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CONFLICT OF LAWS—THE DOING OF AN ACT AS THE BASIS FOR JURISDICTION

No student of the subject of jurisdiction can fail to revert many times to the statement of Justice Holmes that the foundation of jurisdiction is physical power. Although it is possible to mention modern examples of the exercise of jurisdiction which at first glance seem to belie such an analysis, nevertheless the very eminence of the author is sufficient cause for hesitation in denying its accuracy except after extended and detailed study. And it is possible that such a study may show that the Justice, with customary insight, has reached the fundamental concept.

If by physical power is meant only the actual present power to "seize and imprison" the parties—which is said to have been the original basis for jurisdiction—judicial thought and practice have moved far beyond this stage. But if physical power is broken down into its possible aspects, it becomes more difficult to suggest inconsistent illustrations.

Physical power may exist in at least four senses: (1) actual physical power over the parties based upon presence; (2) a continuation of power which arose out of actual physical presence as in the case of a defendant who was served within the state but subsequently left the state; (3) actual physical power over the subject matter—the res—as in suits to quiet title to land; and (4) physical power over the situs of the transaction out of which the cause of action arose. The power of a state to render a judgment against a foreign corporation that has done business within the state but has since left it is an example.

It may well be queried whether all instances in which jurisdiction is exercised can reasonably be said to be applications of one of the above subdivisions of physical power.

An earlier note in this series of studies in the field of jurisdiction considered the means by which jurisdiction over a corporation may be secured. The writer questioned the accepted "doing business" test in the case of foreign corporations and suggested one analogous to the "doing of an act" theory, which is best illustrated by the non-resident motorist statutes.

The purpose of the present note is to determine the nature of the new concept by means of an examination of the cases in which the doing of an act has been held sufficient to give jurisdiction. It

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1 McDonald v. Mabee, 243 U.S. 90, 91 (1916).
2 Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913).
3 For example, Blackmer v. U.S., 294 U.S. 421 (1932).
4 Note (1945) 33 Ky. L. J. 182.
may appear that the situations to which it has been applied are of a fairly distinct type. If this is true, it then becomes a question of determining whether as a matter of law it is possible to extend the new theory, and whether as a matter of policy it is desirable to so extend it.

The doing of an act theory seems to be the subsequent rationalization of a group of three cases, rather than the conscious development by the court (in the same three cases) of a new basis for jurisdiction. The advent of the automobile and the absence of congressional action under the interstate commerce power made inevitable some sort of state regulation of highways when used by non-resident motorists. The first of the three cases referred to above arose out of one of the earliest of such regulatory statutes. A Maryland act requiring out of state motorists to secure a license and pay a graduated tax was upheld by the United States Supreme Court in 1915 as a reasonable exercise of the police power of the state in the interest of safety. A year later the Court approved a New Jersey statute which, going still further, required that an applicant for a license appoint the Secretary of State his agent for the purpose of service of process in any action arising out of the operation of a motor vehicle within the state, with provision that notice of such service be mailed to the post office address given in the application. The power of the state to regulate the use of its highways and the necessity of such regulation to promote safe driving were said by the Court to justify such a statute.

The third in the series of cases and the one in which the new theory took on its present form was Hess v. Pawloski. The plaintiff, a citizen of Massachusetts, recovered a judgment in a Massachusetts court against a citizen of Pennsylvania for injuries arising out of an automobile accident occurring in the state of the forum. It was admitted that there had been no personal service on the defendant, but recovery was based on a Massachusetts statute providing for service on a state official in such cases. The exact provisions of this statute are important as it was to become a model for many similar statutes. The act provided that:

"... acceptance ... by a non-resident motorist of rights and privileges ... as evidenced by his operating a motor vehicle ... shall be deemed to be equivalent to an appointment ... of the registrar ... to be his ... attorney upon whom may be served all lawful process in any action ... growing out of an accident ... and said acceptance or operation shall be a signification of his agreement that any such process ... which is so served ... shall be of the same legal force ... as if served on him personally."

6 For a somewhat similar discussion see Note (1941) 29 Ky. L. J. 344.
7 Hendrick v. Maryland, 235 U.S. 610 (1915).
9 274 U.S. 352 (1927).
10 Ibid. at 354.
In addition it was provided that a copy of the process must be sent by registered mail to the defendant by the plaintiff, as evidenced by a receipt signed by the defendant. And, as a final protection to the defendant, the trial court was specifically directed to grant a continuance if necessary to assure him an opportunity to be heard.

In the Hess case the defendant challenged the statute as a violation of the due process clause of the Fourteenth Amendment. Justice Butler, in a brief opinion, affirmed the judgment of the Massachusetts court without the apparent realization that the decision, if not revolutionary, was at least novel and certain to open the way for the enactment of the same type of statute in analogous situations. The Justice took judicial notice that motor vehicles are "dangerous machines" and reasoned, therefore, that in the public interest... the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways." 20 The question of service was dealt with by referring to a series of cases holding various types of statutes valid or invalid, concluding with a reference to the case upholding the New Jersey statute with the observation that the difference between the formal and informal agreement (that the state official should be constituted agent for receipt of service) was not substantial as far as the due process clause is concerned. It is quite possible that some persons would consider the difference to be substantial and would find the mere statement to the contrary unconvincing.

In reading these three cases one cannot fail to note the lack of discussion given to the problem of securing jurisdiction over an absent defendant. That problem is dealt with as secondary, both in the New Jersey case and in the Massachusetts case. The latter did refer to Flexnor v. Farson21 as holding that the doing of business by an individual within the state was not sufficient to authorize such service but a reference to the New Jersey case, with the comment mentioned above, was deemed adequate to meet the problem of service. It remained for Wuchter v. Pizutti,22 a year later, to emphasize that a statute of this type, to be constitutional, must provide for a method of service reasonably calculated to inform the defendant of the suit and give him an opportunity to defend. The statute in the Wuchter case did not expressly provide for notice to the prospective defendant and was held to be bad.

While the courts have been strict in the matter of how the notice must be sent, some holding nothing less than registered mail and a return receipt sufficient,23 it should be noted that the defendant is not allowed to defeat jurisdiction by refusing to accept the notice

20 Ibid. at 356.
22 276 U.S. 13 (1928).
or to sign the receipt. And, although the statutes are designed primarily for the protection of residents as against non-residents, at least two states have held that a non-resident plaintiff may sue under such a statute even though the defendant is a resident of the same state as the plaintiff.

As far as the Supreme Court itself has attempted to justify such statutes it has done so in terms of (1) public safety and (2) consent. The enactment of such legislation by the state is said to be a valid exercise of the police power and the defendant is considered to have given his consent either actually or by operation of law. Students of the subject of jurisdiction have expressed what may or may not be the same thing technically by saying that the prospective defendant, by coming into the state and doing an act, renders himself liable to service in causes of action arising out of that act, provided that service be in such a manner as is reasonably calculated to give him notice and opportunity to defend.

Apparently the first extension from the non-resident motorist statutes occurred in Iowa, where a statute was passed providing:

"When a corporation, company, or individual has for the transaction of any business an office or agency in any county other than that in which the principal resides, service may be made upon any agent . . . employed in such office . . . in all actions growing out of or connected with the business of that office . . . ." (Italics are ours.)

This act was held to be constitutional in Doherty v. Goodman, a case in which the Iowa court had held a judgment against a non-resident individual was valid, the only service on the defendant being on his agent in the manner set out by the statute.

A similar statute had been before the court on a previous occasion in Flexnor v. Farson. Justice Holmes, in his opinion, held that a judgment based on this statute was not entitled to full faith and credit in the courts of a sister state. The Justice distinguished the corporation cases on the ground that the state, having power to exclude a corporation altogether may impose reasonable conditions upon its entrance into the state, but since a state cannot exclude an individual citizen of another state it cannot, therefore, make consent to such a method of service a condition of coming in and doing business. Thus service under the statute was held insufficient for founding an in personam action.

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12 Hoagland v. Dolan, 259 Ky. 1, 81 S.W. (2d) 869 (1935); Rush v. Circuit Court, 209 Wis. 246, 244 N. W. 766 (1932).
13 STUMBERG, CONFLICT OF LAWS (1937) p. 92; RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 84; CHEATHAM, DOWLING, GODRICH, CASES ON CONFLICT OF LAWS (1936) p. 97.
The court in the *Doherty* case was faced with the choice of distinguishing the two cases or overruling the previous case. It chose to do the former and pointed out that in the *Flexnor* case service was on one not then an agent of the defendants. The writer believes that this question of fact was not the controlling factor in the *Flexnor* decision although Scott considers it a sufficient differentiation. The opinion of Justice Holmes is written not in terms of fact but rather in terms of law in regard to the matter of adequate service.

It is possible, however, to reach the result in the *Doherty* case without overruling the *Flexnor* decision, on the ground of an additional Iowa statute relating to the sale of securities, the particular business in which the defendant was engaged. That statute, based on the belief that the sale of securities requires special regulation, makes it mandatory that persons desiring to sell securities must register with the Secretary of State and consent to service on him in actions growing out of such transactions. It is true that the proceeding in the lower court, which the United States Supreme Court affirmed, was based on the general statute rather than on the special securities statute. Nevertheless, the Supreme Court stresses the existence of the special statute and makes it an important, if not the controlling factor in the decision, there being an express statement that the effect of the general statute under different circumstances was not considered.

It may well be doubted whether the court would have decided the *Doherty* case as it did but for the existence of the special statute. This doubt seems to have prompted the statement of Stumberga that service upon an agent of an individual doing business within the state is sufficient if such business, as an exceptional business, is subject to regulation. It does not, however, necessarily follow that a similar decision in the absence of such special regulation would be erroneous. The non-resident motorist statutes are justified as an exercise of the police power and the securities statute was a declaration that the sale of securities, because of the opportunity for fraud, was a police power situation. As a matter of policy, the courts might well limit the application of a general statute of the Iowa type to police power cases.

Let us suppose that there is no special statute concerning the sale of patent medicine. A non-resident, X, sells a bottle of medicine to Y whereby Y is injured and for which he seeks to recover judgment against X, who has since left the state. Service is in accordance with a statute of the general type. The court might well say that since the sale of patent medicine directly affects the health of the citizens, it is reasonable that the state provide some method by which

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jurisdiction could be exercised over X in actions arising out of such sale, subject always to the requirement that service be in such a manner as to give X notice and opportunity to defend.¹⁴

It is clear that up to the present time the new concept has been applied exclusively to situations which can be brought within the police power of the state. It is interesting to note that a Texas federal court, on the basis of a general statute, reached the same result achieved under the non-resident motorist statutes, service being on the non-resident defendant's agent within the state in an action arising out of an automobile accident within the state. And the Doherty case has been cited as a companion case to Hess v. Pawloski, with no attempt to differentiate between them, in upholding non-resident motorist legislation.

The question as to whether this new basis for jurisdiction should be limited to police power cases must be met. It can be argued that the interest of the state in the outcome, above and beyond that of the individuals involved, justifies what might, in the absence of such interest, be unwise. It becomes, then, a matter of policy, for there seems to be no technical reason why it must be so limited. If, in a transaction that is primarily individual in nature, the interest of the state is the controlling element, even a limitation to police power cases would, considering the present trend in governmental policy, result in the exercise of jurisdiction in many instances beyond the traditional police power concept.

Again let us suppose a case. A and B enter into a contract. A later leaves the state and breaches the contract. Should B be able to serve A under a general statute of the Iowa type? There seems to be no technical difficulty, provided of course that service be in the required manner. It has been said in justification of the non-resident motorist statutes that it works a hardship on a resident of a state, injured within the state, to have to follow the defendant to another state.²⁰ It would seem that the hardship would be as great in a contract as in a tort action. To the defendant's complaint that he is required to return to defend a suit, it can be answered that he made the contract under the protection of the law of the state and that if he were injured he would use the processes of the court and the power of the state in his behalf. As was said in answer to an objection to such service by a foreign corporation, the defendant, having availed himself of the

¹⁴ The writer believes this to be the proper rule in regard to corporations despite Washington v. Superior Court, 289 U. S. 361. For a criticism of that case see Note (1945) 33 Ky L. J. 182.
benefits of the laws of the state by doing business there, should not be heard to complain of its burdens.

Reverting to the analysis of Justice Holmes, it is possible to express the same thought in terms of physical power when used in the broad sense. The defendant was within the state when he did the act out of which the cause of action arose. The state has within its boundaries the situs of the transaction and it is reasonable that it should exercise jurisdiction when the legal consequences of that act are in question. The criminal law recognizes the jurisdiction of the state in which the crime took place. Tort law, at least to the extent of motor accidents, considers the situs of the accident as sufficient to give jurisdiction. The fact that the transaction is the making of a contract rather than the commission of a crime or a tort seems immaterial.

In conclusion, it should be repeated that the doing of an act within a state has been held sufficient for founding jurisdiction in the non-resident motorist and securities cases only. The writer believes that it is possible to extend its application to other situations as a matter of law. It remains to be determined whether in the light of changing conditions it would be wise, as a matter of policy, to make such extensions.

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39 Restatement, Conflict of Laws (1934) Sec. 428 (2).