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Jurisdiction by Implied Consent

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JURISDICTION BY IMPLIED CONSENT

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THE theory of jurisdiction of the state over a person by the doing of an act within the state by a non-resident captivates interest, because of the possibility it seems to hold for the remedy of an evil, namely, the difficulty of reaching a non-resident who has committed a wrong within the state, and who has departed from the state before process can be served.

Ordinarily adherence to precedent is, of course, a sound policy, but strict adherence in deciding cases and formulating rules of law is not always possible, nor, in fact, desirable.[1] Law ought keep pace with the change in conditions in society,[2] the philosophies of men and the progress of civilization. Throughout our legal history we find, embodied in our law, the principle that laws can be adapted to changing conditions. And the courts, through their decisions, indicate that this flexibility is an important feature of the system. While departures from the spirit and letter of the Constitution cannot command respect or approval, application of established principles to new situations makes our law a real, vital institution.[3]

"The exercise of jurisdiction by a state through its courts over an individual may be based upon any of the following circumstances:

a. The individual is personally present within the state

b. He has his domicil within the state

c. He is a citizen or subject owing allegiance to the nation

d. He has consented to the exercise of jurisdiction

e. He has by acts done by him within the state subjected himself to its jurisdiction."[4]

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[1] Swift v. Tyson, 16 Pit. 1 (U.S.) (1842) overruled by Erie Railroad v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935) overruled by Smith v. Allwright, 64 Sup. Ct. 757, 321 U.S. 649, 88 L.Ed. 987 (1944), which upheld the right of negroes to vote in the Texas primary to nominate candidates for Congress.

[2] Hollen v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898).

[3] "While the meaning of the Constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[4] Restatement of the Law of Conflict of Laws, by the American Law Institute, Sec. 77 (1934).
Authority for the bases there enumerated are:
(a) Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895); Hart v. Granger, 1

The discussion here is confined to subdivision (e) above, that is, the power of a court to render an inpersonam judgment against a nonresident who has done an act within the state, by virtue of which he has given his implied consent that an agent be served with process for a cause of action arising out of that act.[5]

Referring briefly to the development of the implied consent theory, we find it arose in cases involving corporations.

Foreign corporations engaged in interstate commerce are distinguished from those doing intrastate business, by virtue of Article 1, Section 8 of the Federal Constitution, which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Therefore, a state may not impose any restriction or regulation upon such corporations which will burden or interfere with interstate commerce, and, consequently, may not require the designation of an agent within the state upon whom service of process may be made. However, if a corporation, engaged in interstate commerce, is doing business within a state, service of process may be made upon an agent conducting the business, in pursuance of a state statute providing for service upon that agent. In *International Harvester Company* v. *Kentucky*[6] the court held that such a corporation is not immune to process, and service upon an agent of the corporation is valid, even though the corporation is engaged solely in interstate commerce.

As to intrastate business, a state may constitutionally prohibit a foreign corporation from coming into the state to do that business, inasmuch as a corporation is not a citizen under the Privileges and Immunities clause of the Constitution.[7] Having the power to refuse to allow the corporation to enter, it also has the power to impose reasonable requirements upon corporations seeking admission, including the giving

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Conn. 154 (1814); Grover & Baker S. Machine Co. v. Radcliffe, 137 U.S. 287, 11 S.Ct. 92, 34 L.Ed. 670 (1890).

(b) Sturgis v. Fay, 16 Ind. 429 (1861); Bickerdike v. Allen, 157 Ill. 95, 41 N.E. 740 (1895); Henderson v. Staniford, 105 Mass 504 (1870); Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

(c) Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932).

(d) The consent here considered is actual assent, expressed in words or shown by conduct.
Chandler v. Hardeman, 12 Ala. App. 572, 68 So. 525 (1915); Ellis v. Gordon, 202 Wis. 134, 231 N.W. 585 (1930); Hazel v. Jacobs, 78 N.J.L. 459, 75 Atl. 903 (1910); Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).

(e) Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097 (1935).

[5] 29 KEN. L. J. 344 (1941).

[6] International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479 (1914).

[7] Federal Constitution, Art. IV, Sec. 2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Paul v. Virginia, 8 Wall. (U.S.) 168 (1868); Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 422 (1898).

of consent to service of process upon an agent, designated by the corporation, or upon the secretary of state.[8] By doing acts within the state, the corporation confers upon the state jurisdiction to entertain suits arising from those acts.[9]

If a foreign corporation comes into the state and there engages in business without taking out a license, as required by statute, and without designating an agent upon whom service of process may be made, as to causes of action arising out of the business within the state, still valid service may be made upon the secretary of state or some other statutory agent. In the case of *Old Wayne Mutual Life Association of Indianapolis* v. *McConough*[10] the court said, "It is true that, if an insurance corporation of another state transacts business in Pennsylvania without complying with its provisions, it will be deemed to have assented to any valid terms prescribed by that commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that commonwealth and there exert its corporate powers.——By going into Pennsylvania without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth." The state having the power to exclude the corporation entirely, it may deem the doing of an act implied consent to substituted service.

Coming now to the individual non-resident, ordinarily a state may not require an individual entering the state to appoint an agent to receive process, as a condition of admission, in view of the Privileges and Immunities clause, which guarantees a citizen of one state free egress and ingress as to other states. Notwithstanding, it has been held that in come cases, under the police power, a state may constitutionally regulate acts of a non-resident within a state, and as a means to this regulation, may enact a statute which provides that the doing of an act within the state confers an implied consent by the non-resident that service of process, for a cause of action arising out of that act, may be served upon the secretary of state, as agent of the non-resident.[11]

When automobiles came into general use and travel from one state to another became very common, it was inevitable that the motorist should become involved in collisions in foreign states. Personal service of process upon these tortfeasors was impractical because they often

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[8] Lafayette Ins. Co. v. French, 18 How. 404 (1855); Penn. Fire Ins. Co. v. Gold Issue Co., 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917); State of Washington v. Superior Court, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256 (1933).

[9] Truck Parts Inc. v. Briggs Co., (D.Ct. D. Minn.), 25 Fed. Sup. 602 (1938).

[10] Old Wayne Mutual Life Asso. of Indianapolis v. McConough, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907).

[11] Restatement of the Law of Conflict of Laws, Sec. 84, 85.

left the state following the accident and failed to return. To remedy this situation, states passed the so-called "non-resident motorist" statutes, providing for substituted service upon an agent (secretary of state or some other governmental officer) under the theory that the automobile operator, by driving his car within the state impliedly consented to the state's jurisdiction over him.

The first case involving such a statute was *Kane* v. *New Jersey*.[12] Here the court sustained the statute which provided that a non-resident operator of an automobile should, before operating his car on the highways of the state, expressly appoint the secretary of state as his agent upon whom process might be served in any action arising out of the operation of the automobile within the state.

Then came the decision of *Hess* v. *Pawloski*,[13] upholding a state statute of Massachusetts which provided that the operation by a non-resident of a motor vehicle upon a public highway of the commonwealth should be deemed equivalent to an appointment by such non-resident of the Registrar of Motor Vehicles to be his agent upon whom process might be served in any action against him growing out of any accident or collision in which the non-resident might be involved while operating the automobile on such a public highway, and that the operation should be a signification of his agreement that any such process against him should be of the same legal force as if served on him personally. A state has the power to forbid a non-resident to do acts within the state involving danger to life or property, unless he first consents to the exercise of jurisdiction of the courts of the state as to causes of action arising out of those acts. In this celebrated case the court said, "This statute is plainly enacted in the exercise of the police power. It is designed to afford protection to the personal safety of travelers on the highways of our commonwealth. Its purpose is to promote the public safety and to converse the public health. These ends are universally recognized as appropriate objects for the exercise of the police power. Specifically, the aim of the statute is to facilitate the enforcement of civil remedies by those injured in their person or property by the negligent and wanton operation of motor vehicle upon the highways of this commonwealth."

Now many states have similar statutes. They have been upheld, where some adequate provision is made for notice to the non-resident defendant.[14]

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[12] Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916). 39 HARV. L. REV. 563 (1926).

[13] 274 U.S. 352 (1927), *Supra.*

[14] Martin v. Condon, 3 N.J. Misc. R. 726, 129 Atl. 738 (1925); Schilling v. Odlebak, 177 Minn. 90, 224 N.W. 694 (1929); Jones v. Paxton, 27 Fed. 2nd 364 (1928) (D.Ct. D. Minn.), WIS. STAT. 85.05 (1927); State ex rel Cronkhite v. Belden, 193 Wis. 145, 211 N.W. 916 (1927); State ex rel Stevens v. Grimm,

Under the police power, states have seen fit to enact laws concerning service of process in cases arising out of the sale of securities.[15]

In *Henry L. Doherty & Co.* v. *Goodman*[16] the question of jurisdiction arose when Goodman sought a personal judgment for damages arising out of a sale contract for securities. Pursuant to an Iowa statute,[17] service was made in Iowa upon an agent of Doherty, a resident of New York. The court sustained the statute and in the opinion quoted with approval the language of the Iowa Supreme Court in *Davidson* v. *H. L. Doherty & Co.*[18] involving the same statute, to the effect that the wording of the statute places residents and non-residents of the state upon he same footing, so there is no abridgment of the privileges and immunities of citizens of the several states. The United States Supreme Court then referred to the non-resident motorist cases, in which cases the power of the states to impose terms upon non-residents, as to activities within their borders, was approved; and concluded by saying that so far as Doherty was affected, the statute went no farther than the principle approved by those opinions permit.[19]

It may be assumed from the tenor of this opinion that if the wording of the statute had not been guarded as it was ("in any county other than that in which the principal resides") the outcome probably would have been the same, rested squarely upon the power of the state to completely regulate the sale of securities.

The theory of implied consent has been applied to the sale of securities by a non-resident in Wisconsin, by the adoption of Sec. 189.27, Wisconsin Statutes, (1941) which reads as follows:

> Service on non-residents. In any action or proceeding in this state, arising out of or founded upon any misrepresentation or fraud or any violation of this chapter or of any order, rule or regulation of the department in which any issuer, dealer or other person, who shall have appointed the director and the deputy di-

192 Wis. 601, 213 N.W. 475 (1927); State ex rel Ledin v. Davison, 216 Wis. 216, 256 N.W. 718 (1934); State ex rel Nelson v. Grimm, 219 Wis. 630, 263 N.W. 583 (1935); Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928); Young v. Masci, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158 (1933); 20 IOWA L. REV. 654 (1935).

[15] WIS. STATS. 189.04 (1931); Thomas v. Atkins, 52 Fed. Sup. 405 (1943) (N.D. Texas).

[16] Henry L. Doherty & Co. v. Goodman, 218 Iowa 529, 255 N.W. 667 (1934); 294 U.S. 623 (1935).

[17] Sec. 11079 Iowa Code, 1927. "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 on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

[18] Davidson v. Henry L. Doherty & Co., 214 Iowa 739, 241 N.W. 700 (1932).

[19] In Hess v. Pawloski, 274 U.S. 352 (1927), *Supra,* that principle was framed in the following words, "The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights."

> rector, and each of them, its attorneys, shall be a party, service of any summons, complaint, pleading, process, order or notice may be made by service upon either such attorneys or by filing a copy of same with the department. The department shall forthwith forward by mail, postage prepaid, to the person designated in the appointment at the address stated therein, or if no such designation has been made, to the issuer, dealer or other person at his last known post-office address, a copy of such papers. Thereupon, service of such papers upon such issuer, dealer or other person shall be deemed complete personal service. The certification of the department under its official seal, of such service, shall be sufficient proof thereof."

Under this statute, an effective means has been provided to reach non-residents who perpetrate fraud in the sale of securities, whether they have designated an agent to receive service or not. This tends to strengthen the belief that the states can and will continue to apply the implied consent theory of jurisdiction as against individuals.

Although implied consent is the basis by which jurisdiction is conferred upon courts by foreign corporations engaged in intrastate business, and by individuals in the non-resident motorist and securities cases, it will be noted that the fundamental idea underlying the basis is different. In the corporation cases it arises because the state has the power to exclude corporations entirely;[20] and in the individual non-resident cases, it is because of the police power, the power of a state to adopt measures which tend to protect the public, through their effect upon the non-resident, the theory being that a statute which subjects him to suit within the state will make him more cautious. The result is that the health and safety and general welfare of the residents are protected.

Now that the theory of implied consent, as a basis of jurisdiction in inpersonam actions, has been accepted, founded as it is on the police power, the query arises, "May it not be extended? May not a state enact a statute, or statutes, which will provide that a non-resident who comes into the state and engages in an activity, or commits an act, which militates against the health, safety, morals, or general welfare of the residents, impliedly consents to the service of process upon the secretary of state, as his agent?"

True, this theory would immediately be branded by some as an unwarranted and unconstitutional deprivation of personal rights. However, many would see that it has considerable merit, and can be constitutionally upheld, upon the principle affirmed in the motorist and security cases.

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[20] 19 IOWA L. REV. 421 (1934).

In approaching the problem, proper emphasis must be placed upon the importance and potential strength of the police power, which the states did not surrender when the Constitution was adopted. That police power is the inherent and plenary power in the state which enables it to prohibit all things harmful to the comfort and welfare of society and to require all things which promote the health, safety, morals and general welfare of its citizens.

In the first instance, the decision as to whether or not a certain measure is within the police power of a state rests with the legislature and is presumed to be lawful. It may be declared unlawful by the courts only when it is clearly arbitrary, unnecessary, or violative of some constitutional right. Excerpts taken from judicial opinions serve to impress this; and serve to convince us that the exercise of police power remains unhampered by precedent:

> "The (state's police) power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress."[21]
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> "A large discretion is necessarily vested in the legislature to determine not only what the interests of public convenience and welfare require, but what measures are necessary to secure such interest."[22]
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> "There must be some reasonable basis for legislative activity in respect to the matter dealt with, else the subject is outside the scope of legislative interference. However, given a subject in respect of which there is some reasonable necessity for regulation, fair doubt in respect thereto being resolved in favor of the affirmative, in case of the legislature having so determined, the degree of exigency is a matter wholly for its cognizance. What is said as regards legitimacy of subjects for the exercise of the police power may be repeated as to appropriateness of means; while given the two elements—legitimacy of subject and appropriateness of means—the degree of interference within the boundaries of reason is for the legislature to decide, there being left in the end the judicial power to determine whether the interference goes so far as to violate some guaranteed right—regulate it so severely as to materially impair it, reasonable doubts being resolved in favor of legislative discretion."[23]

The need for the exercise of the police power in the instances here contemplated is a present one, and the need in the near future in all probability will be much greater. The ease and speed with which a person may now travel by auto from one state to another, of course, is known to all. In addition, on every side we see and hear forecasts of the future; a future which promises, for example, to an average man

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[21] City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).
[22] Cotter v. Stoeckel, 97 Conn. 239, 116 Atl. 248 (1922).
[23] Mehlos v. Milwaukee, 156 Wis. 591, 146 N.W. 882 (1914).

of an eastern city a few hour's trip by plane to Wisconsin or some other middlewest state; a weekend in the south; a week's vacation in California. A knowledge of human nature and past experiences carries the almost certain prediction that in the wake of this unprecedented ease and speed of travel will come breaches of personal and property rights by men in states far from the residences of those travelers. This generally contemplated increased use of air travel, accessible to an ever-increasing proportion of the population brings the realization that the problem of service of process will probably be aggravated to such an extent that some means must be provided to protect the welfare of persons in the state, injured by non-residents, without forcing the plaintiffs to go thousands of miles to seek restitution.

This behooves us now to consider the problems that not only exist today, but those that will confront us later. To seek to develop a method whereby valid service may be made on non-residents who do acts within the state, injurious to others, and leave before process can be served seemed a worthy pursuit.

The justification for using the police power to provide a method of substituted process is the likelihood that a state with a statute authorizing service upon an agent, impliedly appointed by the doing of an act within the state, provides protection for people in the state, whether residents or non-residents,[24] in that the law will have a tendency to promote safety to persons, property and finances, because non-residents will be more apt to act carefully, to avoid torts, if they know that mere escape over the state line, and failure to return to the state of the act, will not envelop them in a cloak of immunity from process within the state.

Other reasons also exist. The person wronged naturally desires some method of bringing the defendant back to the state for trial because suit there is more convenient for the plaintiff and his witnesses. Certainly, it is less expensive for the plaintiff to have the matter litigated where the cause of action arose than in the place where the defendant resides or is found. Then too, the tort is governed by the law of the state where the act was committed.[25]

Concededly, before the enactment of any measure under the police power, there must be a need for it. What proportions that need must

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[24] State ex rel Rush v. Circuit Court, 209 Wis. 246, 244 N.W. 766 (1932). Non-resident motorist statutes apply to non-resident plaintiffs as well as to resident. Suit in Wisconsin under such a statute, by a resident of Illinois against another resident of Illinois was sustained. Accordingly, non-resident claimants undoubtedly could avail themselves of other implied consent statutes.

[25] Western Union Telephone Co. v. Brown, 234 U.S. 542, 34 S.Ct. 955, 58 L.Ed. 1457 (1914); Slater v. Mexican Nat. R.R. Co., 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1903); Mike v. Lian, 322 Pa. 353, 185 Atl. 775 (1936); Le Forest v. Tolman, 117 Mass. 109 (1875); Young v. Masci, 289 U.S. 253 (1933), *Supra.* Restatement of the Law of Conflict of Laws, Sec. 378-379.

assume before a remedy is forthcoming cannot be definitely determined. Is it to be determined solely by the number of persons who can use it? Or, is the determination also to take into consideration the severity of the injury to the plaintiff and the consequent effect on the public? Many believe that the latter ought be considered, as well as the former.

The means of accomplishing the desired end would be the passage of legislation, and it is submitted that a statute providing for service upon non-residents, through an agent within the state (secretary of state or other statutory agent), based upon implied consent through the doing of an act, would be constitutional, just as are the non-resident motorist and security statutes.

The extension of the implied consent theory to fields now partially regulated, under the police power, may be the method by which regulation is made more complete.

Consider, for instance, the licensing of employment agents, covered by Chapter 105 of the Wisconsin Statutes. Any person, firm, corporation or association which furnishes to persons seeking employment information enabling or tending to enable such persons to secure the same must take out a license. This license may be revoked by the Industrial Commission upon certain grounds. Is that adequate protection for the seekers of work? Will that keep potential racketeers out of the state? Would it not be better to have a statute which provided that anyone who engaged in this activity, with or without a license, impliedly consented to service upon the secretary of state, in causes of action arising out of that activity?

Now the need may not be impelling, but consider the situation that may confront us in a period of reallocation of labor, or of unemployment. Ought not some means of protecting workers be now considered, some means which will tend to make employment agents more cautious? The unemployed will undoubtedly flock to employment agencies and pay the fees required. Then they may find that the unscrupulous agent has defrauded them and left the state. If that agent is a resident of the state, he may be reached on the basis of his domicil, but if he is a non-resident the seekers of employment would have to undergo suit in a distant state to recover.

Persons acting as collection agents must also secure a license, under Sec. 218.04 of the Wisconsin Statutes, which provision was enacted under the police power. If a non-resident comes into the state and unlawfully engages in this business without securing a license, defrauds the public, and then departs, the innocent victims cannot reach him except in a foreign state. And, if he does secure a license, the only remedy against him is through foreign suit. The state can revoke his license and impose a small fine or imprisonment. This does not offer much restitu-

tion to those injured. If this agent knew he must return here to defend himself in an action arising out of his acts, or suffer a default judgment being entered against him, it is submitted that he would be less inclined to attempt to carry on his illicit trade.

In the field of foods and drugs, extensive legislation has been enacted in an attempt to protect the health of the public. Requirements are laid down for their production, preparation or manufacture, and also licenses are required for the sale of some foods and drugs, and there are prohibitions against the sale of any adulterated foods and drugs. The penalties for noncompliance include fine and/or small terms of imprisonment. But here too there is a conspicuous absence of any provision which will enable one injured by purchase and consumption of such foods and drugs to reach a non-resident seller. A person living in the state, or a non-resident coming into the state who causes residents to suffer injuries to their health often flee the state to try to escape suit. Would not the health of the state be better protected by an implied consent statute?[26]

In the statutes regulating the sale of real estate, we find that a license must be secured[27] and that a non-resident of the state may become a broker or salesman, but that he must file an irrevocable consent to service of process upon the Real Estate Board in causes of action arising in this state. No provision is made for service if the broker or salesman does not file this consent. If a non-resident comes in, and sells real estate fraudulently without applying for a license and without consenting to service upon an agent, and then departs from the state, the question arises as to wether or not the state really is adequately protecting the welfare of its citizens.

Inasmuch as licenses are required, and machinery has been set up to eliminate as much as possible fraud and misrepresentation, does it not seem logical to conclude that the regulation would be more complete and effective if no loophole were left, through which a defrauder might escape? The effective plug for this hole would be the enactment of an implied consent statute, similar to the one now in force in regard to the sale of securities.

A perusal of the laws of any state reveals that in many other instances licenses are required of persons who wish to engage in an activity which is related to the health, morals, safety, and general welfare of

[26] There have been numerous cases involving injuries to health because of the sale or service of impure or adulterated foods and drugs. Bishop v Weber, 139 Mass 411, 1 N.E. 154 (1885); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152 (1905); Peckham v. Holman, 28 Mass. 484 (11 Pick.) (1831); Askam v. Platt, 85 Conn. 448, 83 Atl. 529 (1912); Malone v. Jones, 91 Kan. 815, 139 Pac. 387 (1914); Green v. Wilson, 194 Ark. 165, 105 S.W. (2d) 1074 (1937) 4 A.L.R. 1559; 47 A.L.R. 148; 105 A.L.R. 1039; 5 A.L.R. 1115; 35 A.L.R. 911; 50 A.L.R. 231; 98 A.L.R. 687; 104 A.L.R. 1033.

[27] Chapter 136, WIS. STATS.

the public. To make regulation complete, in fields generally agreed to be within the province of the police power, the enactment of statutes, upon the theory of implied consent, through the doing of an act, in all probability would further the protection of the public and inure to the benefit of the state, as well as to individuals within it.

Consideration and thought might well be given now to the extension of the theory to cover non-resident aviators. "The law of the subject (aviation) under discussion is as yet in its infancy. It is, of course, the proper function of the legislative department of the government, in the exercise of the police power, to consider the problems and risks that arise from the use of aircraft and to endeavor to adjust private rights and harmonize conflicting interests by comprehensive statutes for the public welfare."[28]

Damage to person and property through the more common use of airplanes will inevitably increase. The following cases illustrate instances where damage has actually resulted, and perhaps serve as indicator of the type of lawsuits that will follow in the wake of expanded air travel.

The aviator who ran into a tower, in attempting to make a landing was held in an action in trespass.[29] The defendant who used plaintiff's private property as a place to park his plane was successfully proceeded against in an action in trespass.[30] In an action against the owner and pilot of an airplane, by the owner of a house, for damages thereto from the crashing of the plane on the roof of the house, there was a verdict against the defendants.[31] A pilot whose plane, while he was taxiing down the runway of an airport, collided with a standing truck, which he could have seen in time had he looked carefully, was held guilty of contributory negligence.[32] Cranking a plane with no one in it, in violation of a statute or ordinance, resulting in its running across a landing field and crashing into other planes, has been held to constitute negligence per se.[33]

If the pilots involved in the above cases, and scores of others similar, were non-residents, who left the state before service of process could be made upon them, the innocent plaintiffs would be forced to forego suit here, and would have to seek out the defendants elsewhere.

To adopt a "non-resident aviators statute" upon the same general pattern of the "non-resident motorist statute" certainly would help safeguard persons and property in the state.

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[28] 6 AMERICAN JURISPRUDENCE 3.
Smith v. New England Aircraft Company, 270 Mass. 511, 170 N.E. 385 (1930).
[29] Rochester Gas and E. Corp. v. Dunlop, 148 Misc. 849, 266 N.Y.S. 469 (1933).
[30] Anderton v. Watkins, 122 Me. 346, 120 Atl. 175 (1923).
[31] Kirschner v. Jones, N.J.L. (1932), U.S. Av. R. 278.
[32] Read v. N. Y. Airport, 145 Misc. 294, 259 N.Y.S. 245 (1932).
[33] T. A. T. Flying Service v. Adamson, 47 Ga. App. 108, 169 S.E. 851 (1933).

Further extension of the theory is conceivable. If, in the future, people do move from one state to another more frequently, more speedily, and more promiscuously, lawmakers may come to the decision that persons in one state must be protected from isolated acts of torts by non-residents; and that a method of suing these non-residents in the state where the cause of action arose will tend to provide that protection. The principle of the non-resident motorist cases (that a statute of substituted service will further the safety and welfare of residents by making non-residents more careful of their acts within the state) may then be applied in cases of all torts.

Pertinent Constitutional provisions must be considered in connection with the theory. The Privileges and Immunities clause[34] does allow free egress and ingress to citizens of one state as to all other states. However, there is no requirement that the regulations affecting residents and non-residents need be identical,[35] and a state may provide a mode of service for non-residents different from that which applies to residents.[36] Constitutional privileges and immunities of a non-resident are not denied, for example, by a Minnesota statute[37] which provides "When a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued, where the foreign limitation, though shorter than that of Minnesota, is not unduly short."[38]

A state may require a non-resident, although a citizen of another state, to give bond for costs, even though such bond is not required of a resident.[39] Regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states.[40]

Therefore, while a state cannot forbid citizens of other states from entering it, the conclusion seems reasonable that a state may require a non-resident to give implied consent to be served with process through a statutory agent, in causes of action arising from his acts within the state—and be sustained under the Privileges and Immunities clause.

The statute could be framed to obviate criticism under that clause. One possibility is that the form follow that of Iowa[41] considered in the

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[34] Federal Constitution, Art. IV, Sec. 2.
[35] Canadian Northern R.R. Co. v. Eggen, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713 (1920).
[36] Ballard v. Hunter, 204 U.S. 241, 27 S.Ct. 261, 51 L.Ed. 461 (1907).
[37] Minn. Gen. Statute, Sec. 7709 (1913).
[38] Canadian Northern R.R. Co. v. Eggen, 252 U.S. 553 (1920) *Supra.*
[39] Ownby v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921).
[40] Blake v. McClung, 172 U.S. 239 (1898) *Supra;* Chalker v. Birmingham & N. W. R.R. 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748 (1919).
[41] Section 11079 (Iowa).

Doherty case. If it applied to all non-residents of the county (or other political subdivision), residents of the state, living outside the county in which the cause arose, and non-residents of the state would be treated alike.

Or, it could be so framed that it embraced non-resident citizens as well as non-citizens. Citizenship and residence in a state are not necessarily synonymous.[42] In *Douglas* v. *New York,*[43] a state statute was upheld which made it discretionary with the courts to entertain an action by a non-resident of the state against a foreign corporation, since the statute was applicable alike to non-resident citizens, and non-resident non-citizens. Similar construction and interpretation would no doubt be applied to a process statute following the plan used in the *Douglas* case.

The Equal Protection Clause[44] requires that all persons shall be treated alike, under like circumstances and condition, both in the privileges conferred and the liabilities imposed.[45] Laws need not affect every man, woman and child exactly alike in order to avoid the constitutional prohibition against inequality.[46] Equal protection in its guaranty of like treatment to all similarly situated permits classification[47] which is reasonable and not arbitrary[48] and which is based upon substantial differences, having a reasonable relation to the objects or persons dealt with and the public purpose sought to be achieved by the legislation involved.[49] The Equal Protection clause does not forbid discrimination with respect to things that are different.[50]

Hostile discrimination certainly is not the aim and purpose of a statute seeking to make non-residents amenable to local process. Rather, it seems, as do the non-resident motorist statutes, to put all upon the same footing.[51]

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[42] Travis v. Yale Mfg., 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920).
[43] Douglas v. New York, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929).
[44] Federal Constitution, Art. XIV, Sec. 1. "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."
[45] Hartford S. B. Ins. Co. v. Harrison, 301 U.S. 459, 57 S.Ct. 838, 81 L.Ed. 1223 (1937).; Colgate v. Harvey, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299 (1935).
[46] Sammarco v. Boysa, 193 Wis. 642, 215 N.W. 446 (1927).
[47] District of Columbia v. Brooke, 214 U.S. 138, 29 S.Ct. 650, 53 L.Ed. 941 (1909); Thompson v. Kentucky, 209 U.S. 340, 28 S.Ct. 533, 52 L.Ed. 822 (1908); St. John v. New York, 201 U.S. 633, 26 S.Ct. 554, 50 L.Ed. 896 (1906); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Southern Ry. v. Greene, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536 (1910).
[48] Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167 (1932); Alward v. Johnson, 282 U.S. 509, 51 S.Ct. 273, 75 L.Ed. 496 (1931); Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930).
[49] Seaboard Air Line R.R. Co. v. Seegers, 207 U.S. 73, 28 S.Ct. 28, 52 L.Ed. 108 1907).
[50] Puget Sound Power and L. Co. v. Seattle, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934).
[51] Hess v. Pawloski, 274 U.S. 352 (1927) *Supra* "Literal and precise equality in respect of this matter is not attainable, it is not required."

Residents can be reached by substituted service[52] even though they be out of the state, and provision for substituted service upon non-residents brings the two classes of defendants upon a more equal plane.

Due Process, under the 14th Amendment[53] requires that notice and an opportunity to be heard be given a defendant.

The requirement of notice to the defendant is adequately provided for in the non-resident motorist statutes, and similarly must be and can be required in a statute involving implied consent. Service of process upon the state official and mailing a copy to the non-resident at his place of residence constitute due process of law and support a personal judgment in favor of the person injured.[54] The statute would have to be strictly followed, inasmuch as the right of substituted service is statutory and is strictly enforced.[55] The method used for giving notice must be reasonably calculated to reach the defendant. If a return receipt were demanded there could be little doubt that the defendant had received the required notice.[56] The time within which to appear or answer ought be long enough to enable defendants to protect their rights.

The similarity between the statutes already upheld as constitutional, providing for reaching non-resident defendants outside the state, and those here contemplated gives rise to the belief that the latter too would be valid.

Time and again courts have held that clauses of the Constitution have in effect been subjugated to the police power of the states. Statutes, challenged as denials of rights granted under the Constitution, have been sustained, where it was shown that the measure was necessary for the good of the public. By analogy, then, the conclusion plausibly may be reached that the implied consent statutes can be upheld, as an exercise of the police power, just as statutes in other fields, passed in the exercise of that power, have been. A reference to some of these cases is illustratory.

Instances in which a state statute has been upheld against attack as depriving an individual of the use of his property, in the interest of the public, include, among others, one giving authority to a board of health to employ all necessary means to protect the public health, and if neces-

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[52] WIS. STATS., Sec. 262.08(4).

[53] Federal Constitution, Art. XIV, Sec. 1. "nor shall any State deprive any person of life, liberty or property without due pricess of law."

[54] Wuchter v. Pizzutti, 276 U.S. 13 (1928) Supra; Hess v. Pawloski, 274 U.S. 352 (1927) *Supra;* State ex rel Cronkhite v. Belden, 193 Wis. 145, 221 N.W. 916 (1927) *Supra.*

[55] Pollard v. Wegener, 13 Wis. 569 (1861); Caskey v. Peterson, 220 Wis. 690, 263 N.W. 658 (1936); Maya Corp. v. Smith, 32 Fed. 2nd 350 (1929) (D.Ct. D. Delaware); Thompson v. Butler, 214 Iowa 1123, 243 N.W. 164 (1932); 20 MINN. L. REV. 649 (1936).

[56] 9 NEBRASKA L. BULLETIN 460 (1931).

sary to destroy private property;[57] quarantine and health laws, authorizing summary destruction of imported cargo and other articles;[58] restriction of the use of natural resources by one class in the interests of the community.[59] Not only may property be destroyed in the attempt to safeguard health, but also to preserve other property.[60]

Personal freedom, guaranteed by the Constitution, also is subject to the police power of a state, when its control is deemed necessary for the good of many. Compulsory vaccination can be required[61] as well as sterilization of feebleminded inmates of a state institution.[62]

When the state of Indiana passed a statute[63] which required a person having charge of a jail to receive any prisoner arrested by police and to detain the suspect until otherwise ordered by a court of competent jurisdiction, its validity was sustained under the police power, inasmuch as the public peace, safety and well-being are the very end and object of free government. So, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the rights of some of the people, or even deprives them of such rights. The court, in *Scoopmire* v. *Taflinger et al*[64] used language in point with the principle here propounded when it said, "Both the Federal and State Constitutions are living and growing documents. Within the limits necessary for the preservation of our form of federal and state governments and the basic principles upon which they rest, the Constitutions of both State and Nation must be construed to the end that public progress and development will not be stifled and that public problems, with their ever increasing complexity, may be met and solved to the best interests of the public generally. In these days of hard-surfaced roads and easy means of rapid transportation, the criminal may be, within an hour, seventy-five or eighty miles from the place where the crime was committed."

So too, in the best interests of the public generally, a private citizen, wronged by an act of a non-resident who can quickly cross the state line, and hold himself immune from the process of the state in which he committed the injury, ought have the benefit of some effective means to aid him.

Although freedom of speech and religion are also among the inalienable rights preserved to all, and no state may prohibit the free exercise

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[57] Lowe v. Conroy, 120 Wis. 151, 97 N.W. 942 (1904); Bittenhause v. Johnston, 92 Wis. 588, 66 N.W. 805 (1896).
[58] Lawton v. Steele, 119 N.Y. 226, 152 U.S. 133 (1894); Health Dept. v. Rector, 145 N.Y. 32, 39 N.E. 833 (1895).
[59] Walls v. Midland Carbon Co., 254 U.S. 300, 41 S.Ct. 118, 65 L.Ed. 276 (1920).
[60] Williams v. State, 176 S.W. (2d) 177 (1943) (Texas); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928).
[61] Jacobson v. Mass., 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905).
[62] Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927).
[63] Burns Ann. Stat., Sec. 47-831, 47-832.
[64] Scoopmire v. Taflinger et al, 52 N.E. (2d) 728 (1944) (Indiana).

of religion and freedom to communicate information and opinion,[65] this personal right does not prevent the state from regulating the hours during which handbills may be distributed, and meetings held. Nor is the right of free speech infringed by a statute which requires paid labor union organizers to register with the secretary of state and secure organizers' cards before soliciting members within the state.[66]

The Contract Clause[67] is also subject to the police power of a state, and may be suspended when necessary. A statute passed in the exercise of this power will be upheld by the courts although it incidentally destroys existing contract rights such as one which forbids the further conduct of a lottery, even though a previous contract had been made permitting it;[68] prescribes hours of labor in particular occupations[69] prohibits child labor;[70] forbids night work by women;[71] reduces hours of labor for women;[72] and prohibits waiver of warranties.[73]

From the foregoing discussion, it is apparent that the tenor of decisions and legal reasoning have been that the power preserved to the states, the police power, may be exercised when necessary, even in the face of some specific clause in the Constitution. That being true, it seems logical to conclude that where there is a real need for a statute providing for service of process upon non-residents who have come into a state and committed an act injurious to property or person therein, that statute can and will be upheld, notwithstanding the 14th Amendment and certain Articles in the Constitution.

By reliance on the *Nebbia Milk* case,[74] surely the proposed statute is justifiable. Neither property rights nor personal rights nor contract rights are absolute, and equally fundamental with them is the right of the public to regulate such rights in the common interest. The guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and the means selected shall have a real and substantial relation to the object sought to be attained. In effect, the police power is not a closed category, and the court indicated that as needs arise and times change, that power will be sufficient to do what is required to promote general welfare.

The resident of another state who enters our state expects to receive, and does receive protection, be it of our police force, our fire

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[65] Cantwell v. Conn., 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).
[66] Ex Parte Thomas, 174 S.W. (2d) 958 (1943) 141 Tex. 591.
[67] U. S. Constitution, Art. 1, Sec. 10. "No State shall pass any law impairing the Obligation of Contracts."
[68] Stone v. Mississippi, 101 U.S. 814, 25 L.Ed. 1079 (1880).
[69] Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898).
[70] Sturges & B. Mfg. Co. v. Beauchamp, 231 U.S. 320, 34 S.Ct. 60, 58 L.Ed. 245 (1913).
[71] Radice v. New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 (1924).
[72] Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).
[73] Advance-Rumley T. Co. v. Jackson, 287 U.S. 283, 53 S.Ct. 133, 77 L.Ed. 306 (1932).
[74] Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

departments, our sanitary regulations, or others. In exchange for that protection, the state asks that he obey our laws and refrain from any injury to persons or property. The next step might well follow—the step that leads to substituted process in case he does an act which in fact injures another.[75]

A state from which a person has departed after committing a crime, in the hope of escaping apprehension, may depend upon extradition to have him returned to answer for his deeds. It seems reasonable to afford a private citizen, a person actually harmed, perhaps by the same act, a devise which will probably induce the defendant to return to stand trial in a civil suit.

It is inevitable that defendants reached by substituted service will be inconvenienced by being obliged to suffer a default judgment, or by going into another state to defend the action. However, one readily comes to the conclusion that a wrongdoer should be required to return to the state where he perpetrated the wrong, rather than that the innocent plaintiff seek out the defendant in a distant state. And, if some injustice should occasionally arise, comfort will be found in the knowledge that jurists will sustain a rule of law or a statute in the fact of admitted hardship upon a party when to do otherwise would overrule a principle which should be preserved for the good of many.[76]

To alleviate the difficulties of the non-resident, provisions can and ought to be made for liberal continuances[77] to enable the defendant to prepare his defense, and for reopening of default judgments.

Some plaintiffs might be tempted to start a suit against a non-resident when no cause of action exists. However, that too can be foreseen and guarded against. Requiring the plaintiff to file a bond, sufficient to cover the travelling expenses and costs of the defendant in case the plaintiff is unsuccessful, and the deposit of security by the plaintiff, as an evidence of good faith and a safeguard against ill-founded or malicious suits will usually solve the problem.[78]

The extension of the implied consent theory, through the doing of an act, as a basis of jurisdiction, may be the principle through which further justice can be secured. Given a need for providing a method of reaching absent non-residents, a statute authorizing service of process upon a statutory agent is an appropriate means to fulfil this need. In the exercise of its police power, a state may enact such a statute, sustainable under the Constitution.

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[75] In the Doherty case (*supra*) that protection was mentioned as one of the reasons why the statute ought be upheld.

[76] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (*supra*); In re Emrenecker's Estate, 218 Pa. 369, 67 Atl. 701 (1907); Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620 (1890).

[77] Jones v. Paxton, 27 Fed. (2d) 364 (1928) (D.Ct. D. Minn.).

[78] N. Y. Consol. Laws (McKinney, 1929) BK 62A; Mich. Comp. Laws, Sec. 4791 (1929); Maine Revised Statutes, Chap. 29, Sec. 131 (1930); Ill. Revised Statutes (Cahill, 1933) C95A, Sec. 21 (1).

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