Jurisdiction in Personam - The Due Process Framework and the Louisiana Experience

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This Symposium is devoted to a consideration of the means by which a state can render a valid personal judgment against a nonresident defendant. But we are not concerned with the nonresident defendant who is personally served with process within the forum state; jurisdiction in such a case is unquestionable. Neither does this Symposium consider the nonresident defendant who actually consents to or waives objection to the jurisdiction of the state of the forum expressly or by general appearance in the litigation; personal jurisdiction, unlike jurisdiction over the subject matter, can be obtained by the consent or waiver of the parties. Our concern is the nonresident defendant, corporate or individual, who has not been personally served within the jurisdiction, has not made a general appearance in the action, and has not actually consented to be sued in the state of the forum.

JURISDICTION IN PERSONAM—THE DUE PROCESS FRAMEWORK AND THE LOUISIANA EXPERIENCE

Although the expansion of personal jurisdiction1 over nonresident defendants2 is being accomplished by individual states, it is occurring within a federal system. To give the states the unbridled right to extend their judicial power beyond their boundaries would be incompatible with federalism: to give each state sovereignty over the citizens of every other state renders the concept of “state” meaningless. The United States Constitution, therefore, imposes certain limitations on the development of the doctrine. In order to place the remainder of this Symposium in the proper federal context, this introductory Comment will attempt to discern the constitutional limits within which the states will be allowed to take jurisdiction, and to determine to what extent Louisiana has occupied the permitted area.

1. “Jurisdiction is the legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties, and to grant the relief to which they are entitled.” LA. Code of Civil Procedure art. 1 (1960). In order to render a valid personal judgment, a court must have jurisdiction over both the subject matter of the dispute, i.e., the particular class of action or proceeding involved, id. art. 2, and the person, i.e., the legal power and authority to render a personal judgment against the parties involved, id. art. 6. This Symposium considers only the latter requirement.

2. Since personal jurisdiction, unlike jurisdiction over the subject matter, can be obtained by the consent or waiver of the parties, Restatement, Judgments §§ 18-19 (1942), any party who appears in a court to institute suit consents to that court’s jurisdiction over his person. Thus there can never be any problem with respect to the court’s jurisdiction over nonresident plaintiffs.
I. THE CONSTITUTIONAL BOUNDS

A. The Basic Principles

Pennoyer v. Neff\(^3\) is the landmark case in the area of personal jurisdiction over nonresidents. Under the fourteenth amendment, due process requirements for a valid judgment\(^4\) were held to be the same as those for full faith and credit:\(^5\) jurisdiction over the subject and jurisdiction over the person.

Three principles of personal jurisdiction were established by Pennoyer:

1. A valid personal judgment can be rendered only by a court with personal jurisdiction over the defendant at the inception of the suit.\(^6\)

2. Mere situs within the forum of property owned by a nonresident defendant does not vest a court with jurisdiction to render a personal judgment against him.\(^7\) This holding undercut many state statutes resting on the assumption that although a personal judgment against a nonresident based on substituted service could not be enforced elsewhere, either under full faith and credit or through comity, such a judgment could be enforced against property of the nonresident within the state.

3. If a court has no jurisdiction over a nonresident defendant, it cannot acquire jurisdiction merely by serving process upon him by publication within the forum state.\(^8\) This restriction seems to be based on the lack of reasonable probability of

3. 95 U.S. 714 (1877).
4. Id. at 733: "[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."
5. Id. at 729. See also Goldey v. Morning News, 156 U.S. 518, 521 (1894); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1850).
6. 95 U.S. 714, 727-28 (1877).
7. Id. at 723-26.
8. Id. at 727.
notice under such a method of service. Since the Court did not have before it a case in which a nonresident defendant had received actual notice of the proceedings by service of process upon him outside the state of the forum, statements by the Court concerning the invalidity of such service of process would seem to be dicta.

*Pennoyer* recognizes three classes of exceptions to the general rule of service within the forum: cases involving personal status of a resident; cases in which process was personally served in the state on an agent actually designated by the nonresident to receive service; and cases in which process was served on a person designated by statute as the agent for service of process for any person acting therein who fails to appoint an agent as required by a valid state statute.

It is this last class of exceptions which has given rise to the greatest amount of litigation. And it is with this area that the remainder of this Comment is concerned. Our immediate task

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9. *Ibid.*: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem."

10. *Id.* at 720.
11. *Id.* at 722, 727, 733.
13. The discussion of this exception is not within the scope of this Symposium. It is based on the clear interest which a state has in being able to determine the status and capacities of its citizens. The mere fact that the person in relation to whom the citizen's status is sought to be determined happens to be a nonresident does not preclude the exercise of that power of determination.
14. This class of exceptions presents only one real problem: the scope to be given to an actual designation of an agent. This question was presented to the Supreme Court in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). A nonresident corporation had appointed an agent for service of process in Missouri as a condition to its being allowed to transact business there. In an action arising out of a Colorado contract, the company was sued in Missouri and process was served on the appointed agent. In upholding the jurisdiction of the Missouri court, Justice Holmes stated that when the power to receive service "actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put on it by the Courts." *Id.* at 96. See also *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S.D.N.Y. 1915).
is to trace the differentiation and expansion of the concept of personal jurisdiction over nonresidents from *Pennoyer* to the enunciation of the present rule, and then to probe the limits set by that rule.

### B. Differentiation and Expansion

Before the advent of the automobile, the bulk of interstate contacts was through corporations. And since corporations are excluded from the protections of the privileges and immunities clause of the Constitution, the development of personal jurisdiction over nonresident corporate defendants was much more rapid than was jurisdiction over nonresident individuals.

**Personal Jurisdiction over Nonresident Corporations**

The early judicial view was that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." Even before *Pennoyer*, however, this view had yielded to a less rigid one. Though it was still maintained that a corporation could exist only in the state of its creation, its existence there might be "recognized" in other states. "Its residence in one state creates no insuperable objection to its power of contracting in another." Since it was recognized that a nonresident corporation might, through its agent, transact business in another state, it was held that the latter state could deem this employee the corporation's agent for service of process. "The inquiry is, not whether the defendant was personally within the State, but whether he, or someone authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear or suffer a judgment by default."  

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15. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868): "The term citizen as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."

16. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839): "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

17. Id. at 588.


19. Id. at 407.
The right of the state to deem the representative of the corporation its agent for service of process was grounded on the state's right to exclude a nonresident corporation from transacting any business at all there. Since the state has exclusionary power, it can condition its consent to the corporation's acting within its borders if the conditions are not "repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."\textsuperscript{20} Broadly stated, the conditions must be reasonable.

The interstate commerce clause of the Constitution presents special problems concerning state regulation of foreign corporations. A state may not exclude a corporation engaged in interstate commerce,\textsuperscript{21} but "the State may pass laws enforcing the rights of a citizen which affect commerce, but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress."\textsuperscript{22} Regulation within these limits is permissible since the corporation and its property within the state receive the protection of state laws, making it only fair that the states be able to protect effectively their citizens from breach of those laws by the corporation.\textsuperscript{23}

Allowing a state to designate a representative of a corporation transacting business there as the corporation's agent to receive process brought foreign corporations squarely within one of the exceptions to the general rule stated in \textit{Pennoyer}. Service of process on designated agents was accepted as sufficient to bring the corporation within the jurisdiction of a state court,\textsuperscript{24} but only if the corporation could be said to be actually "doing business" in the jurisdiction.\textsuperscript{25} Service on an agent "only cas-

\textsuperscript{20} Ibid. The Court continues: "It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed."

\textsuperscript{21} Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{22} Davis v. Cleveland, C., C. & St. L. Ry., 217 U.S. 157, 179 (1910).
\textsuperscript{23} International Harvester Co. v. Kentucky, 234 U.S 579, 588 (1914).
\textsuperscript{24} St. Clair v. Cox, 106 U.S. 350 (1882).
\textsuperscript{25} International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Henrietta Mining & Milling Co. v. Johnson, 173 U.S. 221 (1899).
ually within the state, and not charged with any business of the corporation there," would not be sufficient.26

The Supreme Court has used — and discarded — three tests to establish the forum's power to subject a non-consenting foreign corporation to suit in the state: implied consent,27 presence,28 and doing business.29

In *Lafayette Ins. Co. v. French*30 the Supreme Court initiated the judicial fiction of inferring consent by a nonresident corporation to the jurisdiction of a state court from the mere fact that the corporation did business in the state, and the state conditioned its permission for a nonresident corporation to act within its borders on such consent.31 The scope of such "implied consent" was sharply restricted, however, to causes of action arising out of the business done within the state. The Court refused to extend the fictive consent to causes of action arising in another state.32

In an attempt to make the theory of jurisdiction over corporations more consistent with that of jurisdiction over natural persons, the Court developed the "presence" test. The test took the legal fiction of corporate personality as its starting point, and considered a corporation, like a natural person, subject to the jurisdiction of the courts of a foreign state when present there and duly served with process. *Green v. Chicago, B. & Q. Ry.* stated that a corporation is present in a foreign state, and must respond to process served there upon its agent, only if it is doing business within the state "in such a manner and to such an extent as to warrant the inference that through its agents it was present there."33

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30. See also Henrietta Mining & Milling Co. v. Johnson, 173 U.S. 221 (1899).
32. 205 U.S. 530, 532 (1907).
33. "[T]he company agreed that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of the citizens of Pennsylvania."
The "presence" test was developed in an attempt to justify holding service of process in the state upon an agent equivalent to service upon the nonresident corporation. But the theory presented conceptual difficulties. It seems logically inconsistent to find corporate presence based on the presence of agents when natural persons are not considered present in the same circumstances.

As the requirement of jurisdiction over the person differentiated into two sub-requirements — sufficient connection to justify the state's exercise of judicial power, and a reasonable attempt to notify the person of the proceedings — the Court, in dealing with corporations, began to shift the primary focus of its inquiry from the validity of the process served to the relationship between the state and the corporation. It was realized that both the "implied consent" test and the "presence" test depended upon a determination that the foreign corporation was "doing business" in the state — that its activities were such that the state could validly exercise the legal power to make judicial determinations concerning the corporation. International Harvester Co. v. Kentucky held that solicitation of orders through local agents who also received payment for merchandise delivered in the state was a "continuous course of business" sufficient to support jurisdiction.34 However, the Court continued to act within the strictures of the "solicitation plus" rule of Green v. Chicago, B. & Q. Ry.35 And the fact that a subsidiary corporation was "doing business" within a state was held insuf-

34. 234 U.S. 579, 585, 587 (1914).
35. 205 U.S. 530, 533 (1907): "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

See People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87 (1918), where it was held that a continuous practice of advertising and solicitation "did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it."

See also Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 145 (1923), where the Court said: "[I]t cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough 'to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted.'"

"It also seems sufficiently clear ... that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office."

ficient to subject the parent corporation to the jurisdiction of that state, if the subsidiary was in fact a separate legal entity.36

**Personal Jurisdiction over Nonresident Individuals**

The fiction that foreign corporations implicitly consent to the jurisdiction of states within which they transact business was founded upon the doctrine that a state could exclude a foreign corporation altogether, and therefore could condition its entry. Under the privileges and immunities clause of the Constitution,37 however, there is no basis for a general right of exclusion of nonresident individuals.38

Nevertheless, the protection which the privileges and immunities clause provides for individuals does not completely bar state regulation of the activities of nonresident individuals. Under its police power, a state may make certain demands of nonresidents acting within its boundaries, so long as the regulations be "not enacted for the purpose of creating an arbitrary or vexatious discrimination against nonresidents."39 Neither the privileges and immunities clause nor the equal protection clause of the fourteenth amendment requires that the terms imposed be "technically and precisely the same in extent as those accorded to resident citizens."40

Within these limitations the states were able to gain jurisdiction over nonresident individuals by providing that an in-

37. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) : "[T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass to any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises that are imposed by the State upon its own citizens."
38. Flexner v. Farson, 248 U.S. 289 (1919). Action in Illinois to enforce Kentucky judgment against defendant, an individual resident of Illinois. A Kentucky statute made a business agent in the State the agent to receive process in suits arising out of the business done in Kentucky. Process was served in Kentucky on an agent of the defendant. Plaintiff claims that defendant consented to service under this statute by the fact of his doing business in the state, and is therefore bound by the Kentucky judgment. In holding the Kentucky statute invalid, Justice Holmes stated, *id.* at 293: "[T]he consent that it said to be implied . . . is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. . . . The State has no power to exclude the defendants."
40. *Id.* at 562.
individual "consents" to the jurisdiction of the state's courts for any cause of action which might arise out of acts falling within the regulations of the police power. The two generally accepted activities subject to police power regulations are those which are "dangerous" and those, characterized as "special," in which the state has a federally recognized regulatory interest.

The personal mobility which grew with the automobile industry provided the most pressing area for regulation of dangerous activities by transient nonresidents. Statutes granting a state jurisdiction over nonresident motorists were upheld as reasonable regulation of a state's highways, provided that they were not discriminatory against the nonresident or unduly burdensome on interstate commerce, and that they provided procedures designed reasonably to insure that the nonresident would receive actual notice of the pending proceedings.

The same provisos determined the validity of statutes providing for jurisdiction over nonresidents engaging in "special" activities. Statutes establishing jurisdiction were acknowledged as necessary in both areas to enforce civil and criminal sanctions.

Summary

A state's authority over domestic corporations and individual residents or citizens exists as a necessary corollary of the principle of public law enunciated in Pennoyer: "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory." This authority is not terminated by the temporary departure of the citizen from the state: "Domicile in the state is alone sufficient to bring an absent de-

41. Hendrick v. Maryland, 235 U.S. 610, 622 (1915): "The movement of motor vehicles over the highway is attended by constant and serious danger to the public, and is also abnormally destructive to the ways themselves.

46. 95 U.S. 714, 722 (1877).
defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. The validity of the court's judgment turns upon fair notice.

Prior to the 1940's, jurisdiction over foreign corporations depended directly or indirectly upon a finding that the corporation was "doing business" to a significantly greater extent than mere solicitation. Jurisdiction over nonresident individuals depended upon actual service of process within the territory, unless it could be based on one of the growing number of activities subject to state regulation under the police power.

C. The Present Requirements

The Question of Power

Justice Oliver Wendell Holmes had issued the warning in 1917: "In States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to facts." The echo of these words returned to the Supreme Court a quarter of a century later, as the Court began to acknowledge the fictional basis of some of its decisions concerning jurisdiction over nonresidents. "Implied consent" was fictitious; jurisdiction ostensibly based on that test was more realistically justified by the nature of the acts done within the state. Corporate "presence" was recognized as a symbol for "those activities of the corporation's agents within the state which courts will deem to be sufficient to satisfy the demands of due process."

49. McDonald v. Mabee, 243 U.S. 90, 91 (1917).
51. Id. at 316-17: "Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. . . ." See also Hutchinson v. Chase & Gilbert, 45 F.2d 135 (2d Cir. 1930).
Minimum Contacts

The first rumblings of a change in the jurisdictional test for nonresidents came not in a case involving jurisdiction but in a contest of the right of a state to impose regulations on a nonresident insurance corporation seeking to do business there. The corporation sought a declaratory judgment invalidating the state requirement that corporations must submit to regulation in order to do business. It was denied. Justice Black, speaking for the Court, stated the issue: do the corporation's activities as a whole so affect the state's interests as to give the state the power it claims? The Court found “many actual contacts” with the citizens and property of the state. Signing contracts within a state, the absence of which had been so heavily relied upon in denying jurisdiction in the past, was recognized as only one of many means of contact. The Court upheld the regulation, considering the location of activity before and after the making of the contract, the degree of interest which the state had in the objects insured, and the location of the insured property.

As a test of judicial jurisdiction, the new test was first voiced in *International Shoe Co. v. Washington*. The state initiated in its courts proceedings against a nonresident corporation to collect contributions to the state unemployment compensation fund. The corporation had no office or merchandise in the state and made no deliveries there in interstate commerce. However,

53. *Id.* at 316.
54. *Id.* at 319: “In the instant case, the reciprocals have ... many actual contacts with the New York subscribers and the New York property ..., much of the insurance covers permanent immovables, and the reciprocals have been licensed to do business there for years.”
55. See *Minnesota Commercial Men's Ass'n v. Benn*, 261 U.S. 140 (1923).
56. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 317 (1943): “The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.”
57. *Id.* at 319: “[I]n determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract ..., of the degree of interest of the regulating state in the object insured, and of the location of the property insured, are separately and collectively of great weight.”
58. 326 U.S. 310 (1945).
residents of the state were employed as soliciting agents, and these agents occasionally rented display rooms to exhibit samples and solicit orders. Notice of the pending action was served on one of the agents, and a copy of the process was sent by registered mail to the corporation at its principal business address.

The Supreme Court rejected any simple mechanical or quantitative test to determine whether a nonresident may be subjected to suit. 59 Rather than use the "solicitation plus" rule of the "doing business" test, the Court looked at the relation of the activity to the state. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of law which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations." 60

The Court therefore enunciated a new, more flexible due process test:

"Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. . . .

"Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." 61

The new test was one of sufficient "minimum contacts," certainly a more flexible test than the ossified "doing business" rule which it replaced. The standards for determining sufficiency of contact, however, were such vague terms as "traditional notions

59. Id. at 319: "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less."
60. Ibid.
61. Id. at 316-17.
of fair play and substantial justice” and “reasonable.” The Court recognized the vagueness of the test but thought it no more vague than those which it superseded, while far superior to them in that it looked to the reality of the relationship between the state and the nonresident rather than to some fictional consent or presence, and restored the flexibility necessary to do justice between the parties.

In finding the contacts which the nonresident corporation had with the State of Washington sufficient to support the state’s claim to jurisdiction, the Court pointed out that the corporation’s activities were “systematic and continuous,” resulting in a “large volume of interstate business” and that the obligation arose from these activities. The Court also stressed that the corporation had “received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights.”62 In establishing the “minimum contacts” test, the Court declared:

“But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”63

In stating that a nonresident who receives the benefits of the laws of a state might also be made to feel their pinch, the Court elaborated a thread which had run through even the earliest jurisdiction cases.64 It is this point which may provide the most definite line circumscribing the allowable area within which a state may take personal jurisdiction over nonresident defendants. The Court seems to be taking nonresidents from the sanctuary of technicality and placing them in a situation analogous to that of domiciliaries: the nonresident may not receive the benefits of the laws of the state without also accepting its burdens, including the burden of being subject to its jurisdiction

62. Id. at 320.
63. Id. at 319.
upon reasonable notice and without the formality of service of process within the state.\textsuperscript{65}

\textit{Fairness}

\textit{International Shoe} subdivided the realm of personal jurisdiction.\textsuperscript{66} The inner limit, where jurisdiction of the state is unquestioned, is the situation in which the nonresident's continuous and systematic activities within the state give rise to the liabilities sued upon.\textsuperscript{67} The casual presence of a nonresident, or his conduct of single or isolated acts within the forum state, presents the opposite extreme, where it is generally agreed that the contacts are insufficient to support a suit based on a cause of action unrelated to the activities there. But when the activity in the state, though continuous and systematic, does not give rise to the liabilities sued upon,\textsuperscript{68} or when the liabilities arise from single or occasional contacts within the state,\textsuperscript{69} there is uncertainty, depending on the determination whether the contacts with the state were of such a nature as to justify the suit against the nonresident there.

If sufficient contacts are found to indicate that the nonresident has received the benefits of the laws of the state, there remains the further consideration of the fairness of compelling the nonresident to submit to suit away from its domicile. The central considerations in this determination will be the convenience of the forum: the relative cost to each of the parties of being forced to bring or to defend against a suit at the domicile of the other, balanced against their relative ability to bear this cost, and the location of necessary witnesses.\textsuperscript{70} But the Court has stated that mere convenience is not determinative: \textsuperscript{71} "It is es-


\textsuperscript{66} 326 U.S. 310, 317-18 (1945).


\textsuperscript{71} Hanson v. Denckla, 357 U.S. 235, 254 (1958): "It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida
sential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.”72 Convenience is a consideration only after the test of minimum contacts is met.

**The Requirement of Notice**

Thus far we have been primarily concerned with the power of the forum to render a personal judgment against a nonresident who has not been served with process within the jurisdiction, and has neither made a general appearance in the action nor actually consented to be sued in the forum. But, as indicated previously, the requisites for valid personal jurisdiction are two-fold. Power alone is not enough; it is required that there be effective notice to the defendant.

As early as *Pennoyer*, it was agreed that it was not contrary to “natural justice” that one who has agreed to receive a particular mode of notification of legal proceedings — for example, by actual appointment of an agent for service of process — should be bound by a judgment in which that particular mode of notification was followed, even though he may not have had actual notice of the proceedings.73 But when no agent has been voluntarily appointed, mere service on an agent designated by statute or other such substituted service is not sufficient. “The substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.”74 If process is served on a state officer designated by statute, the nonresident must be advised by some written communication so as to make it reasonably probable that he will receive actual notice; otherwise, the way would be open for fraud. Therefore, any statute enabling a state to claim personal juris-

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72. Id. at 253.
diction over a nonresident defendant must require either the plaintiff or some other person to communicate notice of the pending proceedings to the defendant if the statute is to be within the bounds of due process.\textsuperscript{75} If the service provided by statute and employed in the case is "reasonably calculated" to give the defendant actual notice of the pending proceedings and an adequate opportunity to appear and be heard, "the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied."\textsuperscript{76}

Service on an agent of a corporation acting for it within the state has been held to be a reasonable means of giving notice.\textsuperscript{77} Another accepted method is mailing a copy of the process to the defendant out of state by registered or certified mail, return receipt requested.\textsuperscript{78} But service by publication, with nothing more, has been held insufficient to inform those who could easily have been informed by mail or some other means more likely to give actual notice.\textsuperscript{79} "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."\textsuperscript{80}

\textsuperscript{75} Wuchter v. Pizzutti, 276 U.S. 13 (1928).
\textsuperscript{77} International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945): "We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. . . . Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit."
\textsuperscript{79} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950): "It would be idle to pretend that publications alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to their attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint."
\textsuperscript{80} Ibid. The Court does recognize that there may be cases when service by publication is the only possible means. "This Court has not hesitated to approve
It should be noted that the test of jurisdiction over nonresidents enunciated in *International Shoe* was based on general notions of fairness requiring that a nonresident receiving the benefits and protection of the laws of a state be also subject to suit there. It would seem, therefore, that though the case involved personal jurisdiction over a nonresident *corporation*, the test stated should be applicable as well to nonresident *individuals*, with only those differences which the nature of the two types of legal persons requires. The necessity of some distinction between corporations and natural persons seems to remain, however, because of the protection granted individuals under the privileges and immunities clause. Caution should be exercised in claiming jurisdiction over an individual whose activities in the state cannot be characterized as within the expanding area subject to police power regulation.

II. LOUISIANA'S "LONG-ARM" LEGISLATION

Because personal jurisdiction over nonresidents is an extraordinary deviation from the normally restricted scope of state jurisdiction, it does not exist unless provided by statute.

From as early as 1890, Louisiana has required foreign corporations seeking a license to do business in the state to appoint a resident agent to receive service of process in all actions arising from or connected with the business done in Louisiana. Because the Constitution prohibits a state from excluding a corporation engaged in interstate commerce, and because the state saw the necessity for means to hear claims against a corporation which did business in Louisiana without complying with the requirement, the statutes provided that if the corporation

of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Id.* at 317.

83. La. Acts 1890, No. 149, § 1.
84. For ordinary corporations, the present requirement is found in La. R.S. 12:202(A) (1950). There are special provisions for foreign insurers. See note 89 *infra*, and accompanying text.
85. See note 21 *supra*, and accompanying text.
did not appoint an agent to receive process, or if the appointed agent could not be located, process could be served on any agent of the corporation found within the state on business of the corporation. A 1914 statute further expanded the state's jurisdiction by providing for substituted service on the Secretary of State if service could not be made on any agent of the corporation. The statute required the Secretary of State to give notice to the defendant corporation by sending by registered mail the originals of the papers served on him.

In 1898 Louisiana enacted special legislation for foreign or alien insurers, requiring appointment of the Secretary of State as agent for service of process as a condition to doing business in Louisiana. Provision was made for effective notice to the nonresident insurer by registered mail. With only slight amendment, this requirement is still in effect today, and it has been complemented by provisions authorizing the Secretary of State to receive process for insurance companies doing business in Louisiana without having complied with the statute by making a formal appointment.

Until International Shoe Co. v. Washington it seemed that Louisiana had covered all the possibilities for jurisdiction over nonresident corporations which the Supreme Court had indicated were available. After that decision had broadened the area within which the state could claim jurisdiction, Louisiana enacted a statute providing for service of process on any foreign corporation "engaged in business activities in this state through acts performed by its employees or agents in this state," by substituted service on the Secretary of State when, for any reason, the corporation had not appointed an agent to receive process, or such agents or any employees or agents of the corporation could not be found within the state. The statute was restrictively interpreted, however, making its effect on the then existing law negligible. In 1960, after McGee v. International Life

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86. La. Acts 1890, No. 149, § 2. The successor to this provision was transferred from La. R.S. 13:3471 (5) (c) (1950) to LA. CODE OF CIVIL PROCEDURE arts. 1261-1262 (1960).
87. La. Acts 1914, No. 267, § 26c.
88. Ibid.
91. Id. 22:1253(A).
92. 326 U.S. 310 (1945).
these provisions were greatly liberalized by substitution of the language "a business activity in this state" for the quoted language of the 1950 amendment. (Emphasis added.) This seemingly minor amendment legislatively overruled the judicial restriction placed on the statute, and enabled Louisiana to take full advantage of the McGee rule with respect to corporations.

The Louisiana Direct Action Statute has considerable significance in the area of personal jurisdiction over nonresidents, although its principal effect is in suits against the insurers of domiciliaries. The statute allows a person injured within the State of Louisiana to bring an action here directly and solely against the insurer of the party causing the injury. Any stipulations against such direct action are specifically negated by the statute, and it is inconsequential whether the contract was issued or delivered in Louisiana, as long as the accident occurred here.

After Hess v. Pawloski, Louisiana began to expand its jurisdiction over nonresident individuals by enacting its Nonresident Motorist Act. As amended, that statute utilizes the fiction that use of the public highways of the state by a nonresident amounts to the "appointment" of the Secretary of State as agent for service of process not only on the nonresident, but on his insurer or personal representative as well. A similar provision is in the Foreign Watercraft Statute, which provides that use

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of the navigable waters of the state is deemed the appointment of the Secretary of State as agent for service of process on the nonresident operator in any action based on a collision or accident in which the vessel might be involved while in navigable waters within the state.

The 1964 "Long-Arm" Statute

While these provisions, as amended after McGee, covered foreign corporations adequately, the coverage of nonresident individuals was deficient. The Direct Action Statute, the Nonresident Motorist Act, and the Nonresident Watercraft Statute provided a large measure of coverage of nonresident individuals committing delictual acts in the state, but there remained a considerable gap in Louisiana's claim to personal jurisdiction over nonresident individuals, partnerships, and unincorporated associations entering into contracts and doing other non-delictual acts in the state.\textsuperscript{102} This was the hiatus which the Louisiana Personal Jurisdiction over Nonresidents Statute\textsuperscript{103} was designed to fill. The Louisiana statute is based on the Uniform Interstate and International Procedure Act with the changes necessary to adapt the statute to the Louisiana legislative scheme. It defines "nonresident" as "an individual, his executor, administrator, or other legal representative, who at the time of the filing of the suit is not domiciled or residing in this state, or a partnership, association, or any other legal or commercial entity (other than a corporation) not then domiciled in this state, or a corporation which is not organized under the laws of, and is not licensed to do business in, this state."\textsuperscript{104} The statute provides


\textsuperscript{103} See Consolidated Credit Corp. v. Johnston, 152 So.2d 399 (La. App. 1st Cir. 1963). In garnishment proceedings, service in the state on an employee of the nonresident garnishee, when the garnishee was absent from his in-state place of business, was held insufficient. The case is discussed in \textit{The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Civil Procedure}, 24 LA. L. REV. 291 (1964). See also DeMorcy v. Keystone Exploration Co., 137 So.2d 68 (La. App. 3d Cir. 1962). The court found no legislative provision for obtaining valid service on a nonresident partnership except by service on an employee of the partnership within the jurisdiction on partnership business. This case is discussed in \textit{The Work of the Louisiana Appellate Courts for the 1961-1962 Term — Civil Procedure}, 23 LA. L. REV. 378, 379 (1963).


for service of process on those nonresidents by either registered or certified mail, or by personal delivery by a person designated by the Louisiana court or authorized by the law of the place where service is made. The nonresident is protected by a requirement that no default judgment may be issued earlier than thirty days after proof that the nonresident defendant has received notice has been filed in the record.

The initial section of the statute provides:

"A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

"(a) transacting any business in this state;

"(b) contracting to supply services or things in this state;

"(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

"(d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business or engages in other persistent course of conduct, or derives substantial revenue from the goods used or consumed or services rendered, in this state; or

"(e) having an interest in, using, or possessing a real right or immovable property in this state."

Subsection (a) is broad enough to take full advantage of the decision in McGee. It is intended to completely remove the problem of jurisdiction over nonresidents from the fetters of the "doing business" test, and it is for this reason that "transacting" is used rather than the overlimited cliche.

Subsection (e) presents a leap from the rule of Pennoyer. It is confined to actions arising from the ownership of an interest in, or the use or possession of, a real right or immovable property.

107. Id. 13:3204.
108. Id. 13:3205.
Since these two provisions are the most indefinite of the five included in the statute, and because of their novelty, it is impossible to determine at this time what scope will be given to them. The other three provisions will cover most of the cases requiring jurisdiction over nonresidents. It is with these situations — causes of action arising from contracts, and causes of action arising from in-state and out-of-state tort — that the two comments following are concerned.

David E. Soileau

JURISDICTION IN PERSONAM OVER CONTRACTS WITH NONRESIDENTS

INTRODUCTION

The Louisiana State Law Institute, in drafting Louisiana's "long-arm" statute, included three subsections which will affect the in personam jurisdiction of Louisiana courts over causes of action arising from contracts entered into by nonresidents. These subsections relate to: the transacting of any business in this state; contracting to supply services and things in this state; and having an interest in, using, or possessing a real right or immovable property in this state. A subsection pertaining to contracts of insurance was not included in the Louisiana statute because the Louisiana Insurance Code gives adequate coverage. Both nonresident individuals and non-licensed foreign corporations are included in the coverage of the statute. Nonresident individuals have been held subject to local jurisdiction on the same basis as corporations by state courts and lower federal courts, and the position has been approved by the American Law Institute.

3. See notes 74-77 infra, and accompanying text.
4. Those corporations which have licenses to do business in the state are not covered by this "long-arm" statute because, being licensed, they are subject to the jurisdiction of Louisiana courts. See Comment (b) under La. R.S. 13:3206 (Supp. 1964).