



1966

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Recommended Citation

Moreland, Roy Mitchell (1966) "Conflict of Laws--A Rationale of Jurisdiction," *Kentucky Law Journal*: Vol. 55 : Iss. 1 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol55/iss1/2>

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Conflict of Laws--A Rationale of Jurisdiction

BY ROY MORELAND*

Editor's Note: This is the third installment of a study and series of articles on Jurisdiction in the field of Conflict of Laws. The first installment appeared in 54 Ky. L.J. 5 (1965) and discussed, among other things, "Presence" as a basis of jurisdiction. The second installment appeared in 54 Ky. L.J. 171 (1966) and discussed "Domicile," "Nationality," "Appearance," and "Consent" as bases of jurisdiction. The present installment is a discussion of the "Doing of an Act" as a basis of jurisdiction and discusses both jurisdiction over foreign corporations and suits between private persons on the Conflicts level. The fourth and final installment in this series will appear in Volume 56 of the Kentucky Law Journal. It will deal with "Service."

VI. DOING OF AN ACT

Foreword

It is often said that the principle that the performance of a single act within a state can be a sufficient basis of jurisdiction over a non-resident individual is rooted in *Hess v. Pawloski*,¹¹⁴ a 1927 decision. This is literally true for this is the first case which applied the principle to a non-resident person. But the fundamental concept of jurisdiction over non-resident defendants had been used for over a hundred years in the case of foreign corporations, where the corporation did "business" in the local state, and this corporation *analogy* undoubtedly contributed to the decision as to jurisdiction over private persons in *Pawloski*. Moreover, the decision in *Pawloski* that *one* act may serve as a basis of jurisdiction undoubtedly has affected the currently developing corporation rule—that *one act* by a foreign corporation, rather than *many acts* constituting doing business, may serve as a basis of jurisdiction

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¹¹⁴ 274 U.S. 352 (1927).

over the corporation. In other words, developments in the corporation cases and private person cases have each influenced the development of the "single act" concept in the other field, and so it is necessary to study the development of each in order to understand the historical development of the other. The discussion will begin with the historic concept of jurisdiction over a foreign corporation, for this concept developed first.

A. Jurisdiction over Foreign Corporations

1. *First Approach to the Problem.*—In view of the natural interstate commerce between the states, it was not only necessary and expedient but inevitable for the states to find some ground or grounds upon which jurisdiction could be asserted over foreign corporations. And yet the rationale by which this was done has often occasioned strained reasoning and differing approaches to justify forcing foreign corporations to defend local suits. An early method of coping with the problem was to require the foreign corporation to appoint a resident agent for service of process or to consent to service on a government officer in the state, such as the Secretary of State.¹¹⁵ An important case involving such state regulation was *LaFayette Insurance Co. v. French*¹¹⁶ where a resident agent was appointed for the service of process as provided by statute. It was held that the service was valid. The Court pointed out that a foreign corporation could transact business in the local state only with the consent, express or implied, of the local state. Consequently, the local state could impose reasonable conditions on letting the foreign corporation come in. To make the foreign corporation consent to service of process upon its local agent was a reasonable condition.

So, this early approach to the problem of jurisdiction over a foreign corporation because of express or implied consent to service on a local agent or the Secretary of State was grounded primarily upon the proposition that the local state could keep the foreign corporation *out*, and consequently it could impose reasonable conditions on letting it come *in*. The interstate privileges clause of the Constitution applies to persons, not corpora-

¹¹⁵ The Illinois version of such a statute may be found at CHEATHAM, GOODRICH, GRISWOLD & REESE, *CASES ON CONFLICT OF LAWS* 126 (4th ed. 1957).

¹¹⁶ 59 U.S. (18 How.) 404 (1856).

tions. Consequently, a local state can exclude a foreign corporation, it was reasoned.

This doctrine that a state can exclude a foreign corporation at its pleasure and the reasoning that supports it appear in a number of cases, one of which is *Paul v. Virginia*.¹¹⁷ A more recent case supporting the proposition is *Railway Express Agency v. Commonwealth of Virginia*.¹¹⁸ The writer wonders at the soundness of the rule and whether, realistically speaking, it is true. He has seen attempts to keep chain stores and certain other foreign corporations out of the state field. With the American mania for increased business, the proposition is probably moot. At any rate the Supreme Court has held in several cases that a state may not exercise jurisdiction over a foreign corporation in such a manner as to impose an unreasonable burden on interstate commerce.¹¹⁹ *Davis v. Farmers' Co-operative Equity Co.*¹²⁰ is a leading example of the application of this prohibition on such state action. The point is that to take the approach that a state can keep out a foreign corporation and that consequently it can impose, as a condition of letting it come in, reasonable conditions as to service by consent, active or implied, is tenuous and unrealistic and a poor way to rationalize the obtaining of service over a foreign corporation.

Fortunately the "consent" approach to the obtaining of jurisdiction over foreign corporations is now dated and out of favor. Although state statutes providing for "consent" jurisdiction still exist in most of the states and occasional cases still persist, such statutes are historic survivors that, although the law has moved on, still retain a certain amount of vitality.

2. *Second Approach to the Problem.*—The second approach to obtaining jurisdiction over a foreign corporation—and this has become widely adopted—was to consider the corporation as "present" if it was found to be "doing business" in the forum state.¹²¹ First suggested in 1882,¹²² it was not used independently until

¹¹⁷ 75 U.S. (8 Wall.) 168 (1868).

¹¹⁸ 282 U.S. 440 (1931). See STUMBERG, CONFLICT OF LAWS 83 (3d ed. 1963).

¹¹⁹ See STUMBERG, CONFLICT OF LAWS 85 n.72 (3d ed. 1963).

¹²⁰ 262 U.S. 312 (1923).

¹²¹ See Note, 73 HARV. L. REV. 909, 921 (1960).

¹²² *St. Clair v. Cox*, 106 U.S. 350 (1882).

1914 when, in *International Harvester Co. v. Kentucky*,¹²³ the consent theory was held inapplicable because service of process was not upon the agent designated by statute. Gradually this approach, which was not so fictional and consequently more desirable and realistic than the consent approach, took hold; for a long period it has been the most desirable method of obtaining jurisdiction over foreign corporations. The rationale of this approach is particularly persuasive. It is reasoned that, if a foreign corporation comes into the state and does a number of business acts, it is fair and equitable that the corporation can be sued there, at least on business done within the state. However, contrary to the long-accepted, often criticised, rule that an individual "tagged" with a summons in a state is subject to a suit in the state on any transitory cause of action, cases are divided as to whether a foreign corporation doing business in the forum state can be sued on causes of action unrelated to its activity in that state.¹²⁴

A number of technical distinctions have grown up as to when a foreign corporation is "doing business" in the forum state. It would appear that one substantial business act should satisfy the "doing business" criterion. But as a matter of law it did not, and this remains the law today where the jurisdiction is based upon "doing business." Fundamentally, this was because it was held not to be fair to subject a foreign corporation to defend a local suit based upon a single business act. This does not appear realistic or fair to the local resident who has, he thinks, a substantial cause of action. Moreover, the courts are beginning to permit jurisdiction today based upon *one* substantial act, under the emerging doctrine that a suit against a foreign corporation can be based upon one act under the "doing of an act" as a basis of jurisdiction; however, the requirement of a *number of acts* has been the law and remains the law under the "doing business" jurisdictional tag. For example, an Ohio corporation comes into Kentucky and sells the plaintiff one order of fruit trees for \$1000. This is the only sale and there is no solicitation of business from others. The trees are defective. The law has been, and is today, that the plaintiff cannot get jurisdiction for suit in Kentucky on the basis of "doing business." Should the plaintiff be able to sue

¹²³ 234 U.S. 579 (1914).

¹²⁴ See Note, 73 HARV. L. REV. 909, 921 & cases in n.79.

in Kentucky? The law is developing that he can sue today, but jurisdiction must be based upon the "doing of an act," not "doing business." This current development will be discussed later in this paper.

Numerous cases, some of them recent, support the proposition that nothing less than repeated, continuous acts over a somewhat extended period will constitute "doing business" in the state. One of the best cases illustrative of the rule is the notable decision, *International Shoe Co. v. State of Washington*,¹²⁵ decided by the Supreme Court in 1945. That case, which extended the law in that it made "solicitation" over a period of time "doing business," contains the following language in the opinion by Justice Stone:

"Presence" in the state . . . has never been doubted when the activities of the corporation there have not only been *continuous and systematic* but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Finally, although the commission of some *single or occasional* acts of the corporate agent in a state sufficient to impose an obligation or liability of the corporation has not been thought to confer on the state authority to enforce it . . . other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.¹²⁶ (Emphasis added.)

It may be concluded then that the "doing business" tag as a basis of jurisdiction over foreign corporations has been consistently construed by the United States Supreme Court to require at the minimum a *number* of business acts occurring over a period of time. One substantial act was, and is, not enough to satisfy this jurisdictional tag. As stated previously, the law is currently developing so that one substantial act is sufficient. But that new basis of jurisdiction is under the "doing of an act" approach to jurisdiction, not "doing business."

This "doing of an act" as a basis of jurisdiction over a foreign corporation developed after *Hess v. Pawloski*, decided in 1927. In other words, jurisdiction over a non-resident (*Hess v. Pawloski*) based upon the doing of an act within the forum state came first and developed several years before the emergence of the

¹²⁵ 326 U.S. 310 (1945).

¹²⁶ *Id.* at 317-18.

principle that the doing of a single substantial act might serve as a basis of jurisdiction over a foreign corporation. Consequently, *Hess v. Pawloski* and related cases will be discussed before the discussion of the "doing of an act" as a basis of jurisdiction over a foreign corporation.

B. Jurisdiction over Non-resident Private Persons

It would seem logical that the rule in *Hess v. Pawloski*¹²⁷ that a state may obtain jurisdiction over a non-resident private person on the basis of one substantial *act* within the state bore a direct relation to, and was an out-growth of, the long established proposition that a state could obtain jurisdiction over a foreign corporation, if the corporation had done a series of business *acts* over a period within the state. But, as Holmes once said, the law is not logic but experience, and there does not seem to be a direct connection between the corporation rule based upon a *series* of acts and the basis of jurisdiction over a non-resident private person, based upon the doing of *one* act. At least the opinion in *Hess v. Pawloski*, the first "doing of an act by a private person" case, makes no mention of the corporation rule and discusses the rationale for the creation of the new rule without any reference to, or mention of, the corporation analogy. But the analogy was there. The "doing business" rule had been used as a basis of jurisdiction over foreign corporations for half a century, and undoubtedly furnished an analogy, conscious or unconscious, for the rule as to private persons enunciated in *Hess v. Pawloski*.

The important thing about *Pawloski* was the fact that *one* act, rather than a series of acts as in the corporation cases, was held to be a sufficient basis for jurisdiction over a non-resident private person. In situations where the defendant had left the state and was no longer present, was not a domiciliary or national of the forum state, and had made no appearance or consent to be sued therein, the rule in *Pawloski* was an important development in the law. Where the situation did not come within any of these old, established bases of jurisdiction but the non-resident had done a substantial act within the jurisdiction, that act could be seized

¹²⁷ 274 U.S. 352 (1927).

upon to furnish a basis of jurisdiction for suit, where formerly the plaintiff would have been unable to bring an action within that jurisdiction. The *Hess v. Pawloski* case is itself highly illustrative of the importance of the rule it created. In *Pawloski*, the defendant, a non-resident, had injured the plaintiff with his automobile and then had left the jurisdiction. The plaintiff would have been unable to get jurisdiction under any of the old, established bases of jurisdiction. The creation of a *new* basis of jurisdiction—the doing of an act within the state—gave the plaintiff an opportunity to bring suit for compensation for his injury. Having a basis of jurisdiction, service could be obtained on the defendant without the state, a valid local judgment could be obtained on the defendant within the forum state, and if the non-resident defendant did not satisfy the judgment, he could be sued on it in his home state.

As is typical of most transition cases, the rationale of *Pawloski* is not wholly clear and simple. A state statute gave the forum state jurisdiction over a non-resident in a proceeding against him growing out of an accident or collision involving the non-resident, and it was held that such statute was a valid exercise of the state's police power. The Court pointed out that automobiles are dangerous machines and that the state in the public interest may regulate their use and make residents and non-residents alike responsible for their damage on the public highways. The statute provided that service should be by registered mail and that the return receipt should be filed with the declaration in the suit.

Some of the private person cases coming within "the doing of an act" category suggest that a non-resident by coming into the forum state "impliedly consents" to jurisdiction and service as provided by the statute therein. There is an analogy here, of course, to the early coropration cases which grounded jurisdiction over foreign corporations on "implied consent." This was because, it was argued, the local state could keep the corporation *out*; therefore the state could make the corporation "consent" to local jurisdiction as a condition to letting it come *in*. That argument, tenuous at best, and now dated even in the corporation cases, has no place at all in private person cases; since the forum state under the federal constitution cannot keep foreign persons

out,¹²⁸ there can be no imposition of "implied consent" as a condition to their coming *in*.¹²⁹ In fact *consent* has nothing to do with giving the forum state jurisdiction over a foreign person who has done an act within the state. Whatever the proper rationalization in such cases, it does not rest on consent. That point is certain and recent cases and commentators agree.

In these cases where jurisdiction is grounded on the exercise of a state's police power, it is not necessary that the state could *prohibit* the doing of the act or business in question; *regulation*, the ordinary procedure under police power, is a far cry from *prohibition*.

Seven years after *Pawloski* the Supreme Court rendered a similar decision in *Doherty & Co. v. Goodman*,¹³⁰ a case originating in Iowa and involving the sale of corporate securities. Once again there was a statute, this time providing that, if a corporation or individual maintained an office or agency in an Iowa county, service could be made on any clerk or agent employed in such office in all actions connected with the office or agency. *Doherty*, a citizen of New York, was sued and served under this statute. The case does not mention police power as such but points out that Iowa has treated the business of selling securities as exceptional and subjects it to special regulation under various laws. The case relied on *Pawloski* and a couple of other decisions as precedents for a state's ability to regulate automobiles on local highways. Of course, the selling of securities *is* subject to regulation under a state's police power, which makes *Doherty* a police power case.

The new jurisdictional category was somewhat extended by *Dubin v. City of Philadelphia*¹³¹ in which a non-resident owner of Pennsylvania property was held amenable to a suit under a Pennsylvania statute for damages which occurred when the plaintiff fell on a broken sidewalk on defendant's property. The case does not mention police power as such, but it does rely on the automobile cases for precedent. However, there is language in the opinion which seems to go beyond police power as a basis for

¹²⁸ U.S. CONST. art. IV § 2.

¹²⁹ This is the position of Justice Holmes as stated in *Flexner v. Farson*, 248 U.S. 289 (1919). See CHEATHAM, GOODRICH, GRISWOLD & REESE, *CASES ON CONFLICT OF LAWS* 150 n.2 (4th ed. 1957).

¹³⁰ 294 U.S. 623 (1935).

¹³¹ 34 Pa. D. & C. 61 (C.P. No. 6, 1938).

jurisdiction—the flat statement that non-residents should be answerable for tortious acts by their property in the forum state. This raises the question whether the exercise of its police power by the forum state is necessarily the sole basis for the rationalization of constitutionality in such cases and, to go still further, whether police power is really the fundamental basis for the exercise of such jurisdiction anyway.

The writer takes the view, broadly enunciated in the *Dubin* case, that the “doing of an act” cases should rest upon the proposition that non-residents should be responsible in the forum state for torts committed (and contracts made) therein. While the exercise of police power was said to be the basis of jurisdiction in *Pawloski*¹³² and other early cases, this was transitional reasoning and fundamentally unsound. The police power umbrella is so wide that almost any situation, tort or contract in nature, can be included within its shelter. But the trouble is that these “doing of an act” situations are no more “police power” in category than long-recognized bases of jurisdiction such as presence and domicile. In all these bases of jurisdiction over non-residents, there is some substantial connection with the forum state that justifies forcing the non-resident to come and defend a suit therein. This is based upon a sound public policy which is not necessarily an exercise of police power. Public policy often embraces police power; it does not necessarily do so.

An examination will now be made of some statutes and later cases which rest upon the “doing of an act” as a basis of jurisdiction over a non-resident private person.¹³³ As pointed out in the American Law Institute's *Restatement of Conflict of Laws*,¹³⁴

¹³² Prior to *Pawloski*, the Supreme Court had held valid a New Jersey statute requiring non-resident motorists to appoint the New Jersey Secretary of State as agent to receive service of process in actions brought to recover damages for auto injuries within the state. *Kane v. New Jersey*, 242 U.S. 160 (1916). It may well be that this statute would now be invalid for want of proper service in the light of later decisions. That is the reason the case was not discussed in the text. See *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

¹³³ Many cases permit jurisdictions and service on an agent in the forum state. If there was an act by the agent for his master, there should be no problem as to a basis of jurisdiction under established theories of agency. And, of course, there should be no problem of service, as the local agent can be served. Typical agency cases are as simple as that. So, ordinary agency cases do not touch the fundamental problem of local jurisdiction over a non-resident private person. *E.g.*, *Johnson v. Westerfield's Adm'r*, 143 Ky. 10, 135 S.W. 425 (1911).

¹³⁴ RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, Reporter's Note (Tent. Draft No. 3, 1956).

statutes in many states provide for jurisdiction over non-resident private persons as to causes of action arising from one or more isolated acts within the state. Although the *Restatement* differs,¹³⁵ the writer takes the position, supported by Professor James R. Richardson of the Kentucky Law School, that no statute is needed, although this particular basis of jurisdiction was not used at common law. Reasonable extension of common law principles of jurisdiction, it is believed, permit such result.

In *Kawko v. Hower*,¹³⁶ a New Jersey case, a non-resident employer entered into a contract outside the state for work by an employee in New Jersey. In a suit in New Jersey on that contract, there was service on the secretary of the forum Workmen's Compensation Bureau, followed by a forwarding of the service by him to the non-resident employer, as provided by statute. It was held that the statute was constitutional and the judgment valid. This was a New Jersey contract under established workmen's compensation principles. Thus, New Jersey had jurisdiction.¹³⁷ In a somewhat similar case in New York, the court met directly the issue of jurisdiction. This was a suit on a fire insurance policy on property in New York.¹³⁸ The forum held that there was jurisdiction under the statute. More than likely there were other insurance policies in effect in New York, so this is probably a case of isolated acts—rather than one act—within the forum state, as in *Hower* above. The *Restatement* differentiates between isolated acts and "doing business." These two cases *could be* brought within the ambit of "doing business," but they are really half-way between "doing business" and single acts. They are transitional cases in the "doing of an act" category development.

It is difficult to find cases of a *single* act committed in the forum state. One of the most common and clean-cut situations where a single act is committed by a non-resident occurs in the cases where a foreign private person or his agent commits a

¹³⁵ RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, comment e (Tent. Draft No. 3, 1956).

¹³⁶ 129 N.J.L. 319, 29 A.2d 621 (1943).

¹³⁷ The issue of jurisdiction was not raised in this case, only sufficiency of service. The *Restatement* cites the case as an example of "causes of action arising from one or more isolated acts" (a contract or isolated contracts of employment). RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, Reporter's Note (Tent. Draft No. 3, 1956).

¹³⁸ *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S.2d 418 (1953).

tort with an automobile in the forum state as in *Hess v. Pawloski*.¹³⁹ A similar clean-cut single act situation may be found in the case of a real property tort in the forum state, as in *Dubin v. City of Philadelphia*.¹⁴⁰ Similarly a single act may occur where the foreign person has done an act outside the state which has an injurious consequence within the state. For example, the defendant may have blasted near the state lines, causing debris to fall or windows to break in the forum state. Or, one may cite the oft-repeated illustration of the case where one intentionally or negligently fires a bullet from outside the state and produces an injurious consequence within the state.¹⁴¹ Similarly, a single act from without the state causing injurious consequences within may serve as a *contract* as well as a tort jurisdictional basis for an action. Directly in point is *McGee v. International Life Ins. Co.*,¹⁴² a foreign corporation case to be discussed later, in which a contract mailed in Texas was accepted in California, where the injury occurred. It was held that California had jurisdiction for suit on the contract based upon the single contract act in that state. Likewise, in a contract case but involving private persons, a suit against non-resident defendants was allowed in Florida on a contract creating an exclusive agency to sell land in that state.¹⁴³

The "doing of an act" as a basis of jurisdiction as it applies to non-resident private persons is stated thus in a tentative draft of the second *Restatement of Conflict of Laws*:

A state has judicial jurisdiction over an individual who has done, or caused to be done, an act which either took place in the state or resulted in consequences in the state for the purposes of any cause of action arising out of the act within limitations of reasonableness appropriate to the relationship derived from the act.¹⁴⁴

This statement represents the currently developing law upon the matter, it is believed. It is submitted that the new rule does not rest upon the exercise of "police power" for its rationalization but

¹³⁹ 274 U.S. 352 (1927).

¹⁴⁰ 31 Pa. D. & C. 61 (C.P. No. 6, 1938).

¹⁴¹ See Reese & Galston, *Doing Of An Act Or Causing Consequences As Bases Of Jurisdiction*, 44 IOWA L. REV. 249, 261-62 (1959).

¹⁴² 355 U.S. 220 (1957). See VT. STAT. ANN. tit. 12, ch. 6, § 855 (1958).

¹⁴³ State *ex rel.* Weber v. Register, 67 So. 2d 619 (Fla. 1953).

¹⁴⁴ RESTATEMENT (SECOND), CONFLICT OF LAWS § 84 (Tent. Draft No. 3, 1956).

upon the broader concept that an *act* within the forum state should subject a foreign person who has committed it to an action, if in "fair play" to both parties it is reasonable under the circumstances to do so. In interpreting "reasonableness," some of the cases speak of "minimum contact" in the forum state. "Minimum contact" is a weasel, ambiguous phrase, not helpful in solving cases. It is far better to say that there must be a "substantial act," one of sufficient importance to justify forcing the foreign resident to come in and defend a suit.

The cases and commentators such as Ehrenzweig¹⁴⁵ and the writers of a comprehensive Note in the *Harvard Law Review*¹⁴⁶ speak of objections to and limitations on the new rule. For example, shall it apply equally to injurious acts by foreign persons and foreign corporations? In answering that question, should such facts as differences in the historical development of the two categories be taken into consideration? Thus, the original basis for holding a foreign corporation amenable to a local suit was the supposed fact that it could be kept out of the state, and consequently procedural burdens could be imposed upon it as a condition of letting it come in. This argument did not apply to private persons. This, it is submitted, is erroneous differentiation today. History has served its purpose; it has little or nothing to do with the present rationalization for the rule in either instance. Again, it is suggested that perhaps foreign corporations should not be bound unless the act was a "business act." It is believed that this distinction is also valueless. Corporations, too, can commit *torts*. To bring the matter to a head, the writer would hope that the law would develop without distinctions in the application of the rule as it is applied to foreign private persons and foreign corporations. That does not change the fact that "the circumstances" may occasionally make the rule applicable in one category, where it would not be "reasonable" in the other. The same rule and the same tests should be applied to both foreign corporations and private persons. The *result* of its application, however, may occasionally be different, but that will be because of "reasonableness under the circumstances."

¹⁴⁵ Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285 (1958).

¹⁴⁶ *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 935-40 (1960).

3. *Third (Current) Approach to the Problem of Jurisdiction over Foreign Corporations.*¹⁴⁷—At this point the discussion returns to the development of jurisdiction over foreign corporations. As pointed out in the previous discussion, forum courts took jurisdiction over foreign corporations for over fifty years before *Hess v. Pawloski*,¹⁴⁸ the original case of jurisdiction over foreign private persons. As stated, the first approach to jurisdiction over a foreign corporation was grounded on the proposition that the forum state could keep the foreign corporation *out*; consequently it could impose actual or implied consent to jurisdiction as a condition to letting the foreign corporation come *in*. The second approach to the problem was to consider the foreign corporation as “present” if it was “doing business” in the state. Jurisdiction based upon this proposition is found in many current statutes and decisions and it is still—and will continue to be—widely used. However, coincidentally with “doing business” as a basis of jurisdiction over foreign corporations, the courts are now bringing foreign corporations under the jurisdictional umbrella of the “doing of an act” as a basis of jurisdiction—as in the case of foreign private persons.

The leading case which uses the third and current approach is *McGee v. International Life Insurance Co.*¹⁴⁹ In that case the plaintiff's son, a resident of California, bought an insurance policy from an Arizona corporation, naming plaintiff as beneficiary. Later, defendant, a Texas corporation, agreed to assume the obligations of the Arizona corporation and mailed a re-insurance certificate to plaintiff's son in California, offering to insure him in accordance with his policy. This offer was accepted, presumably by mail, and the son paid premiums from his home in California to defendant's office in Texas. Neither corporation had ever had any office or agent in California or done any business in that state. After the death of her son, the plaintiff sent proof of his death to defendant but it refused to pay the claim. Plaintiff brought suit in California under a state statute subjecting foreign corporations

¹⁴⁷ The outline of this installment is somewhat at variance in this subsection, since subsection 3, of the main division of the Outline, A., follows the main division B. This is because it was thought advisable to discuss the development of jurisdiction over foreign private persons before discussing the third approach to jurisdiction over foreign corporations. What we have here is A.3. of the Outline. While this creates a variance in the Outline, it permits a more logical and understandable discussion of the development of the two categories.

¹⁴⁸ 274 U.S. 352 (1927).

¹⁴⁹ 355 U.S. 220 (1957).

to suit in California on insurance contracts with residents of California, even though such corporations could not be served with process in that state. Process was served by registered mail to the defendant's principal place of business in Texas, and the plaintiff obtained a California judgment. Unable to collect the judgment in California, the plaintiff went to Texas where she filed suit on the California judgment in a Texas court. But the Texas courts refused to enforce the judgment, holding it was void under the fourteenth amendment because service of process outside California could not give the courts of that state jurisdiction over the defendant.

However, the Supreme Court of the United States held that the California judgment was valid, since "the suit was based upon a contract which had substantial connection with that state."¹⁵⁰ Justice Black, who wrote the opinion, pointed out that the contract was delivered in California, the premiums were mailed from there, and the insured was a resident of that state when he died. This, then, is a Supreme Court "one act" case, a single contract causing the defendant to have substantial connection with the forum state although it had no other connection whatever with the state. The case goes all the way in holding that one contract by a foreign corporation may confer jurisdiction.

In a similar case, a Pennsylvania insurance company mailed to a resident of New York a policy insuring hotel property in New Hampshire and received a premium payment by mail from New York. Jurisdiction in New York was upheld on the basis of that single transaction under a statute that made "delivery of contracts of insurance to residents" of New York an act in that state.¹⁵¹

Courts now commonly, and more easily, permit jurisdiction based upon a tort committed in the forum state. A leading case is *Smyth v. Twin State Improvement Co.*,¹⁵² where the highest court of Vermont in a carefully reasoned opinion upheld a state statute as constitutional which permitted service on corporate defendants having committed "a tort in whole or in part in Vermont."¹⁵³ A

¹⁵⁰ *Id.* at 223.

¹⁵¹ *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S.2d 418 (1953). See cases cited, RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, Reporter's Note (Tent. Draft No. 3, 1956). See also EHRENZWEIG, CONFLICT OF LAWS 116 n.48 (1962).

¹⁵² 116 Vt. 569, 80 A.2d 664 (1951).

¹⁵³ VT. STAT. ANN. tit. 12, ch. 6, § 855 (1958).

federal court sitting in Maryland decided likewise as to a similar Maryland statute.¹⁵⁴ Unfortunately, both of these cases gave validity to statutes allowing *substituted service* upon a forum state official but that problem is grist for another day's grinding. Our problem here has to do with basis of jurisdiction, not service.

While courts speak of "contract" and "tort" actions there should be no fundamental difference as to jurisdiction whether the action is in tort or contract. It is true that there may be a difference in *result* in the two categories, but this is because of differences in the "circumstances" making it "reasonable" to take jurisdiction in the one case and not in the other. Torts are more easily localized¹⁵⁵ than contracts, although developments such as the "center of gravity" or "grouping of contacts" doctrine,¹⁵⁶ have made it increasingly difficult to localize either. The availability of witnesses may be the decisive circumstance of one of these cases in either category. The forum may be inconvenient in one and not in the other. Foreign defendants, both private persons and corporations, may well be asked to defend a local tort injury suit more readily than one based upon contract. All such questions should be decided upon the basis of public policy, reasonableness, and fair play under the circumstances.

*Hanson v. Denckla*¹⁵⁷ illustrates the importance of "what is reasonable and fair play under the circumstances." In that case, a woman domiciled in Pennsylvania, executed in Delaware a revocable trust of certain securities with a power of appointment, naming a Delaware trust company as trustee. Later, the settlor became domiciled in Florida, where she remained until her death. Before her death she executed an instrument exercising her power of appointment and revoking prior appointments and delivered the instrument to the trustee in Delaware. She executed a will on the same day leaving all property not under the trust to certain relatives. In a proceeding in Florida in which the Delaware trust company was served by mail, the Florida courts held the trust ineffective under Florida law and the res passed under the resi-

¹⁵⁴ *Johns v. Bay State Abrasive Prods. Co.*, 89 F. Supp. 654 (1950). See Comment, 18 U. CHI. L. REV. 792 (1952).

¹⁵⁵ *Developments In The Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 926 (1960).

¹⁵⁶ *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

¹⁵⁷ 357 U.S. 235 (1958).

duary clause of the will. The Florida courts held that the Florida court had jurisdiction over the non-resident trust company. A Delaware court with personal jurisdiction over the trust company sustained the trust and appointment; this decision was sustained by the Supreme Court of Delaware, and this latter decision was brought to the Supreme Court of the United States. The Supreme Court held that the Florida court did not have in rem jurisdiction over the corpus of the trust or personal jurisdiction over the trust company. Without such jurisdiction it had no power to pass on the validity of the trust, and therefore its decree was void.

In deciding the case, Justice Warren, who wrote the opinion said:

The execution in Florida of the powers of appointment . . . does not give Florida a substantial connection with the contract on which this suit is based. It is the validity of the trust agreement, not the appointment, that is at issue here. . . . The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.¹⁵⁸

In other words the case held that Florida's connection with the trust agreement was too insubstantial for personal jurisdiction over the non-resident trustee. The trust corporation had no office in Florida and did not transact or solicit business there,¹⁵⁹ "nor did the cause of action arise out of any act done there by the corporation."¹⁶⁰ There were vigorous dissents to the decision.

It is submitted that the case was properly decided. While the situation perhaps is a close one, the fact remains that the trust corporation, which is the real defendant in the action, did no business nor act in Florida. While there was a "relationship" with Florida, there was no connection by act there. The new rule should not be watered down so that this technicality is not satisfied. If it is not reasonably satisfied, it is unreasonable to subject the foreign corporation to a local suit.

¹⁵⁸ *Id.* at 253.

¹⁵⁹ Consequently "doing business" could not be a basis of jurisdiction.

¹⁶⁰ Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695, 702 (1959). So, the "doing of an act" could not be a basis of jurisdiction.

As in the case of foreign persons,¹⁶¹ the American Law Institute has drafted a rule that the "doing of an act" may serve as a basis of jurisdiction over foreign corporations. The rule provides:

A state has judicial jurisdiction over a foreign corporation as to causes of action arising out of (1) an act done, or caused to be done, by the corporation in the state or resulting in consequences there, and (2) a thing owned by the corporation in the state within limitations of reasonableness appropriate to the relationship derived from the act or ownership of the thing.¹⁶²

This section covers the rule as to jurisdiction over foreign corporations in practically the same words as the two rules as to jurisdiction over non-resident private persons in sections 84 and 84a of the *Restatement*.¹⁶³ This is as it should be for, as Ehrenzweig points out, "personal jurisdiction over foreign corporations raises essentially the same problems as that over private persons."¹⁶⁴ This is to say that jurisdiction over non-resident private persons and foreign corporations, while originally developing separately in regard to each of these two subjects, has now *merged* for all practical purposes in the "doing of an act" category. It is important to recognize this fact.

The new category serves a very useful purpose. Old bases of jurisdiction, such as presence and domicile, fail to supply a basis of jurisdiction over non-resident private persons in some cases. Similarly, "doing business" has jurisdictional limitations in the case of "isolated and single acts" by a foreign corporation. The new category gives the forum state additional and needed jurisdictional power in both classes of cases.

As pointed up in *Hanson v. Denckla*,¹⁶⁵ the "doing of an act" basis of jurisdiction has its limitations. The circumstances become jurisdictionally important. The absent private person or corporation, as the case may be, should not be required to come in and defend a local suit unless it is "reasonable and fair play under the

¹⁶¹ RESTATEMENT (SECOND), CONFLICT OF LAWS § 84 (Tent. Draft No. 3, 1956).

¹⁶² RESTATEMENT (SECOND), CONFLICT OF LAWS § 91a (Tent. Draft No. 3, 1956).

¹⁶³ RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 84, 84a (Tent. Draft No. 3, 1956).

¹⁶⁴ EHRENZWEIG, CONFLICT OF LAWS 110 (1962).

¹⁶⁵ 357 U.S. 235 (1958).

circumstances" to require him to do so. Each close case will thus depend upon the application of set general rules, tempered by a sound judicial determination as to whether jurisdiction should be taken under the circumstances.

Ed. Note: The fourth and final installment in this series will appear in Volume 56 of the Kentucky Law Journal.