

CPLR 301 and the Commerce Clause (Scanapico v. Richmond, Fredericksburg & Potomac R.R.)

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pretation of the statute which avoids serious constitutional doubts is that which requires receipt, possession and/or transportation to be shown to have been "in commerce or affecting commerce."¹⁷⁸ Therefore, in the face of casting serious constitutional doubts upon the entire statute, the court reversed petitioner's conviction.¹⁷⁹

Since the powers of Congress are confined to those expressed in article I of the Constitution as limited by the tenth amendment, it would appear that state gun-control regulations would face fewer constitutional barriers save any restrictive provisions in the individual state constitutions. Despite this, their effectiveness in stopping firearms proliferation is often nil because of the non-uniformity of legislation from state to state.¹⁸⁰

Clearly what is needed is pervasive legislation which by including substantial due process safeguards would serve the dual function of protecting society at large without infringing upon the rights of legitimate shooters to own and use firearms.¹⁸¹

CPLR 301

AND THE COMMERCE CLAUSE

In one of only three en banc hearings during the 1970 term, the court of appeals in *Scanapico v. Richmond, Fredericksburg & Potomac R.R.*¹⁸² stated that its prior panel decision¹⁸³ upholding personal juris-

¹⁷⁸ *United States v. Bass*, 434 F.2d 1296, 1300-01 (2d Cir. 1970).

¹⁷⁹ *Id.*

¹⁸⁰ Except for Florida, Hawaii, Illinois, New Jersey, Rhode Island and Utah, 44 of the 50 states have passed statutes making it possible for residents to purchase rifles and shotguns from federally licensed dealers in adjacent states. Under the 1968 Federal Gun Control Act, 18 U.S.C. § 921 *et seq.* (1968), enactment of such statutes allows residents to purchase firearms outside of their home states. Now, residents can "shop next door." For example, Missouri touches no fewer than eight other states. See AMERICAN RIFLEMAN, Sept. 1971, at 23.

¹⁸¹ See Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718 (1968), where a possible solution is presented. A procedure would be established whereby one would voluntarily apply for a United States Firearms Identity Card. The only reasons for refusal would be a recent conviction for a violent crime, confinement for alcoholism, narcotics addiction, or mental defects. There would be a provision for persons who had recovered from a restrictive disability to present evidence to that fact. Any denial of a card would be appealable to a board consisting of firearms experts, police, and ordinary citizens. A denial by this board would finally be appealable to the federal district court. All card holders would be then permitted to buy firearms anywhere as long as local laws were not thus violated. Also, there would be a specific provision which would invite the states to require that every gun owner in the state acquire the federal identity card. This proposed law would be a good start in establishing a uniform national system of screening gun owners and is a logical compromise, in the best of American political traditions, between opposing factions.

¹⁸² 439 F.2d 17 (2d Cir. 1970).

¹⁸³ The initial appeal was decided on July 16, 1970 before Circuit Judges Lumbard and Hays and District Judge Blumenfeld. The rehearing by the court en banc was decided December 18, 1970 in an opinion by Chief Judge Friendly.

diction over the Richmond, Fredericksburg & Potomac Railroad (R.F.&P.) did not practically subject every major railroad to such jurisdiction "in any state where it engaged in freight solicitation."¹⁸⁴

This was a tort action of a passenger enroute to New York from Florida. The injury to the plaintiff resulted from a falling suitcase while the train was travelling over the defendant's tracks between Richmond and Washington. In the panel decision, the court held that R.F.&P. maintained sufficient "minimum contacts" in compliance with the due process requirement to subject it to personal jurisdiction within New York.¹⁸⁵ These activities included freight solicitation by two employees, one being a New York resident; sale and issuance by connecting carriers of coupon tickets and through bills of lading covering carriage over R.F.&P.'s tracks, for which R.F.&P. received compensation; and the continuing presence of the defendant's freight cars in interstate trains operated by connecting railroads.¹⁸⁶ In a strong dissent, Judge Lumbard postulated that the latter two criteria would apply equally well to virtually every railroad.¹⁸⁷ He concluded that the majority's basis for jurisdiction rested on the activity of one resident solicitor of freight business.¹⁸⁸ However, the reconsideration established that the holding was not so broad.¹⁸⁹

Judge Friendly's opinion for the court en banc is devoted primarily to the issue of whether there was an unreasonable burden on interstate commerce.¹⁹⁰ This doctrine had its genesis in *Davis v. Farmers' Co-operative Equity Co.*¹⁹¹ where the Court considered four factors in

¹⁸⁴ 439 F.2d at 25.

¹⁸⁵ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The test laid down by the court is a flexible one of balancing the interests and hardships of the parties. It is basically a policy of fairness designed to foster "fair play and substantial justice." The doctrine was extended to its broadest limits in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), where the Court held that an out-of-state insurance company was subject to the jurisdiction of the resident state of the policy holder. The traditional interpretation of *McGee* has been that a corporation will be subject to process in the state where the cause of action arises. See F. JAMES, *CIVIL PROCEDURE* 642 (2d ed. 1965). Cf. N.Y. CIV. PRAC. § 302 (McKinney Supp. 1971). But in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court stated that the trend toward liberalizing the requirements for personal jurisdiction as reflected in *International Shoe* does not "[herald] the eventual demise of all restrictions on personal jurisdiction of state courts." 357 U.S. at 251. Thus, the constitutional requirements of due process "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Id.*

¹⁸⁶ 439 F.2d at 19.

¹⁸⁷ *Id.* at 21. (Lumbard, J., dissenting).

¹⁸⁸ *Id.* at 25. (Lumbard, J., dissenting).

¹⁸⁹ *Id.*

¹⁹⁰ This was probably in response to the appellant's arguments before the court which emphasized this aspect of the case.

¹⁹¹ 262 U.S. 312 (1923). There are only six other Supreme Court cases on this doctrine. *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934); *Denver & R.G.W.*

determining that there was an unconstitutional burden on interstate commerce. First, the cause of action did not arise in Minnesota (the forum state); second, the transaction giving rise to the action was not entered into in Minnesota; third, the carrier did not own or operate a railroad in Minnesota; and fourth, the plaintiff was not a resident.¹⁹² The last criterion was termed "a fact of high significance" by Mr. Justice Cardozo in *International Milling Co. v. Columbia Transportation Co.*¹⁹³ The court of appeals in *Scanapico* relied on this statement and rejected the defendant's contention that *International Milling* should be limited to its facts.¹⁹⁴ Thus, the plaintiff's New York residence was a prime factor in defeating the appellant's commerce clause argument.

The court made it clear that the due process requirements were met since R.F.&P.'s operation of through trains established "a peculiarly intimate relation with New York."¹⁹⁵ The sale of coupon tickets on these through trains along with the other factors mentioned by the majority in the panel decision were also given weight in the conclusion that there was sufficient evidence of corporate presence to constitutionally permit jurisdiction.

Finally, the court reached the issue of whether jurisdiction had been established under New York law.¹⁹⁶ It held that the sale of tickets for the through trains along with R.F.&P.'s freight solicitation brought it within the scope of New York's CPLR § 301¹⁹⁷ as applied in the state¹⁹⁸ and federal courts in New York.¹⁹⁹

R.R. v. Terte, 284 U.S. 284 (1932); Michigan Cent. R.R. v. Mix, 278 U.S. 492 (1929); Hoffman v. Missouri ex rel. Foraker, 274 U.S. 21 (1927); Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor, 266 U.S. 200 (1924); Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101 (1924).

¹⁹² 262 U.S. at 317. From this set of facts one might be tempted to ask why the commerce clause issue was raised at all since apparently there was no basis for jurisdiction under the due process clause. A possible answer might be found in Michigan Cent. R.R. v. Mix, 278 U.S. 492 (1929), where the Court, referring to *Davis*, stated: "It was assumed that the carrier had been found within the State." *Id.* at 496.

¹⁹³ 292 U.S. 511, 520 (1934).

¹⁹⁴ In *International Milling*, the jurisdiction was based upon the attachment of a steamship which was delivering cargo at a Minnesota port. It was conceded that, although the plaintiff's residence was extremely important, it was not controlling in itself. *Id.* at 519. Therefore, Mr. Justice Cardozo had occasion to recognize that the defendant "does not do business like a railroad company along a changeless route." *Id.* at 520. But this element was offset by the fact that the vessel was within the jurisdiction pursuant to direct commercial activity and not for some incidental or collateral purpose. Thus the distinction the appellant apparently attempted to make clearly has no basis. If anything, it weakens his position. *Jaflex Corp. v. Randolph Mills Inc.*, 282 F.2d 508 (2d Cir. 1960); *F. JAMES, CIVIL PROCEDURE 654* (2d. Ed. 1965).

¹⁹⁵ 439 F.2d at 27.

¹⁹⁶ See *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 225 (2d Cir 1963), *overruling*

¹⁹⁷ See generally 1 J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* § 301, at 3-2 *et seq.* (1969).

¹⁹⁸ *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y. 2d 533, 227 N.E.2d 851, 281 N.Y.S.2d

An analysis of the opinion indicates that there was little doubt that the defendant "purposefully [availed] itself of the privilege of conducting activities . . ." ²⁰⁰ within New York. The only other issue was whether there was an unreasonable burden on interstate commerce. Unfortunately, the court merged the two issues and stated that since the higher standards of the commerce clause were satisfied by the elements discussed, "they satisfied a fortiori the requirements of the Due Process Clause of the Fourteenth Amendment."²⁰¹ Unless the court meant to imply a real break with precedent,²⁰² this is a non sequitur.²⁰³ Thus, the opinion is better read by ignoring such an analogy.²⁰⁴

41 *cert. denied*, 389 U.S. 923 (1967).

¹⁹⁹ *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

²⁰⁰ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This is precisely what the dissent did not find. 439 F.2d at 22.

²⁰¹ 439 F.2d at 28.

²⁰² See note 185 *supra*.

²⁰³ The commerce clause, unlike the due process clause, is a device, not unlike forum non conveniens, to annul jurisdiction that has already attached. See *Farrier, Suits Against Foreign Corporations as a Burden on Interstate Commerce*, 17 MINN. L. REV. 381, 390 (1933); See also F. JAMES, *CIVIL PROCEDURE* 661 (2d ed. 1965). See also I J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* § 301.07, at 3-11 (1969). An analysis of the cases shows that this is the most logical view. *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934); *Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924); and *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924), all involved jurisdiction based on the attachment of property within the forum state. Clearly, the state courts could constitutionally assert jurisdiction. But that jurisdiction, although legitimately attached, was declared void by the enforcement of the constitutional right that interstate commerce not be unreasonably burdened. The jurisdiction was not void ab initio. Rather, it was voidable. The same reasoning applies to in personam jurisdiction. In *Michigan Cent. R.R. v. Mix*, 278 U.S. 492 (1929), the plaintiff contended that the defendant railroad had made a general appearance under the state law. The Court admitted that due process was satisfied on the strength of *York v. Texas*, 137 U.S. 15 (1890). It stated, however, that the constitutional claim of the commerce clause cannot be defeated by a local rule of practice. Clearly, if the commerce clause is a limitation upon jurisdiction differing only in degree from the due process clause, the Court could not have made such a statement without further explanation. There are also practical objections to equating, in kind, the commerce clause to the due process clause. Principally, it would afford ground for collateral attack, opening an avenue for needless litigation. See *Foster, Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1232-39 (1930).

²⁰⁴ However, if the court means what it says, *i.e.*, that the test of commerce clause differs only in degree from the test of the due process clause, then the plaintiff's residence has been given a meaning beyond any heretofore given by the Supreme Court. See note 185 *supra*.