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PERSONAL JURISDICTION OVER OUTSIDERS

EDMOND R. ANDERSON JR.*

The law of personal jurisdiction over outsiders—*jurisdiction in personam* over nonresident defendants—has been one of the basic areas in the American development of Conflict of Laws.¹ Increasing mobility and complexity in business organizations and relationships have provoked recent rapid changes in this law,² which threaten to efface state boundaries. One moving force has been the “new look” in fourteenth amendment due process; the United States Supreme Court fosters flexible standards and refuses to draw lines in these cases.³ Another has been the statutory groping of state legislators to favor their constituents.⁴ This article is intended to present the development and current highlights in the American picture and to indicate what is taking place in Missouri.

I. FUNDAMENTAL PRINCIPLES OF AMERICAN PERSONAL JURISDICTION

Jurisdiction has been called a “*talismanic word*,”⁵ even though it is generally thought to be something sound, something we can depend upon. It is actually little more than a functional concept with certain practical limits. A court must have “*jurisdiction*” in order to enforce any judgment or decree rendered; the court will need something or somebody to act upon. This something or somebody takes the form of local property or a person from which an aggrieved party to a law suit can obtain satisfaction.

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1. The American development is apparently unique. EHRENZWEIG, *CONFLICT OF LAWS* § 25 (1962).

2. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

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

4. *E.g.*, ILL. CIV. PRAC. ACT §§ 16-17; ILL. REV. STAT. ch. 110, §§ 16-17 (1963).

5. Justice Frankfurter in *Angel v. Bullington*, 330 U.S. 183, 189 (1947). *Cf.* Justice Rutledge, dissenting, in *Williams v. North Carolina II*, 325 U.S. 226, 258 (1945): “Domicil thus combines the essentially contradictory elements of permanence and instantaneous change. No legal conception, save possibly ‘*jurisdiction*,’ of which it is an elusive substratum, affords such possibilities for uncertain application. . . .”

Another limit, as it has developed in American law, is the policy precluding courts from rendering advisory opinions in private litigation.⁶ The issuance of advisory opinions is generally confined to the executive branch of government. The demands of the parties in a law suit determine the functional conception—jurisdiction. The plaintiff must be able to get the defendant into court. In the case of nonresident defendants, the plaintiff wants the defendant before a convenient and appropriate court. Traveling across the continent, or into the next state, to bring suit often will be inconvenient, and even inappropriate—depending upon what the suit is about. Suit in another state may be impractical, for the court as well as the parties.⁷ The conception of jurisdiction, shifting with the times, forms the method for bringing the defendant into an appropriate local court.

A number of American courts today have evolved a conception of jurisdiction which will protect local plaintiffs almost to the hilt. Other American courts have chosen to remain more cautious; the reasons are not readily apparent, though perhaps it is simply a matter of their not keeping up with the rapid development in the law. A state court need not exercise personal jurisdiction over outsiders.⁸ Today's widespread, sometimes reckless, state or federal court jurisdiction over defendants resident in other states weakens state sovereignty, much in the same way that encroaching federal power does; the states in which these defendants reside are less able to protect their interests.⁹

Jurisdiction over something and somebody has been roughly categorized *jurisdiction in rem* and *jurisdiction in personam*. These distinctions are not clear cut, and further refinements arise, such as jurisdiction *quasi in rem* and *in the nature of a proceeding in rem*.¹⁰ This article will not become

6. *Accord*, *Pennoy v. Neff*, 95 U.S. 714 (1878).

7. The principle of *forum non conveniens* has thus developed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Elliott v. Johnston*, 365 Mo. 881, 292 S.W.2d 589 (Div. 2, 1956).

8. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

9. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoy to Denckla: a Review*, 25 U. CHI. L. REV. 569 (1958); *Cf. Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956). Once a judgment, unassailable on jurisdictional grounds, is obtained against the outsider, it then may be enforced against him in his own state under the "inexorable command" of the Full Faith and Credit Clause, U.S. CONST. art. IV. § 1 and 28 U.S.C. § 1738 (1958). *Morris v. Jones*, 329 U.S. 545 (1947); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Parker v. Hofer*, 2 N.Y.2d 612, 142 N.E.2d 194, 162 N.Y.S.2d 13, *cert. denied* 355 U.S. 833 (1957).

10. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *cf. Williams v. North Carolina I*, 317 U.S. 287 (1942); *Rediker v. Rediker*, 35 Cal.2d 796, 221 P.2d 1 (1950).

bogged down with these nebulous terms; jurisdiction over the person of the defendant, *jurisdiction in personam* as generally understood—concerned with a court's acting upon persons, human or artificial—is the sole subject.¹¹ Jurisdiction based upon control over property, whether technically *in rem* or not, is beyond the scope of this article.

Under the protection of fourteenth amendment due process, two distinct requirements have evolved in the American law of personal jurisdiction.¹² The court must have some basis for acting upon the outsider and certain procedural safeguards must be undertaken and satisfied to protect his rights:

It is elementary that for a court to entertain an action *in personam* against a foreign defendant, jurisdiction over the "person" must be acquired. Traditionally, this has comprised two elements: (1) the power to subject him to the jurisdiction of the court, and (2) effectively bringing him before the court by proper notice. . . .¹³

The important recent developments are in the area of the first requirement: the power-basis for the court to act upon the nonresident defendant. That forms the primary concern in this article. An example, to distinguish these requirements, involves "service upon an agent." Serving a local agent is not a power-basis for the exercise of jurisdiction. Local service upon the principal would be.¹⁴ Nonetheless, service upon the agent may provide adequate notice to the principal satisfying requisite procedural safeguards.¹⁵ There is some tendency to confuse or jumble these require-

11. There is no intent to suggest that *in rem* jurisdiction is less important or valuable to the practitioner. Even where personal jurisdiction can or may be obtained over an outsider, attachment or garnishment proceedings against a local debtor of the outsider is advantageous to prevent procedural delays and speed collection of an ultimate judgment. *Cf. Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959). Where personal jurisdiction fails or is blocked, the possibility of attachment of accounts receivable, bank accounts, or other intangible or tangible assets claimed by or owed to the outsider within local jurisdiction should not be overlooked. *Cf. Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *Pennington v. Fourth National Bank of Cincinnati*, 243 U.S. 269 (1917); *Harris v. Balk*, 198 U.S. 215 (1905).

12. Similar requirements exist in the law of *in rem* jurisdiction. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *State v. Stringer*, 77 Wyo. 198, 310 P.2d 730 (1957); *cf. Schroeder v. City of New York*, 371 U.S. 208 (1962); *A/S Kredit Bank v. Chase Manhattan Bank*, 155 F.Supp. 300 (S.D. N.Y. 1957).

13. *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 505 (4th Cir. 1956); *accord, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1940).

14. *Erlanger Mills v. Cohoes Fibre Mills*, *supra* note 13.

15. *Ibid.*; *International Shoe Co. v. Washington*, *supra* note 13.

ments—this may be a part of the recent development in the American law. As a New Jersey court has stated:

The trend in defining due process is away from the court having immediate power over a defendant and towards the court in which both parties may conveniently settle their dispute. And in defining due process of law, the trend is away from emphasis on territorial limitations and towards emphasis on providing adequate notice and opportunity to be heard. . . .¹⁶

By and large, the courts still fit the changing law into these established requirements. The power-basis requirement has become sufficiently flexible for the purpose.

The most simplified jurisdiction over outsiders has been grounded upon local authority, and this has taken the form of service of process upon the nonresident defendant in the state. In suits against individual defendants, jurisdiction over the person of the individual is acquired when he is served personally with the summons in the state; it makes no difference why he is there.¹⁷ He can be served in an airplane flying over the state.¹⁸ A nonresident corporation, however, cannot be so served; jurisdiction over foreign corporations is more complicated. Perhaps, if all the directors, officers, and shareholders of a foreign corporation were individually served in a state, there would be a rough equivalent to service upon an individual defendant in the state, supplying the requisite power-basis for the court to act. But this never happens. Foreign corporations are more insulated

16. *Hoagland v. Springer*, 75 N.J. Super. 560, 568, 183 A.2d 678, 683 (App. Div. 1962); cf. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951); *Ehrenzweig, Pennoyer Is Dead—Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285 (1958); *Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956). Justice Traynor of the Supreme Court of California has stated: "Why should they [judges] not be free to consider jurisdiction at the outset in the complex of the parties' contacts with the forum state, the interests of the state concerned in the outcome, and a pervading concept of fair play to all parties?" Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 660 (1959).

17. This so-called "transient rule" of personal jurisdiction received its impetus from *Pennoyer v. Neff*, 95 U.S. 714 (1878). Cf. *Harris v. Balk*, 198 U.S. 215 (1905).

18. *Grace v. MacArthur*, 170 F.Supp. 442, 443 (E.D. Ark. 1959): ". . . The Marshal's return as to Smith recites that the writ came to hand on July 21, 1958, and that on the same day he served the same 'by personally delivering to him a copy of this writ, together with a copy of the Complaint, on the Braniff Airplane, Flight No. 337, non-stop flight from Memphis, Tenn. to Dallas, Texas, said copy being delivered to him at 5:16 P.M. at which time the said airplane was in the Eastern District of Arkansas and directly above Pine Bluff, Arkansas, in said District.'"

from such simplified jurisdiction than nonresident individuals, apparently as an outgrowth of earlier notions that corporations could not act or exist outside the states in which they were legally qualified, as announced by Chief Justice Taney in *Bank of Augusta v. Earle* (U.S. 1839).¹⁹ This incongruity suggests a flaw in the basic theory of personal jurisdiction. There is no reason why foreign corporations should have such an insulating advantage as compared with nonresident individuals. Stockholder protection is sufficiently assured by the policy of limited corporate liability. The premise that personal jurisdiction can be obtained simply by handing an outsider a summons in the forum needs reconsideration,²⁰ but, at least, if a nonresident individual can be sued locally in that manner, some method should be evolved in the law whereby foreign corporations also can be so sued. Present law does not permit local suit against a foreign corporation even if the president, vice-president, or general manager of the corporation is served there with process, unless some other power-basis for jurisdiction is shown.²¹ Service upon responsible officers of this sort might be held sufficient, particularly when they are in the state for reasons related to the suit or its subject matter. Current bases of jurisdiction, getting around this foreign corporate insulation from local service by indirect devices, have failed to meet the problem.

The involvement of the U.S. Constitution, primarily fourteenth amendment due process, and in rare instances the interstate commerce clause, with state law determining personal jurisdiction has posed problems.

19. 13 Pet. (38 U.S.) 519 (1839). The significance of the court and date of decision in the area of personal jurisdiction over outsiders is such that it was thought advisable to include a designation with the style of the case the first time each case was named in the body of the article.

20. Professor Ehrenzweig has vigorously attacked this premise, Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956), and his views have made some impression on other writers. Leflar, Cleary, and others, *Transient Jurisdiction—Remnant of Pennoyer v. Neff: A Round Table*, 9 J. PUB. L. 281 (1960); Briggs, *Contemporary Problems in Conflict of Laws—Jurisdiction by Statute*, Part II, 24 MONT. L. REV. 85 (1963).

21. *Blount v. Peerless Chem., Inc.*, 316 F.2d 695 (2d Cir. 1963) [service upon president, who resided locally]; *Long v. Victor Prod. Corp.*, 297 F.2d 577 (8th Cir. 1961) [service upon chairman of the board and a vice-president temporarily lodged at a hotel in the state]; *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956) [service upon general manager, who had come to the state to discuss the complaint sued upon]; *Pucci v. Blatz Brewing Co.*, 127 F.Supp. 747 (W.D. Mo. 1955) [service upon a vice-president temporarily lodged at a hotel in the state]; *Collar v. Peninsular Gas Co.*, 295 S.W.2d 88 (Mo. Div. 1, 1956) [service upon president temporarily lodged at a hotel in the state on business which became the subject matter of the suit].

State law formulates the extent of local jurisdiction subject to shifting minimum constitutional requirements. As the late Judge Goodrich has written:

There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1, § 8, cl. 3; Amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation.²²

In addition, the doctrine of *Erie R. R. Co. v. Tompkins* (U.S. 1938)²³ created the question whether local state law, in diversity of citizenship cases, governs the jurisdiction of federal courts in that state. *Erie* precipitated a line of decisions in which the Supreme Court ruled that *uniformity of outcome* was required among federal and state courts within each state. *Angel v. Bullington* (U.S. 1947)²⁴ and *Woods v. Interstate Realty Co.* (U.S. 1949)²⁵ extended this rule to certain jurisdictional issues. Lower federal courts then tried to follow the law of their state in determining personal jurisdiction.²⁶ The Supreme Court never ruled on the precise issue, but in one case, *Riverbank Laboratories v. Hardwood Products Corp.* (U.S. 1956),²⁷ threw a monkey wrench, probably inadvertently, into this developing body of law.²⁸ Some federal courts thereafter ruled that in

22. *Pulson v. American Rolling Mill Co.*, 170 F.2d 193, 194 (1st Cir. 1948) (Goodrich, Circuit Judge, by special assignment), quoted and followed in *Arrow-smith v. United Press Int'l*, 320 F.2d 219, 222 (2d Cir. 1963) and *Sanders Assoc., Inc. v. Galion Iron Works & Mfg. Co.*, 304 F.2d 915, 918-19 (1st Cir. 1962).

23. 304 U.S. 64 (1938).

24. 330 U.S. 183 (1947).

25. 337 U.S. 535 (1949).

26. *E.g.*, *Roberts v. Evans Case Co.*, 218 F.2d 893 (7th Cir. 1955); *Canvas Fabricators, Inc. v. William E. Hooper & Sons Co.*, 199 F.2d 485 (7th Cir. 1952); *Hilmes v. Marlin Firearms Co.*, 136 F.Supp. 307 (D. Minn. 1955).

27. 350 U.S. 1003, 1012 (1956) (per curiam, memo opinion).

28. *Riverbank Lab. v. Hardwood Prod. Corp.*, 236 F.2d 255 (7th Cir. 1956).

determining personal jurisdiction federal law should be applied rather than the local state law.²⁹ By 1963, however, the federal courts were almost unanimous in the view that local state law determines personal jurisdiction in diversity cases.³⁰

II. PERSONAL JURISDICTION AS IT HAS DEVELOPED IN AMERICAN LAW

A. *The Leading Cases*

In *Pennoyer v. Neff* (U.S. 1878),³¹ the Supreme Court ruled that personal jurisdiction could not be obtained over a nonresident individual by service of process outside the forum state. "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."³² Thus, an individual defendant had to be served in the forum state, unless he was a domiciliary thereof and temporarily resident elsewhere.³³ Certain other exceptions were stated by the Court: "cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance."³⁴ The Court also indicated that a state may require a nonresident,

entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way.³⁵

These principles were applied for many years to ground personal jurisdiction on fictive "consent" to local suit, "doing business" locally, and

29. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960); *K. Shapiro, Inc. v. New York Cent. R.R.*, 152 F. Supp. 722 (E.D. Mich. 1957).

30. *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963), *overruling* the contrary holding in *Jaftex Corp. v. Randolph Mills, Inc.*, *supra* note 29. *Cf. Jennings v. McCall Corp.*, 320 F.2d 64 (8th Cir. 1963).

31. 95 U.S. 714 (1878).

32. *Id.* at 727.

33. Local jurisdiction over the forum's domiciliaries, wherever they may be found and served, was made clear by *Milliken v. Meyer*, 311 U.S. 457 (1940).

34. *Supra* note 31 at 733.

35. *Id.* at 735.

local "presence."³⁶ Nonresident individuals, as citizens under the privileges and immunities clause,³⁷ could not be excluded from a particular state, and thus were not deemed to have "consented" to personal jurisdiction by reason of their presence, existence, or activity there.³⁸ In suits on causes of action arising locally, foreign corporations were deemed to have consented.³⁹ Much of the time, foreign corporations legally qualified to do local business (thus becoming "licensed" to do business in the state), and, as a consequence, were forced to designate a local agent upon whom service could be had.⁴⁰ But, whether the corporation legally qualified or not, its local presence, existence, or activity, if substantial in the sense required, rendered it subject to local jurisdiction by "constructive service"⁴¹ under the "consent" or "doing business" tests. In the case of individual outsiders, other than in the nonresident motorist situation where "consent" to local suit was recognized,⁴² jurisdiction by constructive service could be had only when they were "doing business" there in the substantial sense required so as to establish a basis for the exercise of personal jurisdiction on that ground.⁴³

The *Pennoyer* case laid a territorial framework for personal jurisdiction. Outsiders could be subjected to local suit only in the event they committed conduct within the forum state, were there in some manner, or consented

36. *E.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927); *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917); *Frene v. Louisville Cement Co.*, 134 F.2d 511 (D.C. Cir. 1943); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917). "In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations." Justice Black, for the Court, in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

37. U.S. CONST. art. IV, § 2.

38. *Flexner v. Farson*, 248 U.S. 289 (1919).

39. *Simon v. Southern Ry.*, 236 U.S. 115 (1915); *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S.D. N.Y. 1915); *cf. Hess v. Pawloski*, 274 U.S. 352, 355 (1927) (dictum).

40. *E.g.*, ILL. REV. STAT. ch. 32, §§ 157.106, 157.109-111 (1963); §§ 351.580, .620, RSMo 1959; § 351.630, RSMo 1961 Supp.

41. "Constructive service" refers to service of process in some manner other than such as would supply a direct power-basis for the court to act, *i.e.*, other than traditional "personal service." Examples are: personal service outside the state, service by mail, service upon an agent—an actual agent or one designated under the law, or one made such by operation of law (the Secretary of State or other public official), and service by publication. Courts often use the term "substituted service" for this purpose. See EHRENZWEIG, *CONFLICT OF LAWS*, p. 92 (1962).

42. *Hess v. Pawloski*, 274 U.S. 352 (1927); *Kane v. New Jersey*, 242 U.S. 160 (1916); *cf. Scott, Jurisdiction Over Nonresident Motorists*, 39 HARV. L. REV. 563 (1926).

43. *Wein v. Crockett*, 113 Utah 301, 195 P.2d 222 (1948); *cf. Scott, Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871 (1919).

to such jurisdiction. *Green v. Chicago, Burlington & Quincy Ry.* (U.S. 1907)⁴⁴ held a foreign corporation not subject to local jurisdiction on a cause of action arising elsewhere, under the "doing business" or "presence" tests, when it operated nothing more than a local office, employing an agent there to solicit freight and passenger business. From the *Green* case evolved the so-called "mere solicitation" rule.⁴⁵ *International Harvester v. Kentucky* (U.S. 1914)⁴⁶ modified this rule to permit local jurisdiction over such a foreign corporation which, in addition to maintaining a local office for the solicitation of business, regularly shipped farm machinery into the state and authorized its local agents to accept payment and notes-payable for the sale of its products. From the *International Harvester* case evolved the "solicitation plus" rule. In other words, a distinction was made, depending upon the kind or extent of local activity, or "doing business."

International Shoe Co. v. Washington (U.S. 1945)⁴⁷ altered this territorial framework. International Shoe, a Delaware corporation, sold merchandise to dealers in the state of Washington by means of salesmen who solicited orders there and forwarded these orders for acceptance or rejection to the main office in St. Louis, Missouri. It shipped merchandise into Washington from warehouses outside that state and made all collections from outside Washington. International Shoe maintained no office in Washington, kept no stock of merchandise there, compensated its salesmen on a commission basis, and denied these salesmen the power to accept orders or make collections. It did supply its salesmen with a line of samples and permitted them to rent sample rooms on occasion in hotels or business buildings in Washington. The Supreme Court held International Shoe amenable to personal jurisdiction in the state courts of Washington in an action to collect unemployment compensation taxes on commissions paid these salesmen. Disdaining prior law, the Court, in an opinion by Chief Justice Stone, declared:

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. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in

44. 205 U.S. 530 (1907).

45. Followed in *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918).

46. 234 U.S. 579 (1914).

47. 326 U.S. 310 (1945).

relation to the fair and orderly administration of the laws 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. Cf. *Pennoyer v. Neff, supra*; *Minnesota Commercial Assn. v. Benn*, 261 U. S. 140.

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. . . .

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant 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. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.⁴⁸

The *International Shoe* case announced a flexible standard governing state courts' exercise of personal jurisdiction over foreign corporations, *i.e.*, contacts or ties with the state making it reasonable and just according to traditional notions of fair play and substantial justice. This has been called the "minimum contacts" test. The outsider need only have the requisite *minimum contacts* which would support local jurisdiction within American notions of fair play. In addition, the Court stated:

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. An "estimate

48. *Id.* at 319-20.

of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson v. Chase & Gilbert* . . .⁴⁹

The emphasis shifted from a territorial framework to fair play. The Court gave little indication how this standard should be objectively applied, and state and federal courts have had a field day putting it into operation ever since.

Some light was shed in *Perkins v. Benguet Consolidated Mining Co.* (U.S. 1952),⁵⁰ involving a question of personal jurisdiction in the Ohio courts over a Philippine corporation on a cause of action arising outside Ohio and unrelated to the corporation's activity there. Driven from mining operations in the Philippines during the Japanese occupation in World War II, the president of the corporation, who was also the general manager and principal stockholder, returned to his original home in Ohio and there conducted corporate affairs including directors' meetings, bank transactions, salary payments, purchases of machinery, and various other limited activities. The Supreme Court, in an opinion by Justice Burton, held that due process neither required Ohio to take nor to decline jurisdiction. The continuous systematic activity of the foreign corporation in Ohio was sufficient grounds for personal jurisdiction, if Ohio wished to exercise it. On remand, the Ohio court did so.⁵¹ The *Benguet* case purported to follow *International Shoe* and indicated that continuous systematic activity in the forum alone is sufficient *minimum contact* under due process notions of fair play. The fact that the cause of action arose outside Ohio and was unrelated to the defendant's activity there was not crucial.

Broadside attacks on the *Pennoyer* territorial framework for personal jurisdiction came with *Travelers Health Association v. Virginia* (U.S. 1950),⁵² and particularly *McGee v. International Life Insurance Co.* (U.S. 1957).⁵³ *Travelers Health*, in an opinion by Justice Black, held that Virginia could exercise personal jurisdiction over a Nebraska membership

49. *Id.* at 317. *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930), opinion by Learned Hand, C. J., held, on an "estimate of the inconveniences," that it would be fairer for the plaintiffs to go to Boston, Massachusetts, to sue the defendant—a Massachusetts corporation which maintained a local office in New York to discuss stock transactions that were completed in Boston, and did no other business in New York—than for the defendant to come to the forum court in New York.

50. 342 U.S. 437 (1952).

51. 158 Ohio St. 145, 107 N.E.2d 203 (1952).

52. 339 U.S. 643 (1950).

53. 355 U.S. 220 (1957).

insurance corporation based upon the great number of mail order insured members, approximately 800, in Virginia, despite the fact that no agents of the Nebraska corporation operated in Virginia. The Nebraska corporation engaged in continuous long-term insurance transactions with Virginians, following solicitation based upon the recommendations of fellow Virginia insured members. The action arose out of an attempt by the state of Virginia to force Travelers Health to obtain a permit from the state corporation commission under the Virginia "Blue Sky Law." In *McGee*, International Life Insurance Co., a Texas corporation, assumed certain life insurance obligations of a former Arizona insurance corporation, including a policy with Franklin, a resident of California. International Life, which had not legally qualified to do business in California and had done no other business there, mailed a reinsurance certificate to Franklin in California offering to insure him, and he accepted by paying premiums by mail from that state until his death. Thereafter, his beneficiary sought the proceeds under the policy, but International Life refused to pay, claiming Franklin had committed suicide. The beneficiary sued in a California court, basing jurisdiction on a California statute which subjected foreign insurance companies to local suit on insurance contracts on the life of and delivered to residents of that state.⁵⁴ The beneficiary recovered judgment and sought to enforce it in a Texas court. The Texas courts refused, holding the judgment void under the fourteenth amendment by reason of the California court's lack of personal jurisdiction over International Life. The Supreme Court, in an opinion by Justice Black, reversed, holding the California court had jurisdiction and that Texas must enforce the judgment under the full faith and credit clause. The Court recognized that *Pennoyer v. Neff* placed limits upon the power to exercise personal jurisdiction over outsiders, but thought *International Shoe* indicated a trend toward expanding the scope of permissible state jurisdiction, and that this case fit the *minimum contacts* test announced in that case, since the insurance contract had a substantial connection with California and that state had "a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."⁵⁵ It would have been inconvenient for the beneficiary to pursue International Life to Texas and though "there may be inconvenience

54. CAL. INS. CODE §§ 1610-1620, "Actions Against Nonadmitted Insurers" which authorizes service of process upon the state insurance commissioner, typical of such unauthorized insurers process acts.

55. *Supra* note 53 at 223.

to the insurer if it is held amenable to suit in California where it had this contract," there was "certainly nothing which amounts to a denial of due process."⁵⁶ *Travelers Health* and *McGee* make it clear that a foreign corporation need not act within the forum state through agents, let alone commit acts there itself. The flexible *minimum contacts* test can be satisfied though the foreign corporation has never been in the forum state. It need only submit in some manner by its conduct outside the forum state.

In *Vanderbilt v. Vanderbilt* (U.S. 1957)⁵⁷ and *Hanson v. Denckla* (U.S. 1958),⁵⁸ the Court rendered opinions denying personal jurisdiction. *Vanderbilt* held a Nevada court could not deprive Patricia Vanderbilt of her right to alimony or support, without personal service upon her in Nevada or her appearance in the divorce action there brought by her then husband Cornelius Vanderbilt, Jr. The divorce was good, Nevada courts having jurisdiction for that purpose, but to bind Mrs. Vanderbilt in such a manner would be giving the divorce *in personam* effect.⁵⁹ *Hanson v. Denckla*, in an opinion by Chief Justice Warren, held that Florida could not exercise personal jurisdiction over a Delaware trustee, as a consequence of local probate of the will of a Florida domiciliary and jurisdiction over the beneficiaries contesting for the trust assets there, when the Delaware trustee did nothing in the state of Florida to bring it within the power of Florida courts. The Delaware trustee's only contact with Florida came as a result of its dealings with the decedent, who moved from Pennsylvania to Florida after she had created the trust some years earlier in Delaware. The opinion stated:

it is essential 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 protections of its laws. *International Shoe Co. v. Washington* . . .⁶⁰

The cause of action had not arisen out of any relationship instigated or consummated by the Delaware trustee in Florida, and thus *McGee* could be distinguished. The Court recognized that "territorial limitations on the power of the respective States" remain a practical fact of life in the United

56. *Id.* at 224.

57. 354 U.S. 416 (1957).

58. 357 U.S. 235 (1958).

59. The Supreme Court has rendered a number of recent decisions protecting nonresident wives and mothers in their rights to support and custody of children. *Armstrong v. Armstrong*, 350 U.S. 568 (1956); *May v. Anderson*, 345 U.S. 528 (1953); *Estin v. Estin*, 334 U.S. 541 (1948).

60. *Supra* note 58 at 253.

States.⁶¹ An argument made in the dissent by Justice Black,⁶² that Florida had sufficient interest in the estate of decedent, a Florida domiciliary at the time of her death, and that disposition of the estate "had a very close and substantial connection with that State," since the beneficiaries lived there, to enable Florida courts to exercise jurisdiction over the Delaware trustee in order to determine the rights of the contesting beneficiaries, was rejected by the Court: Florida "does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee."⁶³

International Shoe, *Benguet*, *Travelers Health*, and *McGee*, even as somewhat confined by *Vanderbilt* and *Denckla*, manifest the Supreme Court's support for expanded local jurisdiction over outsiders by the increasing flexibility given the *power-basis* requirement. Even if the *minimum contacts* test "was not so much an innovation on due process as it was a rephrasing of the prevailing fictional tests, in order more properly to describe the judicial methodology long employed,"⁶⁴ it hastened the erosion of territorial rigidity, broadened the jurisdictional sights of judges and legislators, and led to narrow particularizing of power-bases. *Minimum contacts* became minimal.⁶⁵ "Fair play and substantial justice" allowed greater and greater leeway as mobility in transportation and the interstate complexity of business relationships increased. The Supreme Court apparently will check this expansion only in the exceptional case like *Denckla* or in a special situation like *Vanderbilt*.

There may be a rationale in these leading cases that could be reduced to "black letter" law. A Montana lawyer suggests three elements must be present in varying degrees to support personal jurisdiction over outsiders: some governmental interest in the forum, local trial convenience, and a purposeful act of the outsider creating some contact with the forum.⁶⁶ A

61. *Id.* at 251.

62. *Id.* at 256, 258-59. (5 to 4 decision)

63. *Id.* at 254. Cf. Reese and Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); Scott, *Comment: Hanson v. Denckla*, 72 HARV. L. REV. 695 (1958).

64. Sobeloff, C.J., in *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 506 (4th Cir. 1956); cf. Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORN. L. Q. 196 (1957).

65. In *Pugh v. Oklahoma Farm Bureau Mut. Ins. Co.*, 159 F.Supp. 155, 158 (E.D. La. 1958), the court even recognized the contact was "minimal."

66. Towe, *Personal Jurisdiction Over Non-Residents and Montana's New Rule 4B*, 24 MONT. L. REV. 3 (1962).

Montana law professor believes a deeper factor determines the decisions—"institutional affiliation": the business or social relationship involved in the case, giving rise to the issue of jurisdiction, may or may not be affiliated with the forum so as to point to the exercise or denial of jurisdiction.⁶⁷ There seems to be a forum interest factor, arising by "institutional affiliation" or otherwise, and some required local (or locally consummated) activity involved in the cases: where jurisdiction was recognized, either the forum's interest was found sufficient or the outsider's local activity stressed, or both, and each was present to some degree; where jurisdiction was denied, one or the other or both were insignificant or lacking.⁶⁸ But the factors of forum interest and the outsider's local activity are rather vague generalizations and, at most, refinements of the conception—*minimum contacts*. A proper picture of the law can be derived only by a consideration of subsequent state and federal court cases applying the *minimum contacts* test.

A quick look at the law regarding the other fundamental due process requirement for personal jurisdiction over outsiders, *procedural safeguards*, is necessary for a broader picture first, however. *Mullane v. Central Hanover Bank & Trust Co.* (U.S. 1950)⁶⁹ involved the jurisdiction of a New York court over great numbers of beneficiaries of a common trust fund established under New York law and being administered there, in an action by the trustee for settlement of its account, many of these beneficiaries being

67. Briggs, *Contemporary Problems in Conflict of Laws—Jurisdiction by Statute*, Part I, 24 OHIO ST. L. J. 223 (1963). For example, in *McGee*, the insurance relationship as an institution was affiliated with California; whereas in *Denckla*, the trust relationship was affiliated with Delaware, where the settlor created it and presumably intended it to be administered, and had no comparable affiliation with Florida.

68. In *International Shoe*, local activity was stressed, and Washington had an interest in protecting its unemployment compensation fund by assuring that all employers paying compensation for local services contribute; in *Benguet*, local activity was stressed, and Ohio had an interest in assuring that outsiders conducting such activity there may be sued locally; in *Travelers Health*, locally consummated activity in the insuring of a great number of Virginians was stressed, and Virginia's interest in regulating such an insurance company as it does local companies, clear; in *McGee*, International Life's consummation of the local insurance relationship was stressed, as was California's interest in protecting its local beneficiary against the insurer who refused to pay a claim; whereas, in *Denckla*, the Delaware trustee's activity or consummated activity in Florida was virtually nil, and Florida's interest questionable, when the trust was created and administered in Delaware and the whole litigation involved only a fight between various groups of beneficiaries for a little larger share of the decedent's estate; and in *Vanderbilt*, the outsider Patricia Vanderbilt committed no activity and consummated nothing whatever in Nevada, and any interest that state had in her support rights, or even Cornelius Vanderbilt's immunity from her support, does not appear. Most of the subsequent state and federal court decisions, considered *infra*, can also be explained in this manner.

69. 339 U.S. 306 (1950).

nonresidents of New York. The Supreme Court, in an opinion by Justice Jackson, found sufficient power-basis for the New York court to act on the rights of the outsiders, by the interest of that state "in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts,"⁷⁰ but questioned whether the statute-prescribed notice by publication in a local newspaper, which only named the participating trusts and did not name the beneficiaries, met requisite procedural safeguards. As to known present beneficiaries of known place of residence, the Court ruled that due process required at least notice by mail, but as to unknown beneficiaries or those whose interests were "so remote as to be ephemeral," notice by publication was sufficient. The Court thought due process required "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," "or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."⁷¹ *Wuchter v. Pizzutti* (U.S. 1928)⁷² involved personal jurisdiction in a New Jersey court over a Pennsylvanian under the New Jersey nonresident motorist statute, which provided for constructive service upon the Secretary of State of New Jersey, but contained no express statutory requirement that the outsider be notified either by the Secretary of State or by the plaintiff. The Court, in an opinion by Chief Justice Taft, reversed a New Jersey court's exercise of jurisdiction, even though the defendant Pennsylvanian had been personally served in Pennsylvania. The Court thought due process required that the statute provide the requisite procedural safeguard of notice to the outsider, and absent this, the statutory exercise of jurisdiction could not be sustained. The statute itself must "contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued."⁷³ In other words, if jurisdiction over an outsider is to be based upon constructive service, the legislature must provide necessary procedural safeguards under fourteenth amendment due process; the matter of procedural safeguards cannot be chanced haphazardly to the circumstances of each particular case.

70. *Id.* at 313.

71. *Id.* at 314-15.

72. 276 U.S. 13 (1928).

73. *Id.* at 18, 24.

B. *The Trend of Recent State and Federal Court Cases*

To take advantage of the enlarged personal jurisdiction permitted by the *minimum contacts* test, and meet the required statutory-specification of procedural safeguards, as per *Wuchter v. Pizzutti*, a wave of state legislation has appeared. The earlier statutes were formulated to authorize constructive service on a power-basis of "implied consent." Widespread enactment of nonresident motorist statutes followed this pattern.⁷⁴ There were also statutes deeming special appearances a general appearance for practical purposes⁷⁵ and procedural provisions making possible out-of-state service upon local domiciliaries in certain situations.⁷⁶ After *International Shoe*, the statutory emphasis shifted to ground jurisdiction upon local (or locally consummated) activity. Some of the most recent statutes, of various types, have enlarged personal jurisdiction to new extremes. Those of Illinois,⁷⁷ Vermont,⁷⁸ North Carolina,⁷⁹ Wisconsin,⁸⁰ and Montana,⁸¹ and

74. *E.g.*, ILL. REV. STAT. ch. 95 1/2, § 9-301 (1963); § 506.210, RSMo 1959. *Cf.* *Hess v. Pawloski*, 274 U.S. 352 (1927) and the Massachusetts statute involved; Gibbons, *A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257 (1960); Scott, *Jurisdiction Over Nonresident Motorists*, 39 HARV. L. REV. 563 (1926).

75. *E.g.*, the Texas statute involved in *York v. Texas*, 137 U.S. 15 (1890).

76. *E.g.*, the Wyoming statutes involved in *Milliken v. Meyer*, 311 U.S. 457 (1940); N.Y. CIV. PRAC. ACT §§ 232-233 (1942). *Cf.* N.Y. CIV. PRAC. LAW AND RULES § 313 (1963).

77. ILL. CIV. PRAC. ACT §§ 16-17; ILL. REV. STAT. ch. 110, §§ 16-17 (1963), quoted *infra*, note 93. Statutes in the Illinois pattern have been enacted in New York, N.Y. CIV. PRAC. LAW AND RULES: § 302 (1963); Washington, WASH. REV. CODE §§ 4.28.180-185 (1962); Idaho, IDAHO CODE ANN. §§ 5-514, 515 (1963 Supp.); and Kansas, KAN. SESS. LAWS 1963, ch. 303, § 60-308. Regarding the Washington statute, see Comment, *Jurisdiction Over Nonresidents—The Washington "Long Arm" Statute*, 38 WASH. L. REV. 560 (1963). Regarding the Kansas statute, see Jacobson, *The Enlargement of Jurisdiction Over Unlicensed Foreign Corporations Committing Torts in Kansas: New Code 60-308*, 12 KAN. L. REV. 49 (1963).

78. VT. STAT. ANN. tit. 12, §§ 855-56 (1959). Statutes in the Vermont pattern have been enacted in Florida, FLA. STAT. ANN. § 47.16 (1962 Supp.); Minnesota, MINN. STAT. ANN. § 303.13 (1)(3) (1962 Supp.) and Missouri, § 351.630, RSMo 1961 SUPP.

79. N.C. GEN. STAT. §§ 55-144, 145, 146 (1960), quoted *infra* note 107. A statute in the North Carolina pattern has been enacted in Connecticut, CONN. GEN. STAT. ANN. § 33-411 (1960).

80. WIS. STAT. ANN. § 262.05 (1963 Supp.).

81. MONT. REV. CODES ANN. § 93-2702-2 (Rule 4)(B)(1963):

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state;

(b) the commission of any act which results in accrual within this state of a tort action;

a court rule in New Jersey⁸² are examples.⁸³ Some apply to all outsiders, others only to foreign corporations. All are attempts to protect local plaintiffs within the permissible extent of jurisdiction as announced in the leading Supreme Court cases.

The Supreme Court to date has not passed upon the constitutionality of any of these recent statutes. One case currently before the Court,⁸⁴ arising from Alabama which has typical older-type statutes and rules providing for local constructive service in the "doing business" situation,⁸⁵ presents issues bearing upon their constitutionality. The case, *New York Times Co. v. Sullivan* (Ala. 1962), involves a libel action by a member of the Board of Commissioners of the City of Montgomery, who also served

(c) the ownership, use, or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property, or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within, this state, or as executor or administrator of any estate within this state.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; . . . [detailed methods of constructive service are set out].

A statute in the Montana pattern has been enacted in Michigan, MICH. STAT. ANN. § 27A.701-741 (1962). No reported cases arising under either the Montana or Michigan statute have been found. Cf. Briggs, *Contemporary Problems in Conflict of Laws—Jurisdiction by Statute*, Part II, 24 MONT. L. REV. 85 (1963); Towe, *Personal Jurisdiction Over Non-Residents and Montana's New Rule 4B*, 24 MONT. L. REV. 3 (1962).

82. N.J.R.R. 4:4-4(d) which provides for out-of-state service upon a foreign corporation "subject to due process of law, by mailing, registered mail return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office." (Emphasis added.) There may be some doubt as to whether a court rule, rather than a statute, meets the requirements of *Wuchter v. Pizzutti*, text at notes 72-73, *supra*.

83. Cf. MD. ANN. CODE art. 23, § 92 (1957); Stimson, *Omnibus Statutes Designed to Secure Jurisdiction Over Out-of-State Defendants*, 48 A.B.A.J. 725 (1962).

84. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So.2d 25 (1962), cert. granted 371 U.S. 946 (1963).

85. ALA. CODE tit. 7, Rule 5(2e) (1958): ". . . Wherever a foreign corporation has carried on or transacted business in this state without qualifying to do business herein as is provided by the Constitution and statutes of this state, and there is no other agent, and process cannot be served on such foreign corporation as above provided in this rule [upon a designated agent], then any legal process may be served upon any agent or servant of such foreign corporation who has made contracts for the corporation or who did the act which constituted the doing of business in this state. . . ." There was also a statute providing for service upon the Secretary of State in this situation, Alabama Acts Reg. Sess. 1953, at 347; ALA. CODE tit. 7, § 199(1) (1958).

as Police Commissioner, against The New York Times and others, based upon the publication in its New York newspaper of an advertisement, containing allegedly false and defamatory material about the plaintiff, submitted by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." One of the methods of service of process employed was upon one Dan McKee, a "stringer"⁸⁶ in Montgomery who passed news stories on to The New York Times and other newspapers. The Times had a regular staff correspondent in Atlanta, Georgia, who covered eleven states including Alabama. The Times' staff correspondents spent 153 days in Alabama from 1956 until 1960, and gathered 49 news articles there during that time. It sought advertising in Alabama by "sales" solicitors, receiving \$26,800 worth from 1956 until 1960, and regularly dispatched 390 daily newspapers and 2,500 Sunday editions into Alabama, most of them going to local dealers—who were given credit for unsold papers, damages in transit, etc. Beyond this, The Times conducted no business in Alabama. The Alabama Supreme Court upheld jurisdiction declaring that under recent decisions, "the activities of The New York Times, . . . are amply sufficient to more than meet the minimal standards required for service upon its representative McKee."⁸⁷ The court thought McKee a sufficient agent of The Times for purposes of service providing adequate notice, and "[j]ustice demands that Alabama be permitted to protect its citizens from tortious libels, the effects of such libels certainly occurring to a substantial degree in the State."⁸⁸ The court concluded that the publishing of advertisements, in which the alleged libelous matter appeared, was a substantial part of The Times' business, and when it called upon "stringer" McKee to investigate the truth of the published advertisement, "specific acts directly connected with, and directly incident to the business of The Times" were committed in Alabama giving rise to the cause of action.⁸⁹ There were other federal constitutional issues in the case, and what the

86. "A 'stringer' is usually employed by another newspaper, or news agency and is called upon for stories occasionally, or offers stories upon his own. A 'stringer' is paid at about the rate of a penny a word. No deductions are made from these payments for such things as income tax, social security, insurance contributions, etc., and 'stringers' are not carried on the payroll of The Times. Up to July 26 for the year 1960, The Times had paid Chadwick, the 'stringer' in Birmingham, \$135.00 for stories accepted, and paid McKee \$90.00." 273 Ala. at 665, 144 So.2d at 29.

87. *Supra* note 84 at 669, 144 So.2d at 33. *Contra*, *New York Times Co. v. Conner*, 291 F.2d 492 (5th Cir. 1961).

88. *Ibid.*

89. *Id.* at 671, 144 So.2d at 35.

United States Supreme Court will do with the jurisdiction issue remains to be seen. The *minimum contacts* test was probably met: there was regular and systematic activity of a sort in Alabama and arguably, at least, the cause of action arose there.

State and federal courts have gone far with these new statutes. Retroactive application has posed no real problem;⁹⁰ the statutes are remedial and neither enlarge nor impair substantive rights and obligations—"there is no vested right in any particular remedy or method of procedure."⁹¹ "Retrospective application of such a statute creates a problem only if that application operates unfairly against a litigant who justifiably acted in reliance on some provision of the prior law. . . . [which] is difficult to imagine . . ." in this kind of case.⁹²

The Illinois statute,⁹³ enacted in 1955, authorizes personal jurisdiction over outsiders, individual or corporate, for the "transaction of any business"

90. *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957); *accord*, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Owens v. Superior Court*, 52 Cal.2d 822, 345 P.2d 921 (1959); *cf.* Comment, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 Col. L. Rev. 1105 (1963). *Contra*, *Nevins v. Revlon, Inc.*, 23 Conn. Sup. 314, 182 A.2d 634 (1962); *Davis v. Jones*, 247 Iowa 1031, 78 N.W.2d 6 (1956).

91. *Nelson v. Miller*, 11 Ill.2d 378, 382, 143 N.E.2d 673, 676; *accord*, *Owens v. Superior Court*, 52 Cal.2d 822, 833, 345 P.2d 921, 926 (1959): "There is no merit in defendant's contention that subdivision (b) is inapplicable on the ground that it was enacted after the action was filed and he had established his domicile in Arizona. . . . The statute governs procedure only, for it neither creates a new cause of action nor deprives defendant of any defense on the merits, and defendant has no vested right to have the jurisdiction of the courts of this state limited as it was at the time he left the state. . . ." *Cf.* *McGee v. International Life Ins. Co.*, 355 U.S. 220, 224 (1957).

92. *Nelson v. Miller*, *Id.* at 383, 143 N.E.2d at 676.

93. ILL. REV. STAT. ch. 110, §§ 16-17 (1963):

§ 16. Personal service outside State. (1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication. . . .

§ 17. Act submitting to jurisdiction—Process. (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this State;
- (b) The commission of a tortious act within this State;
- (c) The ownership, use, or possession of any real estate situated in this State;
- (d) Contracting to insure any person, property or risk located within this State at the time of contracting.

or the "commission of a tortious act" within the state. *Nelson v. Miller* (Ill. 1957)⁹⁴ promptly upheld the constitutionality of the statute and applied it to ground jurisdiction over a nonresident individual Wisconsin appliance dealer whose delivery man while in Illinois, pushed a stove so as to sever one of the plaintiff's fingers and injure another. *Hellriegel v. Sears Roebuck & Co.* (N.D. Ill. 1957),⁹⁵ denying jurisdiction over an Ohio manufacturer, held the statute inapplicable in the case of a local plaintiff's injury by a power mower in Illinois purchased from an independent local retailer, the mower having been manufactured and sold, allegedly as a dangerous article without adequate warning, to the retailer in Ohio by the defendant. There was reluctance to exercise jurisdiction over nonresidents who tortiously manufactured goods outside the state, subsequently sold to the plaintiff by third persons within the state. *Grobark v. Addo Machine Co.* (Ill. 1959)⁹⁶ denied jurisdiction over a New York manufacturer selling adding machines in New York to the plaintiff for resale in Chicago as exclusive dealer. The case involved a suit for wrongful cancellation of the plaintiff's exclusive dealership entered into, to be performed, and allegedly breached in Illinois, rather than for a tort, but the rationale was the same: reluctance to exercise jurisdiction when the defendant's conduct (business—sales) took place outside the state. But this reluctance was short-lived, at least in the tort situation. *Gray v. American Radiator & Standard Sanitary Corp.* (Ill. 1961)⁹⁷ held an Ohio valve manufacturer subject to local jurisdiction in a suit by an Illinois consumer, injured in Illinois by an exploding water heater purchased there from a retailer who had obtained the water heater from its Pennsylvania manufacturer, the alleged defective valve having been affixed to the heater in Pennsylvania. There was no evidence the Ohio valve manufacturer had done any business on its own in Illinois, though

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section. . . .

Cf. Cleary and Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 N.W.U. L. REV. 599-611 (1955).

94. 11 Ill.2d 378, 143 N.E.2d 673 (1957).

95. 157 F.Supp. 718 (N.D. Ill. 1957).

96. 16 Ill.2d 426, 158 N.E.2d 73 (1959). *Accord*, *Trippe Mfg. Co. v. Spencer Gifts, Inc.*, 270 F.2d 821 (7th Cir. 1959).

97. 22 Ill.2d 432, 176 N.E.2d 761 (1961).

the court observed that its valves may have appeared on a number of products sold in Illinois. The tort was said to have been committed in Illinois because the consequences occurred there and "in law the place of a wrong is where the last event takes place which is necessary to render the actor liable."⁹⁸ The *minimum contacts* test, as established by *International Shoe*, was thought satisfied "if the act or transaction itself has a substantial connection with the State of the forum."⁹⁹ The Ohio defendant "enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves."¹⁰⁰ The court added that "if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products."¹⁰¹

Vermont's statute¹⁰² authorizes constructive service upon foreign corporations committing "a tort in whole or in part in Vermont against a resident of Vermont." *Smyth v. Twin State Improvement Corp.* (Vt. 1951)¹⁰³ ruled jurisdiction could be exercised over a Massachusetts building and roofing company which had left holes in the plaintiff's house in Rutland, Vermont, while endeavoring to re-roof it and affix new siding, causing subsequent damage by leaking rain water. *Deveny v. Rheem Manufacturing Co.* (2d Cir. 1963),¹⁰⁴ brought in the federal court for Vermont, reached a result like the Illinois *Gray* case. Plaintiff was seriously injured in Vermont by a gas explosion occurring when she attempted to relight the pilot on her aunt's Rheem water heater, which operated with a built-in control device manufactured by Robertshaw Fulton Controls Co. Both defendants Rheem and Robertshaw were foreign corporations, and neither had legally qualified to do business in Vermont. Jurisdiction was sustained on the ground that the defendants had committed acts knowing they might have potential consequences in Vermont. Rheem water heaters, with Robertshaw controls, were regularly shipped to Rheem's franchised wholesaler for northwestern

98. *Id.* at 435, 176 N.E.2d at 762-63.

99. *Id.* at 438, 176 N.E.2d at 764.

100. *Id.* at 442, 176 N.E.2d at 766.

101. *Ibid.* A result similar to *Gray* was reached in *Atkins v. Jones & Laughlin Steel Corp.*, 258 Minn. 571, 104 N.W.2d 888 (1960) applying MINN. STAT. ANN. § 303.13(1)(3) (1962 Supp.). Minnesota too had its earlier decision comparable to *Hellriegel*: *Mueller v. Steelcase, Inc.*, 172 F.Supp. 416 (D.Minn. 1959).

102. VT. STAT. ANN. tit. 12, §§ 855-6 (1959).

103. 116 Vt. 569, 80 A.2d 664 (1951).

104. 319 F.2d 124 (2d Cir. 1963). *Accord*, *Green v. Robertshaw-Fulton Controls Co.*, 204 F.Supp. 117, 29 F.R.D. 490 (S.D. Ind. 1962).

Vermont and resold to retailers in that area, from one of which the water heater involved had been purchased. Rheem distributed promotional and service information to these retailers, and representatives of Robertshaw made "calls" on them, giving instructions in the operation of the controls. The court thought the tort "obviously committed in Vermont," and that "holding these defendants responsible to Vermont law comports well with the notions of due process enunciated by the Supreme Court in *McGee and Hanson*."¹⁰⁵ *Arrowsmith v. United Press International* (2d Cir. 1963),¹⁰⁶ also brought in the federal court for Vermont, held, though the issue was not squarely presented, that under Vermont law UPI, a New York corporation, might well be subjected to jurisdiction in Vermont courts in a libel suit by a Maryland resident, when UPI had dispatched the alleged libelous matter to its eleven subscribers in Vermont (two newspapers, eight radio stations, and one radio-television station) and had one employee in Vermont (the "manager" of its Montpelier "News Bureau"—upon whom service was made—who occupied desk space in the state house and "punched out" Vermont news). Though the Vermont statute did not apply since the plaintiff was not a Vermont resident, the court thought the statute indicated a policy of expanded jurisdiction and a Vermont court might fill the gap to assert jurisdiction under its common law, as shown in older Vermont cases, and expressly declined to rule that jurisdiction would violate due process on the facts presented.

The North Carolina statute, an interesting one to show the extent to which local legislators will go,¹⁰⁷ provides for jurisdiction over foreign corporations

105. *Id.* at 128.

106. 320 F.2d 219 (2d Cir. 1963).

107. N.C. GEN. STAT. §§ 55-144, 145, 146 (1960) [enacted in 1955]:

§ 55-144. Suits against foreign corporations transacting business in the State without authorization.—Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State . . . then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served.

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.—(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

(1) Out of any contract made in this State or to be performed in this State; or

whether or not . . . transacting . . . business in this state . . . on any cause of action arising . . . (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used and consumed, . . . (4) Out of tortious conduct in this State, . . .

Erlanger Mills v. Cohoes Fibre Mills (4th Cir. 1956)¹⁰⁸ involved an action in a federal court for North Carolina against a New York corporation for defective goods sold to a North Carolina plaintiff, f.o.b. Cohoes, New York, the plaintiff having placed a special order with the defendant at its New

(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or

(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or

(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

(b) Whenever a foreign parent corporation is subject to liability for any obligations of a subsidiary corporation that is subject to suit in this State, the parent corporation is itself so subject in any action to enforce the said liability. . . .

(c) Any foreign corporation subject to suit under this section may, even though it is not transacting business in this State, appoint and maintain a registered agent, . . . In any case where a foreign corporation is subject to suit under this section and has failed to appoint and maintain a registered agent upon whom process might be served, or whenever such registered agent cannot with reasonable diligence be found . . . then the Secretary of State shall be an agent of such corporation upon whom any process in any such cause of action may be served.

§ 55-146. Service on foreign corporations by service on Secretary of State.—(a) Service on the Secretary of State, when he is agent of a foreign corporation as provided in this chapter, . . . shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, . . . Service of process on the foreign corporation shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail with return receipt requested addressed to such corporation at its principal office as it appears in the records of the Secretary of State or, if there is no address of the corporation on file with the Secretary of State, then to said corporation at its office as shown in the official registry of the state of its incorporation. The Secretary of State may require the plaintiff or his attorney to furnish such address. . . .

(c) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. . . .

108. 239 F.2d 502 (4th Cir. 1956).

York offices, and the defendant having specially manufactured the goods to fill the order. There was no evidence the defendant had done any business in North Carolina or dealt with any other North Carolinian. Denying jurisdiction, the court of appeals held the statute unconstitutional as sought to be applied to the facts of the case. The *minimum contacts* test was not met: the New York defendant had no "definite link" with North Carolina. Further facts that the contract price was sizeable (\$17,000) and the defendant's general manager had visited the plaintiff's offices in North Carolina to discuss the claim—where he was handed the process summons—also failed to impress the court as sufficient contacts. Moreover, the court thought this kind of jurisdiction would involve an undue burden upon interstate commerce, giving a colorful example of "the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires"—such a sale also being "with the reasonable expectation that these goods are to be used or consumed in [the vendee's domicile] and are so used and consumed."¹⁰⁹ *Putnam v. Triangle Publications, Inc.* (N.C. 1957)¹¹⁰ similarly held the statute's "reasonable expectation" clause unconstitutional, under the *minimum contacts* test, as sought to be applied in a libel and invasion of privacy suit by North Carolinian Harley Putnam against the Delaware publisher of the magazine "Official Detective Stories" and others, sold on newsstands in North Carolina. The defendant Delaware publisher sold its magazines in mass lots to eighteen independent North Carolina wholesalers who took delivery from defendant outside North Carolina with a return-privilege for unsold copies and resold to retailers in the state; it solicited neither subscriptions nor advertising in North Carolina, though a few times a year, one of its representatives visited the state to obtain statistics and promote sales.

But the North Carolina legislature declined to alter the statute. In *Painter v. Home Finance Company* (N.C. 1957),¹¹¹ a South Carolina corporation, alleged to have wrongfully repossessed Mrs. Myrtle Painter's 1952 Dodge in Buncombe County, North Carolina and taken it to South Carolina where it was sold, was held subject to jurisdiction under the statute's

109. *Id.* at 507.

110. 245 N.C. 432, 96 S.E.2d 445 (1957).

111. 245 N.C. 576, 96 S.E.2d 731 (1957).

"tortious conduct in this State" clause. When this emotion-provoking case came along, with actual conduct by the defendant in the state, the Supreme Court of North Carolina in a short opinion, citing Vermont's *Smyth* case and *International Shoe*, could hardly wait to apply the statute. *Shepard v. Rheem Manufacturing Co.* (N.C. 1959),¹¹² another exploding water heater personal injury, emotion-provoking case, then sustained jurisdiction under the statute's "reasonable expectation" clause, in an action by North Carolinian Mrs. Kathryn Shepard against a foreign corporation, where the defendant, as in the Vermont *Rheem* case, had shipped large quantities of its water heaters into North Carolina for sale by dealers there. The court thought the "acts of negligence upon which the plaintiff bases her cause were committed" by the defendant in its "manufacturing and producing a defective gas water heater and in causing it to be shipped into this State where it was installed and used in the plaintiff's home . . . inflicting upon her serious personal injury."¹¹³ The holding was believed to be entirely consistent with the *minimum contacts* test of the *International Shoe* case, and "traditional notions of fair play and substantial justice." The *Erlanger Mills* and *Putnam* cases were disregarded as being distinguishable on their facts. *Belk v. Belk's Department Store* (N.C. 1959)¹¹⁴ upheld jurisdiction over a closely-held South Carolina department store corporation in an action by a Florida resident stockholder to compel declaration of a cash dividend by the corporation, which operated no stores in North Carolina but regularly purchased substantial quantities of merchandise there and held stockholders' and directors' meetings and had its executive offices at Charlotte in that state. The court found sufficient *minimum contacts* on which to base jurisdiction and did not even refer to the jurisdiction-enlarging statute. *Moss v. City of Winston-Salem* (N.C. 1961),¹¹⁵ however, denied jurisdiction, under the statute's "reasonable expectation" and "tortious conduct in this State" clauses, in a personal injury suit on behalf of a ten-year-old North Carolina boy against defendant foreign corporation for the manufacture and sale of a power mower, allegedly without adequate warning of the danger in operating it without a screen to protect against solid objects being picked up out of the grass and ejected with great force, which caused the plaintiff's injuries. The particular mower had been purchased by the City of Winston-Salem on a bid from a local farm tractor

112. 249 N.C. 454, 106 S.E.2d 704 (1959).

113. *Id.* at 460, 106 S.E.2d at 708.

114. 250 N.C. 99, 108 S.E.2d 131 (1959).

115. 254 N.C. 480, 119 S.E.2d 445 (1961).

company which had obtained it from a Norfolk, Virginia independent distributor. The defendant manufacturer had nothing whatever to do with the transaction and did no business in North Carolina. Following its *Putnam* case, with no mention of *Shepard v. Rheem Manufacturing Co.*, the North Carolina court held that since the defendant had "no contacts, ties, or relations with the State of North Carolina" jurisdiction could not be maintained.¹¹⁶

These cases indicate the broad jurisdiction-enlarging North Carolina statute has not had easy going in the courts. In the emotion-provoking wrongfully-repossessed automobile and exploding water heater cases, the North Carolina court showed little hesitancy in its application, but otherwise, jurisdiction based on the statute has been carefully avoided (the *Moss* case was not nearly so emotion-provoking by reason of the strained "failure to warn" basis for the tort). The *Putnam* and *Moss* cases cannot be distinguished in principle from the *Rheem* exploding water heater case, as far as the defendant foreign corporation's contacts with North Carolina are concerned, and that is the ground on which the court purported to base its distinctions. The *Moss* case can be distinguished from *Rheem*, in that the power mower manufacturer probably had no "reasonable expectation" within the meaning of the statute that its power mower would be "used or consumed" in North Carolina, while the water heater manufacturer did, when it shipped them in large quantities into the state for sale by dealers there. But no such distinction was made by the North Carolina court, and the *Putnam* case certainly could not be distinguished on that basis since the defendant Delaware publisher produced and distributed great numbers of magazines specifically destined for North Carolina. The conclusion is inescapable that the North Carolina court wants to pick and choose among cases to be tried there, and is using the *minimum contacts* test in order to do so.

New Jersey's rule of procedure provides for constructive service by registered mail upon a foreign corporation "subject to due process of law."¹¹⁷ *Hoagland v. Springer* (N.J. Super. 1962)¹¹⁸ sustained jurisdiction over a Michigan corporation, constructively served in accordance with the rule, by reason of the "economic realities" of the situation. Plaintiff's employer, a New Jersey trucker, had purchased a Cummins engine for one of his

116. *Id.* at 484, 119 S.E.2d at 447-48.

117. See note 82 *supra*.

118. 75 N.J. Super. 560, 183 A.2d 678 (App. Div. 1962), *aff'd per curiam* 39 N.J. 32, 186 A.2d 679 (1962).

truck tractors from the defendant, receiving and installing it in Dearborn, Michigan; the engine subsequently exploded while plaintiff was driving the tractor on the New Jersey Turnpike seriously injuring him. The Michigan defendant was a Cummins distributor for its area, doing no business in New Jersey; another Cummins distributor held the New Jersey territory, had legally qualified to, and did conduct business there. The defendant Michigan distributor and the New Jersey distributor assisted each other in the service of Cummins engines, regardless where or by whom sold, and dealt with each other in the sale of parts and materials. The court thought Cummins, an Indiana corporation, and all its distributors formed one cohesive economic unit, and the Cummins operation in New Jersey sufficient local activity upon which to ground jurisdiction over the Michigan distributor; otherwise, the Michigan distributor would be permitted "to receive the fruits of its New Jersey activities without the attendant liabilities which should go with it."¹¹⁹

In some recent cases, enlarged personal jurisdiction has been exercised using older-type general service statutes. The Alabama Supreme Court upheld jurisdiction over The New York Times in this manner in *New York Times Co. v. Sullivan*.¹²⁰ In *Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.* (1st Cir. 1962),¹²¹ a breach of contract suit brought in the federal court for New Hampshire by Sanders, a Delaware corporation with its principal place of business in New Hampshire, against Galion, an Ohio corporation which had never legally qualified in New Hampshire, the only New Hampshire statute applicable was a typical one providing for constructive service upon the Secretary of State in the "doing business" situation.¹²² The contract had required as Sanders' performance, the manufacture of certain models of a newly-developed motor grader attachment in New Hampshire, and Galion's representatives consulted with Sanders on several occasions there regarding this project. Galion sold its motor graders

119. *Id.* at 570, 183 A.2d at 684.

120. Text at notes 84-89 *supra*.

121. 304 F.2d 915 (1st Cir. 1962).

122. N.H. REV. STAT. ANN., ch. 300 § 11 (1955): "Service of process . . . on a foreign corporation, may be made . . . Whenever any foreign corporation authorized to transact, or transacting business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process . . . may be had, or whenever service on any such registered agent cannot with reasonable diligence and promptness be made . . . then and in every such case the secretary of state shall be and hereby is irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process . . . required or permitted by law to be served upon such corporation."

and road rollers in New Hampshire, primarily through a local independent distributor, controlling most of the incidents of all such sales. The contract sued upon had no relation with this distributorship or Galion's local sales, and the district court had denied jurisdiction for that reason.¹²³ The court of appeals reversed, holding jurisdiction could be exercised on the ground that Galion was engaged in the "mainstream" of commercial business in New Hampshire sufficient under the *minimum contacts* test, equating the local independent distributorship to a Galion branch outlet by reason of the control Galion had over sales made by the distributor, and it made no difference whether the cause of action in suit was related or unrelated to that "mainstream." Though recognizing that New Hampshire law determined whether jurisdiction will be exercised,¹²⁴ the court had no trouble finding jurisdiction under the New Hampshire older-type constructive service statute declaring, with little discussion and rarely-displayed aplomb, "that it was the objective of the local statute to exercise jurisdiction to the full extent of the constitutional limit."¹²⁵ *Shealy v. Challenger Manufacturing Co.* (4th Cir. 1962),¹²⁶ a personal injury suit by South Carolinian Shealy against Tennessee corporation Challenger brought in the federal court for western South Carolina, upheld local personal jurisdiction, where Challenger regularly shipped or delivered and sold quantities of its disappearing stairways to an independent building supply wholesaler in South Carolina for resale. Shealy alleged injuries caused by a defect in one of Challenger's stairways which had been purchased from the independent wholesaler in South Carolina by a building contractor and installed in a new residence constructed for Shealy there. The court found sufficient *minimum contacts* with South Carolina, by reason of Challenger's locally consummated activity, to remove any "substantial constitutional question,"¹²⁷ the case being "far from the penumbra bordering the outer constitutional limits,"¹²⁸ but was troubled

123. 203 F.Supp. 522 (D.N.H. 1961).

124. Quoting from *Pulson v. American Rolling Mill Co.*, 170 F.2d 193, 194 (1st Cir. 1948), see text at note 22 *supra*.

125. 304 F.2d at 919, citing *W. H. Elliott & Sons Co. v. Nuodex Products Co.*, 243 F.2d 116, 123-24 (1st Cir.), *cert. denied*, 355 U.S. 823 (1957) [particularly, Woodbury, C.J. (concurring)]. Compare *Benson v. Brattleboro Retreat*, 103 N.H. 28, 164 A.2d 560 (1960).

126. 304 F.2d 102 (4th Cir. 1962). [The opinion is authored by Haynsworth, C.J.; it is interesting to note that Sobeloff, Ch.J., author of the opinion in *Erlanger Mills*, see text at notes 108-09 *supra*, also heard this case and apparently joined in the Haynsworth opinion. *Accord*, *Green v. Robertshaw-Fulton Controls Co.*, 204 F.Supp. 117, 29 F.R.D. 490 (S.D. Ind. 1962).

127. *Id.* at 103-04.

128. *Id.* at 107.

with the interpretation of an older-type South Carolina constructive service statute, which it did not bother to quote,¹²⁹ the only applicable South Carolina statute—which the court thus recognized was binding in the case. There were pre-*International Shoe* South Carolina cases denying jurisdiction in similar factual situations, but these were discarded. Pointing out that *International Shoe* had been law for more than 16 years, the court thought “the law has moved on in the state courts as it has in the federal,” that “the more recent decisions illuminate the old” ones, and “when a state’s interpretation of her service of process statute has already moved forward in keeping with the relaxation of earlier declarations of constitutional restraint upon her power [as South Carolina’s had done to some extent], there is no longer a place for hesitancy to assume that it will” move on with the trend.¹³⁰ The earlier South Carolina decisions were believed to have been forced upon the South Carolina courts by restricted notions of jurisdiction prevailing at the time,¹³¹ and the court thought South Carolina courts today would uphold jurisdiction in this kind of case, without any legislative enlargement.

In other cases, enlarged personal jurisdiction has been exercised by sideways application of related jurisdiction-enlarging statutes. *Owens v. Superior Court* (Cal. 1959)¹³² upheld local jurisdiction over an Arizonan whose dog bit the plaintiff in Los Angeles, California. At the time of the bite, defendant resided in California and was domiciled there, but, prior to filing of the suit, had moved to Arizona and become domiciled there. A California statute provided for jurisdiction over an outsider who “was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the

129. S.C. CODE §§ 12-722, 10-424 (1962). These provide for service upon “the Secretary of State . . . in any action . . . against such foreign corporation growing out of the transaction of any business in this State,” and “Such service may also be made by delivery of a copy thereof to any such corporation outside the State. . . .” § 12-722 was repealed in 1962, effective January 1, 1964, and superseded by § 13.14 of Act No. 847 (1962) as part the new South Carolina Business Corporation Act of 1962, which provides for equivalent constructive service. S.C. Acts at 2118-9 (1962).

130. 304 F.2d at 105.

131. “Our conclusion is emphasized by the fact that when South Carolina’s Supreme Court in earlier cases found substantial activity in that state insufficient to support an assertion of jurisdiction over a foreign corporation, that court invariably declared that its conclusion was governed by federal authorities. Plainly, it then construed the reach of the statutes to be not less wide than the constitutional limitations as they were then understood. . . .” *Id.* at 107.

132. 52 Cal.2d 822, 345 P.2d 921 (1959).

time of service.”¹³³ Defendant having been personally served in Arizona, the only basis for jurisdiction under the statute was the fact that he had been a resident domiciled in California at the time the cause of action arose. A number of earlier California cases had sustained jurisdiction over defendants who were domiciled in California at the time the cause of action arose and at the time of the commencement of the suit even though served outside the state.¹³⁴ The Supreme Court of California was reluctant to ground jurisdiction solely upon defendant’s California residence and domicile at the time the cause of action arose, but ruled that since “the cause of action arose out of defendant’s activities in this state, namely, his ownership and possession of the offending dog” as a California domiciliary, the *minimum contacts* test was satisfied.¹³⁵ Such local activity by a California domiciliary giving rise to the cause of action was sufficient. *Pugh v. Oklahoma Farm Bureau Mutual Insurance Co.* (E.D. La. 1958)¹³⁶ exercised personal jurisdiction over an Oklahoma insurance company, which had done no business in Louisiana and had not legally qualified there, simply by reason of its automobile liability policy issued to an Oklahoma resident who drove his automobile into Louisiana and injured plaintiff, a Texan and passenger in the automobile. Louisiana had expressly extended the application of her nonresident motorist statute to public liability and property damage insurers of the vehicles of nonresident motorists¹³⁷ and had a “direct action” statute subjecting insurance companies to suit prior to the injured party’s determination of rights against the insured.¹³⁸ The “minimal” contact with Louisiana—“presence on the risk at the time of the accident”—was held sufficient to ground jurisdiction under the *McGee* case.¹³⁹

The preceding state and federal court cases were selected as presenting difficult close questions and striking highlights in recent efforts to exercise jurisdiction. No attempt was made at a thorough coverage of the law. The picture was merely representative of the movement, both statutory

133. CAL. CIV. PROC. CODE § 417 (1963 Supp.).

134. *Smith v. Smith*, 45 Cal.2d 235, 288 P.2d 497 (1955); *Myrick v. Superior Court*, 41 Cal.2d 519, 261 P.2d 255 (1953); *Allen v. Superior Court*, 41 Cal.2d 306, 259 P.2d 905 (1953).

135. *Supra* note 132 at 830-32, 345 P.2d at 924-25.

136. 159 F.Supp. 155 (E.D. La. 1958).

137. LA. REV. STAT. § 13:3474 (Supp. 1962).

138. LA. REV. STAT. § 22:655 (Supp. 1962), upheld against constitutional objections in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

139. *Supra* note 136 at 158-59.

and in the courts, since *International Shoe*. A clear trend appears: legislatures and courts are teaming up to exercise ever-broadening personal jurisdiction over outsiders, in what resembles a frenzy to aid local interests. The legislatures and courts hardly keep up with each other; in North Carolina, for instance, the legislature has gone considerably further than the courts,¹⁴⁰ whereas in Illinois,¹⁴¹ Vermont,¹⁴² New Hampshire,¹⁴³ South Carolina,¹⁴⁴ and California,¹⁴⁵ the courts appear to have gone further than the legislature.

Broad interpretations of these cases, each involving its special fact situation and application of local statutes, would be meaningless and will not be attempted here, but certain features of the trend do stand out. The forum court's attitude or disposition toward the exercise of jurisdiction appears more important than the presence, absence, or specific provisions of applicable jurisdiction-enlarging statutes. A comparison of the Illinois *Gray*,¹⁴⁶ Vermont *Rheem*,¹⁴⁷ and North Carolina *Rheem*¹⁴⁸ water heater explosion cases with the South Carolina *Challenger* defective disappearing stairway case¹⁴⁹ demonstrates this. North Carolina had the broadest statute with its "reasonable expectation" clause, Illinois and Vermont had statutes covering torts committed in the state, and South Carolina had only an older-type general service statute, yet each court found jurisdiction on similar facts, a wrong committed outside the forum state with personal injury consequences within. In the New Hampshire *Galion* breach of contract case,¹⁵⁰ the federal court seemed bent on exercising jurisdiction regardless of the statute. Statutes like those in Illinois, Vermont, and North Carolina authorizing personal jurisdiction on narrow particularized bases, "single acts" so-called, point the way for courts to exercise jurisdiction over outsiders more readily than otherwise. Certainly, such statutes establish an obvious minimum basis for personal jurisdiction. But the absence of such a statute did not prevent the exercise of jurisdiction in the Cali-

140. See text at notes 107-16 *supra*.

141. See text at notes 93-101 *supra*.

142. See text at notes 102-06 *supra*.

143. See text at notes 121-25 *supra*.

144. See text at notes 126-31 *supra*.

145. See text at notes 132-35 *supra*.

146. See text at notes 97-101 *supra*.

147. See text at notes 104-05 *supra*.

148. See text at notes 112-13 *supra*.

149. See text at notes 126-31 *supra*.

150. See text at notes 121-25 *supra*.

fornia *Owens* dog bite case,¹⁵¹ the Alabama *New York Times* libel case,¹⁵² or the South Carolina *Challenger* defective disappearing stairway case. And presence of the broadest of these statutes did not lead to the exercise of jurisdiction in the North Carolina *Putnam* "Official Detective Stories" libel case,¹⁵³ though there may have been special public overtones, and thus a greater forum interest, in the Alabama *New York Times* case.

The flexible *minimum contacts* test has opened the door, and state and federal courts have gone a long way with it. The "mere solicitation" rule, as announced in *Green v. Chicago, Burlington & Quincy Ry.*, nonetheless, still stands.¹⁵⁴ Even under the recent statutes, it has weathered the storm;¹⁵⁵ some local (or locally consummated) activity creating a real interest in the forum state is required, and solicitation alone hardly does so. "Traditional notions of fair play" in American law still generally permit outsiders to solicit local business without undue consequence.

III. THE PRESENT MISSOURI LAW OF PERSONAL JURISDICTION

The present setup of Missouri statutes is favorable for the exercise of personal jurisdiction. Missouri has typical constructive service statutes permitting local personal jurisdiction over the following: foreign corporations legally qualified to do business in the state;¹⁵⁶ foreign savings and loan associations;¹⁵⁷ authorized and unauthorized foreign insurance companies;¹⁵⁸ foreign fraternal benefit societies;¹⁵⁹ foreign mutual insurance

151. See text at notes 132-35 *supra*.

152. See text at notes 84-89 *supra*.

153. See text at note 110 *supra*.

154. *L. D. Reeder Contractors v. Higgins Indus., Inc.*, 265 F.2d 768 (9th Cir. 1959); *MacInnes v. Fontainebleau Hotel Corp.*, 257 F.2d 832 (2d Cir. 1958); *Fannin v. Chesapeake & Ohio Ry.*, 204 F.Supp. 154 (W.D. Pa. 1962); *Fisher Governor Co. v. Superior Court*, 53 Cal.2d 221, 347 P.2d 1 (1959); *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958); *cf. Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.*, 310 F.2d 20 (1st Cir. 1962).

155. See *Southern New England Distrib. Corp. v. Berkeley Fin. Corp.*, 30 F.R.D. 43 (D.Conn. 1962), *Connecticut Tool & Mfg. Co. v. Bowsteel Distrib.*, 24 Conn.Sup. 290, 190 A.2d 236 (1963), *Dumas v. Chesapeake & Ohio Ry.*, 253 N.C. 501, 117 S.E.2d 426 (1960), all requiring something in addition to "mere solicitation." The broad North Carolina statute does not purport to ground jurisdiction upon solicitation alone—limiting its application to "any cause of action arising . . . out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business. . . ."—See note 107 *supra*.

156. §§ 351.580, .620, RSMo 1959; §§ 351.630(1), (3)-(5), 355.375(1), (3)-(5), RSMo 1961 Supp.; Mo. R. Civ. P. 54.06 (c).

157. § 369.580, RSMo 1959; Mo. R. Civ. P. 54.21.

158. §§ 375.160—.162, .210, .220, .820, RSMo 1959; Mo. R. Civ. P. 54.20.

159. §§ 378.400—.410, RSMo 1959; Mo. R. Civ. P. 54.20.

companies;¹⁶⁰ nonresident securities issuers;¹⁶¹ foreign banking corporations;¹⁶² foreign corporate fiduciaries;¹⁶³ adjacent-state rural electric cooperatives;¹⁶⁴ nonresident milk manufacturers and processors;¹⁶⁵ nonresident motor carriers;¹⁶⁶ nonresident motorists;¹⁶⁷ and nonresident watercraft owners.¹⁶⁸ Missouri also has a freewheeling general service statute applicable to foreign corporations;¹⁶⁹ a strong court rule permitting local personal jurisdiction over Missouri domiciliaries served outside the state;¹⁷⁰ and since 1961 a statute in the Vermont pattern authorizing local jurisdiction over foreign corporations committing torts in Missouri.¹⁷¹

The constitutionality of the Missouri nonresident motorist statute's express application to the "executor, administrator or other legal representative" of a deceased nonresident motorist¹⁷² was solidly upheld by the Supreme Court of Missouri in *State ex rel. Sullivan v. Cross* (Mo. En Banc 1958).¹⁷³ There has been some difficulty with the statutory method of

160. § 379.280, RSMo 1959; Mo. R. Civ. P. 54.20.

161. § 409.100, RSMo 1959.

162. § 362.435, .445, RSMo 1959.

163. § 363.205 RSMo 1959.

164. § 394.200, RSMo 1959.

165. §§ 416.510-.560, RSMo 1959.

166. § 508.070, RSMo 1959; Mo. R. Civ. P. 54.19.

167. §§ 506.200-.320, RSMo 1959; Mo. R. Civ. P. 54.13-.18.

168. §§ 506.330-.340, RSMo 1959; Mo. R. Civ. P. 54.13-.18.

169. § 506.150(3) RSMo 1959: ". . . Service shall be made as follows: . . .

(3) Upon a domestic or foreign corporation or upon a partnership, or other unincorporated association, *when by law it may be sued as such*, by delivering a copy of the summons and of the petition to an officer, partner, a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof, or to any other agent authorized by appointment or required by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." (Emphasis added.) Cf. Mo. R. Civ. P. 54.06(c)(1).

170. Mo. R. Civ. P. 54.07(a): "Personal service outside the state of summons and petition may be made in any action upon any party who at the time of commencement of the action or at the time of service was domiciled in this state, and such service shall have the force and effect of personal service of summons and petition within this state and shall warrant a general judgment (*in personam*) against the party so served." The constitutionality of such exercise of jurisdiction has been made clear by *Milliken v. Meyer*, 311 U.S. 457 (1940); cf. *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878), quoted in text at note 32 *supra*. Cf. CAL. CIV. PRO. CODE § 417 (1963 Supp.), quoted in text at note 133 *supra*; California cases cited in note 134 *supra*; N.Y. CIV. PRAC. LAW AND RULES § 313 (1963). Whether a court rule meets the requirements of *Wuchter v. Pizzutti*, text at notes 72-3 *supra*, is another question.

171. §§ 351.630(2)-(5), 355.375(2)-(5), RSMo 1961 SUPP., quoted in text at note 217 *infra*.

172. § 506.210, RSMo 1959.

173. 314 S.W.2d 889 (Mo. En Banc 1958), noted 25 Mo. L. REV. 83 (1960). Cf. *Brooks v. National Bank*, 251 F.2d 37 (8th Cir. 1958).

notice of the service upon the Secretary of State: *Parker v. Bond* (Mo. En Banc 1959)¹⁷⁴ held that the copy of the notice of service mailed by the Secretary of State to the nonresident defendant must actually reach him; notice merely mailed with the reasonable probability that it would reach him does not suffice. The court thought its decision consistent with *Wuchter v. Pizzutti*,¹⁷⁵ in that "notice to an incorrect or false address would be no better notification than requiring no mailing at all."¹⁷⁶ Also, it has been held that an attempt to constructively serve a Missouri resident under the statute is void; the plaintiff must prove a prima facie case that the defendant is a nonresident.¹⁷⁷

Missouri's attitude toward the exercise of personal jurisdiction over outsiders is best shown in the application of its general service statute on foreign corporations. Section 506.150(3),¹⁷⁸ authorizes constructive service upon a foreign corporation "when by law it may be sued as such." On its face, this is equivalent to New Jersey's rule of procedure providing for similar service "subject to due process of law."¹⁷⁹ But state and federal courts in Missouri have been very careful in their application of this statute, demonstrating extreme reluctance to exercise jurisdiction. This can be shown only by presenting some of the cases in detail.

Wooster v. Trimont Mfg. Co. (Mo. Div. 1, 1947)¹⁸⁰ held jurisdiction proper in a suit to recover commissions due plaintiffs, manufacturers' agents with an office in St. Louis, for selling the products of Trimont, a Massachusetts corporation, whose president was served the process in Missouri. Trimont was engaged in the manufacture of pipe tools at its factory in Roxbury, Massachusetts—selling only to the wholesale trade. It furnished plaintiffs with catalogues, discount sheets, samples, sales data, and information on competitors' products, had its name placed upon plaintiffs' office door, on the office building directory, in the St. Louis telephone and post office directories, and on plaintiffs' letterhead, using plaintiffs' office as a

174. 330 S.W.2d 121 (Mo. En Banc 1959), *overruling* *Williams v. Shroul*, 294 S.W.2d 640 (St. L. Mo. App. 1956), *cert. denied*, 353 U.S. 929 (1957). The Court interpreted §§ 506.240 and 506.200(2), RSMo 1959 to preclude jurisdiction, by insufficient service, unless the notice be sent by "restricted, registered mail" and the nonresident either receipt for the delivery of the mail or the postal authorities establish that he refused to receive or receipt for it. *Cf. Saffeels v. Fruehauf*, 210 F. Supp. 70 (W.D. Mo. 1962).

175. See text at notes 72-3 *supra*.

176. *Supra* note 174 at 125.

177. *State ex rel. Lesli v. Aronson*, 362 S.W.2d 61 (St. L. Mo. App. 1962).

178. Quoted in note 169 *supra*.

179. See note 82 *supra*.

180. 356 Mo. 682, 203 S.W.2d 411 (Div. 1, 1947).

mailing address in its business. It employed missionary men to solicit large buyers in Missouri, held at least one salesmen's meeting in St. Louis, authorized plaintiffs to adjust complaints in Missouri and collect accounts there, and, from 1941 through 1943, received 1,420 customers as a result of plaintiffs' activities in its behalf and business totaling over \$114,000. The court believed the *International Harvester* "solicitation plus" rule applicable and, in view of the broadening tendencies in *International Shoe*, was "constrained to rule that, under the facts here, defendant was doing business in this state to the extent of making it amenable to the process served upon it."¹⁸¹

Hayman v. Southern Pacific Co. (Mo. Div. 1, 1955)¹⁸² denied jurisdiction over Southern Pacific, a Delaware corporation owning or operating railroad facilities in the west and southwest but none in Missouri, in a suit under the Federal Employers Liability Act by a Missouri resident who had been injured in California while working as a brakeman on a Southern Pacific train. Pullman and freight cars from Southern Pacific trains were brought into Missouri by other railways, and Southern Pacific had operated offices for solicitation purposes in St. Louis and Kansas City for 15 years, in the charge of local general agents and employing a total of 20 people. Occasionally collections were made or claims for loss handled at these offices. The court thought the case similar to *Green v. Chicago, Burlington & Quincy Ry.* ("mere solicitation"), distinguishing *Wooster v. Trimont Mfg. Co.* on the ground that there the obligation sued upon had arisen out of the defendant's activities in Missouri and in addition *Trimont* was a "solicitation plus" case. The court declared, "it seems to us that the most reasonable and satisfactory rule is to hold that a state has jurisdiction of any action against a foreign corporation which seeks to enforce an obligation or liability arising out of acts done in the state by its agents."¹⁸³ The holding purported to commit Missouri to the rule that jurisdiction would not be sustained unless the cause of action had arisen in Missouri from activity of the defendant there.¹⁸⁴ The court thought, in so ruling, it was following *International Shoe* which it considered a "solicitation plus"

181. *Id.* at 687, 203 S.W.2d at 414.

182. 278 S.W.2d 749 (Mo. Div. 1, 1955).

183. *Id.* at 752. The Court cited McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331 (1946).

184. See Comment, *Jurisdiction Over Unlicensed Foreign Corporations in Missouri*, 23 Mo. L. REV. 190 (1958).

case like *International Harvester*. Of course, the Missouri court need not exercise jurisdiction in any case, but when it suggested that denial of jurisdiction over Southern Pacific was required by *International Shoe*, particularly as applied in *Perkins v. Benguet Consolidated Mining Co.*,¹⁸⁵ it injected questionable law into the Missouri picture.

Collar v. Peninsular Gas Co. (Mo. Div. 1, 1956)¹⁸⁶ clearly showed Missouri's reluctance to exercise jurisdiction. Peninsular, a Michigan corporation, had sued Collar, a Kansas resident doing business in Kansas City, Missouri, in a Missouri court, and in the present action Collar brought suit against Peninsular for malicious prosecution of the earlier suit. Service was had upon Peninsular's president in the Phillips Hotel, downtown Kansas City, Missouri, shortly after trial in the first suit. It was held that in order to exercise jurisdiction in such a case the foreign corporation must be doing business in Missouri, and this required that the corporation "must have entered the state and engaged there in carrying on and transacting, through its agents, the ordinary business in which it is engaged," "some substantial part of its usual and ordinary business."¹⁸⁷ Peninsular's suit "was but a single, isolated act and not a part of the usual and customary business of the defendant."¹⁸⁸ Collar's argument that Peninsular had submitted to the jurisdiction of the courts of Missouri by its earlier suit was rejected. "We see nothing in that conduct which, according to our notions of fair play and substantial justice, would require a holding that the defendant be subjected to the jurisdiction of the courts of this state in the litigation of the instant claim."¹⁸⁹

Morrow v. Caloric Appliance Corp. (Mo. En Banc 1963)¹⁹⁰ sustained personal jurisdiction over Caloric, a Pennsylvania corporation, in a property damage suit brought by Missourians, Mr. and Mrs. Morrow, in the Circuit Court of Scott County, Missouri, for the destruction of the contents of their home by a fire caused by an allegedly defective Caloric gas range purchased from a local Missouri dealer. Service was had upon Walter L.

185. See text at notes 50-1 *supra*. Cf. Comment, *State Court Jurisdiction Over Foreign Corporations: Due Process Requirements for a Cause of Action Unrelated to Corporate Activity Within the Forum State*, 7 *St. L. U. L. J.* 168 (1962).

186. 295 S.W.2d 88 (Mo. Div. 1, 1956).

187. *Id.* at 91. The Court cited *State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge*, 331 Mo. 1015, 56 S.W.2d 28 (Div. 1, 1932) and *Nathan v. Planters' Cotton Oil Co.*, 187 Mo. App. 560, 174 S.W. 126 (K.C. 1915), both decided long before *International Shoe*.

188. *Id.* at 92.

189. *Id.* at 93.

190. 372 S.W.2d 41 (Mo. En Banc 1963).

Vocke in St. Louis County, Missouri, a manufacturer's representative and operator of a service agency for Caloric. From an office in his home in St. Louis County, Vocke represented Caloric in an exclusive territory covering the area within a radius of 150 miles from St. Louis. Caloric carried an advertisement for its appliances in the "yellow pages" of the St. Louis telephone directory listing Vocke's office address. Caloric supplied Vocke with business cards, letterheads, catalogues, and similar material, and Vocke received mail addressed to Caloric at the office address. Vocke was paid a commission on all Caloric appliances sold in his territory, and thus promoted Caloric's business as much as possible. He obtained orders from distributors and dealers, including Uregas Company in Cape Girardeau, the main Caloric distributor in outstate Missouri. Caloric advertised in newspapers and on television stations in Missouri. Basic prices of the appliances were set by Caloric. Some appliance orders were sold direct to dealers and others sold to Vocke, in lieu of consignment to the dealers. Caloric rented a warehouse in St. Louis, Missouri, and kept a large stock of appliances there, from which about half of all the orders from Vocke's territory were supplied. Caloric's business in Vocke's territory amounted to about \$200,000 annually. The court believed that whether Caloric was amenable to local jurisdiction in Missouri depended upon its "doing business" there, and held that it was. Reviewing the *Trimont*, *Hayman*, and *Collar* cases, the court thought the activities of Caloric in Missouri sufficient to satisfy due process, and that under the *Hayman* rule, the liability had arisen out of an act done by a Caloric agent or agents in the state. Moreover, the case squarely fit the *Trimont* ruling, since there was a continuous course of Missouri business, rather than the single or isolated act present in the *Collar* case. The court quoted extensively from *Hayman*, perpetuating the view that *International Shoe* was a "solicitation plus" case with no discussion of the real meaning of that case, its subsequent application by state and federal courts or even by the Supreme Court, or its *minimum contacts* test and "fair play" emphasis. The court's analysis was couched in the framework of the demands of fourteenth amendment due process; in fact, the case was before it only for that reason, having been transferred there from the Springfield Court of Appeals by reason of the federal constitutional issue.¹⁹¹

This line of Missouri decisions grounds local jurisdiction on the "doing business" test which was wholly abandoned by the Supreme Court in

191. 362 S.W.2d 282 (Spr. Mo. App. 1962).

International Shoe in 1945.¹⁹² The "doing business" test has a quality of objectivity lacking in the *minimum contacts* test which replaced it, and the Missouri court may be jurisprudentially sound in adhering to it. The *minimum contacts* test has opened the door to what may become a Pandora's box, weakening state sovereignty in a manner similar to encroaching federal power¹⁹³ and creating an atmosphere conducive to conflict between the states. But there is no assurance the Missouri court is conscious of the direction it is heading in these cases. Its opinions apply the "doing business" test as a requirement of fourteenth amendment due process or the *International Shoe* case itself, rather than as purposeful Missouri law.

The major drawback of the "doing business" test, and this appears particularly in the Missouri cases, is its preoccupation with facts removed from the cause of action sued upon. The *Caloric* case is a good example: plaintiffs Morrow sued Caloric for fire damage to the contents of their home caused by a defective gas range, yet in order to decide the jurisdictional issue the court examined the details of the relationship between outsider Caloric and agent Vocke, other business relationships Caloric had with Missouri, and even the amount of gross sales of Caloric appliances in the state. The Morrows' right to sue in a convenient local court is dependent upon facts of no concern or importance to them or their property loss. The *minimum contacts* test with its emphasis upon "fair play" obviates much of this, and a part of the trend in American law since *International Shoe* is to obliterate this distinction between jurisdictional facts and the facts giving rise to the litigation. The present case development under the *minimum contacts* test is toward an appraisal of more realistic jurisdictional facts.

True, *Caloric* and *Trimont* allowed local jurisdiction, however grounded. The *Hayman* denial of jurisdiction also was sound; that case was a suit under the Federal Employers Liability Act, section 6 of which provides that the action "may be brought . . . in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business . . ."¹⁹⁴ (emphasis added), so the "doing business" test had a real application, since Southern Pacific did not reside

192. Justice Black, for the Court, in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957): "In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations."

193. See note 9 *supra*.

194. 45 U.S.C. § 56 (1958).

in Missouri and the cause of action did not arise there. The *Collar* case is the doubtful one; after Peninsular had sued Collar in a Missouri court, it seems unfair to require him to go to an inconvenient court in Michigan to sue Peninsular for malicious prosecution of the earlier suit.

More important, perhaps, the Missouri court's continued adherence to the "doing business" test as a due process requirement under *International Shoe* has left the federal courts in Missouri without proper direction. Recent cases in those courts have shown a striking reluctance to exercise jurisdiction, sometimes based upon distinctions, apparently taken from Missouri law, wholly out-of-tune with the present trend in American law since *International Shoe*.

Pucci v. Blatz Brewing Co. (W.D. Mo. 1955)¹⁹⁵ involved an action against Blatz, a Wisconsin corporation, which formerly had been licensed to do business in Missouri but had abandoned that license four years before the suit. Service was had upon one Rocco Bunimo, a Blatz vice president, while he was staying at a hotel in Kansas City, Missouri, and jurisdiction was predicated upon Blatz' activities within the state. Blatz had no office, place of business or regular salesman in Missouri and maintained no stock of merchandise there, but it did sell great quantities of beer through local Missouri distributors, f.o.b. Milwaukee, Wisconsin, and had one or two employees whose sole duties were to encourage and develop a demand for Blatz beer in Missouri. These local distributors, including McKissick in Kansas City, were independent entrepreneurs who received advertising allowances from Blatz, displayed the Blatz legend on their delivery trucks and were listed in telephone directories under the name "Blatz Beer." The alleged cause of action arose out of a Missouri real estate transaction entered into in 1944, six years before Blatz surrendered its license to do business in Missouri, and was unrelated to its present activities there. Denying personal jurisdiction, the court held, under Missouri law, the defendant must be "doing business" in the state to be subject to jurisdiction, and "doing business" was equivalent to "'continuous and systematic' activity in, or contact with, or within, the state of Missouri."¹⁹⁶ The court, recognizing that "Missouri does not assert the full constitutional breadth of process power, as did the state of Washington" in *International Shoe*,¹⁹⁷ ruled even that case would not permit jurisdiction on these facts,

195. 127 F.Supp. 747 (W.D. Mo. 1955).

196. *Id.* at 749.

197. *Id.* at 750.

where Blatz' conduct was limited to isolated activities in Missouri and the cause of action was unconnected with those activities. Though the court accurately detected Missouri's reluctance to exercise jurisdiction and thus probably reached a decision in accord with Missouri law, its ruling that *International Shoe* would not permit jurisdiction in this case is certainly questionable, especially since *Travelers Health Association v. Virginia*,¹⁹⁸ applying *International Shoe* to less activity in Virginia than Blatz engaged in in Missouri, and in view of the fact that the cause of action arose in Missouri.

Fiore v. Family Publications Service (E.D. Mo. 1957),¹⁹⁹ involved a suit by the former manager of Family Publications' St. Louis office for damages for failure to supply a service letter at termination of employment as required by Missouri law.²⁰⁰ Family Publications, a New York corporation, with its main offices in New York City and New Jersey, maintained a St. Louis office, employing independent salesmen there to solicit magazine subscriptions which were delivered to that office and forwarded to New Jersey for acceptance or rejection. It employed an independent collection force, made all its employment contracts in New York, and sent funds to the St. Louis office for local expenses and payment for solicited orders. Service of process was made upon the person in charge of the St. Louis office. The court held jurisdiction proper, declaring, "surely it is not undue for the defendant to be required to answer for a wrong arising out of this employment which is at the very core of its activities."²⁰¹ The court purported to apply *International Harvester* and *International Shoe*, and the Missouri *Hayman* and *Collar* cases. The decision is an exceptional one among Missouri cases, finding jurisdiction on such limited local activity, but may be consistent with the rest since the action arose directly out of Family Publications' local activity. *Shannon v. Brown & Williamson Tobacco Corp.* (W.D. Mo. 1958),²⁰² however, denied jurisdiction on similar facts in a suit by Shannon, a former employee of the defendant B & W, a Delaware corporation with its principal office in Kentucky. Shannon had been employed as a solicitor under Jones, B & W's division sales manager, who resided in Springfield, Missouri, for the purpose of calling upon retailers to stimulate sales of B & W products and encouraging patronage of local

198. See text following note 52 *supra*.

199. 157 F.Supp. 572 (E.D. Mo. 1957).

200. § 290.140, RSMo 1959.

201. 157 F.Supp. at 575.

202. 167 F.Supp. 493 (W.D. Mo. 1958).

independent wholesalers and jobbers in Missouri who handled B & W products. B & W had no office or property in Missouri, gave Shannon instructions from its office in Kentucky and paid him by check drawn there. Service was had upon Jones in Springfield. There is no clear indication in the opinion as to what the suit is about, but presumably it arose out of the employment relationship. The court held the case within the "mere solicitation" rule, citing and discussing *Green v. Chicago, Burlington & Quincy Ry.*, *Hayman*, *Collar*, and *Trimont*, among other cases. The court stated: "Missouri has expressed a willingness to extend its jurisdiction over foreign corporations to the limits allowed within the bounds of due process."²⁰³ The same court had stated to the contrary three years earlier in *Pucci*,²⁰⁴ and such a misunderstanding must be traceable to the Missouri court's opinions applying the "doing business" test as a supposed requirement of due process under *International Shoe*. The federal court for western Missouri did not cite *Fiore*, decided by the federal court for eastern Missouri, and the two cases seem inconsistent.

Long v. Victor Products Corp. (8th Cir. 1961),²⁰⁵ typically denied jurisdiction, in an action brought in the federal court for eastern Missouri, by Missouri citizens against Victor, a New York corporation engaged in the manufacture and sale of refrigeration equipment in Maryland and West Virginia. The suit was brought for breach of a contract executed in Maryland, and service was had upon Victor's chairman of the board and a vice president while they were staying at the Chase Hotel in St. Louis. Victor maintained no office or property in Missouri, but employed a salesman there who solicited orders and had the title of district sales manager. During the preceding two years it sold and shipped equipment to forty purchasers in Missouri, but serviced this equipment only in Maryland. From 1958 to 1960, it displayed equipment at four separate conventions or meetings in St. Louis at the invitation and expense of the sponsors (7up, Dr. Pepper, etc.), and at one of these meetings, sold units of equipment to purchasers outside Missouri and shipped this equipment directly from a display at the St. Louis hotel meeting site. The court held Victor's local activities "mere solicitation," citing *Green v. Chicago, Burlington & Quincy Ry.*, *Hayman*, and *Shannon v. Brown & Williamson Tobacco Corp.* After citing and discussing a number of cases, the court stated: "While, as we

203. *Id.* at 494.

204. See text at note 197 *supra*.

205. 297 F.2d 577 (8th Cir. 1961).

have noted, these cases are often close, and the line defining the limit of jurisdictional due process is not always easy to locate, we are in agreement with the district court's conclusion that, under the circumstances present here, jurisdiction was lacking."²⁰⁶

Wash v. Western Empire Life Insurance Co. (8th Cir. 1962)²⁰⁷ affirmed an order of the federal court for western Missouri denying jurisdiction in an action by Mr. and Mrs. Wash, Missourians, against Western, a Colorado insurance corporation, to recover the proceeds of a life insurance policy issued by Western to their son, who had since died. Western had not legally qualified to do business in Missouri and claimed it had never done any such business: the application for the particular life insurance involved read on its face that it was dated at Denver, Colorado, and witnessed there. Plaintiffs' affidavits established as a matter of fact that the application had been executed, the policy sold, and the initial premium paid in Missouri. Apparently, a Colorado agent for Western was related to a member of the Wash family and issued the policy in Missouri without any authority to do so or even knowledge on the part of Western. Service was had under the unauthorized insurers process statute.²⁰⁸ The court ruled a foreign insurance company like Western would not be brought within the jurisdiction of Missouri courts when it had no knowledge of the local transaction and had not acquiesced in it, disregarding the *International Shoe* and *McGee* cases on the ground that the issue was not Missouri's "'power' to subject" Western to jurisdiction, but rather "whether or not the legislature, in enacting the substituted service section, intended that knowledge on the part of the appellee be a prerequisite to valid service of process."²⁰⁹ The court could only guess what the Missouri law on that point was. This is a clear example of judicial reluctance to exercise jurisdiction, especially so, since the case law presented to the court firmly upheld jurisdiction. The Colorado agent's issuance of the policy was the responsibility of Western, which enabled him to do so, and the risk of his authority should not fall on the beneficiaries under the policy, at least as far as jurisdiction is concerned. The ruling injects a new roadblock to jurisdiction: a foreign corporation now can argue that its alleged local activity, or even some part of it, was not authorized, and cast further

206. *Id.* at 583.

207. 298 F.2d 374 (8th Cir. 1962).

208. §§ 375.160-.161, RSMo 1959.

209. *Supra* note 207 at 378.

doubt upon whether the requisite quantum of "doing business" in Missouri is shown.

Jennings v. McCall Corporation (W.D. Mo. 1962)²¹⁰ denied jurisdiction in an interesting case. McCall, a Delaware corporation with its principal office in New York City, is engaged in the business of publishing magazines (McCall's and Redbook) and in the business of design, production, and sale of printed patterns used to make dresses and other garments. Stores in Missouri regularly purchase patterns from McCall's offices located in Chicago and New York City. McCall employed a salesman named Bleuher out of its New York office, who covered Illinois, Wisconsin, Minnesota, and Missouri for the pattern division, soliciting pattern sales and servicing existing accounts. McCall also employed three women who operated out of a rented office in Kansas City, soliciting magazine subscriptions by telephone. Plaintiff Bertha Jennings, in 1956, attended a meeting of the Missouri Home Economics Association, held in Kansas City, Missouri, at which Kit Mason, director of McCall's pattern division, presented patterns for spring fabrics. Bertha Jennings talked to Mason about a novel and unique idea she had to improve dress patterns and learned how to write the proper McCall office in New York City. She then corresponded with McCall in New York City about her idea and sent the confidential details, but McCall advised her the idea would not be used and returned the letter containing the details. Somewhat later, McCall announced a "revolutionary" improvement in dress patterns, which Bertha Jennings claimed was hers, and she brought this suit. Service of process was had upon Bleuher while he was in Kansas City, Missouri. The court, admitting McCall was conducting sufficient activities and business in Missouri to render it subject to the jurisdiction of Missouri courts, declined to exercise jurisdiction because "notwithstanding the nature and extent of its business, the particular nature of business which is the basis of this suit, was not a part of its business activities in the State of Missouri."²¹¹ *Trimont* was distinguished since there the cause of action arose out of the business transacted in Missouri; here, the suit pertained "to a phase of its business that was entirely in the State of New York,"²¹² and "that insofar as the relationship between the plaintiff and defendant is concerned, it was not doing business within the State of Missouri, and not subject to process

210. 218 F.Supp. 662 (W.D. Mo. 1962), *aff'd*, 320 F.2d 64 (8th Cir. 1963).

211. *Id.* at 666, 320 F.2d at 66-67.

212. *Ibid.*

within this state."²¹³ The view that the cause of action sued upon must arise out of the foreign corporation's activities in the forum is consistent with the ruling by the Missouri court in *Hayman*, though in that case the cause of action itself arose entirely outside the state.

There is nothing in *International Shoe* or its progeny to require this kind of ruling in the *Jennings* case. Where there was sufficient local activity by the foreign corporation in the state, as the *Jennings* court admitted there was, *Perkins v. Benguet Consolidated Mining Co.*²¹⁴ held the fact that the cause of action arose outside the forum, and was unrelated to the defendant's activity there, no bar to the exercise of personal jurisdiction. In *Jennings* it is not clear where the cause of action arose; the court never considered that question. If, as a matter of fact, it did arise in whole or in part in Missouri, that would be all the more reason for the exercise of jurisdiction over McCall. *Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.*²¹⁵ found jurisdiction on similar facts, reversing the trial court which had denied jurisdiction on the ground that the contract sued upon had no relation with the foreign corporation's local activities.

The major drawback of the "doing business" test, its preoccupation with facts removed from the cause of action sued upon, is compounded by the *Jennings* ruling. The Missouri court's recent *Caloric* decision found jurisdiction by reason of Caloric's extensive activity in Missouri, which was at best remotely connected with the plaintiffs' suit, but *Jennings* rules there must be this remote connection; otherwise jurisdiction is to be denied. If the *Jennings* ruling is correct, and it can draw some support from *Hayman*, as mentioned above, personal jurisdiction over outsiders in Missouri is further restricted; the trend in Missouri law would then appear to be opposed to the general trend in American law, rather than merely dragging along behind it. In effect the *Jennings* ruling elevates the "mere solicitation" rule²¹⁶ to one of "mere doing business." Missouri law in this respect is less favorable for the exercise of local jurisdiction than Supreme Court decisions dating back to 1907. If and when Missouri courts come to grips with the *minimum contacts* test as announced in *International Shoe* and applied in later cases, anomalies of this sort can be avoided. But so long as the "doing business" test is adhered to and applied as a supposed

213. *Id.* at 667, 320 F.2d at 67, 70-2.

214. See text at notes 50-1 *supra*.

215. Text at notes 121-25 *supra*.

216. For a statement of rule, see text at notes 44-5 *supra*.

requirement of due process under *International Shoe*, anomalies will continue, as an unavoidable consequence of attempts to apply inconsistent legal principles (from the "doing business" test on the one hand to *International Shoe* on the other) to the examination of jurisdictional facts removed from and often irrelevant to the actual facts sued upon.

The Missouri legislature has provided an opportunity to clear up some of these difficulties by its 1961 enactment of the following Vermont-style statute authorizing local jurisdiction over foreign corporations committing torts in Missouri:²¹⁷

2. If a foreign corporation commits a tort, excepting libel and slander, in whole or in part in Missouri against a resident or nonresident of Missouri, such act shall be deemed to be doing business in Missouri by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of state of Missouri and his successors to be its agent and representative to accept service of any process in any actions or proceedings against the foreign corporation arising from or growing out of the tort. Service on the secretary of state of any such process shall be made by delivering to and leaving with him or with any clerk having charge of the corporation department of his office, duplicate copies of the process. The committing of the tort shall be deemed to be the agreement of the foreign corporation that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served personally within the state of Missouri.

3. In the event that any process, notice, or demand is served on the secretary of state, he shall immediately cause a copy thereof

217. §§ 351.630(2)-(5), 355.375(2)-(5), RSMo 1961 SUPP. Cf. Jacobson, *The Enlargement of Jurisdiction Over Unlicensed Foreign Corporations in Missouri—The "Single-Act Statute,"* 31 U.K.C. L. REV. 292 (1963). House Bill No. 718, considered by the 72nd General Assembly in 1963, but not enacted, would have gone further; it provided:

Section 1. 1. Personal service outside the state of summons and petition may be made in any action upon any party who has submitted himself to the jurisdiction of the courts of this state, and the service shall have the force and effect of personal service of summons and petition within this state and shall warrant a general judgment in personam against the party so served.

2. Any individual who commits a tortious act within this state thereby submits himself to the jurisdiction of the courts of this state as to any cause of action arising from the act.

3. Service outside the state as provided in this section shall be made by an officer authorized by law to serve process in civil actions within the state or territory where the service is made, or by his deputy, by delivering a copy of the summons and petition personally to the party to be served, . . .

to be forwarded by registered mail, return receipt requested, addressed to the secretary of such corporation at its principal office as the same appears in the records of the secretary of state. . . .

This shows a broadening policy for Missouri. The statute is framed in accord with the *minimum contact* standard, but even under the "doing business" test, a foreign corporation committing a local tort can now be treated as "doing business" in Missouri. The statute could have been applied in the *Caloric* case,²¹⁸ would have permitted jurisdiction in *Collar v. Peninsular Gas Co.*, and should have helped Bertha Jennings. There has been little hesitation in applying this kind of statute retroactively in other states, but such application has been denied in Missouri.²¹⁹ The constitutionality of the statute, though never passed upon by the Supreme Court, does not appear in doubt.²²⁰ Active application of the statute could precipitate a real change in the cautious attitude of Missouri courts regarding the exercise of local personal jurisdiction, and bring Missouri more in line with the present American trend.

IV. SUMMARY AND CONCLUSION

The American law of personal jurisdiction has been anchored in a territorial framework by state boundary lines. At least since *Pennoyer v. Neff* (U.S. 1878), distinct methods for exercising jurisdiction by local personal service and constructive service have evolved. Personal service of process upon individual outsiders within the forum state, however temporarily, has become a ground for local jurisdiction. In the case of foreign corporations, since such personal service was impossible under prevailing views as to corporate structure and authority, indirect methods were devised grounding jurisdiction upon local "presence" or "doing business" with a proper kind of constructive service. These developments led to the recognition of two

218. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, text at notes 97-101 *supra*, *Deveny v. Rheem Mfg. Co.*, text at notes 104-05 *supra*, and *Shepard v. Rheem Mfg. Co.*, text at notes 112-13 *supra*.

219. State *ex rel.* *Clay Equipment Corp. v. Jensen*, 363 S.W.2d 666 (Mo. En Banc 1963), holding the statute operates prospectively only since otherwise it would change the legal effect of past transactions. Cf. text at notes 90-2 *supra*.

220. The trend of recent state and federal court cases presented *supra*, text at notes 74-155, is the best proof. The Supreme Court in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), did cite in a footnote with apparent approval *Smyth v. Twin State Improvement Corp.*, text at note 103 *supra*, upholding the constitutionality of the Vermont statute under due process, and the Missouri statute is patterned after the Vermont statute.

fundamental requirements: that there be some power-basis for the forum court to act upon the outsider, such as the outsider's "doing business" in the forum state, and that certain procedural safeguards be undertaken and satisfied to protect the outsider's rights, such as due notice of the suit and an opportunity to be heard.

International Shoe Co. v. Washington (U.S. 1945) abandoned the rigid bases "presence" and "doing business," and announced a flexible due process standard for personal jurisdiction over foreign corporations, grounded upon local activity or contacts—within the vague confines of "fair play." This flexible standard, shifting the emphasis to "traditional notions of fair play and substantial justice" came to be called the *minimum contacts* test. As the test was applied in state and federal courts, territorial limitations remained as little more than grudging geographical practicality. The power-basis requirement absorbed the new flexibility, and subsequent statutes and court decisions in many states grounded personal jurisdiction upon ever-narrowing and more particularized power-bases or local contacts, such as the outsider's commission of a single tortious act or its presence upon a single insurance risk within the forum state. A trend, in state and federal courts, resembling a frenzy to exercise jurisdiction appeared, sometimes overriding applicable older state statutes and case precedent. *Minimum contacts* became more and more minimal. The Supreme Court gave its stamp of approval to this trend in *McGee v. International Life Insurance Co.* (U.S. 1957).

This trend has not spread to Missouri. The Missouri Supreme Court repeatedly has demonstrated a reluctance and cautious approach in the exercise of jurisdiction over outsiders. In its decisions, the Missouri court has treated *International Shoe* as little more than a variation on earlier law requiring that personal jurisdiction be grounded upon a foreign corporation's substantial "presence" or "doing business" in the forum state. Its opinions have applied *International Shoe* as though the Supreme Court in that case had established a due process requirement that the outsider be present to the extent of "doing business" in the state. This interpretation and application of *International Shoe* has caused considerable confusion in the Missouri cases, particularly those in the federal courts for Missouri.²²¹

221. *Fiore v. Family Publications Service*, 157 F.Supp. 572 (E.D. Mo. 1957), in an opinion by the late Judge Weber, seems to have correctly applied *International Shoe*; see text at notes 199-201 *supra*.

The *minimum contacts* test at best has been given a ritualistic application, conforming it to the older "doing business" standard.

Missouri courts must sooner or later come to grips with the *minimum contacts* test as it is applied by the Supreme Court and other state and federal courts throughout the nation. The Missouri Supreme Court need not accept the *minimum contacts* test: it has proven to be no panacea and may turn out to be a Pandora's box. Grounds for local personal jurisdiction are for the Missouri court to determine, limited only by constitutional requirements which are wide open under the *minimum contacts* test. The Missouri court has the leeway and should recognize its power and duty in this area at the first opportunity, putting an end to the present confusion stemming from its interpretation and application of *International Shoe* to date. The 1961 Missouri legislature enacted a jurisdiction-enlarging statute presumably indicating a policy of expanded local personal jurisdiction.²²² This should jar Missouri courts out of their lethargy. There is a strong need on the national scene for a constructive approach to the matter of personal jurisdiction, which has led to occasional reckless exercises of jurisdiction over outsiders.²²³ Equally important, there is a special need for new direction in Missouri where reluctance to take jurisdiction on occasion has appeared pathetic.²²⁴

222. See text at notes 217-20 *supra*.

223. Consider the implications of *Gray v. American Radiator & Standard Sanitary Corp.*, text at notes 97-101 *supra*; *Hoagland v. Springer*, text at notes 118-19 *supra*; and *Pugh v. Oklahoma Farm Bureau Mut. Ins. Co.*, text at notes 136-39 *supra*.

224. Consider *Jennings v. McCall Corp.*, text at notes 210-16 *supra*.

II. DIVORCE

A. *Jurisdiction of Missouri Courts to Divorce*

While the two meanings are often inseparable in the cases, it should be noted that the statutory "jurisdiction" of courts³ is not always the same as "jurisdiction" in the sense of that power which entitles a decree to full faith and credit in the interstate concept. When reference is made to "jurisdiction," an effort has been made to delineate which meaning is used.

1. Residence and Domicile

a. Of one party as the foundation of jurisdiction

The Missouri courts, as a general principle, have based jurisdiction to divorce almost exclusively upon the theory, approved as a foundation for requiring full faith and credit in *Williams v. North Carolina I*,⁴ that the marital status of the parties is a *quasi-res* in the domicile of either party. If a plaintiff is a domiciliary of the State of Missouri, the courts have jurisdiction over the marital status with power to divorce upon personal, constructive or mailed service to the other party.⁵ Perhaps one of the clearest and leading expressions of this concept is contained in *Howey v. Howey*:⁶

. . . (1) A divorce suit is a proceeding in rem; (2) the status of husband and wife is the res; (3) this status attaches to each of the parties; (4) such status (the res) goes with each of the parties to their respective domiciles; (5) if they happen to have separate domiciles, the wife can have a separate domicile from the husband; (6) every state has the sovereign right to determine the domestic relations of all persons having their domicile within its territory;

3. In this regard, it should always be borne in mind that divorce is basically a statutory power granted to the courts and that the exercise of this power is limited to statutory authority. *Watts v. Watts*, 304 Mo. 361, 263 S.W. 421 (1924); *Chapman v. Chapman*, 269 Mo. 663, 192 S.W. 448, *reversing* 194 Mo. App. 483, 185 S.W. 221 (St. L. Ct. App. 1916); *Stack v. Grimm*, 239 Mo. 340, 143 S.W. 450 (1911); *Tureck v. Tureck*, 207 S.W.2d 780 (St. L. Mo. App. 1948).

4. 317 U.S. 287 (1942). See also *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954).

5. *Howey v. Howey*, 240 S.W. 450 (Mo. En Banc 1922), *cert. denied* 269 U.S. 730 (1922); *Wagoner v. Wagoner*, 287 Mo. 567, 229 S.W. 1064 (1920); *Howard v. Strode*, 242 Mo. 210, 146 S.W. 792 (1912); *Lieber v. Lieber*, 239 Mo. 1, 143 S.W. 458 (1911); *Anthony v. Rice*, 110 Mo. 223, 19 S.W. 423 (1892); *State ex rel. Miller v. Jones*, 349 S.W.2d 534 (St. L. Mo. App. 1961); *Hanna v. Hanna*, 224 Mo. App. 1142, 32 S.W.2d 125 (St. L. Ct. App. 1930); *Keena v. Keena*, 222 Mo. App. 825, 10 S.W.2d 344 (St. L. Ct. App. 1928).

6. *Howey v. Howey*, *supra* note 5.

(7) where either husband or wife has a domicile in the state, the courts of the state have jurisdiction over the status (the res) and for proper causes can dissolve the marriage relations; and (8) the decree so pronounced is a judgment in rem.

The publication statutes, when employed here, must be strictly complied with.⁷

If, on the other hand, the party seeking the divorce is not a domiciliary, the Missouri courts have almost universally held they are without jurisdiction.⁸ This is usually the view even when the conduct upon which the grounds are based occurred within the state.⁹ Once jurisdiction is acquired, however, domicile does not appear to be necessary to continue jurisdiction, and the power of the court to divorce may survive a change of domicile after instigation of suit, but prior to the rendition of the decree, although the rule is not clear in this regard.¹⁰

It may be noted that the Missouri statute requires a *residence* of one year rather than *domicile*.¹¹ Judicial interpretation has usually been that the two are equivalent and that *resident*, as used in Section 452.050, RSMo 1959, means *domicile*.¹² This section also grants jurisdiction to circuit courts to divorce in the absence of a year's residence or domicile where the acts constituting grounds for divorce are committed within the state.¹³ In this event, however, domicile is still required to confer jurisdiction although it need not be for a year.¹⁴ In some instances, the application of this require-

7. Cox v. Cox, 115 S.W.2d 104 (Spr. Mo. App. 1938).

8. Wright v. Wright, 350 Mo. 325, 165 S.W.2d 870 (En Banc 1942); Kruse v. Kruse, 25 Mo. 68 (1857); Phelps v. Phelps, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); McConnell v. McConnell, 167 Mo. App. 680, 151 S.W. 175 (St. L. Ct. App. 1912); Pate v. Pate, 6 Mo. App. 49 (St. L. Ct. App. 1878).

9. Kruse v. Kruse, 25 Mo. 68 (1857).

10. In Schneider v. Friend, 361 S.W.2d 308 (St. L. Mo. App. 1962), plaintiff had acquired a Missouri domicile at the time her petition was filed but had moved without the state prior to the rendition of the final decree. The court held that even if she had changed her domicile the Missouri courts retained jurisdiction. This may be simply *dictum*, however, because the court made it clear it was not necessarily convinced that a change in residence had taken place.

It is clear under the Missouri decisions, however, that once the decree has been entered, jurisdiction continues for the purpose of modification. See cases under note 89 *infra*.

11. § 452.050, RSMo 1959.

12. Scotton v. Scotton, 359 S.W.2d 501 (Spr. Mo. App. 1962); Grant v. Grant, 324 S.W.2d 382 (Spr. Mo. App. 1959); State *ex rel.* Stoffey v. LaDriere, 273 S.W.2d 776 (St. L. Mo. App. 1954); Phelps v. Phelps, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952).

13. § 452.050, RSMo 1959.

14. Phelps v. Phelps, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); McConnell v. McConnell, 167 Mo. App. 680, 151 S.W. 175 (St. L. Ct. App. 1912).

ment has been based upon the statutory language requiring the action to be brought in the county of plaintiff's residence.¹⁵ Another view is that this last statute is not jurisdictional but controls venue only,¹⁶ in which case the requirement of domicile must be considered to be court-attached to fulfill the requirements for full faith and credit. There is no statutory requirement that the acts constituting grounds for divorce have been committed within the state and, so long as the domicile or residence requirement of one year is met, the courts will grant relief for acts committed elsewhere, but which constitute grounds under the Missouri law.¹⁷

Our courts thus seem to have firmly established that jurisdiction to divorce is founded upon the marital status being before the court because of the domicile or residence of one of the parties. In so doing, it has long been recognized that this status may be divided between two states where the parties, after separation, have established separate domiciles.¹⁸ While the domicile of either party may confer jurisdiction in the interstate sense, however, the Missouri courts have restricted their power to divorce to cases where the plaintiff is the domiciliary, holding that they are without jurisdiction to grant a divorce to a non-resident where only the defendant has a Missouri domicile¹⁹ and that they cannot consider a counterclaim or crossbill filed by a non-resident in response to the petition of a Missouri domiciliary.²⁰ These cases appear to be based solely upon statutory considerations.

b. What constitutes domicile or residence

As already noted, *residence* and *domicile* are usually regarded as one and the same by the Missouri courts.²¹ In order to establish a domicile, two

15. § 452.040, RSMo 1959. *Kruse v. Kruse*, 25 Mo. 68 (1857); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); *Pate v. Pate*, 6 Mo. App. 49 (St. L. Ct. App. 1878).

16. *Montgomery v. Montgomery*, 185 S.W.2d 870 (Spr. Mo. App. 1945); *Walton v. Walton*, 6 S.W.2d 1025 (St. L. Mo. App. 1928); See also *Werz v. Werz*, 11 Mo. App. 26 (St. L. Ct. App. 1881) where the court treated the statute as jurisdictional, but also as subject to waiver.

17. *Hays v. Hays*, 324 Mo. 810, 24 S.W.2d 997 (1930).

18. *Howey v. Howey*, *supra* note 5; *State ex rel. Miller v. Jones*, 349 S.W.2d 534 (St. L. Mo. App. 1961).

19. *Kruse v. Kruse*, 25 Mo. 68 (1857); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); *McConnell v. McConnell*, 167 Mo. App. 680, 151 S.W. 175 (St. L. Ct. App. 1912).

20. *Price v. Price*, 281 S.W.2d 307 (Spr. Mo. App. 1955); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); *Pike v. Pike*, 239 Mo. App. 655, 193 S.W.2d 637 (K.C. Ct. App. 1946); *Butler v. Butler*, 252 S.W. 734 (Spr. Mo. App. 1923).

21. *Supra* note 12.

elements must ordinarily exist: (1) actual bodily presence in a location, and, (2) the intention to remain there either permanently or indefinitely.²²

Regarding the first of these requirements, the presence must be actual and constructive presence will not suffice.²³ The presence need not be continuous however, even when meeting the statutory requirement for a year's residence.²⁴ Once the domicile is established, it is retained even during long periods of physical absence.²⁵

While certain presumptions concerning domicile are sometimes held,²⁶ it is always a question of fact to be determined by the court in Missouri²⁷

22. *Nolker v. Nolker*, 257 S.W. 798 (Mo. En Banc 1924); *Schneider v. Friend*, 361 S.W.2d 308 (St. L. Mo. App. 1962); *Scotton v. Scotton*, 359 S.W.2d 501 (Spr. Mo. App. 1962); *Madsen v. Madsen*, 193 S.W.2d 507 (Spr. Mo. App. 1946); *Lewis v. Lewis*, 238 Mo. App. 173, 176 S.W.2d 556 (K.C. Mo. App. 1943); *Bradshaw v. Bradshaw*, 166 S.W.2d 805 (Spr. Mo. App. 1942); *Trigg v. Trigg*, 226 Mo. App. 284, 41 S.W.2d 583 (K.C. Mo. App. 1931); *In re Ozias' Estate*, 29 S.W.2d 240 (K.C. Mo. App. 1930).

23. *Pate v. Pate*, 6 Mo. App. 49 (St. L. Ct. App. 1878). In this case a woman sought to assert residence or domicile upon the theory that a married woman's residence follows that of her husband without regard to her actual presence.

24. *Scotton v. Scotton*, 359 S.W.2d 501 (Spr. Mo. App. 1962); *Grant v. Grant*, 324 S.W.2d 382 (Spr. Mo. App. 1959); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1954); *Madsen v. Madsen*, 193 S.W.2d 507 (Spr. Mo. App. 1946); *Trigg v. Trigg*, 226 Mo. App. 284, 41 S.W.2d 583 (K.C. Ct. App. 1931).

25. This is particularly true of personnel in military service where the fact of service would tend to rebut any intention to change domicile. *Oliver v. Oliver*, 325 S.W.2d 33 (St. L. Mo. App. 1959); *Barth v. Barth*, 189 S.W.2d 451 (St. L. Mo. App. 1945); *Trigg v. Trigg*, 226 Mo. App. 284, 41 S.W.2d 583 (K.C. Ct. App. 1931).

26. Missouri has recognized, on at least one occasion, a presumption of fact, not law, that a residence once established is presumed to continue until a change is shown. *Gillip v. Butts*, 77 S.W.2d 1014 (K.C. Mo. App. 1934).

The following presumptions have been recognized elsewhere and might, in a proper case, be successfully advocated in Missouri courts:

(a) That domicile follows the place of actual physical presence, *Burr's Adm'r v. Hatter*, 24 Ky. 721, 43 S.W.2d 26 (1931); *Pattison v. Firor*, 146 Md. 243, 126 Atl. 109 (1924); *Stewart v. Stewart*, 117 Ore. 157, 242 Pac. 852 (1926); *In re Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303, cert. denied, 287 U.S. 660 (1932).

(b) That a former domestic domicile is favored over an acquired foreign domicile, *Strathmann v. Kinkelaar*, 105 Okl. 290, 233 Pac. 215 (1925); *In re Lyon's Estate*, 117 Misc. 189, 191 N.Y. Supp. 260 (Supp. Ct. 1921), aff'd 192 N.Y. Supp. 936, 200 App. Div. 918 (Sup. Ct. App. Div. 1922).

(c) That domicile, once acquired is presumed to continue, *Bassett v. Bassett*, 68 N.E.2d 409 (Ohio 1946); *In re Strebeigh's Estate*, 176 Misc. 381, 27 N.Y.S.2d 569 (Surr. Ct. 1941); *Smith v. Smith*, 29 N.Y.S.2d 469 (Dom. Rel. Ct. 1941), aff'd 35 N.Y.S.2d 725, 264 App. Div. 769 (Sup. Ct. App. Div. 1942).

27. *May v. May*, 294 S.W.2d 627 (St. L. Mo. App. 1956); *Scotton v. Scotton*, 359 S.W.2d 501 (Spr. Mo. App. 1962); *Grant v. Grant*, 324 S.W.2d 382 (Spr. Mo. App. 1959).

and must be both alleged and proved.²⁸ The burden of proof is upon the proponent of the divorce whether by petition or crossbill.²⁹

c. Problems with a divided res

Where jurisdiction to divorce is based upon the marital status being before the court because one of the parties has domicile in Missouri, it naturally follows that a sister state might have concurrent jurisdiction of the marital status because the other party to the marriage is a domiciliary of that state. If one of the states has rendered a final decree, the problem is whether or not recognition of that decree is required under the full faith and credit clause, discussed *infra*. The problem, however, arises: what if both states should have a divorce action pending at once? This precise problem confronted the St. Louis Court of Appeals in *State ex rel. Miller v. Jones*.³⁰ In that case a wife, whose domicile was Colorado, filed for divorce in that state, obtaining personal service in Missouri upon the husband who was a Missouri resident. He immediately filed for divorce in Missouri and subsequently obtained service by mail. The wife appeared specially and, upon refusal of the trial court to dismiss the Missouri action, sought prohibition in the appellate court. The court of appeals determined that prohibition only tested the trial court's jurisdiction. The court reaffirmed the principle that jurisdiction to divorce was *quasi in rem* jurisdiction over the marital status based upon the domicile of either party and found that both Colorado and Missouri had such jurisdiction to divorce, although neither court could grant complete relief over questions of alimony and custody and support of children.³¹ It therefore held that the trial court had

28. *State ex rel. Stoffey v. La Driere*, 273 S.W.2d 776 (St. L. Mo. App. 1954); *Goading v. Goading*, 239 Mo. App. 1000, 197 S.W.2d 984 (K.C. Ct. App. 1946); *Amberland v. Amberland*, 188 Mo. App. 50, 173 S.W. 104 (St. L. Ct. App. 1915). Compare *Kennedy v. Kennedy*, 223 Mo. App. 1116, 23 S.W.2d 1089 (St. L. Ct. App. 1920). The same requirement for alleging domicile is applied to a cross-bill. *Price v. Price*, 281 S.W.2d 307 (Spr. Mo. App. 1955); *Pike v. Pike*, 239 Mo. App. 655, 193 S.W.2d 637 (K.C. Ct. App. 1946).

29. *Gomez v. Gomez*, 336 S.W.2d 656 (Mo. 1960); *Hays v. Hays*, 221 Mo. App. 516, 282 S.W. 57 (K.C. Ct. App. 1926). This burden is to prove domicile by the preponderance of the evidence. *Lewis v. Lewis*, 238 Mo. App. 173, 176 S.W.2d 556 (K.C. Ct. App. 1943).

30. 349 S.W.2d 534 (St. L. Mo. App. 1961). See also *Coffey v. Coffey*, 71 S.W.2d 141 (St. L. Mo. App. 1934).

31. The court noted that the minor child born of the marriage was with the mother in Colorado, and commented that the Missouri courts did not, therefore, have jurisdiction to determine the question of custody. It also commented that Colorado had no jurisdiction in personam over the father to award support or alimony.

jurisdiction to proceed notwithstanding that the Colorado action was first commenced and first served. It was stated that the trial court *might* stay the proceedings pending the Colorado action or even refuse to entertain the action, but that this was purely a matter of *comity* and within the trial court's discretion.

2. Other Foundations for Jurisdiction to Divorce

a. Consent and jurisdiction in personam

An appearance in court of this state may, in some instances, confer jurisdiction over the party in domestic relations affairs.³² It has ordinarily been held, however, that a court with both parties before it is without jurisdiction of the subject matter (the marital status) unless one of the parties is a domiciliary.³³ A 1945 decision by the Springfield Court of Appeals, however, cast a considerable shadow across this field.³⁴ In that case, a soldier, who was apparently a non-resident, brought a divorce proceeding against his non-resident wife. She filed an answer and motion for temporary allowances. In reversing the trial court's dismissal for want of jurisdiction, the court stated:

. . . defendant submitted herself to the Circuit Court of Pulaski County, Missouri, by her answer and motion for temporary alimony, and the Circuit Court . . . thereafter had *full venue* in the case and had the right and power thereafter to pass on the marital relationship . . . regardless of ordinary jurisdiction, *and we need not consider the question of jurisdiction at all.*³⁵ (Emphasis added.)

No subsequent case following or commenting upon this decision has been found.

On its face, this decision appears to hold that if both parties are before the court, the question of jurisdiction need not be considered at all.

This case is completely inconsistent with the other cases in Missouri and with the basic concept that jurisdiction of the subject matter (the marital status) is essential. A clue to the decision may lie in the reference to "full venue" in the quoted portion of the opinion. Apparently the acts

32. *Weiler v. Weiler*, 331 S.W.2d 165 (St. L. Mo. App. 1960).

33. *Wagoner v. Wagoner*, 287 Mo. 567, 229 S.W. 1064 (1920); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); *Stansbury v. Stansbury*, 118 Mo. App. 427, 94 S.W. 566 (K.C. Ct. App. 1906); RESTATEMENT, CONFLICT OF LAWS § 111 (1934).

34. *Montgomery v. Montgomery*, 185 S.W.2d 870 (Spr. Mo. App. 1945).

35. *Id.* at 871.

complained of had occurred within Missouri and the court, in applying Section 452.040 RSMo (requiring residence in the county where the action is brought), followed the line of decisions holding this to be a venue rather than jurisdictional statute.³⁶ Since venue may be waived the court found that the trial court acquired venue and, in a momentary lapse, confused venue with jurisdiction of the subject matter. The authorities cited by the court tend to support this rationale of the case.³⁷

It seems very doubtful that this case will be followed in the future and most probably it may be said that at least one of the parties must be domiciled in Missouri in order to confer jurisdiction of the subject matter upon our courts.³⁸

b. Estoppel to deny jurisdiction

The doctrine of estoppel is sometimes applied to divorce suits. This is not a matter of conferring jurisdiction upon a court which undertakes to act in a divorce proceeding without jurisdiction, but is rather that a party may not challenge or attack the court's jurisdiction by reason of his own conduct and reliance of the other party.³⁹ It does not seem appropriate here to go into the grounds for estoppel other than to point out this possible basis for a court's decree being effective, notwithstanding the absence of jurisdiction otherwise.

B. Recognition of Foreign Decrees

1. Jurisdiction of Foreign Forums

Long before 1942 when the United States Supreme Court overruled *Haddock v. Haddock*,⁴⁰ and determined in *William v. North Carolina I*⁴¹ that a decree based upon jurisdiction *in rem* rendered in the domicile forum of one spouse, was entitled to full faith and credit, Missouri was recogniz-

36. See *supra* note 16.

37. The court relied on *King v. King*, 237 Mo. App. 764, 170 S.W.2d 982 (Spr. Ct. App. 1943), and several similar cases wherein there was no question of domicile within the state and the sole issue was venue under § 452.040, RSMo 1959.

38. A number of states do, however, accord recognition to foreign decrees based upon jurisdiction of both parties in personam on principles of comity. 27B C.J.S. *Divorce* § 343 (1959).

39. In *Littlefield v. Littlefield*, 199 Mo. App. 456, 203 S.W. 636 (K.C. Ct. App. 1918) a party who remarried because of a divorce decree was estopped from seeking to set it aside. A similar reason was given for not permitting a party to challenge enforcement of an Ohio alimony decree in *Hamill v. Tabbott*, 81 Mo. App. 210 (K.C. Ct. App. 1899). See also *Richeson v. Simmons*, 47 Mo. 20 (1870).

40. 201 U.S. 562 (1906).

41. 317 U.S. 287 (1942).

ing such decrees.⁴² Our courts acknowledged that under the *Haddock* rule they were not required to accord such recognition on constitutional principles, but insisted that it was the policy of the state to do so on principles of *comity*.⁴³ The *Williams* case, which caused such consternation and confusion elsewhere, must have been received by Missouri courts with a sense of vindication. As a consequence of Missouri's early enlightenment, the state cases following the rendition of the *Williams* case are merely a continuation of the former policy on this problem, unmarked by the considerable confusion of radical change and unsettled doctrine sometimes found in sister states.⁴⁴

It appears clear that the Missouri courts recognize the jurisdiction of a sister state to divorce as being the same as that of our own courts, the minimum requirement being that one of the parties be domiciled in the forum granting the divorce, thereby conferring jurisdiction over the subject matter, i.e. the marital status.

2. Effect of Pleading a Foreign Decree

When a decree of divorce rendered in a sister state is plead in a Missouri court and is, upon its face, properly rendered by a court of competent jurisdiction in the sister state, it raises a presumption that the decree is entitled to full faith and credit in this state. If the spouse challenging the foreign decree appeared in the foreign proceeding, this presumption becomes conclusive as to the jurisdiction of that court and proper service, in which case collateral attack on these issues is precluded and the decree stands as

42. *Howey v. Howey*, 240 S.W. 450 (Mo. En Banc), *cert. denied* 260 U.S. 730 (1922); *Barrett v. Barrett*, 79 S.W.2d 506 (K.C. Mo. App. 1935); *Howard v. Strode*, 242 Mo. 210, 146 S.W. 792 (1912); *Lieber v. Lieber*, 239 Mo. 1, 143 S.W. 458 (1911); *Anthony v. Rice*, 110 Mo. 223, 19 S.W. 423 (1982); *Gould v. Crow*, 57 Mo. 200 (1874); *Hanna v. Hanna*, 224 Mo. App. 1142, 32 S.W.2d 125 (St. L. Ct. App. 1930); *Keena v. Keena*, 222 Mo. App. 825, 10 S.W.2d 344 (St. L. Ct. App. 1928); *Williams v. Williams*, 53 Mo. App. 617 (St. L. Ct. App. 1893).

43. *Howard v. Strode*, 242 Mo. 210, 146 S.W. 792 (1912). The court stated, 242 Mo. at 225: "There is nothing in the *Haddock* case which in the slightest degree seeks to control our policy in this regard. This policy violates no rights under either the state or federal constitution." *Accord*: *Howey v. Howey*, *supra* note 5; *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d 870 (1942).

44. *Leichty v. Kansas City Bridge Co.*, 354 Mo. 629, 190 S.W.2d 201 (En Banc 1945), *cert. denied*, 327 U.S. 782 (1946); *Keller v. Keller*, 212 S.W.2d 789, *cert. denied*, 335 U.S. 858 (Mo. 1948); *State ex rel. Miller v. Jones*, 349 S.W.2d 534 (St. L. Mo. App. 1961); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); *Butler v. Walsh*, 235 S.W.2d 826 (Spr. Mo. App. 1951); *Wood v. Wood*, 231 S.W.2d 882 (Spr. Mo. App. 1950).

res judicata in Missouri.⁴⁵ In cases where the spouse challenging the decree did not appear, the presumption of jurisdiction is rebuttable and subject to collateral attack as to both jurisdiction and notice.⁴⁶ A decree of a sister state is also subject to a collateral attack on the grounds of fraud in the concoction of the judgment, irrespective of proper jurisdiction and service.⁴⁷

3. Grounds for Collateral Attack

The Missouri courts have recognized three grounds for challenging a foreign divorce decree pleaded in Missouri. As frequently stated, these are: (1) fraud in the concoction of the judgment, (2) lack of jurisdiction over the subject matter, and (3) failure to give due notice to the defendant.⁴⁸ Evidence outside of the record of the former decree is ordinarily admissible to support the attack on the foreign judgment.⁴⁹ Further, if a Missouri domiciliary brings a subsequent divorce proceeding here, the policy of our courts is against a non-recognizable foreign judgment causing delay of the Missouri proceeding⁵⁰ and even where a proceeding is pending in the sister state

45. *Keller v. Keller*, 212 S.W.2d 789, *cert. denied*, 335 U.S. 858 (Mo. 1948). This decision involved a husband who took a temporary leave from his Missouri employment to obtain a Nevada divorce. The court made it clear it did not believe he had established a bona fide Nevada domicile but stated that the wife's appearance there gave her a day in court and precluded the Missouri court from questioning the jurisdiction. This result was founded upon a federal case requiring the extension of full faith and credit under like circumstances. *Davis v. Davis*, 305 U.S. 32 (1938).

46. *Leichty v. Kansas City Bridge Co.*, *supra* note 44, attacked on service; *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952) attacked on jurisdiction; *Hill v. Hill*, 241 Mo. App. 243, 236 S.W.2d 394 (K.C. Ct. App. 1951), attacked on service; *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d 870 (1942), attacked on jurisdiction.

47. *Roseberry v. Crump*, 353 S.W.2d 825 (K.C. Mo. App. 1961), *trans.* to court of appeals, 345 S.W.2d 117 (Mo. 1961). The court stated, 353 S.W.2d at 827: "There is no question but that the foreign judgment here was entered by a court of competent general jurisdiction as to both subject matter and the persons." The court nevertheless refused to recognize the decree because of fraud in the concoction. *Picadura v. Humphrey*, 335 S.W.2d 6 (Mo. 1960); *Fadler v. Gabbert*, 330 Mo. 851, 63 S.W.2d 121 (1933); *Weiler v. Weiler*, 354 S.W.2d 165 (St. L. Mo. App. 1960).

48. *Roseberry v. Crump*, *supra* note 47; *In re Veach*, 287 S.W.2d 753 (Mo. 1956).

49. *Leichty v. Kansas City Bridge Co.*, *supra* note 44; *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d 870 (1942); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); *Butler v. Walsh*, 235 S.W.2d 826 (Spr. Mo. App. 1951); *Hill v. Hill*, 241 Mo. App. 243, 236 S.W.2d 394 (K.C. Ct. App. 1951); *Daugherty v. Nelson*, 241 Mo. App. 121, 234 S.W.2d 353 (K.C. Ct. App. 1950).

50. *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d 870 (1942); *Coffey v. Coffey*, 71 S.W.2d 141 (St. L. Mo. App. 1934). Both held that Missouri citizens would not be required to go to other states to protect their rights but would be entitled to prompt justice in their own courts. *Cf. Leichty v. Kansas City Bridge Co.*, *supra* note 44.

to set a fraudulent judgment aside, our courts will proceed without awaiting such action.⁵¹ The burden of proof that a foreign decree should not be recognized, where valid upon its face, falls upon the party alleging its invalidity.⁵²

a. Fraud in the concoction

The fraud contemplated as a ground for refusing to recognize the decree of a sister state is not mere false testimony at the trial.⁵³ Rather it must be such a fraud in the procurement as tends to trick an adversary out of a defense or to blind him to the pendency of the action. In the recent case of *Roseberry v. Crump*,⁵⁴ the Missouri court was asked to enforce alimony provisions contained in a Kansas decree. At the time of the rendition of the decree, both parties were Kansas domiciliaries and personal service had been made upon the husband so that no question concerning the jurisdiction of the Kansas court existed either as to the parties or the subject matter. The evidence tended to show that at the time of the former proceeding, the wife assured the husband that alimony would not be requested and that he need not appear. A property agreement had been entered into. Relying upon this, the husband did not appear and an award of alimony was made. The court held that this was fraud in the concoction or procurement and that the Kansas decree would not be enforced here and was void. This ruling was made notwithstanding that the wife herself was not the perpetrator of the fraud, but rather the Kansas court had insisted upon awarding the alimony although it was advised of the previous agreement.

The court in the *Roseberry* case also noted that the husband had been immediately advised of the alimony award and had failed to appeal. It ruled, however, that his subsequent negligence would not cure the defect,

51. *Weiler v. Weiler*, 331 S.W.2d 165 (St. L. Mo. App. 1960). In this case, an Illinois domiciliary wife obtained a divorce there by fraud. The husband, a Missouri domiciliary, brought a proceeding to set the Illinois decree aside and also an action for divorce in Missouri to which the Illinois divorce was pleaded in defense. The court dismissed the wife's contention that the Missouri divorce proceeding should have awaited the outcome of the proceeding to set aside.

52. *Anthony v. Rice*, 110 Mo. 223, 19 S.W. 423 (1892); See also cases cited in *supra* note 46.

53. *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d 870 (1942); *Keena v. Keena*, 222 Mo. App. 825, 10 S.W.2d 344 (St. L. Ct. App. 1928).

54. 353 S.W.2d 825 (K.C. Mo. App. 1961), *trans.* to the court of appeals, 345 S.W.2d 117 (Mo. 1961).

implying that the judgment was void rather than voidable because of the fraud.⁵⁵

One is inclined to question whether this decision will be followed beyond the points it actually rules, that is, that portion of the foreign judgment awarding alimony will not be enforced in Missouri. The author suggests that had the husband been prosecuted for bigamy upon remarriage the court might have treated the Kansas judgment as voidable only or have held that the alimony portion of the judgment was divisible from the divorce.⁵⁶

Another recent case dealing with fraud in the procurement is *Weiler v. Weiler*.⁵⁷ In this case a wife, found to be a domiciliary of Illinois, filed for divorce in Illinois, obtained service upon the husband in Missouri. She then agreed to drop the Illinois proceeding in consideration of the execution of a deed. The husband, relying upon this, made no effort to answer or appear. The court refused to accord the Illinois decree recognition in this state because of this fraud.

b. Lack of jurisdiction over the subject matter

In view of Missouri's clear position regarding the requirement of domicile within the forum in order to confer jurisdiction over the subject matter of the action, very little need be added on this subject. Unless the party challenging the foreign decree appeared and contested the proceeding in the foreign forum,⁵⁸ our courts will conduct an independent inquiry into the foreign decree and will deny it recognition where jurisdiction is found wanting.⁵⁹

A different sort of question is presented, however, where a foreign domiciliary has obtained a divorce in his own forum but failed to meet the residence requirements of the local statutes. At least one recent case seems to imply that our courts will inquire into the jurisdiction of the foreign forum under its own statutory requirements and deny recognition if these requirements are not met.⁶⁰

55. *Id.* at 829. In the court's language ". . . that defendant should have appealed in Kansas, even if true, will not put pulsating life into a judgment stillborn because of fraud in its procurement."

56. That decrees are sometimes held to be divisible for the purpose of extending recognition to parts thereof only, see 27B C.J.S. *Divorce* § 350 (1959).

57. 331 S.W.2d 165 (St. L. Mo. App. 1960).

58. See *supra* note 45.

59. See cases cited *supra* notes 42, 44 and 46.

60. *Weiler v. Weiler*, 331 S.W.2d 165 (St. L. Mo. App. 1960). In that case a wife, after separation, returned to her Illinois home which the court considered as becoming her domicile. She did not, however, meet the residence requirement of

c. Failure to give defendant due notice

An attack upon a foreign decree for the reason that the foreign court failed to give proper notice has been permitted in the Missouri cases.⁶¹ Usually this situation has arisen where constructive service was had on the defendant in the foreign divorce forum by reason of a false affidavit that the plaintiff did not know the defendant's whereabouts. For this reason, the cases dealing with defective notice have been filled with loose terminology concerning "fraud." In a sense, this would be fraud in the concoction because it would tend to prevent the defendant from defending or to blind him to the pendency of the action as discussed above. Yet the courts have treated this as a separate ground for denial of full faith and credit.

Because these cases, in Missouri, have been restricted to a factual situation emissive of a discussion of fraud, the question is left dangling as to whether or not defective service, in the absence of fraud, would cause the Missouri courts to deny recognition to a foreign divorce decree. Probably such recognition would be withheld and fraud would not be a necessary element to an attack on the service made by a foreign court. This is indicated where, after discussing fraud, the court in *Leichty v. Kansas City Bridge Co.*, stated:

. . . a state must have sufficient control over the marriage status of its residents to enable its courts to affect that status without personal service if such service cannot be obtained. *However, due process requires that reasonable and good faith effort be made to notify the absent spouse.*⁶²

The emphasis was added to the above quote by the Kansas City Court of Appeals in the subsequent case of *Hill v. Hill*.⁶³ There is at least a hint in this language that the real basis for denial of full faith and credit where service is defective is the absence of due process of law and not fraud.⁶⁴

one year required in that state. She filed for divorce in Illinois, making false affidavit that she had a year's residence there. There was no question raised that the Missouri husband was not duly summoned. In treating this aspect of the case, the court indicated a terminology of fraud. This fraud, did not, however, prevent her from being an Illinois domiciliary, giving the Illinois court jurisdiction of the marital status. The refusal to recognize the decree for this reason, therefore, must be because the Illinois court had no jurisdiction under its own statutes rather than in the interstate sense.

61. *Leichty v. Kansas City Bridge Co.*, *supra* note 44; *Hill v. Hill*, 241 Mo. App. 243, 236 S.W.2d 394 (K.C. Ct. App. 1951).

62. *Leichty v. Kansas City Bridge Co.*, *supra* note 44 at 635, 190 S.W.2d at 203.

63. *Supra* note 61.

64. The position of our courts in other situations would tend to reinforce this conclusion. In cases dealing with a motion to modify, where jurisdiction of the

The foregoing suggests a second question. What if the foreign divorce forum affords notice or service sufficient to meet the requirements of due process, but does not comply with its own statutes? Will our courts terminate its inquiry if due process is met or will it further inquire into the statutory requirements of the sister state before according recognition? Apparently this problem has not been met head on in this state in a divorce proceeding. Other courts appear to be divided.⁶⁵ A suggestion of the position our courts would adopt may be found in *In re Barger*,⁶⁶ where in determining whether or not to recognize a foreign adoption, the Missouri court looked to the notice statutes of the decreeing forum and found they had not been complied with. Recognition was denied.

If the defendant appears in a foreign divorce proceeding he normally can not contend that there was a failure of notice in attacking the foreign decree,⁶⁷ although this probably would not be a bar if his appearance were specially made to contest jurisdiction.⁶⁸

III. SEPARATE MAINTENANCE

Since an action for separate maintenance is primarily one seeking maintenance, support and alimony for the spouse bringing the action,⁶⁹ this type of proceeding is lumped together with those specific subjects.⁷⁰

subject matter was acknowledged, our courts have indicated that the notice of the proceeding must comply with due process. *Green v. Green*, 368 S.W.2d 426 (Mo. 1963); *Hayes v. Hayes*, 363 Mo. 583, 252 S.W.2d 323 (1952); *Jack v. Jack*, 295 Mo. 128, 243 S.W. 314 (En Banc 1922); *Baker v. Baker*, 274 S.W.2d 322 (Spr. Mo. App. 1954).

65. Holding that the statutes in the divorce forum must be complied with, *Corkum v. Clark*, 263 Mass. 378, 161 N.E. 912 (Sup. J. Ct. Mass. 1928); *Weissberger v. Weissberger*, 183 Misc. 1006, 53 N.Y.S.2d 42 (Sup. Ct. 1944); *Roland v. Roland*, 244 S.W.2d 318 (Tex. Civ. App. 1951); *Morey v. Morey*, 27 Minn. 265, 6 N.W. 783 (1880). Holding that due process without statutory compliance is enough, *Dilk v. Scott*, 225 Ark. 861, 286 S.W.2d 9 (1956).

66. 365 S.W.2d 89 (St. L. Mo. App. 1963). This may be construed a *dictum*, however, because the court also determined that the notice failed to accord due process of law.

67. The Missouri courts have taken the position that an appearance confers jurisdiction over the person and constitutes a waiver of the necessity for service or notice. *Nolker v. Nolker*, 257 S.W. 798 (Mo. En Banc 1924).

68. *Beckmann v. Beckmann*, 211 S.W.2d 536 (St. L. Mo. App. 1948), *aff'd* in part and *rev'd* in part on other grounds, 358 Mo. 1029, 218 S.W.2d 566 (Mo. En Banc 1949). See, *Divilbiss, Special Appearances in Missouri*, 27 Mo. L. REV. 533 (1962).

69. A decree is obviously unnecessary merely to permit the parties to live separately.

70. In Missouri, this action may be brought as a separate proceeding, not in conjunction with divorce. § 452.130, RSMo 1959.

IV. ALIMONY, MAINTENANCE, SUPPORT AND ALLOWANCES

A. *Jurisdiction of Missouri Courts to Make Orders*

1. Proceedings Necessary

a. Temporary allowances and alimony

It seems to be fairly clear that the Missouri courts have jurisdiction to make temporary allowances only while a proceeding for divorce or separate maintenance is pending and that once a decree is entered, jurisdiction is lost.⁷¹ While alimony provisions made at the time of divorce may be later modified, alimony may not be granted for the first time after the divorce decree becomes final.⁷²

b. Child support

The above mentioned rule is not true, however, in the case of child support. In these situations the court may reopen the issue upon a motion to modify, and make an award after the rendition of a final decree.⁷³ This is true even where the court did not originally have jurisdiction to award support, but subsequently acquired jurisdiction by reason of the father later being personally before the court,⁷⁴ although it would not hold true if his subsequent appearance were specially made for the purpose of only contesting jurisdiction.⁷⁵

c. Marriage necessary

It is necessary that there have been a marriage, since allowances or alimony cannot be granted prior to a finding that a marriage did in fact exist.⁷⁶

71. *State ex rel. Gercke v. Seddon*, 93 Mo. 520, 6 S.W. 342 (1887); *Williams v. Williams*, 349 S.W.2d 422 (St. L. Mo. App. 1961); *Gross v. Gross*, 319 S.W.2d 880 (St. L. Mo. App. 1959); *Schenberg v. Schenberg*, 307 S.W.2d 697 (St. L. Mo. App. 1957); *Beckler v. Beckler*, 227 Mo. App. 761, 57 S.W.2d 687 (K.C. Ct. App. 1933); *Coons v. Coons*, 236 S.W. 364 (K.C. Mo. App. 1922); *Libbe v. Libbe*, 166 Mo. App. 240, 148 S.W. 460 (K.C. Ct. App. 1912).

72. *Smith v. Smith*, 350 Mo. 104, 164 S.W.2d 921 (1942); *Ruckman v. Ruckman*, 337 S.W.2d 100 (St. L. Mo. App. 1960); *Baker v. Baker*, 274 S.W.2d 322 (Spr. Mo. App. 1954); *Stokes v. Stokes*, 222 S.W.2d 108 (Spr. Mo. App. 1949).

73. *Kelly v. Kelly*, 329 Mo. 922, 47 S.W.2d 762 (1932); *Laumeier v. Laumeier*, 308 Mo. 201, 271 S.W. 481 (1925); *Roberts v. Roberts*, 292 S.W.2d 596 (Spr. Mo. App. 1956); *Kaestner v. Kaestner*, 228 Mo. App. 1043, 58 S.W.2d 494 (St. L. Ct. App. 1933).

74. *Kaestner v. Kaestner*, 228 Mo. App. 1043, 58 S.W.2d 494 (St. L. Ct. App. 1933).

75. *Supra* note 68.

76. *Bradley v. Bradley*, 295 S.W.2d 592 (St. L. Mo. App. 1956); *Sams v. Sams*, 232 Mo. App. 376, 106 S.W.2d 524 (K.C. Ct. App. 1937).

2. Jurisdiction in Rem by Attachment

The early Missouri cases indicated that an order granting alimony, maintenance or support was strictly limited to situations where there was personal jurisdiction over the defendant. The distinct implication was made that in a proceeding to obtain such relief, the plaintiff could not proceed by attachment upon constructive or outstate service, to obtain an alimony or support judgment limited to specific property within the state.⁷⁷

This view apparently prevailed almost exclusively until 1952, when it was indicated in *State ex rel. Nelson v. Williams*⁷⁸ that in a suit for separate maintenance, a judgment for support to a wife, *in rem* against specific property attached might be possible on constructive service. In this instance, separate maintenance was distinguished from divorce. Apparently, alimony in divorce cases may not be based upon attachment of the property of a non-resident found within the state, but no decision has been found directly passing upon the point, except by dictum.⁷⁹

3. Jurisdiction in Personam

With the possible exception made in *State ex rel. Nelson v. Williams*, the general rule in Missouri is that any award of alimony, temporary allowances, support or maintenance is a money judgment *in personam*. As such it requires personal jurisdiction of the defendant and personal service within the state.⁸⁰

B. Recognition and Enforcement of Foreign Decrees

1. Status of Foreign Alimony Decree in Missouri

A foreign decree for alimony or support to which full faith and credit is extended is viewed in Missouri as an ordinary money judgment. For this reason a proceeding to enforce such a judgment in this state is con-

77. This rule was really one of *dictum*, however, because none of these early cases involved a strict attachment proceeding bringing the property before the court as contemplated by § 506.160, RSMo 1959. *Chapman v. Chapman*, 269 Mo. 663, 192 S.W. 448 (1917), where the court stated, 269 Mo. at 674: "There is not in this State any law authorizing a proceeding against defendant's property for alimony on constructive service of process." *Ellison v. Martin*, 53 Mo. 575 (1873); *Elvins v. Elvins*, 176 Mo. App. 645, 159 S.W. 746 (St. L. Ct. App. 1913).

78. 249 S.W.2d 506 (St. L. Mo. App. 1952).

79. *Chapman v. Chapman*, *infra* note 80.

80. *Chapman v. Chapman*, 269 Mo. 663, 192 S.W. 448 (1917); *Moss v. Fitch*, 212 Mo. 484, 111 S.W. 475 (1908); *Ellison v. Martin*, 53 Mo. 575 (1873); *State ex rel. Miller v. Jones*, 349 S.W.2d 534 (St. L. Mo. App. 1961); *Poole v. Poole*, 287 S.W.2d 372 (St. L. Mo. App. 1956); *State ex rel. Silverman v. Kirkwood*, 230 S.W.2d 513 (St. L. Mo. App. 1950), *trans.* 361 Mo. 1194, 239 S.W.2d 332 (En Banc 1951); *Elvins v. Elvins*, 176 Mo. App. 645, 159 S.W. 746 (St. L. Ct. App.

sidered as an action for debt,⁸¹ and, as a consequence, irrespective of the law of the forum where the judgment was rendered, it will not be enforced here by jailing the defendant for contempt.⁸² It has also been determined, for this reason, that a foreign judgment for alimony or support is not entitled to the preference given to a similar domestic judgment in the case of a garnishment; that is, the defendant may assert a 90% exemption of wages against a foreign support judgment.⁸³

2. Validity of a Foreign Judgment

The Missouri courts will inquire into the circumstances of a foreign support or alimony judgment and deny it recognition if jurisdiction *in personam* is found wanting.⁸⁴ It does not appear that our courts have had occasion to pass upon the question of whether or not they would recognize a foreign alimony or support judgment against specific property attached within the foreign forum and entered upon constructive service.⁸⁵ It is unlikely such a situation would arise since once the property were attached in a sister state, it would be difficult to bring the property to Missouri. The converse of this situation has occurred, however. In *McDaugal v. McDaugal*,⁸⁶ an Arkansas court had jurisdiction of a husband *in personam* and by its decree incorporating a property settlement, affected title to personal property in Missouri. In considering the validity of this judgment in Missouri, the Missouri court held that the Arkansas judgment was valid in this respect. The court employed the fiction that the status of intangible personal property follows the domicile of the owner and

1913); *Stone v. Stone*, 134 Mo. App. 242, 113 S.W. 1157 (St. L. Ct. App. 1908); *Hendrix v. Hendrix*, 103 Mo. App. 40, 77 S.W. 495 (St. L. Ct. App. 1903); *Hamill v. Tabbott*, 81 Mo. App. 210 (K.C. Ct. App. 1899); *Anderson v. Anderson*, 55 Mo. App. 268 (K.C. Ct. App. 1893).

81. *Nelson v. Nelson*, 282 Mo. 412, 221 S.W. 1066 (En Banc 1920).

82. *Roberts v. Stoner*, 18 Mo. 481 (1853); *Harrington v. Harrington*, 233 Mo. App. 390, 121 S.W.2d 291 (K.C. Ct. App. 1938); *In re Kinsolving*, 135 Mo. App. 631, 116 S.W. 1068 (St. L. Ct. App. 1909).

83. *Harrington v. Harrington*, *supra* note 82.

84. *Moss v. Fitch*, 212 Mo. 484, 111 S.W. 475 (1908); *Ellison v. Martin*, 53 Mo. 575 (1873); *State ex rel. Miller v. Jones*, 349 S.W.2d 534 (St. L. Mo. App. 1961); *Poole v. Poole*, 287 S.W.2d 372 (St. L. Mo. App. 1956); *State ex rel. Silverman v. Kirkwood*, 230 S.W.2d 513 (St. L. Mo. App. 1950), *trans.* 361 Mo. 1194, 239 S.W.2d 332 (En Banc 1951); *Stone v. Stone*, 134 Mo. App. 242, 113 S.W. 1157 (St. L. Ct. App. 1908).

85. Many states employ such procedure as an *in rem* proceeding against the specific property, 27B C.J.S. *Divorce* § 247 (1959).

86. *McDougal v. McDougal*, 279 S.W.2d 731 (Spr. Mo. App. 1955).

held that jurisdiction over the owner empowered the Arkansas court to affect the property as it desired.

It is well established that the Missouri courts will entertain a collateral attack against a foreign judgment for support or alimony sought to be recognized here, considering evidence outside of the record of the foreign judgment. The grounds for such an attack are the same as with a foreign divorce decree, i.e. (1) lack of jurisdiction, (2) failure to give due notice to the defendant, and (3) fraud in the concoction or procurement.⁸⁷ Where a foreign court has jurisdiction, the mere fact that its substantive law, as to when alimony may be allowed, differs from our own law does not affect the recognition of the foreign judgment.⁸⁸

V. MODIFICATION

A. *Continuing Jurisdiction after Decree*

1. Duration and Nature of Jurisdiction

Once a decree of divorce or separate maintenance has been entered in Missouri, our courts take the position that the jurisdiction which the court had over the subject matter and parties at the time of rendition continues for the purpose of modification of the decree.⁸⁹ This jurisdiction is considered to continue until the death of one of the parties to the marriage, at which time the original action becomes abated and the court's jurisdiction accordingly is terminated.⁹⁰ This continuing power of the court terminates upon the death of either spouse, even as to the control of the custody of children, notwithstanding that children are sometimes considered as "wards of the court."⁹¹ No other ground has been found for terminating the court's jurisdiction of parties and subject matter once a decree has been entered.

87. *Roseberry v. Crump*, 353 S.W.2d 825 (K.C. Mo. App. 1961), *trans.* to court of appeals, 345 S.W.2d 117 (Mo. 1961).

88. *McDougal v. McDougal*, 279 S.W.2d 731 (Spr. Mo. App. 1955).

89. *Krueger v. Krueger*, 107 S.W.2d 967 (Spr. Mo. App. 1937); *Haagen v. Haagen*, 11 S.W.2d 757 (St. L. Mo. App. 1928); *Wald v. Wald*, 68 Mo. App. 337, 151 S.W. 786 (St. L. Ct. App. 1912); *Smith v. Smith*, 151 Mo. App. 649, 132 S.W. 312 (Sp. Ct. App. 1910); *Kaplun v. Kaplun*, 227 S.W. 894 (St. L. Mo. App. 1920).

90. *Shepler v. Shepler*, 348 S.W.2d 607 (St. L. Mo. App. 1961); *Heil v. Rogers*, 329 S.W.2d 960 (K.C. Mo. App. 1959); *Schumacher v. Schumacher*, 223 S.W.2d 841 (St. L. Mo. App. 1949).

91. *Shepler v. Shepler*, 348 S.W.2d 607 (St. L. Mo. App. 1961); *In re Wakefield*, 274 S.W.2d 345 (St. L. Mo. App. 1955), *aff'd* 365 Mo. 415, 283 S.W.2d 467 (Mo. En Banc 1955); *Schumacher v. Schumacher*, 223 S.W.2d 841 (St. L. Mo. App. 1949); *State ex rel. Walker v. Crouse*, 240 Mo. App. 389, 205 S.W.2d 749 (K.C. Ct. App. 1947).

Continuing jurisdiction as to both parties and subject matter naturally implies that a subsequent change in domicile or removal from the state will not adversely affect the court's power to modify. This has been the view of the Missouri authorities.⁹²

2. Acquisition of Additional Jurisdiction

Where the original decree was based upon the court having only jurisdiction of the subject matter (the marital status or *res*), empowering the court to grant a divorce only, the appearance of the non-resident spouse to bring a subsequent motion to modify may give the court jurisdiction *in personam*. Such after acquired jurisdiction has been held to confer power upon the Missouri courts to make an award of child support⁹³ or child custody⁹⁴ where they did not have such power in rendering the original decree. Such subsequent awards must be based upon application contained in a "counter" motion to modify.

3. Conditions Precedent to Modification

a. Notice to other spouse

While modifying a decree is, in a sense, a continuation of the court's jurisdiction in an existing case, yet it is also in the nature of an independent proceeding, requiring effective and reasonable notice to the other party.⁹⁵ While such notice is not jurisdictional⁹⁶ and a new summons is not necessary,⁹⁷ strict proof of notice is required, particularly where the other party is in another state.⁹⁸ No special time element is employed so long as it

92. *Middleton v. Tozer*, 259 S.W.2d 80 (St. L. Mo. App. 1953); *Drew v. Drew*, 186 S.W.2d 858 (K.C. Mo. App. 1945); *Riesnmev v. Riesnmev*, 236 Mo. App. 551, 155 S.W.2d 505 (K.C. Ct. App. 1941); *Conrad v. Conrad*, 296 S.W. 196 (St. L. Mo. App. 1927).

93. *Kaestner v. Kaestner*, 228 Mo. App. 1043, 58 S.W.2d 494 (St. L. Ct. App. 1933).

94. *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W.2d 458 (Spr. Ct. App. 1929).

95. *Jack v. Jack*, 294 Mo. 128, 243 S.W.2d 314 (En Banc 1922); *Hayes v. Hayes*, 363 Mo. 583, 252 S.W.2d 323 (1952); *Williamson v. Williamson*, 331 S.W.2d 140 (St. L. Mo. App. 1960); *Baker v. Baker*, 274 S.W.2d 322 (Spr. Mo. App. 1954); *State ex rel. Tatum v. Ramey*, 134 Mo. App. 722, 115 S.W. 458 (K.C. Ct. App. 1909).

96. *Krueger v. Krueger*, 107 S.W.2d 967 (Spr. Mo. App. 1937).

97. *Baker v. Baker*, 274 S.W.2d 322 (Spr. Mo. App. 1954).

98. *Williamson v. Williamson*, 331 S.W.2d 140 (St. L. Mo. App. 1960). In this case, the motion and notice to take it up were served in Georgia by a deputy sheriff. Because the return was signed only and not verified, the court held proof of notice was not proved. *Compare: Krueger v. Krueger*, 107 S.W.2d 967 (Spr. Mo. App. 1937).

provides an opportunity to appear and be heard.⁹⁹ The requirement is basically one of due process of law: that the party be informed of the character of the proceeding and have an opportunity to defend against it.¹⁰⁰

b. Allegation of change of condition

A validly entered decree in a suit for divorce or maintenance, whether entered by a domestic or foreign court, is *res judicata* as to the facts existing at the time of rendition. As a consequence, to empower a court to modify such a decree, it is essential that the movant both allege and prove a change in condition which occurred subsequent to the entry of the original decree.¹⁰¹

4. Relief Which may be Granted

a. Child custody and child support

The Missouri courts have held that they retain power to make such modifications as may be required in child custody,¹⁰² and may also make new provisions for child support in a modification proceeding.¹⁰³

b. Suit money

When a modification proceeding is pending, the courts of Missouri have held that they have the power to award suit money for this purpose.¹⁰⁴

c. Alimony

The Missouri courts have held they have the power to adjust alimony, upwards or downwards, in a modification proceeding.¹⁰⁵ They have ruled,

99. *Baker v. Baker*, 274 S.W.2d 322 (Spr. Mo. App. 1954).

100. *Green v. Green*, 368 S.W.2d 426 (Mo. 1963).

101. *Hayes v. Hayes*, 363 Mo. 583, 252 S.W.2d 323 (1952); *Martin v. Martin*, 160 S.W.2d 457 (St. L. Mo. App. 1942); *Foster v. Foster*, 146 S.W.2d 849 (K.C. Mo. App. 1940).

102. *Middleton v. Tozer*, 259 S.W.2d 80 (St. L. Mo. App. 1953); *Drew v. Drew*, 186 S.W.2d 858 (K.C. Mo. App. 1945); *Riesenmey v. Riesenmey*, 236 Mo. App. 551, 155 S.W.2d 505 (K.C. Ct. App. 1941); *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W.2d 458 (Spr. Ct. App. 1929); *Conrad v. Conrad*, 296 S.W. 196 (St. L. Mo. App. 1927); *Phipps v. Phipps*, 168 Mo. App. 697, 154 S.W. 825 (K.C. Ct. App. 1913); *Meyers v. Meyers*, 91 Mo. App. 151 (1901).

103. *Bettinger v. Bettinger*, 355 S.W.2d 354 (St. L. Mo. App. 1962); *Kaestner v. Kaestner*, 228 Mo. App. 1043, 58 S.W.2d 494 (St. L. Ct. App. 1933).

104. *Kaplun v. Kaplun*, 227 S.W. 894 (St. L. Mo. App. 1920); *Smith v. Smith*, 151 Mo. App. 649, 132 S.W. 312 (Spr. Ct. App. 1910).

105. *Beckmann v. Beckmann*, 358 Mo. 1029, 218 S.W.2d 566 (En Banc 1949); *State ex rel. Shoemaker v. Hall*, 257 S.W. 1047 (Mo. En Banc 1924); *Carr v. Carr*, 253 S.W.2d 191 (Mo. 1952); *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936);

however, that where the original decree made no provision for alimony they had no power to grant it at a later time by way of modification.¹⁰⁶ This appears to be based upon domestic statutes rather than interstate considerations.

B. *Jurisdiction to Modify Foreign Decree*

Where a decree of a sister state was rendered with jurisdiction of the subject matter and parties, upon due notice and without fraud in the concoction or procurement, the full faith and credit clause requires that it be acknowledged as *res judicata* over all issues therein determined or litigated. As has been heretofore pointed out, the Missouri courts always afford such recognition. But, as has just been noted, a divorce decree is ordinarily a continuing question and a change in condition may warrant a modification. In such a case, the original decree is *res judicata* only on those facts existing when it was rendered. It follows, therefore, that full faith and credit does not prevent a second state from modifying the decree of a sister forum if the second state has subsequently acquired the requisite jurisdiction of the parties and subject matter and there has occurred a change in condition affecting child custody, alimony or some such matter.¹⁰⁷ Missouri has adopted this position and will modify the decree of a sister state if appropriate jurisdiction and cause exists.¹⁰⁸

VI. VALIDITY OF MARRIAGE AND ANNULMENT

Until recently, the Missouri cases relative to the validity or voidability of a marriage celebrated in a sister state or foreign country were somewhat confused. It was fairly clear that if the parties were Missouri domiciliaries, our courts would accept jurisdiction to determine the marriage validity or to grant annulment, but it was not certain which law would be applied, that of Missouri or that of the celebrating forum.¹⁰⁹ The more recent cases

Backy v. Backy, 355 S.W.2d 389 (St. L. Mo. App. 1962); Jenkins v. Jenkins, 257 S.W.2d 250 (K.C. Mo. App. 1953); Maxey v. Maxey, 212 S.W.2d 810 (K.C. Mo. App. 1948).

106. See cases cited *supra* note 71.

107. The best known federal case to this effect is Halvey v. Halvey, 330 U.S. 610 (1947).

108. Daugherty v. Nelson, 241 Mo. App. 121, 234 S.W.2d 353 (K.C. Ct. App. 1950); *In re Leete*, 205 Mo. App. 225, 223 S.W. 962 (St. L. Ct. App. 1920); *In re Steele*, 107 Mo. App. 567, 81 S.W. 1182 (K.C. Ct. App. 1904).

109. Two cases were primarily responsible for this confusion. Westermayer v. Westermayer, 216 Mo. App. 74, 267 S.W. 24 (St. L. Ct. App. 1924), dealt with a situation where both parties were Missouri domiciliaries but were married in Illinois. In annulling the marriage, the Missouri court evidently applied Missouri law

in this field seem to establish that the substantive law of the place of celebration (*lex loci contractus*) will be followed in these cases, although Missouri procedure will be employed.¹¹⁰ Such subsequent endorsement of this line of earlier cases would indicate that this policy would prevail even where the marriage thus recognized was strongly against the policy of this state.¹¹¹

VII. ADOPTION

An article has been printed in another Symposium concerning the Missouri requirements to grant an adoption.¹¹² Only two additional comments would seem appropriate in this regard. In one recent case where the father of a child sought to be adopted in Missouri was a resident of Texas, the Missouri court did look to the Texas law in determining whether or not his consent was waived by abandonment.¹¹³ Since the court found there was an abandonment under both the Texas and the Missouri law, it did not hold which was controlling. Another case which may have some future significance in this field is a recent ruling that the prior approval of another court which had previously granted a divorce and made a custody award of the subject of the adoption was unnecessary in order for the adoptive court to act.¹¹⁴ This case dealt with two domestic courts, but the rule might have application where a foreign court had decreed custody.

Relative to the effect of a foreign adoption in Missouri, the only case found on this subject indicates that the foreign adoption will be recognized, but will be given only such effect as if it were decreed in this state.¹¹⁵

to determine that the marriage was voidable. In *Gross v. Gross*, 96 Mo. App. 486, 70 S.W. 393 (St. L. Ct. App. 1902), the same procedure was followed in annulling a Russian marriage. In neither case was the law of the celebrating forum pleaded or proved.

On the other hand, applying the law of the forum wherein the marriage was celebrated were *Henderson v. Ressor*, 265 Mo. 718, 178 S.W. 175 (1915); *Snuffer v. Karr*, 197 Mo. 182, 94 S.W. 983 (1906); *Green v. McDowell*, 210 Mo. App. 517, 242 S.W. 168 (Spr. Ct. App. 1922); *Potievska v. Independent Western Star Order*, 134 Mo. App. 471, 114 S.W. 572 (St. L. Ct. App. 1908).

110. *Hartman v. Valier & Spies Milling Co.*, 356 Mo. 424, 202 S.W.2d 1 (1947); *Henderson v. Ressor*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed* 248 U.S. 536 (1918); *Taylor v. Taylor*, 355 S.W.2d 383 (Spr. Mo. App. 1962).

111. See, for instance *Buchanan v. Harvey*, 35 Mo. 276 (1864), indicating that a polygamous marriage would be recognized if valid where entered into.

112. *Cook, Adoption Revisited*, 27 Mo. L. REV. 391 (1962).

113. *In re Adoption of P.J.K.*, 359 S.W.2d 360 (Spr. Mo. App. 1962).

114. *Pratt v. Pratt*, 363 S.W.2d 54 (St. L. Mo. App. 1962).

115. *Melek v. Curators of University of Missouri*, 213 Mo. App. 572, 250 S.W. 614 (K.C. Ct. App. 1923); *Steele v. Steele*, 161 Mo. 566, 61 S.W. 815 (1901).

This decision is in accord with the prevailing rule,¹¹⁶ but with the more liberal attitudes of today concerning adoption and property rights, it may be doubtful authority in the future.

With regard to when recognition will be afforded to a foreign adoption, our law clearly indicates that a collateral attack will lie against a foreign adoption sought to be asserted here on the same basis as against a foreign divorce, even to the extent of inquiring into whether or not compliance was had with the statutes of the adoptive forum.¹¹⁷

VIII. CUSTODY

A. Jurisdiction of Missouri Courts to Determine Custody

1. Jurisdiction in Personam over the Parents

The decisions indicate that the courts of this state will undertake to determine the custody of minor children in a divorce or separate maintenance proceeding if they have jurisdiction *in personam* over both of the parties to the marriage.¹¹⁸ This power will be exercised irrespective of the physical presence or domicile of the child within the state.¹¹⁹ In this regard it has been held that a pleading filed by a foreign domiciliary with the children in her custody in another state is sufficient to confer such jurisdiction even though the foreign domiciliary does not physically appear in the Missouri court and is herself a minor when filing such pleadings.¹²⁰

The Missouri courts have also held that jurisdiction *in personam* may be acquired after the rendition of the original decree, thus permitting the court in a modification proceeding to determine custody of the children.¹²¹

2. Child's Domicile within Missouri

The Missouri courts have exercised the power to determine the custody of minor children, when such children are domiciliaries of Missouri, but

116. 2 C.J.S. *Adoption* § 66 (1936).

117. *In re Barger*, 365 S.W.2d 89 (St. L. Mo. App. 1963).

118. *State ex rel. Shoemaker v. Hall*, 257 S.W. 1047 (Mo. En Banc 1924); *Weiler v. Weiler*, 331 S.W.2d 165 (St. L. Mo. App. 1960); *Daugherty v. Nelson*, 241 Mo. App. 121, 234 S.W.2d 353 (K.C. Ct. App. 1950); *Drew v. Drew*, 186 S.W.2d 858 (K.C. Mo. App. 1945); *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W.2d 458 (Spr. Ct. App. 1929).

119. *Weiler v. Weiler*, *supra* note 58; *Drew v. Drew*, *supra* note 58; *State ex rel. Shoemaker v. Hall*, *supra* note 118; *Daugherty v. Nelson*, *supra* note 118.

This power is based upon the theory that what the Court is doing is fixing the reciprocal rights of the parents. *Jack v. Jack*, 294 Mo. 128, 243 S.W. 314 (En Banc 1922); *Schumacher v. Schumacher*, 223 S.W.2d 841 (St. L. Mo. App. 1949).

120 *Weiler v. Weiler*, *supra* note 118.

121. *Supra* note 94.

the court has not acquired jurisdiction *in personam* over both parents.¹²² The Missouri courts have indicated that they will exercise this power even where the children are not physically present within the state, if Missouri remains the children's domicile.¹²³

3. Physical Presence of Child within Missouri

A third foundation for jurisdiction has been found to exist in several states other than Missouri. Bare physical presence of a child within the state clothes the courts with sufficient interest in the child's welfare as to empower a court to pass upon the custody question.¹²⁴ No Missouri case directly passing upon this point has been found, although there is dictum to the effect that our courts might exercise jurisdiction under these circumstances in an appropriate case.¹²⁵

Neither have our courts indicated that personal jurisdiction of both parents or domicile of the child are exclusive jurisdictional grounds for custody determination. Whether or not the Missouri courts will adhere to this dictum, however, remains to be seen.

B. Recognition of Foreign Decrees Determining Child Custody

1. Jurisdiction of Foreign Forum

A 1958 decision by the Kansas City Court of Appeals appears to indicate that there is no fixed rule as to when Missouri will extend recognition to a foreign custody determination.¹²⁶ This decision involved a Virginia decree wherein both the husband and wife were personally present in the proceeding. The Missouri courts refused to accord this decree recognition, holding that it showed upon its face that the wife was a Missouri resident at the time of the rendition. The children were not physically present in Virginia at the time of the rendition of the decree. Thus it appears that Missouri will not accord to a foreign forum recognition of jurisdiction in the same situation where her own court will exercise jurisdic-

122. Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W.2d 566 (En Banc 1949); Moss v. Fitch, 212 Mo. 484 (1908); Bernstein v. Bernstein, 351 S.W.2d 46 (K.C. Mo. App. 1961); McCoy v. Briegel, 305 S.W.2d 29 (St. L. Mo. App. 1957); Crooks v. Crooks, 197 S.W.2d 678 (St. L. Mo. App. 1946); Kaestner v. Kaestner, 228 Mo. App. 1043, 58 S.W.2d 494 (St. L. Ct. App. 1933); Elvins v. Elvins, 176 Mo. App. 645, 159 S.W. 746 (St. L. Ct. App. 1913).

123. State *ex rel.* Stoffey v. La Driere, 273 S.W.2d 776 (St. L. Mo. App. 1954).

124. Annot., 4 A.L.R.2d 7 (1949).

125. Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W.2d 566 (En Banc 1949).

126. *In re* Rice, 316 S.W.2d 329 (K.C. Mo. App. 1958).

tion. The court did not pass upon the question of whether the domicile of the children continued in Virginia notwithstanding their physical presence in Missouri. It would thus appear that there is no clear rule as to when Missouri will extend full faith and credit or recognition based on comity to a foreign decree so far as children are concerned. It would be difficult to say that the federal cases establish any clear requirement in this regard.¹²⁷

2. Collateral Attack

It does appear clear that Missouri will permit a collateral attack upon a foreign decree on the same basis and grounds as in a divorce case.¹²⁸

IX. CONCLUSIONS

Considering the relative rarity with which conflict of law problems have arisen in domestic relations situations in the past, the Missouri law is remarkably well established. In our modern society with its lessening emphasis on family stability¹²⁹ and greater emphasis on a mobile population, these problems may be expected to occur much more frequently in the future. Barring some major reversal in this field by the United States Supreme Court, little change may be anticipated in Missouri.

127. For a discussion of the federal cases, see Hazard, *Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

128. *Howey v. Howey*, 240 S.W. 450 (Mo. En Banc 1922). See also *Daugherty v. Nelson*, *supra* note 118.

129. Perhaps this was best summed up in the revised modern version of Goldilocks. It begins: Once upon a time there were three bears, a mama bear, a papa bear, and a little baby bear by a previous marriage.