Reform of Rule Against Perpetuities*, 92 TRUSTS & ESTATES 768 (1953).

8 See 1936 N.Y. Law Revision Commission 475, 481-82.

9 See Orr v. Orr, 147 App. Div. 753, 133 N.Y. Supp. 48, *aff'd* 212 N.Y. 615, 106 N.E. 1037 (1914) (also involving a complex differentiation between original shares and subshares).

10 See *In re* Horner's Will, 237 N.Y. 489, 143 N.E. 655 (1924) where, although there was no division of either corpus or income into shares and no provision for releasing any share upon the death of a beneficiary, the court, having found "a constructive division into shares, atoms within the mass, each with its own several life," held the trust to be valid.

been legal but for some portion of the trust, or because of some ultimate limitation placed thereon, the courts would save the trust by severing the invalid portion.[11] However, this excision of the invalid portion raised further questions as to distortion of the testator's intent[12] and the acceleration of interests following the termination of the trust.[13] These problems continued to plague the courts and, at times, defeat the testamentary scheme.

Much of the doctrine pertaining to the old rule will remain of equal value under the new rule. The rule continues to apply both to the duration of trusts to receive and apply, and to the period during which the ascertainment of the ultimate takers of the corpus can be postponed.[14] Under the new rule, as under the old, there is no provision for a period in gross either in addition, or as an alternative, to lives in being. This failure to provide for a period in gross has been ameliorated by the courts in cases of trusts limited upon the attainment of a certain age, by the finding that such trusts might also be terminated by the death of the beneficiary.[15] Under the doctrine of "relation back," whereby the validity of instruments in execution of powers is tested acording to the law in force at the time of the creation of the power,[16] the "two-life rule" will continue to be applicable to powers created prior to the effective date of the new rule. Furthermore, although not necessarily connected with the law of perpetuities, remnants of the "two-life rule" are left in the provisions permitting only two legal life estates before a remainder takes effect.[17]

The evidentiary test, which requires that the lives or minorities measuring the permissible period be neither so designated nor so numerous as to make proof of their end unreasonably difficult, has been criticized by one group, the Surrogates' Association, as being a likely source of substantial litigation.[18] However, in the past century there has been only a handful of American cases[19] involving this test, which was first enunciated by a common law court in 1805.[20] One problem for the future arises from the fact that the New York reports contain many precedents embodying the strained constructions designed to circumvent the old rule. It is to be hoped that the courts will regard these as no longer needed when similar cases arise in the future.

Although it is regrettable that no provision was made for a period in gross, New York's acceptance of the "multiple-lives rule" is a welcome one. Indeed, it was very difficult to find any justification for the arbitrary "two-life" limitation. In the light of this change, wills containing trust provisions should be reviewed to see whether changes can be made to carry out the wishes of the testator more simply or more completely, or to effect estate tax savings by continuing a single trust for a longer period of time.

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11 Smith v. Chesebrough, 176 N.Y. 317, 68 N.E. 625 (1903) (trust for two years excised).

12 Benedict v. Webb, 98 N.Y. 460 (1885) (excision would create too great a distortion of the testator's intent).

13 Oliver v. Wells, 254 N.Y. 451, 173 N.E. 676 (1930) (accelerated), and *In re* Silsby, 229 N.Y. 396, 128 N.E. 212 (1920) (not accelerated).

14 Powell, *Statutory Change;* 1 N.Y. REAL PROP. LAW 35, 37 (McKinney Supp. 1958).

15 Sawyer v. Cubby, 146 N.Y. 192, 40 N.E. 869 (1895). And for an especially strained construction see Kahn v. Tierney, 135 App. Div. 897, 120 N.Y. Supp. 663, *aff'd mem.* 201 N.Y. 516, 94 N.E. 1095 (1911) where, notwithstanding the apparent intention of the testator that the trust should continue until the youngest child reached twenty-six, or at least until five years after her death, the court found that "five years from" modified "arriving at twenty-one years" but was not to be carried forward so as to qualify "her death" which was to be read "at her death."

16 N.Y. REAL PROP LAW §§ 178, 179.

17 N.Y. REAL PROP LAW §§ 43, 45, 46.

18 See Memorandum of Counsel to the Governor, reprinted in McKinney's Sess. Laws of N.Y. A-140, A-141 (1958).

19 Powell, *Statutory Change;* I N.Y. REAL. PROP. LAW 35, 39 (McKinney Supp. 1958).

20 Thellusson v. Woodford, 11 Vesey 112, 32 Eng. Rep. 1030, 1039 (1805).