

1973

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Recommended Citation

LeFlar, Robert A. (1973) "Barely Fair, Not Grossly Unjust," *South Carolina Law Review*: Vol. 25 : Iss. 2 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol25/iss2/5>

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BARELY FAIR, NOT *Grossly Unjust*

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The most disturbing feature of South Carolina's long-arm jurisdiction in actions in personam is the announced rule that jurisdiction is to be exercised "to the outer limits" allowed by the due process clause of the federal constitution. Judge Craven referred to this South Carolina rule in his *Ratliff v. Cooper Laboratories, Inc.* opinion.¹ The rule has been several times stated in South Carolina state cases² and has been recognized in earlier federal cases³ undertaking to apply South Carolina's service law.

The difficulty was stated by the late Professor Elliott E. Cheatham, one of America's greatest conflict of laws scholars, in the last piece of major writing that he published before his death:

Is it wise for a court to hold or a legislature explicitly to provide that a state statute on competence of the courts based on activities of the defendant in the state shall extend as broadly as the due process clause permits? A legislature or a court ordinarily seeks to make laws that are fair—fair to all sides. The due process clause of the Constitution, however, is a very special

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1. "South Carolina has extended its service of process laws to the outer limits allowed by *International Shoe*." 444 F.2d 745, 747 (4th Cir. 1971).

2. *Carolina Boat & Plastics Co. v. Glascoat Distributors*, 249 S.C. 49, 152 S.E. 2d 352, 353 (1967) (" . . . requires, as the jurisdictional test, only that the corporation have such contact with the state of the forum that the maintenance there of an action against it in personam shall not 'offend traditional notions of fair play and substantial justice.'"); *Boney v. Trans-State Dredging Co.*, 237 S.C. 54, 115 S.E. 2d 508 (1960). These decisions were reached under the standard "doing business in the state" foreign corporation statutes, judicially reinterpreted to give them this breadth despite earlier and narrower interpretations. S.C. CODE ANN. §§ 12-23.13, 12-23.14 (Cum. Supp. 1971). South Carolina's oddly located general long-arm act, apparently enacted in 1966 as a part of, or an amendment to, the Commercial Code, S.C. CODE ANN. §§ 10.2-801 to 10.2-809, *inclusive*, is otherwise a standard modern statute, but seems not yet to have been interpreted as to its constitutional scope.

3. *Shealy v. Challenger Mfg. Co., Inc.*, 304 F.2d 102, 107 (4th Cir. 1962): "In no case has that court held that the statutes did not authorize an exercise of jurisdiction which, in the opinion of that court, was constitutionally permissible;" *Deering Milliken Research Corp. v. Textured Fibres, Inc.*, 310 F. Supp. 491 (D.S.C. 1970); *Gardner v. Q.H.S., Inc.*, 304 F. Supp. 1247 (D.S.C. 1969); *Middlebrooks v. Curtis Publ. Co.*, 264 F. Supp. 373 (D.S.C. 1967); *Siegling v. International Ass'n of Approved Basketball Officials*, 262 F. Supp. 441 (D.S.C. 1966).

kind of law. It does not prescribe; it only limits. It requires not that a law be fair, but that it not be too unfair, not grossly unfair. In applying the due process clause the courts state insistently that they are not to substitute their judgment as to wisdom or desirability or even fairness for that of the legislature. To say that a law does not violate the due process clause is to say the least possible good about it. Due process is manifestly not a fair or wise test of the competence of a court over a defendant.⁴

A number of other states, sometimes more blatantly, have followed the same path as has South Carolina to the conclusion that the due process clause lays down the scope of local long-arm service. California was perhaps the first state to do this, at a time when it, like South Carolina, had no modern long-arm statute. The old California statute only authorized substituted service when the foreign corporation was "doing business" in the state, and the term "doing business" had been interpreted in the traditional sense as requiring that the corporation have engaged in a connected series of related transactions of a business character, usually extending over a considerable period of time. This was unfair to plaintiffs whose causes of action arose out of lesser corporate activities within the state. The need for long-arm service was apparent and, since the legislature had failed to provide for it, the California Supreme Court did what the legislature should have done. By reinterpreting the old "doing business" statute, it held that the statute permitted long-arm service in any case in which the service would not violate the due process clause. "'Doing business' within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process,"⁵ said the Court. Since the Court had thus taken care of the problem it was a long time before the legislature finally got around to it, and when a new statute was finally enacted it did no more than extend to

4. Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 25 (1971). See also Leflar, *Conflict of Laws*, 1969/70 Ann. Survey Am. L. 1, 8; "If 'good law', as distinguished from 'barely permissible law', is what is wanted in this area of jurisdiction, the courts should take a more restrained approach in their interpretation of the long-arm statutes. Due process may be satisfied by some procedures that are only barely fair."

5. *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 Cal. 2d 855, 858, 323 P.2d 437, 439 (1958). This case was followed and strengthened by *F.W. Borgward G.M.B.H. v. Superior Court*, 51 Cal. 2d 72, 330 P.2d 789 (1958).

all defendants, human as well as corporate, the quasi-emergency rule previously promulgated by the Court. The eventual statute was short and superficially simple:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.⁶

An obvious difficulty with this statute is its ambiguity, since its scope was left to judicial decisions yet to be rendered. Fortunately, there was a companion enactment specifying *forum non conveniens*⁷ as a corollary doctrine, so that the law's unfairness to distant defendants could sometimes be avoided. The new statute undoubtedly has the virtue of flexibility, and was certainly easy to draft, but it did nothing to clarify the rule of law or to ease the previously self-imposed task of the courts in applying the law.

Other states show a similar history. Several states reinterpreted their "doing business" statutes, much as California and South Carolina did.⁸ Wisconsin started out by reinterpreting its old statute,⁹ but the legislature of that state reacted quickly, enacting one of the earliest and most specific but comprehensive long-arm statutes.¹⁰ Oregon used the same interpretative process to expand its typical modern long-arm statute to permit service to the outer margin of what due process permits.¹¹ The Utah legislature employed a similar technique when, after specifying factual situations in which service was specifically authorized, it declared that the purpose of its statute was to permit exercise of jurisdiction to the "fullest extent permitted by due process."¹²

6. CAL. CIV. PRO. CODE § 410.10 (West Supp. 1969).

7. *Id.*, § 410.30. See Green, *Jurisdictional Reform in California*, 21 HAST. L.J. 1219 (1970).

8. See *In Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 224 (6th Cir. 1972) (Ohio statute); *Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.*, 304 F.2d 915 (1st Cir. 1962) (New Hampshire statute); *Key v. S.C. Johnson and Son, Inc.*, 189 A.2d 361 (D.C. App. 1963) (District of Columbia statute); *Jarrard Motors, Inc. v. Jackson Auto & Supply Co.*, 237 Miss. 660, 115 So.2d 309 (1959) (Mississippi statute). For discussion of the theory, see Keane and Collins, *Changing Concepts of What Constitutes "Doing Business" in a State*, 42 MARQ. L. REV. 151 (1958); Note, *Recent Interpretations of "Doing Business" Statutes*, 44 IOWA L. REV. 345 (1959).

9. See *Koepp v. Peters*, 193 F. Supp. 296, 298 (E.D. Wis. 1961).

10. WIS. STAT. ANN. § 262.05 (1972 Pocket Part).

11. *State ex rel. White Lumber Sales, Inc. v. Sulmonetii*, 448 P.2d 571 (Ore. 1968). Judge O'Connell, dissenting, wisely pointed out that this "outer limits" approach is likely to produce some results that border on "unfair play" and doubtful justice.

12. UTAH CODE ANN. §§ 78-27-22 to 78-27-28, inclusive. See Note, *In Personam Juris-*

The Rhode Island statute,¹³ like the new one in California, authorizes the exercise of jurisdiction to the full extent permitted by the due process clause, thus leaving everything to the courts. And in New Jersey the courts actually imposed this vague standard upon themselves by Rule of Court.¹⁴

An established judicial procedure has to be very bad indeed for the United States Supreme Court to declare it unconstitutional under the due process clause. At an earlier time in our constitutional history it was almost impossible to invalidate a procedure that dated back to the early days of Anglo-American common law even though the procedure actually operated to deprive a party of his rights, including property, without affording him any real opportunity to have them litigated. Due process was deemed to be the process employed by common law and equity courts in times gone by. "Fair play and substantial justice" was not yet the name of the game. Old concepts still prevailed when *Ownbey v. Morgan*¹⁵ was decided in 1921. Delaware's retention of the "custom of London", under which a defendant in a "foreign attachment" action was barred from litigating his claim on the merits unless he first posted bond in the amount of the claim, was held not to violate due process, and an insolvent defendant unable to post the exorbitant bond was denied all remedy. The 1945 redefinition of procedural due process of law in terms of "fair play and substantial justice"¹⁶ probably marked the end of such barbaric reliance upon customs two centuries old as the test of constitutional protections in the courts, and *Ownbey v. Morgan* would presumably be overruled if, God forbid, its issue should again be presented to the Supreme Court. Nevertheless, the law's history remains part of the law, and it remains true that due process still

diction Expended: Utah's Long-Arm Statute, 1970 UTAH L. REV. 222.

13. R.I. GEN. LAWS (1969) § 9-5-33 (Jurisdiction if there be "minimum contacts . . . in every case not contrary to the provisions of the Constitution or laws of the United States").

14. ". . . [J]urisdiction shall be exercised subject to due process of law." New Jersey R.R. 4:4-d(d).

15. 256 U.S. 94 (1921). "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice. . . . However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Id.*, at 110, 112.

16. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

permits some procedures which fair-minded men would not adopt.

Another example, closer to the persistent doubts that arise as to far-fetched long-arm judicial jurisdiction, is the case¹⁷ in which a default judgment based on a sheriff's false return of service was sustained. It was said that the defendant, who never knew that an action was pending against her, had a remedy against the sheriff's bond. This "remedy" gave her a protection which satisfied the outer limits of due process. Yet the bond of a crooked or lazy sheriff who, if he made a false return on one summons, would do the same thing on a dozen or a hundred others, is inevitably soon used up so that it affords small help to one of the sheriff's several victims.¹⁸ Due process may be satisfied, but the defendant has been bilked.

Judicial jurisdiction in rem has from the common law's beginnings been classified separately, for process serving purposes, from jurisdiction in personam. Various forms of substituted or constructive (often long-arm) service have traditionally been permitted when legal proceedings were directed against a res. This has been true, at least under *Harris v. Balk*¹⁹ for purposes of garnishment or attachment, even when the res was an intangible—a chose in action that by its non-physical nature could not have a real location anywhere. The chose in action, without doubt a property interest and an asset of the creditor, is deemed to have a situs at any place where the debtor is found so that the creditor's property interest can be reached in rem there. As far as due process requirements are concerned, the distinction between proceedings in personam and those in rem is fading away,²⁰ since due process for both types of proceeding calls for a type of service reasonably calculated to give actual notice. Actions in rem as well

17. *Miedreich v. Lauenstein*, 232 U.S. 236 (1914).

18. This was a mortgage foreclosure, and the defendant was a resident of the forum state. Appearance by an unauthorized attorney, as a basis for personal jurisdiction over a resident of the forum state, presents a similar problem. See *Vilas v. Plattsburgh & M.R.R.*, 123 N.Y. 440, 25 N.E. 941 (1890) (nonresident); *Brown v. Nichols*, 42 N.Y. 26 (1870) (resident). For a case in which an extremely attenuated mode of service against a forum resident was sustained, though without any apparent unfairness since he was deliberately hiding out, see *Fishman v. Sanders*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S. 2d 380 (1965). Cf. *Dobkin v. Chapman*, 21 N.Y.2d 490, 236 N.E.2d 451 (1968).

19. 198 U.S. 215 (1905).

20. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Atkinson v. Superior Court*, 49 Cal.2d 338, 316 P.2d 960 (1957).

as actions in personam regularly affect and often destroy personal rights. So long as *Harris v. Balk* remains good law, a garnishment proceeding in rem without personal service on a creditor can have that effect, and can be extremely burdensome on the creditor. The burden is especially great if the plaintiff garnishor finds the garnishee debtor, and brings his garnishment action, at a place far from where the creditor defendant resides and the garnished debt arose. In such cases the expense of defending may exceed the value of the garnished chose in action, so that practically the creditor defendant may be compelled to permit a default despite the existence of a good defense against the garnishor's claim. Yet *Harris v. Balk* decides that due process of law is not violated by this often burdensome but hallowed procedure. Perhaps it too should be overruled, but it is still the law today.

Recently questions have been raised anew as to a sort of mutation on *Harris v. Balk*. This is the New York device for garnishment of the contingent debt owed by a liability insurer to its insured on a liability insurance policy, by the insured's alleged accident victim as plaintiff garnishor. New York allows this kind of garnishment proceeding if the garnishor is a New York resident, even though the tort cause of action arose elsewhere and the principal defendant, owner of the garnished chose in action, resides in some other state and is served by long-arm only.²¹ It is enough that the garnishee debtor, the insurance company, be doing business in New York so that the debt's imaginary situs can be located there. Here again the due process clause is apparently satisfied,²² though it has been vigorously protested that this type of so-called garnishment violates both the theory and the social justification of the remedy.²³ The fact that no other state has seen fit legislatively to follow New York's example, despite the advantage that the plaintiff's personal injury bar can derive from the

21. *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967); *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The procedure has not been carried so far as to allow garnishment by plaintiffs who are nonresidents of New York. See *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir. 1969). Presumably this is a *forum non conveniens* limitation in the local law.

22. *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1969), *cert. denied*, 396 U.S. 844 (1969). See also *Beja v. Jahangiri*, 453 F.2d 959 (2d Cir. 1972).

23. See Siegel, *Jurisdiction Ad Infinitum: New York's "Rem" Seizure of the Insurance Policy for Jurisdiction in Accident Cases*, 20 INTL. & COMP. L.Q. 99 (1971); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 325 (1970).

procedure, emphasizes the point that what the due process clause permits may be so nearly unfair, so close to injustice, that fair-minded lawmakers will reject it.

Other illustrations of permissible procedures that approach dangerously close to unfair play and substantial injustice might be given. The use of cognovit clauses as consents to jurisdiction without service comes near the edge, and most states do not allow it.²⁴ The application of ordinary long-arm statutes in defamation actions brought against out-of-state magazine and newspaper publishers²⁵ raises First Amendment free press issues that, though not yet fully resolved, leave room for much difference of opinion as to whether service ought to be permissible to the outer limits of due process. Long-arm service by a mail order seller of goods to a consumer in a distant state, in action brought in the seller's state where the contract of sale was completed and the goods were shipped,²⁶ probably ought to be limited to a lesser scope than the due process clause might permit. These are only some of the more striking examples.

Apart from the risk of marginal unfairness to defendants inherent in the exercise of state jurisdiction to the outer limits allowed by due process, there are other defects and inefficiencies as well. The ambiguity of the rule operates as a trap for both litigants and courts.

On a case close to the outer limits dividing line, as was *Ratliff v. Cooper Laboratories, Inc.*, when there is no precedent exactly in point in the forum state, neither lawyer nor judge can with certainty know whether long-arm service is good or bad until the issue has been passed upon by the highest court to which the case is taken.²⁷ The long-arm statute does not tell them where the line

24. Cf. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972) (companion cases). See *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

25. See Comment, *Constitutional Limitations to Long-Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967); Comment, *Long-Arm Jurisdiction over Publishers*, 67 COLUM. L. REV. 342 (1967).

26. Compare *Prentice Lumber Co. v. Spahn*, 474 P.2d 141 (Mont. 1970) (allowing service), with *Riverland Hardwood Co. v. Craftsman Hard. Lumber Co.*, 259 La. 635, 251 So.2d 45 (1971), and *"Automatic" Sprinkler Corp. v. Senaca Foods Corp.*, 280 N.E.2d 423 (Mass. 1972) (not allowing service).

27. This is illustrated by the decision of the District Court in *Ratliff v. Cooper Laboratories, Inc.*, which sustained the long-arm service that was later, on appeal, held to violate due process.

is drawn, and they derived no guidance from it. The plaintiff's attorney can only take a chance, either going ahead with service that may turn out to be ineffective and foregoing suit in some other surer but less desirable forum, or filing his suit where he knows he can get good service but with the prospect of poorer substantive results. He knows that he cannot count on trying service in the preferred state first then, if the service is disallowed, file anew in the other state, because by that time the other state's statute of limitations will probably have run. Nothing in the inexact long-arm law resolves his dilemma.

The trial judge's dilemma is essentially the same as the lawyer's. Service under the vague service law does not tell him whether the case is properly before him or not. A trial judge is often not well equipped to pass upon difficult federal constitutional issues in a hurry. He is inevitably tempted, if the service is near the margin of what due process allows, to dismiss the case for inadequate service and let an appeal be taken on that preliminary ground before he proceeds to trial on the merits. He knows this will be a time-wasting procedure, if the service is upheld on appeal. But the alternative is to take evidence on the merits and render judgment, perhaps by default, then risk the waste of that extra trial time and effort if the service is held to be bad on appeal. It would aid judicial efficiency if the outer limits of permissible service under any state's law were spelled out with reasonable specificity. This might save some effort for process servers, too.

It is clear that *Ratliff v. Cooper Laboratories, Inc.* was decided correctly, though it decides no more than the invalidity of service on its own facts. Other marginal cases will arise in South Carolina, and they also will have to be decided on their own facts, often after appeals are taken. Clear limits specified in the long-arm statute, or interpretation of the statute as permitting no more than it specifically authorizes, would avoid most of the uncertainty which necessitates these doubts and ultimate appeals. Even more important, clear limits placed somewhat short of the outer margins of due process would protect defendants against the extremes of fair play and substantial justice when exercise of jurisdiction based upon the service would be barely fair, not grossly unjust, but bordering on both unfair play and substantial injustice.