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Roy Mitchell Moreland
University of Kentucky

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Conflict of Laws--A Rationale of Jurisdiction--Service of Process

By ROY MORELAND*

Editor's Note: This is the fourth and final 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 third installment appeared in 55 Ky. L.J. 11 (1966) and discussed "Doing of an Act" as a basis of jurisdiction. The concluding installment discusses "Service of Process," which is also a problem of jurisdiction as a facet of the Constitutional requirement of due process.

VII. SERVICE OF PROCESS

While the primary concern here is the problem of service on an out-of-state defendant, it is thought advisable to discuss it first on the state level, *i.e.*, service of process where the defendant is within the state. It is hoped that a determination of what is reasonable and adequate on the state level will be helpful in determining what is sufficient where the defendant is not present in the state. One might deduce that the rules should coincide and merge on the two levels, subject perhaps to *some* variance in the two categories because of practical differences in the circumstances.

A. SERVICE OF PROCESS IN SUITS BETWEEN LITIGANTS PRESENT WITHIN THE STATE.

1. *Personal Service*—Federal Rules of Civil Procedure (4) (d) (1) [hereinafter cited as CR] provides that a copy of the summons and complaint be personally served on the defendant, and be left at his dwelling house or usual place of abode with some person of

* Professor of Law, University of Kentucky College of Law; LL. B., University of Kentucky; J. D., University of Chicago; S.J.D., Harvard University Law School.

suitable age and discretion then residing therein, or delivered to an agent.¹⁶⁷ It would appear that this rule is reasonable and in accordance with the standards of "fair play" required in judicial procedure. The question is whether the rule should go further. Federal Rules of Criminal Procedure 4 (c) (3) takes this additional step by providing that the defendant may be served personally or by mailing the warrant to his last known address, an alternative which is omitted in the new Kentucky Rules of Criminal Procedure 2.10 (2). It is submitted that the Federal Civil Rule and the Kentucky Criminal Rule, which omit mail service to the last known address, are more in accordance with reasonable and fair constitutional process. That question, among others, however, is grist for discussions ahead where it may be found that some sort of service by mail is both desirable and constitutional, so long as the defendant receives actual notice.

Personal service on the defendant is in the historic tradition. As pointed out by Professor Blume,¹⁶⁸ the service could not be accomplished unless the server and the defendant were so situated that the defendant could be arrested. This early concept of jurisdiction and service was carried forward and served as a basis for statements such as Holmes' that the foundation of jurisdiction is physical power over the defendant.¹⁶⁹ *Pennoyer v. Neff*¹⁷⁰ enunciated the same fundamental idea when it held that a defendant could not be brought within the jurisdiction of the court except by personal service within the state. But the physical power concept of early history, of Holmes, and of *Pennoyer* has been increasingly eroded because social needs and an expanding conception of due process have so required. The first big break in the dike of "physical power" occurred in *Hess v. Pawloski*,¹⁷¹ where the Supreme Court upheld out-of-state service on a non-resident who had an automobile accident within the forum state. Further inroads have been made on the concept, and there will be more.

Discussions earlier in this series have shown how the historic conception of physical power as a basis of jurisdiction has led to the sometimes shocking rule that jurisdiction over a transient may

¹⁶⁷ Many states have adopted the same or practically the same rule. See, e.g., Ky. R. Civ. P. 4.04 [hereinafter cited as CR].

¹⁶⁸ W. BLUME, *AMERICAN CIVIL PROCEDURE* 276 (1955).

¹⁶⁹ *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

¹⁷⁰ 95 U.S. 714 (1878).

¹⁷¹ 274 U.S. 352 (1927).

be obtained by serving him while he is temporarily and casually within the state.¹⁷² Conversely, the "power concept" has also led to increased difficulty in apprehending the elusive defendant who finds a haven from local suit by hiding or fleeing to another state.

2. *Substituted Personal Service*¹⁷³—The traditional manner of substituted service is to leave the summons at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, as provided in CR 4 (d) (1). This is ordinarily as satisfactory as personal service since the defendant will usually get the summons. In case he does not actually receive it, the law should provide him recourse so that he would not have to suffer a default judgment. Lack of such recourse would not be "fair play," but if the statute is literally interpreted,¹⁷⁴ no relief is provided. This lack of "fair play" amounts to a historic survivor which the law has not, as yet, corrected.¹⁷⁵ In such a case the courts will say that the service is good "if it was reasonably calculated to give the defendant actual notice. . . ."¹⁷⁶ This rather glib statement is little consolation to a defendant who had no actual notice of the suit and suffered a default judgment.

¹⁷² See Moreland, *Conflict of Laws—A Rationale of Jurisdiction*, 54 Ky. L.J. 5, 10-18 (1965).

¹⁷³ The phrase "substituted personal service" is somewhat unfortunate. However, it is inveterate in statutes, cases, and texts and it is difficult to phrase a better one. See, e.g., F. JAMES, *CIVIL PROCEDURE* 622 (1965).

¹⁷⁴ *Bryant v. Shute's Ex'r*, 147 Ky. 268, 144 S.W. 28 (1912).

It must of course follow that if the statute is followed in the matter of making the service by leaving a copy at the residence of the defendant the fact that the defendant did not receive actual notice, or that actual notice of the action was not thereby brought to him, does not affect the validity of the judgment. If it were allowed to do so such process would be of no effect, and it would have been useless to prescribe it. *Id.* at 276, 144 S.W. at 32.

¹⁷⁵ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 75(e) (1956) states: "It is not necessary that the defendant should have received actual knowledge of the action." Moreover, "for a defendant domiciled in the state, service of the summons by leaving it at his last and usual place of abode is enough." *Id.* at § 75(d). These statements are tempered somewhat by the Supreme Court's observation in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950), that: "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." For various wordings of state statutes and cases pro and con, see 2 J. MOORE, *FEDERAL PRACTICE* § 4.11(3) (2d ed. 1965). See also *FED. R. CIV. P.* 60(b) for possible relief from default judgment where no notice was received.

¹⁷⁶ *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Kentucky, in a rare departure, has evaded the occasional inequities in the rule by omitting the alternative provision for service at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing therein. The only service provided by the Kentucky Rule is personal service.¹⁷⁷ While this is eminently more fair to the defendant, it often puts a difficult burden on process servers since they sometimes have to return many times, often at night, to effect service, and occasionally the defendant is never served.

The question naturally arises: Why not use the registered letter with return receipt as one alternative for obtaining personal service on the elusive defendant? It is arguable that the part of the rule which permits leaving the summons at the defendant's dwelling should not result in a valid service unless the defendant receives actual notice. However, the mailing of a registered letter with return receipt would give the defendant actual notice or he would not be validly served. This method of service is quite common with out-of-state service, such as in an automobile accident case.¹⁷⁸ There would seem to be no reason why it could not be used advantageously to serve in-state defendants.

Admittedly, service by mail would not reach *all* elusive defendants. Perhaps it is better to let the scales weigh, as they do at present, in favor of the plaintiff in such cases. That may not result completely in fair play, but it may be good public policy which, in the end, may outweigh the ideal of notice in *all* cases. However, that decision should be a matter of *considered* determination.

Actually, the use of service by mail is provided by statute in some states. An illustrative decision is *Durfee v. Durfee*,¹⁷⁹ a Massachusetts case. The statute provided that "when personal service is required of any citation issued by a probate court, the court may direct such service to be made by registered mail addressed to the party entitled thereto at his post office address." Not only was the citation delivered by registered mail, but a return receipt, which the defendant signed, was attached. The court correctly held that the service was valid. Of course, service by mail should always provide for a registered letter with return receipt to insure actual

¹⁷⁷ CR 4.04(1).

¹⁷⁸ See, e.g., KY. REV. STAT. ch. 188 (1962).

¹⁷⁹ 293 Mass. 472, 200 N.E. 395 (1936). See N. Y. JUD. C. REPORT AND STUDIES 183 (1938).

notice and return thereof to the court. However, several jurisdictions have provided that ordinary mail is sufficient in certain cases.¹⁸⁰ It has been said that service by ordinary mail should be valid even though not received, in view of a presumption that mail properly addressed and stamped is delivered.¹⁸¹ But, in light of the recent Supreme Court decisions in *Wuchter v. Pizzuti*¹⁸² and *Mullane v. Central Hanover Bank & Trust Co.*,¹⁸³ the statement is of doubtful validity. There is no good reason to resort to ordinary mail when the registered letter with return receipt is available.

3. *Service to an agent*—It is trite to say that service may be made upon an agent authorized to accept it. But when the agent is not authorized to accept service, or the suit does not arise out of the subject of agency, more difficult questions are presented. In such cases, the law of agency and corporations may well govern. As pointed out by Professor James,¹⁸⁴ the very fact of agency raises a likelihood that notice will be given, even though no authority is given to accept service and it is not authorized by statute.¹⁸⁵

4. *Service in actions in rem*—In an in rem action, service by newspaper publication that the owner of the property might or might not see has been valid for several hundred years. There is authority as early as 1668 to the effect that the plaintiff in an in rem action was “not bound to give the owner notice of the summons.”¹⁸⁶ This astonishing rule, when viewed in the light of current mores, arose out of the fact that in those days owners or tenants of land lived on the land and would watch for suits concerning it. Presumably, they would see a notice of a suit when published in the local newspaper. It was largely a rural society, population was sparse, and people, especially the owners of land, did not move around much. Even under those conditions, the rule must have worked many inequities, and it is even more unfair under modern

¹⁸⁰ See 4 N. Y. JUD. C. REPORT AND STUDIES 198 n. 30 (1938) for illustrative statutes.

¹⁸¹ F. JAMES, *supra* note 173, at 652.

¹⁸² 276 U.S. 13 (1928).

¹⁸³ 339 U.S. 306 (1950).

¹⁸⁴ F. JAMES, *supra* note 173, at 650.

¹⁸⁵ For abstracts of numerous cases illustrative of various problems in the relationships of agency and service of process, see 2 J. MOORE, *supra* note 175, at § 4.12.

¹⁸⁶ W. BLUME, *supra* note 168, at 180.

conditions. Many people do not live on their land now, population is often dense, and legal notices are seldom read. Service by publication has outlived its efficiency, but like so many other types of service of process, it has lingered on because the law was unable to keep up with a changing society and advancing notions of "fair play." However, as in some other categories of service of process, an attack is now on as to service by publication in an in rem action. Representative is the excellent opinion in 1950 by Mr. Justice Jackson in *Mullane v. Central Hanover Bank & Trust Company*.¹⁸⁷ The case tore a large hole in the dyke of service by publication. That case and the problem will be considered later in the discussion of service of process by publication on out-of-state defendants.

Fortunately, *Mullane* has already borne fruit as to service by publication on in-state defendants. In *Walker v. Hutchinson*,¹⁸⁸ the Supreme Court held that service by publication in a land condemnation suit was insufficient where the owner had no actual knowledge of the suit. The Court stated that *Mullane* had given thorough consideration to the problem of adequate notice under the due process clause, saying: "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property."¹⁸⁹

B. SERVICE OF PROCESS IN CONFLICT OF LAWS CASES

1. *Personal service on nonresidents within the forum state—*

One of the historic bases of jurisdiction over nonresidents is presence in the forum state. If a resident of Ohio is physically present in Kentucky, he may be served in a Kentucky suit while he is actually in the state, even though his presence is only temporary and casual. Except for the rare application of the doctrine of forum non conveniens, the basis of jurisdiction and service of process are valid in such a case, and the judgment in the suit is entitled to full faith and credit in any other state. This somewhat astounding situation is the result of an application of the "power concept" of jurisdiction and service.

¹⁸⁷ 339 U.S. 306 (1950).

¹⁸⁸ 352 U.S. 112 (1956).

¹⁸⁹ *Id.* at 116.

The "power concept" is of ancient heritage. As stated earlier, people in early England lived in sparsely settled communities and did not move around very much. Suits in those early days were begun by *arresting the defendant*.¹⁹⁰ Thus, the "power concept" developed. There is nothing very astonishing about this early rationalization; it fitted a situation where the parties to suits and their causes of action were local. As time passed, the rule and the rationalization continued, and well they might, for what better justification might a court have for subjecting a defendant to a suit than that he was physically within the court's jurisdiction and power—power not only to try the case but to make an effective decree. So, even today, there is nothing astounding about a court having jurisdiction to try a case where the subject matter and the parties are before the court.

But the "power concept" of jurisdiction and service raises two important problems under modern conditions. In the past, few parties from other jurisdictions came within the local jurisdiction, but today numerous "foreign" defendants come in, sometimes temporarily. Often it is desirable to sue such transients locally, *e.g.*, the plaintiff may be a resident of the forum state or an elusive defendant may be advantageously "found" there.

The other current problem occurs where the plaintiff desires to sue in the forum state but the defendant is a nonresident of that jurisdiction. The plaintiff could follow the defendant and sue him in the state where he is domiciled or residing, but in many situations this may not be the best solution to the problem. Under certain conditions, should he be able to sue the nonresident locally? These two problems will now be considered separately.

The first problem, that of serving the non-resident who is temporarily and casually within the forum state, is not really a conflict-of-laws problem. The plaintiff and the defendant are both "present" in the jurisdiction and the defendant is served therein. Nevertheless, the defendant is, in fact, a non-resident. Technically, there is no conflicts question; the defendant is a transient and, as such, a resident of another state.

The problem of the transient defendant who is served while temporarily within the forum state has been discussed at con-

¹⁹⁰ W. BLUME, *supra* note 168, at 274.

siderable length elsewhere in this series of articles,¹⁹¹ and no attempt will be made to consider it anew at this point. Realistically, the rule has its advantages and disadvantages. If the plaintiff is a resident of the forum state there is an advantage to him in being able to sue the non-resident therein, rather than in the jurisdiction in which the transient is domiciled or a resident. Furthermore, if the defendant is elusive the plaintiff can sue and serve him in any jurisdiction in which he is temporarily present. Thus, the rule results in a considerable check on elusive or mobile defendants. These are good results, and they stem, of course, from the "power concept" of jurisdiction and service.

However, the "power concept" has its disadvantages. Often the defendant is forced to defend a suit in a state with no connection to the case, except that he was served while temporarily present therein. *Peabody v. Hamilton*¹⁹² involved a defendant who had no connection with the forum state other than that he was served while his boat was temporarily anchored there. *Peabody* upheld jurisdiction in spite of the state's limited connection with the case.¹⁹³

The law of transient jurisdiction is under vigorous attack.¹⁹⁴ But, it is submitted, the attackers are only partly right. Such service does have its disadvantages; it also has its advantages. It has historical roots, and it would seem fair to allow the elusive defendant to be sued wherever he can be "caught." Its inequities should be ironed out. Then the rule as to jurisdiction, based upon presence in the forum state, might well read, as suggested earlier in this study of jurisdictional problems, as follows:

A state has jurisdiction over an individual who is present within its territory whether permanently or temporarily provided that, balancing the interests of the parties,¹⁹⁵ it appears that there has been sufficient contact with the state to justify a suit therein, or the defendant is so elusive that it would be difficult to find him in a state which would have jurisdiction of

¹⁹¹ See Moreland, *supra* note 172, at 15.

¹⁹² 106 Mass. 217 (1870).

¹⁹³ See also *Darrah v. Watson*, 36 Iowa 116 (1872).

¹⁹⁴ See, e.g., *Transient Jurisdiction—Remnant of Pennoyer v. Neff*, A Round Table Discussion, 9 J. PUB. LAW 281-337 (1960).

¹⁹⁵ See G. STUMBERG, PRINCIPLES OF THE CONFLICT OF LAWS 68 (3d ed. 1963).

the case under ordinary, more acceptable principles.¹⁹⁶

2. *Service on foreign corporations doing business within the state*—As discussed elsewhere in this series of articles,¹⁹⁷ jurisdiction over foreign corporations has evolved in three steps. The first approach to the foreign corporation problem was grounded on the proposition that the forum could keep the foreign corporation out; consequently, it could put conditions upon letting it come in. Such conditions could include provisions as to service of process. This approach has been largely repudiated, but many statutes still provide for local service. The second approach was based upon the theory that if a foreign corporation did enough “business” in the forum to justify suing it there the state had jurisdiction. This type of statute is still widely used. The third, and more recently used approach, is based upon the theory that if the foreign corporation does isolated acts—or even one substantial single act—in the forum, it is subject to local jurisdiction.

As in actions in personam, due process in corporation cases is concerned not only with jurisdiction, under one of the above approaches, but also with service of process. There has been considerable evolution in ideas as to the sufficiency of service in corporate cases. Early statutes provided that foreign corporations desiring to do business in a state should appoint an agent therein for service of process, especially if the corporation planned to maintain no business office in the state. But corporations often did not take the affirmative step of appointing an agent for service of process. So these statutes provided further that if no agent for process was appointed, service might be made upon the forum’s Secretary of State. Is such a statute constitutional as to sufficiency of service under due process? Professor Stumberg states that it is “if proper steps have been taken to notify the corporation of the pendency of the suit.”¹⁹⁸ This ordinarily means that the Secretary of State should send the foreign corporation a registered letter with return receipt. Such statutes are now common. Some cases say that only the best service, if short of actual notice, should suffice. In view of realistic thinking by the present Supreme Court, it would seem that, except for rare cases where circumstances might

¹⁹⁶ Moreland, *Conflict of Laws—A Rationale of Jurisdiction*, 54 Ky. L. J. 5, 17 (1965).

¹⁹⁷ *Id.* at 12-16, 23-28.

¹⁹⁸ G. STUMBERG, *supra* note 195, at 84.

warrant less, the registered letter with return receipt would seem to be required. The Supreme Court is moving strongly and quickly to a view that due process requires actual notice in practically all cases.¹⁹⁹

3. *Service on private persons outside the jurisdiction*—As previously stated,²⁰⁰ the “power concept” of jurisdiction and service of process raises two important problems under current conditions. The first problem concerns the transient defendant who becomes subject to the jurisdiction of the forum because he was served there while temporarily present.

The other problem occurs when the plaintiff desires to sue in the forum state but the defendant is a non-resident of that jurisdiction. In these cases, the related questions of jurisdiction and service of process are involved. As discussed, in earlier days suits were largely between local litigants and concerned local injuries. Consequently, it was natural that there grew up a civil process based upon “physical power” over the parties and subject matter. If the parties were present and the adjudication involved a local controversy, the court had “power” to try the case and render an effective decree. Service of process was effected by “arresting” the defendant to make him available for the trial.

However, as time passed, the “power concept” proved too narrow to meet the demands of an advancing and changing society. Many suits were no longer local; it was often necessary to sue out-of-state defendants and to be able to serve them so that they could be brought before the court. Such problems were inevitable in intercourse with other jurisdictions. Thus, it became necessary to add additional theories of jurisdiction and service to the original “power concept.” Such additions and changes in judicial concepts were reluctantly made, for the law was, and is, slow to adapt to society’s changes.

The first big break in the “physical power” concept occurred in 1927 in the historic case of *Hess v. Pawloski*.²⁰¹ Two things were perhaps most responsible for delaying this evolutionary change. The first was the oft repeated statement of Justice Holmes that

¹⁹⁹ *Wuchter v. Pizzuti*, 276 U.S. 13 (1928), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) are representative of the current trend. See also ILL. STAT. ANN. ch. 32, § 157.109-.111 (1954).

²⁰⁰ See text at notes 190-93 *supra*.

²⁰¹ 274 U.S. 352 (1927).

“the foundation of jurisdiction is physical power.”²⁰² That statement was historically correct, and Holmes’ prestige added much to the continued acceptance of the “physical power” concept.

The other stumbling block was the decision in *Pennoyer v. Neff*.²⁰³ Professor Ehrenzweig has stated that the decision was historically incorrect and socially unsound.²⁰⁴ While both of these observations are overstatements, it can be said that the decision’s language was reactionary. *Hess v. Pawloski* and its successors justify this statement although *Pawloski* was not decided until fifty years after *Pennoyer*. A similar decision should have come much earlier. *Pennoyer* involved an action in personam against a non-resident who was served by publication. The situation presented a fine opportunity to render a landmark decision that service by publication was insufficient for in personam jurisdiction over non-residents. Indeed, that was the specific point before the Court.²⁰⁵ The Court met the problem by deciding that it was insufficient: “But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose.”²⁰⁶ That was a correct decision on the specific point before the Court. Unfortunately, however, the decision went much further. For example, the Court said: “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.”²⁰⁷ What this probably meant was that such could not be done under *Pennoyer’s* facts, but, at best, the statement is misleading. Admitting that the case was decided correctly on its facts, some of the language is unfortunate and the case has had a reactionary effect on the development of jurisdiction and service in action in personam where the defendant is a non-resident.

Hess v. Pawloski, which broke the “power concept” deadlock as to jurisdiction and service on non-residents by creating an

²⁰² *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

²⁰³ 95 U.S. 714 (1878).

²⁰⁴ Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

²⁰⁵ Other matters before the Court depended upon the disposition of this point.

²⁰⁶ 95 U.S. at 727.

²⁰⁷ *Id.*

exception to the narrowness of the existing rule, opened a whole Pandora's box of new situations where jurisdiction might be obtained over non-residents. These situations are presently limited to non-residents who have done "acts" within the forum state. At first, these "acts" had to come within the police power concept, but this new basis of jurisdiction is now being extended to any kind of substantial act involving tort or contract. It may be prophesied that the "power concept" of jurisdiction over non-residents, who are served while temporarily within the state, will also continue to serve as a basis of jurisdiction over non-residents, although refined somewhat to adjust the principle to the standards of "fair play." So today, the "power concept" is only one of several jurisdictional principles applicable to non-residents. Domicile and citizenship, for example, are also old, established bases. The reactionary influence of the "power concept" and *Pennoyer* has been largely eliminated.

The Court, in *Hess v. Pawloski*, while creating a revolutionary exception to the "power concept," uttered some very reactionary language:

The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. *Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery.* There must be actual service within the State of notice upon him or upon someone authorized to accept service for him.²⁰⁸ (Emphasis added.)

The Court then proceeded to permit jurisdiction and service by registered mail with return receipt *outside the state* as authorized under the state statute. The last half of the opinion is so contradictory to the first half that it seems impossible that it was written by the same judge. However, one should not be too severe on a transitional opinion.

The case permits service by registered letter with return receipt. Assuming there is a basis of jurisdiction, this is now uniformly held to constitute due process in actions in personam against a non-resident. This is sufficient actual notice.

Is service on the Secretary of State of the forum state sufficient?

²⁰⁸ 274 U.S. 352, 355 (1927).

Since *Wuchter v. Pizzutti*,²⁰⁹ and the principles of fair play enunciated in *Mullane v. Central Hanover Bank and Trust Co.*,²¹⁰ this probably would not be valid service. In *Wuchter*, the plaintiff, a New Jersey resident, was injured by a car driven by the defendant, a resident of Pennsylvania. The defendant was served by leaving a copy of the summons with the New Jersey Secretary of State, as provided by a statute which made him the agent for service of process on a non-resident who used the highways. Receiving no notice, the defendant suffered a default judgment. The Supreme Court held the statute unconstitutional because it contained no provision making it reasonably probable that the defendant would receive actual notice.²¹¹

As to whether a requirement that a forwarding of notice of service of process by the state official will be *implied* in the absence of statutory direction, it is impossible to speak with absoluteness. In a corporation case,²¹² where the statute itself required no such forwarding, a state court correctly said that such forwarding of notice will be implied. Courts consistently say that "due process requires a method of notice reasonably calculated to afford parties interested in a judicial proceeding the opportunity to appear and be heard."²¹³ But this is weasel language going back far beyond *Pizzutti* and *Mullane*. The phrase "reasonably calculated to reach" does not require "actual notice." It is used repeatedly in cases where jurisdiction is based on domicile but the defendant is outside the state. In *Milliken v. Meyer*,²¹⁴ Justice Douglas uttered the phrase, and in a similar situation where the defendant was out of the state but retained a forum domicile, Justice Holmes said that perhaps a summons left at his last and usual place of abode would be sufficient.²¹⁵

An ordinary letter mailed to the defendant's last known address outside the state would be due process, if he actually received it. If he did not receive it and suffered a default judgment, the matter is questionable, although Professor James thinks that

²⁰⁹ 276 U.S. 13 (1928).

²¹⁰ 339 U.S. 306 (1950).

²¹¹ 276 U.S. at 19.

²¹² *Mazzoleni v. Transamerica Corp.*, 313 Pa. 317, 169 A. 127 (1933).

²¹³ *Developments in the Law—Jurisdiction*, 73 HARV. L. REV. 909, 987 (1960).

²¹⁴ 311 U.S. 457 (1940).

²¹⁵ *McDonald v. Mabee*, 243 U.S. 90 (1917).

such service is sufficient in view of the "presumption that a letter properly addressed, stamped and posted was in fact delivered."²¹⁶ One case has held such service valid.²¹⁷ The presumption may be questioned in view of current mail service, but the situation probably falls within the "reasonably calculated to reach" test. The current trend, in view of *Pizzutti* and *Mullane*, is toward a requirement of actual notice to satisfy due process, except in rare cases. However, the phrase "reasonably calculated to reach" undoubtedly still remains in the law, although the limits of the rule are currently impossible to draw because the question of requisite notice is in transition. Ideally, the rule undoubtedly would be: Anything less than actual notice is insufficient.

4. *Out of state service in actions in rem*—The *Restatement (Second) of the Conflict of Laws* has this Comment as to notice in actions in rem:

Requirement of Notice. Whether a particular method of notification is reasonable, and hence sufficient, depends upon the nature of the action and upon the circumstances. A method may suffice in proceedings in rem and Quasi in rem and yet not be adequate in a proceeding in personam. Generally speaking, the requirements as to notice are more stringent where the purpose of the action is to obtain a personal judgment against the defendant than where the purpose is to obtain a judgment affecting the defendant's interests in a thing.²¹⁸

This statement represents the dated, reactionary view as to notice in actions in rem. The *Restatement* continues in language pointing up the severity of the situation:

Where the adverse claimants are unknown, notification by publication in a newspaper or by posting a notice at the courthouse or on the premises involved, will ordinarily be sufficient. Where, however, the proceeding will affect the interests of known claimants, a form of notification better calculated to reach them, if available, may be necessary. Such notification may be by mail, by personal service even outside the state, or otherwise.²¹⁹

²¹⁶ F. JAMES, *supra* note 173, at 652.

²¹⁷ *Durfee v. Durfee*, 293 Mass. 472, 200 N.E. 395 (1936). See 4 N.Y. JUD. C. REPORT AND STUDIES 183 (1938).

²¹⁸ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 100, comment c (1957).

²¹⁹ *Id.*

These Comments represent a literal statement of existing law as to service of process against non-resident defendants in actions in rem, even after *Mullane*. They indicate the onesided, reactionary condition of the present situation. Part of the problem is due to the fact that the rules governing service in actions in rem are historic survivors. They date back to the times when those with interests in land lived on the land, and would supposedly know of claims against it. Another part of the problem perhaps goes back to the fact that a scarcity in land is developing and rules as to service and land proceedings will undoubtedly tighten up. At any rate, the actual decision and the language in the *Mullane* opinion were long overdue. The decision was almost as revolutionary as *Hess v. Pawloski*. Accepting most of what has gone before as important only as history, the modern law of sufficiency of service in actions in rem may be said to begin with *Mullane*, both as to actual decision and dictum as to the problem. It therefore becomes important to examine *Mullane* with particularity.

Mullane was an in rem proceeding to determine, among other things, the sufficiency of notice to the beneficiaries of a trust fund. The beneficiaries lived outside the forum state, Florida. The Supreme Court held that service by publication was sufficient notice to those whose addresses were unknown, but insufficient as to those with known addresses. Notice by publication was in strict accordance with a Florida statute. The net result of the decision was to hold the statute unconstitutional as to those whose addresses were known. Should it have been unconstitutional also as to those whose addresses were unknown? That question has not been answered affirmatively as yet, but such an answer may well come in the near future.

The Court had difficulty in determining whether the action was really in rem or in personam. This provided an opportunity to say that sufficiency of service should not be determined upon the technicality of the nature of the action but, instead, upon the reasonableness of the service under the circumstances. This apparent truism was a revolutionary statement in view of the historic differences of notice in actions in personam and in rem. The rule of the case that sufficiency should be based upon reasonableness, not classification, will often lead to differences in the service required in actions in personam and in rem, as in *Mullane*, but it

is a *movement* towards frankly facing the problem and tightening the rule as to sufficiency of notice in actions in rem.

The opinion says that service by publication will only reach non-residents whose addresses are unknown by *chance*, but the case holds that such service is reasonable. And yet the opinion is forward looking in that it removes the historic division between actions in rem and in personam as to sufficiency of service. Also, an advanced step is made with the observation that service by publication is unreasonable as to non-residents whose addresses are known. The law had been otherwise for several hundred years. The case will do much towards advancing the standards of fair play as to service in actions in rem.

It may be concluded that constructive service in actions in rem, as well as in personam, is under severe attack. Too long the law has hidden ambiguity and indefiniteness behind vague words and phrases of art like "constructive," "presumed," and "implied." Recently, there has been a dramatic turn toward certainty in the articulation of the law, and it should be no different with "constructive service." Instead of speaking of "constructive service" in civil actions, let the courts say "service by publication," for example. Instead of speaking of "service reasonably calculated to reach," let the courts say "service by letter to the defendant's last known address." If the courts, in referring to these historic survivors, will speak specifically instead of in terms of art, it will become apparent just how devoid of fair play the service actually is. *Vague words and phrases of art do no more than hide ambiguity.*

As stated, the Comment in the *Restatement* quoted *supra*,²²⁰ represents a literal statement of existing law, even after *Mullane*, as to service of process against non-resident defendants in actions in rem. *Mullane* was a landmark case but the question still remains: Was the decision correct as to service by publication upon defendants whose addresses were unknown? Professor Goodrich points out that after *Mullane* "the standard of reasonable notice is the same for both actions in rem and in personam but the measure of reasonableness may vary with the circumstances."²²¹ (Emphasis added.) The writer accepts this as a proper interpretation of *Mullane*, but it is a rather glib statement because of the

²²⁰ *Id.*

²²¹ H. GOODRICH, *CONFLICT OF LAWS* 107 (4th ed. 1964).

continued difference in *result* as to service of process between actions in rem and in personam. If a non-resident cannot be reached, it is submitted that the reasonableness of the situation is the same whether the action is in rem or in personam. Does the decision in *Mullane*, that service by publication on non-resident defendants whose addresses are unknown is sufficient, represent reasonableness *under the circumstances*? Default judgments where there was no actual notice to the defendant are deplorable. The law is in transition toward a further tightening up on service of process. Actual notice in all cases may become a requisite of due process in the not too distant future.

5. *Service on out of state corporations*—Assuming there is a basis of jurisdiction over a foreign corporation,²²² the next question to be considered by a court is the matter of sufficient service of process to satisfy due process. Historically, when it was rationalized that a state could keep a foreign corporation out, and thus could impose conditions on its admission, a usual condition was that the out-of-state corporation appoint a local agent for service of process. But sometimes the corporation failed to appoint an agent and then left the state with outstanding claims. This led to enabling statutes in the various states providing that if no agent was appointed, or the agency had ended, service of process could be made on the forum's Secretary of State or some other state official.²²³ Sometimes this service would be forwarded to the home office of the foreign corporation; sometimes it would not.

Decisions were uncertain as to whether service on the state official was, in itself, sufficient without a forwarding. The matter was brought to a head in *Wuchter v. Pizzutti*,²²⁴ the leading case involving service on a non-resident by serving the forum's Secretary of State. There, the Supreme Court considered a state statute which provided that in actions by residents of the state against non-residents for personal injuries resulting from the operation of motor vehicles on the state highway, service of process could be made on the Secretary of State as their agent. The statute did not require process to be forwarded to the non-resident. The Supreme Court held that the statute violated due

²²² Moreland, *supra* note 196, at 12-16, 23-28.

²²³ C. STUMBERG, *supra* note 195, at 84.

²²⁴ 276 U.S. 13 (1928).

process since it made no provision making it reasonably probable that notice of the service would be communicated to the defendant. The defendant in *Wuchter* did, in fact, have actual notice, but he did not appear.

It is submitted that this decision, involving a non-resident private person, is equally applicable to a foreign corporation, and represents a decided advance as to service of process on the forum Secretary of State as to both classes of defendants.

Today, typical statutes provide for service on the local agent, or if none was appointed or the agency has ended, then on the Secretary of State or some other state official who shall forward it to the home office of the foreign corporation.²²⁵ An affirmative duty to forward the process is placed on the Secretary of State. If this duty to forward is not written into the statute, will it be implied? *Mazzoleni v. Transamerica Corporation*²²⁶ correctly gave an affirmative answer to that question. Otherwise, the provision for service would be unconstitutional on the authority of *Wuchter*.

Direct service by mail is often used as a means of giving notice to a non-resident. Service by ordinary mail is occasionally given approval.²²⁷ It is often used in divorce actions against a non-resident spouse which, of course, are actions in rem. Ordinarily, a letter is sent to "his last known address." There is usually little concern as to whether the letter is received. An authority has said that ordinary mail is so reliable that service by such a notice is presumptively received.²²⁸ But the last known address of the defendant may not be his current address, and courts have been careless about this fact.

In justifying service by ordinary mail, Professor James states that "the constitution does not require receipt of notice in all

²²⁵ See, e.g., Illinois Business Corp. Act, ILL. STAT. ANN. ch. 32, § 157.111 (1954). This section provides:

In the event that any process, notice, or demand is served on the Secretary of State, he shall immediately cause a copy thereof to be forwarded by mail, addressed to such corporation at its principal office as the same name appears in the records of the Secretary of State. Any service so had on the Secretary of State shall be returnable in not less than thirty days.

²²⁶ 313 Pa. 317, 169 A. 127 (1933).

²²⁷ See F. JAMES, *supra* note 173, at 652. See also *Durfee v. Durfee*, 293 Mass. 472, 200 N.E. 395 (1936).

²²⁸ F. JAMES, *supra* note 173, at 652.

cases, but simply means reasonably calculated to give it.”²²⁹ This is an erroneous interpretation of the Constitution, which requires “due process.” The trouble is that *courts* have traditionally held that “service reasonably calculated to reach” satisfies due process.²³⁰ However, this criterion is presently being re-examined, and is under severe criticism. Constructive service ending in a default judgment should be avoided where at all possible. The requirements as to sufficiency of service have been entirely too loose and the law is tending toward a requirement of actual service in all cases.

This would seem to be particularly true of service on foreign corporations. The foreign corporation’s address can be obtained from the proper official of the foreign state. Corporations, in all states, record this information. Armed with the corporation’s address, the one attempting the service should be able to deliver actual notice. A registered letter with return receipt will insure that this has been done. Thus, anything less than actual service should be insufficient notice and lack of due process.

VIII. CONCLUSION

It is concluded, therefore, that anything less than *actual* notice to a foreign corporation should be lack of due process. It is more difficult to lay down a suggested rule as to service on non-resident private persons. Service on the forum Secretary of State or other forum official without a forwarding is insufficient under *Pizzutti*. It is, however, still the prevailing rule that service “reasonably calculated to reach” a non-resident does not violate due process. This historic rule is under attack, although given reiteration in the *Restatement of Judgments* and the *Restatement (Second) of the Conflict of Laws*.²³¹ Constructive service, *i.e.*, anything less than actual notice, is undesirable. It is something less than the *fair play* that the Supreme Court talks about in recent decisions. Perhaps in a rare case, like *Mullane*, where the addresses of defendants are unknown, it is defensible, but even in these cases that is doubtful. Where a choice must be made between expediency and due process, due process should prevail.

²²⁹ *Id.*

²³⁰ *See, e.g.*, RESTATEMENT OF JUDGMENTS § 6, comment c (1942).

²³¹ *Id.* *See also* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 75, comment d (1956).

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