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Jurisdiction over Nonresident Aircraft Operators by Substituted Service of Process

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NOTES

Conflict of Laws

JURISDICTION OVER NONRESIDENT AIRCRAFT OPERATORS BY SUBSTITUTED SERVICE OF PROCESS

Just as the advent of the automobile, bringing with it extensive use of state highways by nonresident motorists, raised a number of jurisdictional questions in the early part of the century, so the increased use of the airplane has posed similar problems in recent years. In general, the states have endeavored to meet these difficulties by employing means similar to those used to solve the problem of the nonresident motorist. The basic question involved herein is whether or not a strict analogy can be drawn between nonresident motorists and nonresident aircraft operators, or whether the states must find some other basis for acquiring jurisdiction. In this connection, it will be necessary to determine, in the light of existing authority, the validity of the statutes which have already been enacted in this area, as well as to attempt to predict the future import of similar state legislation dealing with the problem of the nonresident aircraft operator.

Existing Legislation

In recognition of the widespread use of aircraft during the last two decades, both by private individuals and commercial interests, at least eight states have passed legislation providing for some method of acquiring jurisdiction over nonresident owners or operators of aircraft.[1] All except one of these states,[2] have followed the pattern of the early Pennsylvania statute on the subject.[3] With some variation in phraseo-

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[1] CONN. GEN. STAT. § 4831 (1949); MD. ANN. CODE GEN. LAWS art. 75, § 159 (1951); MASS. ANN. LAWS c. 90, § 50 (1954); MINN. STAT. § 360.0215 (1949); N.J. STAT. ANN. § 6:5-3 (Supp. 1953); N.Y. GEN. BUS. LAW § 250; PA. STAT. ANN. tit. 2, § 1410 (Supp. 1953); VA. CODE § 8-67.4 (Supp. 1952). A number of additional states have adopted the provision of the Uniform Aeronautics Act which stipulates that liability to passengers arising out of collisions on land and in the air will be determined by the tort law of that state, no mention being made of service of process upon nonresidents. UNIFORM AERONAUTICS ACT § 6 (withdrawn by National Conference of Commissioners, 1943).

[2] N.Y. GEN. BUS. LAW § 250.

[3] ". . . any nonresident of this Commonwealth, being the operator or owner of any aircraft, who shall accept the privilege, extended by the laws of this Commonwealth to nonresident operators and owners, of operating an aircraft . . . shall, by the operation of an aircraft over or above the lands and waters of the Commonwealth of Pennsylvania, make and constitute the Secretary of Revenue of the Commonwealth of Pennsylvania his, her, or their agent for the service of process in any civil suit or proceeding instituted in the courts of the Commonwealth of Pennsylvania against such operator or owner of such aircraft arising out of, or by reason of,

logy, the statutes in these seven states provide that the accident must be one arising from operations within the territorial limits of the state, *e.g.*, "occurring within or above the state" [4]; "growing out of such use or operation of an aircraft in the State" [5]; "occurring in Maryland" [6]; "occurring [*sic*] on or over the land or water or in the air space of this State." [7]

While the obvious intent of the above legislation is to protect persons and property within the confines of the state, the New York statute on the subject presents difficulties in that it cannot be fully justified on these grounds. In reference to service upon nonresident aircraft operators, the statute provides: [8]

> The operation by a nonresident of an aircraft from any airfield in this state, or such operation of an aircraft owned by a nonresident if so operated with his consent, express or implied, shall be deemed equivalent to an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such nonresident may be involved while operating an aircraft *which has landed at, or departed from any airfield in this state* or in which such aircraft may be involved while being operated in this state with the consent, express or implied, of such nonresident owner. . . . [Emphasis added]

It is evident that this statute, unlike those discussed above, cannot be construed as applying only to causes of action arising within the limits of the state. This extra-territorial aspect of the statute was employed by the plaintiff in the recent case *Peters v. Robin Airlines*,[9] one of the few cases thus far litigated in this area of the law. The administratrix of the decendent, a New York resident, killed in an airplane crash in California, brought a wrongful death action against the defendant nonresident corporation, by service of summons on the secretary of state. The court upheld the validity of the service, ruling that the departure from an airfield within the state fulfilled the demands of the statute. The fact that the plane had made five intermediate landings in other states was considered "irrelevant." Dismissing the contention that there was a violation of due process, it was held that the airline by doing business had established sufficient minimum contacts within the state, thus enabling its courts to acquire jurisdiction.

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any accident or collision, occurring within or above the Commonwealth, in which such aircraft is involved. PA. STAT. ANN. tit. 2, § 1410 (Supp. 1953).

4 CONN. GEN. STAT. § 4831 (1949).

5 MINN. STAT. § 360.0215 (1949).

6 MD. ANN. CODE GEN. LAWS art. 75, § 159 (1951).

7 N.J. STAT. ANN. § 6:5-3 (Supp. 1953).

8 N.Y. GEN. BUS. LAW § 250, as amended, Laws 1953, c. 148; adding the clause "or in which such aircraft may be involved while being operated in this state." This was added pursuant to the governor's recommendation when he approved the original statute, Laws 1952, c. 748, that it was necessary to effectuate the intent of the statute.

9 203 Misc. 924, 118 N.Y.S.2d 238 (Sup. Ct. 1952).

This decision was reversed on appeal;[10] the court ruled that the statute was unconstitutional as an attempt to extend the state's police powers beyond its territorial limits. In effect, the court ignored the "doing business" theory, so heavily relied upon by the lower court. Thus, these conflicting decisions point up the two possible theories upon which the statutes can be constitutionally justified.

The "Police Power" Theory

The Supreme Court was first called upon to determine the constitutionality of a nonresident motorist statute in 1915 when a Maryland statute requiring a nonresident to procure a license before operating a motor vehicle within the state was challenged. The Court upheld the statute in *Hendrick v. Maryland*,[11] ruling that it was a reasonable police power measure and not a direct burden on interstate commerce. A year later in *Kane v. New Jersey*,[12] the Court upheld a New Jersey statute which provided that a nonresident automobile operator appoint the Secretary of State as his agent upon whom process might be served in any action brought to recover damages for the negligent operation of the automobile within the state.

Such was the situation when Massachusetts passed a statute which stipulated that the mere operation by a nonresident of a motor vehicle on the public highways of Massachusetts should be deemed equivalent to the appointment of the Registrar of Motor Vehicles to be his attorney upon whom process might be served should he become involved in an accident while using the state's highways.[13] In *Hess v. Pawloski*[14] the Supreme Court upheld the Massachusetts statute on the basis of the *Hendrick* and *Kane* cases as well as on several cases which recognized the power of a state to acquire jurisdiction over foreign corporations doing business within the state.[15] The difference between the formal appointment of the public official in the *Kane* case, and the implied appointment in the case then in issue was considered as "not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment."[16] A subsequent case,[17] held that in order to satisfy the demands of due process, there need only be some provision for notice reasonably calculated to reach the defendant. At present, all forty-

10 Peters v. Robin Airlines, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953).

11 235 U.S. 610 (1915).

12 242 U.S. 160 (1916).

13 MASS. GEN. LAWS c. 90, as amended by Laws 1923, c. 431, § 2.

14 274 U.S. 352 (1927). See Scott, *Jurisdiction Over Nonresident Motorists*, 39 HARV. L. REV. 563 (1926).

15 Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917); Lafayette Ins. Co. v. French, 18 How. 404 (U.S. 1856).

16 Hess v. Pawloski, 274 U.S. 352, 357 (1927).

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

eight states, and the District of Columbia have acts providing for substituted service of process on nonresident motorists.[18]

Since the motor vehicle statutes, from their inception, were said to be founded upon a reasonable exercise of the state's police power,[19] it is only natural that the states should attempt to justify the aircraft statutes on similar grounds. The rationale of the vehicle statutes is that in return for the privilege of using its highways, the state had the right to demand that a nonresident be amenable to the courts of that state, and as was reasoned in the famous case of *Hess v. Pawloski*:[20]

> Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways.

That the exercise of these powers is not limited to motor vehicles was well illustrated in *Doherty & Co. v. Goodman*,[21] where the Court applied the same reasoning to the sale of securities within a state by a nonresident thus upholding a statute providing for service of process on any agent transacting business within the county for a nonresident principal. "Both the sale of securities and the operation of motor vehicles are fraught with danger and economic harm to the general public," [22] and because of this are subject to regulation by the states in an attempt to aid and protect the injured.[23]

It would seem that the foreseeability of injury to persons and property because of the nature of the airplane as a dangerous instrumentality would place it in the same class as the motor vehicle, thereby subjecting its operation to the state's police power. Analogizing the regulation of the state's highways to the supervision of its airways, the same reasoning which served as a basis for the motor vehicle statutes could, in general, be applied to the aircraft legislation. It should be noted, however, that because the highways of a state do not extend beyond its borders, neither does its jurisdiction. In addition, it is a well-established principle that the police power of a state may not be projected beyond its borders.[24] Thus, the New York type statute, which does not restrict service of pro-

18 These statutes are collected in Knopp v. Anderson, 71 F. Supp. 832, 836-37 (N.D. Iowa 1947).

19 Hess v. Pawloski, 274 U.S. 352 (1927).

20 *Id.* at 356.

21 294 U.S. 623 (1935).

22 GOODRICH, CONFLICT OF LAWS 203 (3d ed. 1949).

23 That the plaintiff need not be a resident of the state is brought out by a number of decisions which hold that a nonresident plaintiff can sue under the nonresident motorist statutes. State *ex rel.* Gallagher v. District Court, 112 Mont. 253, 114 P.2d 1047 (1941); Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940); Malak v. Upton, 166 Misc. 817, 3 N.Y.S.2d 248 (Sup. Ct. 1938). See Note, 138 A.L.R. 1464 (1942).

24 GOODRICH, *op. cit. supra* note 22, § 12.

cess to acts occurring within the state,[25] would find no justification under this theory. As previously noted, it was on these grounds that the Appellate Division struck down the New York statute in *Peters v. Robin Airlines*. It remains to be considered now whether or not a statute of the type enacted in New York could be upheld, on the theory of a foreign corporation "doing business" within the state.

The "Doing Business" Theory

At the outset, it must be realized that a cause of action arising from an accident involving non-commercial aircraft could not be said to arise from the doing of business within the state, and those portions of the statutes dealing with substituted service in such actions could only be justified on the "police power" theory as outlined above. Due to the relatively small proportion of suits involving private flights, consideration will be limited to the problem of the activities of commercial aircraft.

Like other large corporations, an airline, by establishing ticket offices and by using other airport facilities, extends its business activities into many jurisdictions. It is upon this "doing business" aspect that those jurisdictions that enact the New York type statute must attempt to justify their substituted service. In general, corporations doing business in a foreign state have been held amenable to the jurisdiction of that state under various theories, among which are "implied consent," [26] "presence," [27] and "submission to jurisdiction,"[28] the first of these being the most widely accepted although admittedly based upon a fictitious rather than upon actual assent to jurisdiction.[29]

Although a state can not wholly exclude a corporation doing interstate business,[30] it can as a prerequisite to admission, impose certain statutory conditions to which the corporation must conform.[31] The statutes imposing such conditions fall into three main classifications. The first of these requires some form of consent by the corporation, and the designation of a corporate agent to receive service; the second type provides for service upon any agent of the corporation, or upon a state officer, even though not specifically authorized; and finally some of these statutes provide for service in the same manner as upon a domestic corporation.[32] Since the aircraft statutes fall within the second classification, our discussion will be confined mostly to this category.

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25 N.Y. GEN. BUS. LAW §250.

26 Lafayette Ins. Co. v. French, 18 How. 404, 407 (U.S. 1856).

27 International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

28 Referred to but not expressly relied upon in People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918).

29 1 BEALE, CONFLICT OF LAWS 385 (1935).

30 St. Clair v. Cox, 106 U.S. 350, 356 (1882).

31 International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

32 Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry On Business Within The Territory*, 30 HARV. L. REV. 676, 690 (1917).

The courts have traditionally held that where a foreign corporation has complied with statutory requirements and expressly designated an agent or state official upon whom process might be served, such service was valid even for causes of action arising without the state.[33] On the other hand, where the foreign corporation did not appoint such agent, the courts have denied jurisdiction by substituted service for out-of-state causes of action.[34] Thus, where a foreign airline company has authorized an agent to receive service of process, it will be amenable for causes of action occurring outside the state.

In cases similar to *Peters v. Robin Airlines,* where the company has failed to designate such an agent, service under the New York type statute should, by the weight of authority, be limited to causes of action arising within the state. The majority view is expressed in *Old Wayne Mutual Life Ass'n v. McDonough,*[35] where the Supreme Court held invalid a judgment rendered in Pennsylvania, on an insurance policy issued in Indiana by an Indiana corporation reasoning that even though the insurance company was engaged in some business in Pennsylvania at the time, service upon the Pennsylvania insurance commissioner was not sufficient to acquire jurisdiction for out-of-state transactions. This view was reiterated in *Simon v. Southern Ry.,*[36] where after admitting that every state has the power to provide for service of process upon foreign corporations doing business within its limits and to stipulate that in case the companies fail to appoint such agent service may be made on an officer designated by law, the Court added:[37]

> But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business.

With but few exceptions,[38] this is the view followed in a majority of the states.[39]

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33 Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917) (state official); Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148 (S.D.N.Y. 1915) (corporate agent). For collected cases, see Note, 145 A.L.R. 630 (1943).

34 Old Wayne Mutual Life Ass'n v. McDonough, 204 U.S. 8 (1907); Simon v. Southern Ry., 236 U.S. 115 (1915).

35 204 U.S. 8 (1907).

36 236 U.S. 115 (1915).

37 *Id.* at 130.

38 Owen v. Appalachian Power Co., 78 W.Va. 596, 89 S.E. 262 (1916), holding valid substituted service on the statutory agent of a Virginia corporation by a resident of Virginia for a cause of action arising in Virginia, merely because the corporation was engaged in some activity in West Virginia.

In recent years, some doubt has been cast upon this majority view, although it has not been expressly overruled. In *International Shoe Co. v. Washington,*[40] a corporation having its principal place of business in Missouri, but employing in Washington a small number of salesmen who were regularly engaged in soliciting orders and displaying samples, was held to be "present" and "doing business" in Washington, and amenable to service of process in the latter state. The court intimated that if a foreign corporation was sufficiently carrying on business within the state, it was subject to process for out-of-state causes of action. The reasoning in this case apparently influenced the court in *Perkins v. Benguet Consolidated Mining Co.,* [41] wherein service upon the president of a foreign corporation doing business in Ohio was upheld, even though the cause of action arose without the state. In this case, however, the fact that service was made upon the president of the corporation rather than upon a state official would seem to distinguish it from the aforementioned cases.

Another aspect of the "doing business" theory was pointed out in the latter two cases: namely, the degree of activity necessary to constitute corporate presence for jurisdictional purposes. The courts have failed to state definitively the essentials of "doing business" other than that it must be continuous and systematic,[42] it being apparent that each case turns upon the court's interpretation of the facts. The Restatement of Conflict of Laws seems to beg the question by taking the view that if the cause of action arises out of business done within the state, its activities are sufficient for the state to acquire jurisdiction.[43] In an oft-cited New York case,[44] Judge Cardozo, in commenting upon the fact that there is no precise test as to the extent of business that need be transacted said,[45] "All that is requisite is that enough be done to enable us to say that the corporation is here." At first glance it might appear that the *International Shoe* case further liberalized this notion of what constitutes "doing business," when the Court stated:[46]

> . . . 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 with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

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39 Central Motor Lines v. Brooks Transportation Co., 225 N.C. 733, 36 S.E.2d 271 (1945); Maryland Casualty Co. v. Newport Culvert Co., 277 Ky. 320, 126 S.W.2d 468 (1939). See recent cases, Note, 162 A.L.R. 1424 (1946).

40 326 U.S. 310 (1945).

41 342 U.S. 437 (1952).

42 St. Clair v. Cox, 106 U.S. 350 (1882).

43 RESTATEMENT, CONFLICT OF LAWS, § 85 (Supp. 1948).

44 Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

45 *Id.,* 115 N.E. at 918.

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

In the course of rendering its decision, however, the Court ultimately reverted to the "systematic and continuous" [47] standard, thus indicating that this criterion still prevails.

Unless the dicta of the *International Shoe* case is further extended, the activities of foreign airlines within the state will have to be more than casual or sporadic for the state to acquire jurisdiction. While those airlines which maintain ticket agencies and utilize the other aviation facilities of the state will no doubt be regarded as "doing business" within that state, the courts may find that the activities of other airlines are merely occasional and therefore insufficient to meet the "systematic and continuous" test. Moreover, even if this standard is met and the corporation is deemed to be "doing business," the state cannot acquire jurisdiction, under the majority view, unless the cause of action arises within the state.

Conclusion

It is evident that the states are confronted with a definite problem which, like that of the motor vehicle, must eventually be resolved by some form of legislative action. In all probability, those states which enact statutes providing that the cause of action must arise within the state, will be able to justify such legislation as a constitutionally valid exercise of the police power. If, on the other hand, future enactments attempt to extend jurisdiction to out-of-state causes of action on the thesis that the airline was "doing business" within the state, a number of legal as well as practical problems will result. Assuming that the courts find the activities of the airline within the state sufficient to satisfy the legal requisites of "doing business," the additional requirement that the cause of action arise from such business must be met.[48]

On the practical side, it should be noted that those states which have no ceiling as to wrongful death claims will be plagued by lawsuits arising from out-of-state air disasters merely because the ill-fated plane used an airfield within the state at an earlier stage of its journey. This factor, supplemented by the further realization of the great number of planes that use New York's airports every day, should lead that state to abandon its statute as well as prompt other states to limit their non-resident aircraft statutes to causes of action arising within the state.

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[47] *Id.* at 320.

[48] The fact that the airline ticket is purchased within the state might be sufficient grounds to give rise to a contract action.