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INTRODUCTION

With the advent of modern methods of transportation and communication and the consequent shrinkage of the relative size of our nation it is not surprising that the old concept of limiting the exercise of personal jurisdiction to persons found within the boundaries of the forum state has been discarded. Personal jurisdiction has been forced to adapt to the greatly expanded flow of persons and commerce across state lines.

It is the purpose of this article to explore the inroads that have been made on the traditional concept of jurisdiction and to discuss the present constitutional limitations controlling the new and expanded concept of personal jurisdiction. Analization of these constitutional limitations indicates that three elements are necessary to meet the requirements of due process. The text of this article will correlate the new Rules of Civil Procedure, recently adopted in Montana, with this new concept of personal jurisdiction.

I. EXPANSION OF PERSONAL JURISDICTION OVER NON-RESIDENTS

A. Traditional Concept of Jurisdiction.

The traditional common law concept of jurisdiction was the exercise of physical power over the persons or properties involved in the litigation.[1] Under the doctrine established by *Pennoyer v. Neff*[2] it was thought that because a state could not extend the force and effect of its law beyond its boundaries, it likewise could not extend the force and effect of its service of process beyond its boundaries.[3] A judgment obtained without proper service of process on the defendant is rendered without jurisdiction and is an arbitrary interference with the defendant's liberty and property.[4] Therefore, except in cases where the defendant had property within the state,[5]

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[1]"The foundation of jurisdiction is physical power." McDonald v. Mabee, 243 U.S. 90, 91 (1917); Buchanan v. Rucker, 9 East. 192, 103 Eng. Rep. 546 (Ct. of King's Bench, 1808); Schisby v. Westenholz, L.R. 6 Q.B. 155 (Ct. of Queen's Bench 1870).

[2]95 U.S. 714 (1878).

[3]"The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions." Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

[4]See Pennoyer v. Neff, 95 U.S. 714 (1878); Milliken v. Meyer, 311 U.S. 457 (1940); McDonald v. Mabee, 243 U.S. 90 (1917).

[5]Hart v. Sansom, 110 U.S. 151 (1884) (dictum); Pennoyer v. Neff, 95 U.S. 714 (1878) (dictum). Jurisdiction over a non-resident who has property in the state was limited to in rem actions directly involving that property or quasi in rem actions involving the attachment of that property to pay a personal obligation. Freeman v. Alderson, 119 U.S. 185 (1886); Educational Studios v. Consolidated Film Indus. 112 N.J. Eq. 352, 164 Atl. 24 (1933); Restatement, Conflict of Laws § 102 (1934); Restatement, Judgments § 32 (1942); 1 Beale, Conflict of Laws 441, § 102.1 (1935); Goodrich, Conflict of Laws 172-175 (3d Ed. 1949).

where the defendant was personally served within the jurisdiction of the court,[6] or where the defendant had consented to the jurisdiction of the court,[7] a judgment against a non-resident defendant was unconstitutional and void.[8]

B. Jurisdiction over a Domiciliary

The first suggestion that physical power over the defendant may not be necessary to sustain jurisdiction came from the Supreme Court of the United States in *McDonald v. Mabee*.[9] The Court held, in that case, that service by publication would not bind a domiciliary of the state who has left the state intending not to return where another form of substituted service is available which is more likely to give him notice in fact. However, Mr. Justice Holmes, speaking for the Court, stated: "No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance."[10] The suggestion in the *Mabee* case was directly confirmed in *Milliken v. Meyer*[11] which held that personal service upon a domiciliary while he is temporarily outside the state will subject him to the court's jurisdiction.

C. Jurisdiction over Non-Resident Motorists

Even before the *Mabee* case, the foundation was being laid for an even greater inroad on the traditional concept of jurisdiction. The advent of the automobile caused states to search for methods of guaranteeing a forum within the state for a redress of injuries caused by a foreign defendant temporarily motoring within the state. New Jersey passed a law prohibiting the use of its highways by a non-resident until such non-resident appointed the secretary of state as his process agent for any actions arising out of such use. This statute was upheld in *Kane v. New Jersey*;[12] the Supreme Court said that such a requirement did not deny equal privileges and immunities to non-residents. Massachusetts then passed a law making

[6]Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S.W. 100 (1891). A non-resident defendant may be brought under the jurisdiction of a court by service on him personally while temporarily within the jurisdiction. Restatement, Judgment § 15 (1942); Peabody v. Hamilton, 106 Mass. 217 (1870); Darrah v. Watson, 36 Iowa 116 (1872).

[7]Restatement, Conflict of Laws § 81 (1934); York v. Texas, 137 U.S. 15 (1890); (appearance); Egley v. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1924) (Confession of Judgment); Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931) (by contract).

[8]Pennoyer v. Neff, 95 U.S. 714 (1878); Haddock v. Haddock, 201 U.S. 562 (1906); McDonald v. Mabee, 243 U.S. 90 (1917); Flexner v. Farson, 248 U.S. 289 (1919). Such a judgment was open to collateral attack and was not entitled to full faith and credit. See Thompson v. Whitman, 85 U.S. (18 Wall) 457 (1875); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907).

Judgments purporting to bind non-resident defendants were said to be unconstitutional on several grounds. The most obvious ground for attacking such a judgment was on the basis of a violation of due process and equal protection under the 14th amendment. See text accompanying note 4 *supra*. Also, such a judgment was attacked as violating the privileges and immunities clause and the interstate commerce clause of the constitution. Scott, *Jurisdiction over Nonresident Motorists*, 39 Harv. L. Rev. 563, 565 (1926).

[9]243 U.S. 90 (1917).

[10]*Id.* at 91. The court continues: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if subsantial justice is to be done."

[11]311 U.S. 457 (1940).

[12]242 U.S. 160 (1916).

the operation of a motor vehicle on the roads of Massachusetts the equivalent of an appointment of the secretary of state as a process agent. This law was upheld in *Hess v. Pawloski*.[13] Pointing out the dangerous character of motor vehicles, the Supreme Court said it was within the public interest to regulate residents and non-residents alike in the promotion of care on the part of all who use the highways.[14] The court maintained that there was no discrimination because a resident was already subject to suit within the forum. In both the *Hess* case and *Wuchter v. Pizzutti*[15] the Supreme Court held that if the law makes a reasonable provision for probable communication of notice to the defendant and the defendant has a reasonable opportunity to appear and defend there is no violation of due process. Although the court in the *Hess* case spoke in terms of implied consent to the appointment of the secretary of state, it is well established now that jurisdiction over a non-resident motorist does not rest on consent.[16] All of the fifty states and the District of Columbia have non-resident motor vehicle statutes today.[17]

D. Jurisdiction over Foreign Corporations

Another inroad on the *Pennoyer v. Neff* doctrine was developed through an attempt to subject foreign corporations to the personal jurisdiction of the courts. Originally it was thought a corporation, as a fictitious person could not be present outside the state of its incorporation.[18] Under the *Pennoyer v. Neff* doctrine courts had to obtain *de facto* power over the defendant's person to obtain personal jurisdiction, and, therefore, jurisdiction could not be obtained over foreign corporations.[19]

As corporate business increased, two theories were devised to obtain jurisdiction over foreign corporations. The first was based on consent. It was said that a corporation, being a creature of state law, could be pro-

[13] 274 U.S. 352 (1927).

[14] *Id.* at 356. *Accord*, Olberding v. Illinois Cent. R.R., Inc., 346 U.S. 338 (1953). "The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself." Olberding v. Illinois Cent. R.R., Inc., *supra* at 341.

[15] 276 U.S. 13 (1928).

[16] Even before the decision of the Hess case, Scott, writing for the Harvard Law Review urged that the basis of the non-resident motorist statutes should not rest on any fiction involving consent. Scott, *Jurisdiction over Nonresident Motorists*, 39 Harv. L. Rev. 563 (1926).

In Olberding v. Illinois Cent. R.R., Inc., 346 U.S. 338 (1953), the Supreme Court held that consent to federal venue could not be implied from the driving of an automobile in the district. At page 341 the court said: "But to conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued and has thus waived his federal venue rights is surely to move in the world of Alice in Wonderland." Although this case deals with federal venue rather than state jurisdiction, it seems clear that the Supreme Court gives no credulence to the fiction of implied consent.

It seems that Scott would limit the extention of jurisdiction to the extent that a State is able to prevent a nonresident from committing specified acts. Scott, *Jurisdiction over Nonresident Motorists*, 39 Harv. L. Rev. 563, 581 (1926).

[17] All the statutes except those of Hawaii and Alaska are cited in footnote 1 of *Nonresident Motorist Statutes—Their Current Scope*, 44 Iowa L. Rev. 384.

[18] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856).

[19] See Goodrich, Conflict of Laws § 76 (3rd Ed. 1949).

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hibited entirely from doing business in another state.[20] Admission to do business, therefore, might be conditioned upon the appointment by the corporation of a resident agent to receive service of process[21] or upon consent to an appointment by the state of such an agent.[22] It soon developed that doing business in the state could be made the equivalent of an appointment of a process agent on the theory that by doing such business, the corporation had given implied consent to the appointment of the agent.[23]

The second theory devised to obtain jurisdiction over foreign corporations was based on presence. A corporation which was doing continuous and systematic business within the state was said to be present within the state.[24] Once a corporation was found to be present within a state it could be bound by service of process just as any other individual found within the state.[25]

Gradually the courts began to realize that both theories are really based on a fiction.[26] Judge Learned Hand and Professor Scott advocated dropping the fictions of consent and presence. Instead, they would base the court's jurisdiction on regulations to which it is reasonable and just to subject a corporation as though it had consented.[27] The Supreme Court finally repudiated these fictions in *International Shoe Co. v. Washington.*[28]

The rejection of these two theories brought forth another problem; namely, how much contact with a state must the defendant have in order

[20]Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856). After these cases were decided it developed that a corporation engaged in interstate commerce could not be entirely prohibited from doing business within a state other than the state of its incorporation. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183-84 (1868) (dictum); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. (VI Otto) 1 (1877). However, this point seems to have been overlooked in the subsequent cases discussing consent as a basis for jurisdiction.

[21]St. Clair v. Cox, 106 U.S. 350, 356 (1882).

[22]Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856); Mutual Reserve Fund Life Ass'n v. Phelps, 190 U.S. 147, 158 (1903).

[23]American Ry. Exp. Co. v. Royster Guano Co., 273 U.S. 274, 280 (1927); Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1933). A state may provide for service upon a state officer if a corporation appoints an agent and then withdraws him. Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, *supra.*

[24]Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (dictum); Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2nd Cir. 1930).

[25]St. Clair v. Cox, 106 U.S. 350, 355. See International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[26]If a corporation fails to or refuses to file the necessary statutory consent, it is clearly a fiction to say that it has, by implication, given its consent to be sued. See International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). Similarly, it is a fiction to say a corporation is present wherever its agents have committed acts. Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2nd Cir. 1930). Furthermore, once a corporation withdraws its agents from a state, it cannot still be said to be actually present under any concept of the word "present"; however, it would still be subject to suit. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U.S. 147 (1903). See generally, GOODRICH, CONFLICT OF LAWS 210-13 (3rd Ed. 1949).

[27]Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148 (S.D.N.Y. 1915); Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2nd Cir. 1930); Scott, *Jurisdiction over Nonresidents Doing Business Within a State,* 32 HARV. L. REV. 871 (1919); Scott, *Jurisdiction over Nonresident Motorists,* 39 HARV. L. REV. 563 (1926).

[28]326 U.S. 310 (1945). "For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *Id.* at 316.

to make the service upon him consistent with the constitutional limits of due process.[29] The landmark case on this question is *International Shoe Co. v. Washington*[30] in which the State of Washington was allowed to recover unpaid contributions to the state's unemployment compensation fund from a Delaware corporation. According to the Supreme Court in that case, due process requires only that the defendant have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,' "[31] The test is a qualitative one and not quantitative; it depends upon reasonableness in view of the nature and kind of local activities engaged in by the defendant. As applied to the facts in the *International Shoe Co.* case, it was held that a shoe manufacturer who has salesmen continuously operating within a state meets the test even though there was no office established and no contracts were completed within the state.

The test was given further clarification under *Travelers Health Ass'n v. Virginia ex rel. State Corporation Commission*[32] where it was held that a non-resident corporation doing a mail order insurance business within the state may be sued there. In that case, the defendant had claim investigators operating within the state and its policyholders were made members of the Association and were encouraged to recommend other prospects.

Finally, the limits of due process were extended to a lone transaction of a single item of business within the state. In *McGee v. International Life Insurance Co.*[33] the defendant took over from the insurer an insurance policy on the life of the insured, a resident of California; the only contact the defendant ever had with the state of California was the mailing of reinsurance certificates to the insured in California and receiving from him the annual premiums. The Supreme Court held that California had a manifest interest in providing effective means of redress for its residents when the insurers refuse to pay claims; therefore, since the defendant had actual notice there was no violation of due process.

E. Jurisdiction over Non-Resident Individuals

Another significant inroad on the traditional concept of jurisdiction was the extension of jurisdiction over non-resident individuals doing business within the state. Unlike corporations not engaged in interstate commerce, a non-resident individual cannot be excluded from a state altogether without violating the privileges and immunities clause of the federal Constitution.[34] Therefore, it had been held that doing business within a

[29]A single or occasional act was not enough. Rosenberg Bros. & Co., Inc. v. Curtis Brown Co., 260 U.S. 516 (1923). Continuous activity of some type within a state was not enough. Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907). See Simon v. Southern Ry., 236 U.S. 115 (1915); People's Tobacco Co., Ltd. v. American Tobacco Co., 246 U.S. 79 (1918). Continuous activity within a state was enough. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917). For the position of the Montana Supreme Court see State *ex rel.* American Laundry Mach. Co. v. District Court, 98 Mont. 278, 41 P.2d 26 (1934).

[30]326 U.S. 310 (1945).

[31]*Id.* at 316.

[32]339 U.S. 643 (1950).

[33]355 U.S. 220 (1957).

[34]Flexner x. Farson, 248 U.S. 289 (1919); Hess v. Pawloski, 274 U.S. 352 (1927).

state, no matter how continuous or systematic, was not sufficient grounds for exercising jurisdiction over a non-resident individual.[35]

This theory, however, has been repudiated. In *Doherty & Co. v. Goodman*[36] a non-resident individual engaged in the corporate securities business established a branch office in Iowa. A statute permitting service of process on the district manager, in spite of a clear absence of authority to receive it, was upheld. The court said there was no abridgment of equal privileges or immunities because a state has a clear right to regulate the selling of corporate securities by residents and non-residents alike.

In the *Doherty* case, as in *Hess v. Pawloski*,[37] the Supreme Court emphasized the fact that an interest subject to the special regulatory power of the state was involved.[38] Thus, it could be argued that jurisdiction over non-resident individuals is limited to those situations in which a state has a "high social interest," such as the operation of motor vehicles,[39] the selling of securities,[40] and the conducting of dangerous operations within the state.[41] This question has not been firmly decided by the Supreme Court of the United States. However, from the language and the reasoning of the *International Shoe case*, it seems that the Supreme Court intended the "minimum contacts rule" to apply to individuals as well as to corporations.[42] Furthermore, the distinction between individuals and corporations on the theory that the privileges and immunities clause applies to the former and not the latter seems to have been drained of its vitality by the *International Shoe* case; there the defendant was engaged in interstate commerce and could no more be prohibited from conducting business within the state than could an individual. Mr. Justice Trayner of the California Supreme Court has made the following statement:[43]

> The rationale of the International Shoe case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over non-resident motorists make clear that the

[35]Flexner v. Farson, 248 U.S. 289 (1919). The court said that since a state did not have the power to exclude a non-resident individual, the implied consent theory failed. This reasoning would be valid even under the ideas of Professor Scott and L. Hand, i.e., jurisdiction should be based on regulations to which it is reasonable and just to subject the defendant as though he had consented.

[36]294 U.S. 623 (1935).

[37]274 U.S. 352 (1927).

[38]Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935); Hess v. Pawloski, 274 U.S. 352, 356 (1927).

[39]See text accompanying note 14, *supra*.

[40]Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[41]Sugg v. Hendrix, 142 F.2d 740 (5th Cir. 1944). See *Developments in Jurisdiction over Nonresident Individuals Doing Local Business*, 3 DUKE B.J. 78 (1952).

[42]The court in the International Shoe case constantly talks in terms of a person and not a fictituous business entity. For example at page 316 the court states: "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. . . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it. . . ." The reasoning of the court is as equally applicable to individuals as to corporations. A corporation does not have an exclusive right to "traditional notions of fair play and substantial justice." "Of course Mr. Justice Stone in International Shoe was speaking about jurisdiction over corporations, but there is no reason why this approach is not equally applicable to jurisdiction over individuals." Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641, 647 (4th Cir. 1961).

[43]Owens v. Superior Court, 52 Cal.2d 822, 345 P.2d 921, 924 (1959).

minimum contacts test for jurisdiction applies to individuals as well as foreign corporations.

Non-resident individuals have been considered subject to local jurisdiction on the same basis as corporations by the American Law Institute,[44] by lower federal courts,[45] and by various state courts.[46] The same principle applies to partnerships and unincorporated associations.[47]

F. Jurisdiction over Non-Residents for Actions Unrelated to Their Contact With the State

The final significant inroad on the traditional concept of jurisdiction based on physical power was the development of jurisdiction over non-residents doing business in the state for actions unrelated to that business. As early as 1917 it was thought that a corporation could be so completely present within a state that it should be subject to an cause of action brought in the courts of that state.

Thus, in *Tauza v. Susquehana Coal Co.*[48] a Pennsylvania corporation which maintained a sales manager, eight salesmen, a suite of offices, eleven desks, and many stenographers in New York was subject to a suit in New York on a cause of action unrelated to the business it conducted there.[49]

This view was adopted by the Supreme Court in *Perkins v. Benguet Consolidated Mining Co.*[50] In that case a Philippine corporation was carrying on continuous and systematic business with the state of Ohio on a temporary basis while it was excluded from the Philippines by Japanese occupation. The Court held it was subject to a suit for recovery of past dividends in a state court in Ohio. The Court stated at page 446: "We find no requirement of federal due process that either *prohibits* Ohio from opening its courts to the cause of action here presented or *compels* Ohio to do so."

It has been suggested that the rule enunciated in *Perkins v. Benquet Consolidated Mining Co.* should be limited to situations in which the courts of the corporation's domicile are not available to the plaintiff.[51] In fact, at least one court has stated that the *Perkins* case should be limited

[44]Restatement, Judgments §§ 22, 23 (1942); Restatement (Second), Conflict of Laws §§ 77-86 (Tent. Draft No. 3, 1956).

[45]Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961). See Insull v. New York World-Tel. Corp., 172 F. Supp. 615 (N.D. Ill. E.D. 1959); Wagenberg v. Charleston Wood Products, 122 F. Supp. 745 (E.D.S. Car. 1954).

[46]Owens v. Superior Court, 52 Cal.2d 822, 345 P.2d 921 (1959); State *ex rel.* Weber v. Register, 67 So. 2d 619 (Fla. 1953).

[47]See, McDaniel v. Textile Workers Union, 36 Tenn. App. 236, 254 S.W.2d 1 (1952); Schluter v. Trentonion Publishing Co., 4 N.J. Super. 294, 67 A.2d 189 (Super. Ct. 1949); Lewis Mgf. Co. v. Superior Court, 140 Cal. App. 2d 245, 295 P.2d 145 (Dist. Ct. App. 1956); Note, *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 936-37 (1960).

[48]220 N.Y. 259; 115 N.E. 915 (1917).

[49]Mr. Justice Cardozo, speaking for the court, said: "The essential thing is that the corporation shall have come into the state: When once it is here, it may be served; and the validity of service is independent of the origin of the cause of action." *Id.* at 918.

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

[51]Note, *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 932 (1960).

to its own peculiar fact situation.[52] The *Perkins* case, however, has been followed many times in both federal and state courts without such a limitation.[53]

A major problem arises in determining how much business the defendant must do within the state to make it constitutionally subject to any cause of action. Most courts indicate that the business must be continuous and systematic, which implies having an office, some employees and a considerable amount of business activitity within the state.[54] The third tentative draft of the Restatement of Conflicts states the following test: "doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts."[55]

It has been held that the mere solicitation of orders by authorized agents within the state[56] is not sufficient nor is the docking of a ship at a port within the state once or twice a year[57] sufficient business to make the foreign corporation present within the state for all purposes. However, the leasing of a commercial airplane and its crew to an associate company has been held to constitute sufficient business to subject the lessor to all suits, where the associate operated within the state and sold "through tickets" within the state.[58]

Apparently there are no cases applying the above rule to individuals. Although the rule is particularly adapted to corporations who often have their principal place of business in a state other than the state of in-

[52]L. D. Reeder Contractors v. Higgins Indus. Inc., 265 F.2d 768 (9th Cir. 1959). In this case the defendant had not qualified to do business in the state and had no employees or office in the state; the only contact it had with California was the shipment of $1000 of merchandise into the state annually to independent contractors, and exhibitions at certain fairs.

[53]Scholnik v. National Airlines, Inc., 219 F.2d 115 (6th Cir. 1955); Davis v. Asano Bussan Co., 212 F.2d 558 (5th Cir. 1954); Lau v. Chicago & No. W. Ry., 14 Wis. 2d 329, 111 N.W.2d 158 (1961); Dumas v. Chesapeake & Ohio Ry., 253 N.C. 501, 117 S.E.2d 426 (1960); Fisher Governor Co. v. Superior Court, 53 Cal. 222, 347 P.2d 1, 3 (1959) (dictum); RESTATEMENT (SECOND), CONFLICT OF LAWS (Tent. Draft No. 3) §§ 85, 92 (1956). In addition, see the following cases in which the rule was approved but the decisions against jurisdiction were based on state statutes: Arkansas-Louisiana Feed & Fertilizer Co. v. Marco Chem. Co., 292 F.2d 197 (8th Cir. 1961); Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959); McAvoy v. Texas E. Transmission Corp., 185 F. Supp. 784 (W.D. Ark. 1960); Silas v. Paroh S.S. Co., 175 F. Supp. 35 (E.D. Va. 1958); Rufo v. Bastian-Blessing Co., 405 Pa. 123, 173 A.2d 123 (1961).

[54]The court in the Perkins case gave the following indication of the amount of business necessary: "On the other hand, if the same corporation carries on, in that state, other continuous and systematic corporate activities as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings in personam in that state, . . ." 342 U.S. at 445.

[55]RESTATEMENT (SECOND), CONFLICT OF LAWS (Tent. Draft No. 3) § 85, comment b (1956). It should be mentioned that in all of the illustrations given by the Restatement involving a suit upon a cause of action not arising out of the business done in the state, the defendant's *only* place of business is outside his resident or domicil state.

[56]McAvoy v. Texas E. Transmission Corp., 185 F. Supp. 784 (W.D. Ark. 1960).

[57]Silas v. Paroh S.S. Co., 175 F. Supp. 35 (E.D. Va. 1958).

[58]Scholnik v. National Airlines, Inc., 219 F.2d 115 (6th Cir. 1955). See generally Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1 (1959) (Opinion by Mr. Justice Traynor).

corporation, it would seem the same principles should apply to unincorporated associations, partnerships, and individuals who conduct continuous and systematic business within the state.[59] The third draft of the Restatement of Conflict of Laws (Second) has taken this position.[60]

The subjection of a non-resident engaged in interstate commerce to a suit not related to any business done within the state may violate the interstate commerce clause[61] because of the increased burden in having to defend a suit in an inconvenient forum. There are three cases which tend to substantiate this conclusion,[62] but all three have been strictly limited to their particular facts, *i.e.*, to a railroad company which is merely soliciting traffic within the state without any other business there.[63] In light of the more recent developments in the general area of jurisdiction over non-residents it is doubtful that the exercise of jurisdiction on those particular facts would constitute an unconstitutional burden on interstate commerce.[64]

G. A New Concept of Jurisdiction and Hanson v. Denckla

It is apparent that the United States Supreme Court, in *International Shoe Co. v. Washington*,[65] established a new concept of jurisdiction over non-residents. The concept of jurisdiction based on physical power over the litigants was rejected and replaced by a concept of jurisdiction based upon the nature of the relationship between the defendant and the forum state. According to the *International Shoe* decision, the exercise of jurisdiction will be constitutional only if the defendant has "certain minimum contacts" with the forum state.[66] The quality and not the quanity of the contacts is decisive,[67] and the contacts must be such that the suit does not offend "traditional notions of fair play and substantial justice."[68]

The *Interational Shoe* case clearly left the precise nature of the contacts required under the due process clause indefinite; the constitutionality

[59]See text accompanying notes 44, 45, 46, and 47 *supra*.

[60]Restatement (Second), Conflict of Laws (Tent. Draft No. 3) § 85 (1956). There was a major change in this section from earlier drafts by the deletion of the requirement that the cause of action must arise out of the business done in the state.

[61]Restatement (Second), Conflict of Laws (Tent. Draft No. 3) § 92, comment e (1956).

[62]Davis v. Farmers Co-op. Equity Co., 262 U.S. 312 (1923); Atchison T. & S.F. Ry. v. Wells, 265 U.S. 101 (1924); Michigan Cent. R.R. v. Mix, 278 U.S. 492 (1929).

[63]See International Milling Co. v. Columbia Transp. Co., 292 U.S. 511 (1934); Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44 (1941); Miles v. Illinois Cent. R.R. Co., 315 U.S. 698 (1942).

[64]In fact, the test for what constitutes an unconstitutional burden on interstate commerce may be the same as the test for due process. See McAvoy v. Texas E. Transmission Corp., 185 F. Supp. 784 (W.D. Ark. 1960).

[65]326 U.S. 310 (1945).

[66]*Id.* at 316.

[67]*Id.* at 319. The quantity of the contacts with the forum state, however, may be important in determining the substantiality of the defendant's activity within the state. For example, the repetition of many inconsequential acts may demonstrate a single contact of a substantial nature. Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522, 582.

[68]International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In the International Shoe case the court looks to "an 'estimate of inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business . . ." and to the extent it "enjoys the benefits and protection of the laws of that state." *Id.* at 317 and 319.

of the exercise of jurisdiction in each case was to depend primarily upon an individual analysis of its own facts.[69] As a new body of law was developed, both by the legislatures and by the courts, it became apparent that fewer and fewer contacts were required to sustain jurisdiction.[70] In fact, this trend appeared destined to abolish all significance in state boundaries.[71]

However, just six months after the decision in *McGee v. International Life Ins. Co.*,[72] the Supreme Court refused to permit an extension of jurisdiction to the facts presented in *Hanson v. Denckla*.[73] The Court said, at page 251: "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." In this case the settlor of a trust originally resided in Delaware where the trust was executed, but eight years before her death she moved to Florida. In Florida she corresponded with the trustee, a Delaware corporation, by mail, receiving trust income and carrying on several bits of trust administration.[74] While in Florida the settlor executed two powers of appointment, the validity of which gave rise to the action before the court. Many of the interested parties were residents of Florida. However, the Delaware trustee had no other contact with the state of Florida.

In denying that the Florida court could constitutionally assert jurisdiction over the Delaware trustee, Warren, C. J., speaking for a majority of five, said the contacts of the trustee with the forum did not amount to the transaction or solicitation of any business there. He distinguished the facts from those in the *McGee* case by pointing to the manifest interest which the state of California had in the *McGee* case to control insurance contracts. Further, he noted that the trustee had done no "purposeful act" within the state. "[T]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement

[69]Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 929 (1960).

[70]See Note, 29 U. CINC. L. REV. 100, 102 & nn. 15 & 16 (1960); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957); Hanson v. Denckla, 357 U.S. 235, 260 (Black, J., dissenting) (1958).

In McGee v. International Life Ins. Co., *supra*, a sufficient contact with the forum state was found in the mere solicitation by mail of a single insurance contract.

[71]It is interesting in this connection to compare the concept of jurisdiction that prevails in many of the civil law countries in Europe. For example, Germany bases jurisdiction upon 1) domiciliation, 2) the performance of a contract within the forum, 3) the commission of a tort within a forum, and 4) the ownership of property within a forum. These rules apply to citizens and foreigners alike. Furthermore, the ownership of any kind of property, with more than a nominal value, subjects one to jurisdiction on any pecuniary claim and the sum recoverable is not limited to the value of the property. Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 914 (1960); Lorenzen, *Conflict of Laws of Germany*, 39 YALE L.J. 804 (1930). The same concept of jurisdiction prevails in France but the number of acts included is greater. All French citizens are subject to French jurisdiction wherever they may be and any person who enters into an obligation with a French citizen, by tort or by contract, is subject to French jurisdiction. Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919 (1960).

[72]355 U.S. 220 (1957).

[73] 357 U.S. 235 (1958).

[74]The only business transacted by mail mentioned by the court was a change in the compensation of the trustee and revocation of a portion of the trust. Hanson v. Denckla, 357 U.S. 235, 252 n.24 (1958).

of contact with the forum State.'"[75] Warren stated that an estimate of conveniences is not controlling[76] but instead there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.'"[77]

II. THREE ELEMENTS NECESSARY FOR JURISDICTION—A TEST FOR DUE PROCESS

Many courts have attempted to apply the broad and general rules established by the *International Shoe* case, the *McGee* case, and the *Hanson* case to particular fact situations; but relatively little, if any, consistency or similarity in application can be detected. Perhaps the following three elements, which are emphasized to a greater or lesser extent in nearly all the cases, may be helpful in establishing a general guide. These three elements are proposed as a test for the constitutionality of the assertion of personal jurisdiction over all non-residents for causes of action *arising out of their contacts with the forum state.*[78]

A. First Element—Some Governmental Interest

The forum must have some interest that is served by the litigation of the case within its boundaries. In other words it must have some reason for providing a forum for the litigation. The activities of the defendant which precipitated the suit must be of such a nature that the forum state has an interest either in regulating them or in some way exercising a slight degree of control over them.

If the forum state could prohibit the activities altogether, its governmental interest is clearly very great or "high." If the activities cannot be prohibited altogether but the forum state can exercise a considerable amount of control in regulating them, its governmental interest is "manifest." Finally, if the state's right to exercise control over the activities is slight

[75] *Id.* at 253.
[76] *Id.* at 251 and 254.
[77] *Id.* at 253.
The four dissenting justices emphasized the nominal role played by the trustee. Mr. Justice Black, writing for himself and Justices Burton and Brennan, claimed the Delaware trustee was little more than a custodian because the settlor did most of the administration. Mr. Justice Douglas, writing a separate dissenting opinion, claimed that the Delaware trustee was just a stakeholder. Both dissenting opinions emphasize the substantial convenience in holding the trial in Florida; 95% of the assets under the trust were to go to Florida residents, the will was being probated in Florida, and there were no beneficiaries or legatees in Delaware.
[78] This test is applicable for determining the constitutionality of jurisdiction asserted over foreign corporations, non-resident motorists, and all other non-resident individuals whose contact with the forum state is directly related to the cause of action under litigation. However, it does not apply to the jurisdiction asserted over a domiciliary or a non-resident individual or corporation for actions unrelated to their contact with the forum. The test of domiciliation can be found elsewhere. A test for the contact a defendant must have with the forum state for causes of action unrelated to his contact with the state can be found in Restatement (Second), Conflict of Laws § 85, comment b (1956): "doing a series of similar acts [in the forum] for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention thereby of initiating a series of such acts."

or only incidentally connected with the injury or the subject matter of the suit, its governmental interest is "slight."

The need for a governmental interest was originally enunciated in the non-resident motorist cases in which judges spoke of the "high governmental interest" of the forum state in protecting its citizens from the operation, by non-residents, of dangerous instrumentalities within the state.[79] It is well established, however, that such a high governmental interest is no longer necessary.[80] The United States Supreme Court has used the term "manifest interest" in upholding such activities as the sale of securities within the state[81] and the sale of insurance within the state[82] as a proper basis for extending jurisdiction. In fact there are no Supreme Court cases extending jurisdiction over non-residents in which the Court has not found such an interest.[83] At least two lower federal courts[84] and one state court[85] have required a manifest interest to meet the due process test.

However, most courts which have recently ruled on this point require much less governmental interest. For example, in *Nelson v. Miller*,[86] the Illinois court said that the fact the injury occurred in Illinois was sufficient even though in that case the probability that such an injury would occur was very slight. In *Pavlovscak v. John L. Lewis*,[87] the federal circuit court said that activity which has a "substantial direct impact . . . upon the

[79]Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927); Olberding v. Illinois Cent. R.R., Inc., 346 U.S. 338 (1953).

[80]Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); Owens v. Superior Court, 52 Cal. 2d 822, 345 P.2d 921 (1959). Mr. Justice Traynor, speaking for the California court, said: "The rational basis of the decisions upholding the non-resident motorists statutes is broad enough to include the case in which the non-resident defendant causes injury without the intervention of any particular instrumentality." Owens v. Superior Court, *Id.* at 925. Both the McGee case and the Travelers Health Ass'n case, *infra* note 82, are inconsistent with the "dangerous instrumentality theory" since they involve insurance contracts, which in no way can be considered dangerous instrumentalities.

[81]Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[82]Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

The manifest interest referred to here is the same as the "high social interest" discussed in relation to jurisdiction over individuals in subsection E of Part I of this article.

[83]The two most recent cases on personal jurisdiction decided by the Supreme Court both discuss the governmental interest of the forum state in terms of a "manifest interest." In McGee v. International Life Ins. Co. the Court said: "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." 355 U.S. 220, 223 (1957). In Hanson v. Denckla the majority opinion distinguishes the McGee case on the ground that there was no manifest interest in the facts of the Hanson case. 357 U.S. 235, 252 (1958).

[84]In denying jurisdiction over a non-resident mail order business which sent its advertising catalogues into the state, the circuit court of the 7th circuit said: "we think the more recent case of *Hanson v. Denckla*, . . . demonstrates the McGee case has been limited by the Court to the insurance field." Trippe Mfg. Co. v Spencer Gifts, Inc., 270 F.2d 821, 822 (7th Cir. 1959). This case was followed in Edwin Raphael Co., Inc. v. Maharam Fabrics Corp., 283 F.2d 310 (7th Cir. 1960).

[85]A Georgia court said: "While the rule [jurisdiction based on physical power] has understandably been stretched for reasons of public policy to include motorists statutes and insurance statutes, as in McGee v. International Life Ins. Co., supra, it is unthinkable that it should be expanded to cover the individual who enters into a single transaction with no intention of doing more." Allied Finance Co. v. Prosser, 103 Ga. App. 538, 119 S.E.2d 813, 816 (1961).

[86]11 Ill. 2d 378, 143 N.E.2d 673, 679 (1957).

[87]274 F.2d 523 (3rd Cir. 1959).

community" will satisfy the due process clause.[88] In general, there seems to be little difficulty in finding a sufficient governmental interest if the trial conveniences and the conveniences of all the parties weigh heavily in favor of the forum state.[89] To a certain extent, therefore, the governmental interest is very similar to the second element of the due process test—trial convenience. A distinct governmental interest has become so negligible that many courts no longer mention it as a vital element of the jurisdiction test.[90] Nevertheless, a valid and workable distinction is preserved. For example, the state does not have a governmental interest if a resident of the forum state is the middle man in a purchase of goods by a non-resident from another non-resident, with a dispute arising as to the quality of the goods which does not substantially concern the resident's participation in the transaction.[91] Here there is no reason for the state to provide a forum for the litigation and a sufficient governmental interest could not be found no matter where the trial conveniences predominated. Even the dissenting opinion in *Hanson v. Denckla*[92] is not necessarily inconsistent with this concept of governmental interest.

B. Second Element—Trial Convenience

The forum state must be in a favorable position with regard to the relative conveniences of the parties and the court. In estimating the relative conveniences, the courts frequently look to the same factors that are considered important for applying the doctrine of *forum non conveniens*,[93] *i.e.*, ease of access to sources of proof, availability of the witnesses, need to view the premises, the public interest of the court, the dispositive law which will govern the case, and all other matters which will make the trial of the case easy, expeditious and inexpensive.[94] Greatest weight, however, seems to be given to the place of residence of all the parties[95] and to the inconvenience to the defendant in requiring him to defend a suit in the forum state.[96]

[88] *Id.* at 525. This case involved rights to a pension from a union welfare and retirement fund. Mine operators in Pennsylvania paid money into the fund and retired miners in Pennsylvania received substantial allowances from the fund, and about 10% of all the administration of the fund was conducted in Pennsylvania. These activities were sufficient to subject the fund to jurisdiction in Pennsylvania.

[89] See Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).

[90] See Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2nd Cir. 1960); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); W. H. Elliott & Sons Co. v. Nuodex Co., 243 F.2d 116 (1st Cir. 1957).

[91] See L. D. Reeder Contractors of Ariz. v. Higgins Indus., Inc., 265 F.2d 768 (9th Cir. 1959).

[92] 357 U.S. 235, 258 (1958) (Black, J., dissenting).

[93] Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); L. D. Reeder Contractors of Ariz. v. Higgins Indus., Inc., 265 F.2d 768 (9th Cir. 1959); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).

[94] See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

noted that that note was concerned with situations in which only a single act had been committed. Note, *Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342 (1958).

[95] See Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 368 (1954), *cert. denied*, 348 U.S. 943 (1955); Hanson v. Denckla, 357 U.S. 235, 257 (1958) (dissenting opinion of Black, J.).

[96] Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

Prior to *Hanson v. Denckla*[97] trial convenience was given primary importance. Some of the key state court cases discussed trial convenience at great length and appear to have based their decision on this point.[98] However, trial convenience is clearly de-emphasized in *Hanson v. Denckla.* Speaking for the majority, Mr. Justice Warren states: "Those restrictions [on personal jurisdiction of the state courts] are more than a guarantee of immunity from inconvenient or distant litigation."[99] Again at page 254 Mr. Justice Warren states: "It [the court] does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation." As both dissenting opinions point out, Florida (the forum state) was clearly the most convenient forum for all parties when considered as a whole.[100] Although at least one court has based a decision on this de-emphasis,[101] trial convenience is not generally ignored as a necessary element of jurisdiction over non-residents.[102] While the *Hanson* case indicates that jurisdiction does not necessarily abide the *most* convenient forum, it is difficult to exclude trial convenience from the minimum contacts test. Trial convenience constitutes an inherent part of what the *International Shoe* case[103] called "traditional notions of fair play and substantial justice."[104]

C. Third Eement—A Purposeful Act of the Defendant

There must be some act by which the defendant purposefully avails himself of the benefits and protections afforded him by the laws of the forum state. This element is taken directly from the language of the majority opinion in *Hanson v. Denckla,* which states:[105]

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of con-

[97]357 U.S. 235 (1958).

[98]Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied,* 348 U.S. 943 (1955); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[99]357 U.S. at 251.

[100]Both dissenting opinions emphasized the minor role of the Delaware trustee and explained how the real controversy was between Florida residents. See note 78, *supra.*

[101]Grobark v. Addo Mach. Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959).

[102]See Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); L.D. Reeder Contractors of Ariz. v. Higgins Indus., Inc., 265 F.2d 768 (9th Cir. 1959).

[103]326 U.S. 310 (1945).

[104]See the discussion of this test in note 68, *supra.* In discussing the fairness requirement of Mr. Justice Black, in his dissenting opinion (Hanson v. Denckla), spoke of nothing but convenience. At 259 he stated: "I can see nothing which approaches that degree of unfairness. Florida, the home of the principal contenders for Mrs. Donner's largess, was a reasonably convenient forum for all. Certainly there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts." The importance of the dissent in the Hanson case should not be underrated in as much as it was a 5-4 decision and two of the justices sitting on the case are no longer with the court (Mr. Justice Burton and Mr. Justice Whittaker).

The strong connection between fairness and convenience was also emphasized in L.D. Reeder Contractors of Ariz. v. Higgins Indus., Inc., 265 F.2d 768 (9th Cir. 1959). Quoting from 47 Geo. L.J. 342, 351-52 (1958), the court stated at 774: "The reasonableness of subjecting the defendant to jurisdiction under this rule [minimum contacts necessary for fair play and substantial justice] is frequently tested by standards analogous to those of forum non conveniens."

[105]357 U.S. 235, 253 (1958).

tact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but 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.

There are two parts to this element. First, the defendant must establish contacts with the forum state on his own initiative. Second, he must have enjoyed benefits from the protection afforded him by the laws of the forum.[106] The terms "benefit" and "protection" are open to very broad interpretation; this part of the third element causes little difficulty. The privilege of conducting any activities for pleasure or for profit within the forum State is clearly such a benefit.[107] Access to the courts of the forum state to enforce any rights arising out of transactions within the state is sufficient whether or not use is made of this privilege.[108] The privilege of having its product marketed in the state under the normal protections of the laws of the state is sufficient.[109]

The part of this element that gives the most difficulty is the problem of determining what type of contact with the forum state constitutes a purposeful act of the *defendant*. Clearly the transactions of any business within the state with a profit motive will constitute such an act.[110] For this purpose a single act done within the state is sufficient,[111] and neither the defendant nor his agent need be present within the state.[112] Also, causing injury while within the state to perform a single contract constitutes such an act.[113]

[106]The following cases emphasize the commission of a purposeful act by the defendant as a part of the minimum contacts rule: Kaye-Martin v. Brooks, 267 F.2d 394 (7th Cir. 1959); Grobark v. Addo Mach. Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959); L.D. Reeder Contractors of Ariz. v. Higgins Indus., Inc., 265 F.2d 768 (9th Cir. 1959); Florence Nightingale School of Nursing, Inc. v. Superior Court, 168 Cal. App. 2d 74, 335 P.2d 240 (1959); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[107]"[T]here [must] be some act by which the defendant purposefully avails itself of the *privilege of conducting activities* within the forum State." Hanson v. Denckla, 357 U.S. 235, 253 (1958) (Emphasis added). See Florence Nightingale School of Nursing, Inc., v. Superior Court, 168 Cal. App. 2d 74, 335 P.2d 240, 246 (1959).

[108]Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 680 (1957).

[109]Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761, 766 (1961).

[110]Florence Nightingale School of Nursing, Inc. v. Superior Court, 168 Cal. App. 2d 74, 335 P.2d 240 (1959); Gavenda Bros., Inc. v. Elkins Limestone Co., 116 S.E.2d 910 (W. Va. 1960); Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).

[111]Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961).

[112]McGee v. International Life Ins., 355 U.S. 220 (1957) (defendant's only contact with the forum state was by mail); Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959) (distribution through a manufacturer's representative); S. Howes Co. v. W.P. Milling Co., 277 P.2d 655 ((Okla. 1954) (defendant sold to an independent contractor outside the state but shipped the goods directly to the plaintiff within the state). *Contra*, Grobark v. Addo Mach. Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959) (defendant was held not subject to jurisdiction in Illinois for breach of contract with an independent contractor who had contracted for the exclusive distribution of defendant's product in Illinois). However, it is submitted that this case is overruled by implication by Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[113]Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

In *Hanson v. Denckla* the court said that the Delaware trustee who entered into the trust agreement before the settlor moved to Florida had done no purposeful act to invoke the protection and benefit of the Florida law. Further, the court said there was nothing that the settlor or anyone else could have done to bring the trustee under the jurisdiction of the court; the purposeful act must come from the defendant.[114] In *Kaye-Martin v. Brooks,*[115] the court held that a non-resident who discussed a contract with another non-resident while he was attending a convention in Chicago, when the contract was not initiated, finalized nor to be performed in Illinois, had not committed a purposeful act in the state of Illinois.[116]

Solicitation

It would seem that solicitation of orders within the state should clearly fall within the definition of a purposeful act.[117] However, there has been some difficulty on this point. Before the *International Shoe* case was decided, a line of cases commencing with *Green* v. *Chicago, B. & Q. R. Co.*[118] had taken the position that "mere solicitation" was not a sufficient basis for personal jurisdiction. This so-called "solicitation plus" doctrine, which required something in addition to mere solicitation, was not easily rejected and has had an effect on many of the recent cases.[119] Nevertheless, it has been soundly repudiated[120] and is clearly inconsistent with the most recent cases.[121]

Newspaper Distribution

It would seem that the distribution of newspapers within the forum state would constitute the doing of a purposeful act. However, there is a well established line of cases holding that non-resident newspaper companies who ship their publications into the state to subscribers or to independent contractors for sale on news stands are not subject to the state's jurisdiction.[122] But a television station which broadcasted its programs

[114]Hanson v. Denckla, 357 U.S. 235, 254 (1958).
[115]267 F.2d 394 (7th Cir. 1959).
[116]"Brooks did not come to Illinois for the purpose of negotiating with Hansen or Kaye-Martin but rather to attend a convention. Moreover no party to this action, insofar as the record shows, had any intention of invoking any of the benefits or protections of the laws of the State of Illinois. The fact that some of the events leading up to execution of the final contracts in Dallas, Texas, occurred in Chicago was wholly fortuitous." *Id.* at 397, 398. *Cf.* Orton v. Woods Oil & Gas Co., 249 F.2d 198 (7th Cir. 1957) (A Louisiana proprietor who hired an Illinois lawyer and engineer to incorporate his business under the laws of Delaware was held not to be subject to jurisdiction in Illinois).
[117]Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2nd Cir. 1960). Berlemann v. Superior Distrib. Co., 17 Ill. App. 2d 522, 151 N.E.2d 116 (1958).
[118]205 U.S. 530 (1907).
[119]See Arundel Crane Service, Inc. v. Thew Shovel Co., 214 Md. 387, 135 A.2d 428 (1957); Le Vecke v. Griesedieck W. Brewery, 233 F.2d 772 (9th Cir. 1956); MacInnes v. Fontainbleau Hotel Corp., 257 F.2d 832 (2nd Cir. 1958); Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959).
[120]Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943); Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 859, 323 P.2d 437, 440 (1958); See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2nd Cir. 1960); Johns v. Bay State Abrasive Prod. Co., 89 F. Supp. 654 (D. Md. 1950).
[121]Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961).
[122]Schmidt v. Esquire, Inc., 210 F.2d 908 (7th Cir. 1954), *cert. denied*, Schmidt v. Crowell-Collier Publishing Co., 348 U.S. 819 (1954); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957); Insull v. New York World Telegram Corp., 273 F.2d 166 (7th Cir. 1959).

into Kentucky from its transmitter in West Virginia and relied upon advertisers in Kentucky for about three percent of its gross receipts was held subject to Kentucky jurisdiction for a libel suit.[123] It is submitted that the newspaper cases meet all of the elements of the minimum contacts test[124] and are contrary to the most recent developments.[125]

Foreign Act with Local Consequence

The application of the purposeful act requirement to acts done outside the state which have consequences within the state causes considerable trouble. The requirement is satisfied if the defendant sends something into the forum state with the expectation that a contract will be executed or performed there and the cause of action arises out of that contract.[126] Much more difficulty arises from the statutes in some states[127] which permit jurisdiction over non-residents who commit a tort in whole or in part within the jurisdiction. If the defendant commits an act outside the forum state which results in an injury or other consequence within the state the forum generally will be favored with trial convenience[128] and necessary governmental interest.[129] Therefore, jurisdiction over these cases often depends on the application of the third element, *i.e.*, whether the defendant's activity outside the state constituted an act whereby he purposefully availed himself of the benefits and protections of the laws of the forum.

If the act committed outside the state was committed with the inten-

[123]WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958); *cf.* Wanamaker v. Lewis, 153 F. Supp. 195 (D. Md. 1957).

[124]The newspaper companies have done, on their own initiative, an act whereby they have obtained the benefit and protection of the laws of the forum state. Further, trial convenience is generally greatest where the plaintiff has been injured; and the forum state has an interest in protecting its citizens from defamation by non-residents.

[125]Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961).

It is interesting to note that the recently enacted New York Civil Practice Law and Rules (Consol. Laws of N.Y. (C.P.L.R.) § 302 (a)(2)(1962)) explicitly excludes defamation from its otherwise broad authorization for service of process over non-residents.

[126]McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (sending a contract into the state by mail); S. Howes Co. v. W.P. Milling Co., 277 P.2d 655 (Okla. 1954) (goods sold to an independent contractor outside the state were sent to the customer within the state). A contrary result was reached, however, in Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), where the contract was completed in New York and the goods were shipped f.o.b. the New York plant. The court said that the fact that the defendant could reasonably expect the goods to reach the forum state (North Carolina) was not sufficient contact to warrant jurisdiction in the forum for a breach of contract action. Extending jurisdiction this far, the court said, would constitute a threat to interstate commerce. *Id.* at 507. However, it is submitted that the defendant committed an act whereby it fully intended to make use of the forum state as a market place for its goods. Had the defendant's operation or its product been such that distribution within the state was highly unlikely there may have been no benefit or protection from the laws of North Carolina. But such facts do not appear in the case. The other two elements, especially trial convenience, may have been an important factor in this case.

[127]*E.g.*, TEX. CIV. STAT., art. 2031b § 4 (Vernon Supp. 1960); MINN. STAT. ANN. § 303.13(3) (1957); VT. STAT. ANN., 1959, tit. 12, § 855; WIS. STAT. § 262.05(4) (1959); REVISED CODES OF MONTANA, 1947, § 93-2702-2 (Rule 4B(1)(b) (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.).

[128]The court nearest to the scene of the injury is generally most convenient because most of the witnesses and much of the evidence are found in that area.

[129]The forum state has an interest in providing a local forum for redress of the wrong inflicted upon its residents and others within its boundaries.

tion of causing the consequences complained of, the act would certainly be a purposeful act as described above. For example, if a man stands just outside the forum state and shoots a bullet into the forum state intending to cause the resulting consequence he should be subject to the jurisdiction of the state just as if he had been within the state when he fired the shot.[180] Similarly, if a broadcasting company intentionally beamed its programs into the forum state it should be subject to jurisdiction for defamation arising out of such programs.[181]

If the defendant sends goods into the state which cause injury within the state because of their defective manufacturing or packaging, he should be subject to that state's jurisdiction, whether the injured party dealt with the defendant directly[182] or whether he purchased the defendant's goods through an independent contractor.[183] Further, it has been held that if the defendant anticipated and expected his goods to be delivered into and used within the forum state, that state has jurisdiction over him for causes of action resulting from the negligent manufacture of those goods.[184] In *W. H. Elliott & Sons Co., Inc. v. Nuodex Products Co., Inc.*[185] the plaintiff's property in New Hampshire was damaged by paint originally manufactured by a Massachusetts corporation using, as an ingredient, a chemical product manufactured by the defendant in New Jersey. Although the defendant's chemical ingredient was not sent into New Hampshire by the defendant, the defendant fully anticipated and expected that it would get into the state and be used there. In fact, the defendant had registered its product under the New Hampshire economic poisons law and had conducted advertising and sales campaigns within the state. Clearly, the defendant had chosen New Hampshire as a substantial market place for its products and benefited from the protection of the laws accordingly.

In *Gray v. American Radiator & Standard Sanitary Corp.*[186] an Illinois resident was injured by the explosion of a hot water heater manufactured in Pennsylvania. A defective valve, made by the defendant in Ohio, had been used in the construction of the heater. The court said the Ohio defendant not only anticipated and expected that its valves would be used

[180]See Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 260 (1959).

[181]Wanamaker v. Lewis, 153 F. Supp. 195 (D. Md. 1957); *accord*, WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958).

[182]Atkins v. Jones & Laughlin Steel Corp., 258 Minn. 271, 104 N.W.2d 888 (1960) (truck driver was injured while unloading defendant's acid product because of faulty packaging in a foreign state); Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959) (defendant's hot water heater, shipped into the state, exploded and injured the plaintiff).

[183]*Cf.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); W.H. Elliott & Sons Co., Inc. v. Nuodex Prod. Co., Inc., 243 F.2d 116 (1st Cir. 1957). There are two cases holding that such a defendant is not subject to the jurisdiction of the forum: Johns v. Bay State Abrasive Prod. Co., 89 F. Supp. 654 (D. Md. 1950); Mueller v. Steelcase, Inc., 172 F. Supp. 416 (D. Minn. 1959). It is submitted that, under the rationale of the Gray case and the Elliott case, *supra*, both of these cases are in error.

[184]Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961); W.H. Elliott & Sons Co., Inc. v. Nuodex Prod. Co., Inc., 243 F.2d 116 (1st Cir. 1957); Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718, 721 (N.D. Ill. 1957) (dictum); *contra*, Rufo v. Bastian-Blessing Co, 405 Pa. 123, 173 A.2d 123 (1961).

[185]243 F.2d 116 (1st Cir. 1957).

[186]22 Ill. 2d 432, 176 N.E.2d 761 (1961).

in Illinois but its product enjoyed a "substantial use and consumption" in the state. Again, it appears that the defendant relied on the Illinois market as a substantial outlet for its products and enjoyed the benefits and protection of the laws of Illinois accordingly.[187]

This anticipation and expectation rule clearly has its limitations. For example, a tire dealer in California might sell a tire to a Pennsylvania tourist while the latter is visiting in California. The dealer could not reasonably be expected to defend an action in Pennsylvania for an injury caused by that tire in Pennsylvania even though he clearly anticipated and fully expected that the tire would be used in Pennsylvania.[188] It is submitted that this situation can be distinguished from the situations in the *Gray* case and the *Nuodex* case just discussed; here the tire dealer has not chosen Pennsylvania as a market place for a substantial part of its products nor does it rely on Pennsylvania as a substantial outlet for its products. Therefore, the tire dealer would not have enjoyed the protection provided by the laws of Pennsylvania to those who market their products in Pennsylvania.

D. Interrelation of the Three Elements

Jurisdiction cannot be maintained over a non-resident unless all three elements are present. Fulfilling one of the elements alone would not be sufficient.

To a limited extent the three elements may be dependent upon each other. For example, doing a purposeful act may reduce the inconvenience of requiring the defendent to defend in the forum and may add impetus to the forum's governmental interest. Also, once trial convenience is found to preonderate in favor of the forum state, it is much easier to find that the state has a governmental interest in the litigation. Generally, however, these three elements require quite different considerations.

It may be suggested that the strength of one element may permit a lesser compliance with the other two. For example, if there is a strong or high governmental interest in providing a forum within the state, the requirement of trial convenience may be lessened; further, if there is a weak governmental interest in the litigation, strong arguments must exist in favor of trial convenience. This view is suggested by the American Law Institute.[189] However it is submitted that if sufficient facts exist to satisfy each of the elements, there is no need to measure or weigh the varying degree of compliance with these elements.

E. Other Tests

The American Law Institute, in the third tentative draft of the Restatement (Second), Conflict of Laws, states three "principal factors" to be considered in determining the question of jurisdiction.[140] They are

[187] *Id.* at 766.
[188] Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956) (dictum).
[189] Restatement (Second), Conflict of Laws § 84, comment c at 91; comment d at 93 (Tent. Draft No. 3, 1956). As explained in the next section, the Restatement divides the due process test into three principle factors which are quite analogous to the three elements proposed herein.
[140] Restatement (Second), Conflict of Laws § 84 (Tent. Draft No. 3, 1956).

strikingly similar to the three elements proposed in this note. The first is "the nature and quality of the act." Under this factor, the Restatement cites such things as dangerous acts, acts subject to special regulation by the forum state, and acts done for a pecuniary profit. Many of these same considerations are necessary in meeting the requirement of governmental interest. The second factor mentioned by the Restatement is "the extent of defendant's contacts with the state." Although the term is obviously vague, the contacts suggested seem to require some action under the defendant's own initiative whereby he derives a benefit from the state, *i.e.*, a purposeful act. The third factor mentioned by the Restatement is inconvenience to the defendant to stand trial in the forum state. Although trial convenience includes many considerations in addition to inconvenience to the defendant, there is obviously much similarity between the Restatement's third factor and the second element stated herein. It is submitted, however, that the Restatement test suffers from a lack of adequate clarification and definition of the three principal factors.[141]

III. MONTANA'S NEW RULE 4B.

A court may not obtain personal jurisdiction over a non-resident not found within the state unless a statute expressly authorizes such jurisdiction.[142] Further, such a statute must provide for a method of service of process that is most likely to notify the defendant of the action.[143]

Since the *International Shoe Co. v. Washington*[144] decision, a large number of states have enacted legislation designed to expand their jurisdiction over non-residents.[145] Montana's new Rule 4B, patterned after the First Tentative Draft of the Uniform Extra-Territorial Process Act, and the recent legislation in Illinois, Texas, and Wisconsin,[146] definitely takes a modern approach to the problem of personal jurisdiction over non-residents.

A. Personal Service of Process

"The fundamental requisite of due process of law is the opportunity to be heard."[147] Inherent in this requisite is the right to have fair notice of the pending litigation and reasonable opportunity to appear and defend.[148]

[141]A note in the Georgetown Law Journal has also suggested a three pronged test for jurisdiction over non-residents. The three parts there suggested are as follows: (1) the defendant must do some act or consummate some transaction within the state; (2) the cause of action must arise out of such activity; and (3) there must be substantial minimum contact, *i.e.*, convenience. However, it must be noted that that note was concerned with situations in which only a single act had been committe. Note, *Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342 (1958).

[142]Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957). Such jurisdiction was unknown at common law and, therefore, it requires express statutory authorization. Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 265 (1959).

[143]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[144]326 U.S. 310 (1945).

[145]*E.g.*, Smith-Hurd Ill. Ann. Stat. ch. 110, § 17 (1956); Tex. Civ. Stat. art. 2031b (Vernon Supp. 1960); Wis. Stat. § 262.05 (1959); Minn. Stat. Ann. § 303.13 (1957); Vt. Stat. Ann. 1959, tit. 12 § 855; Ann. Code of Md. art. 23 § 92 (1957); Consol. Laws of N.Y. (C.P.L.R.) § 302 (1962); Fla. Stat. ch. 47.16 (1961); Tenn. Code Ann. § 56-319 (1955); Ky. Rev. Stat. § 271.61-0 (1953).

[146]See Mason, *The Montana Rules of Civil Procedure*, 29 F.R.D. 23, 27.

[147]Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[148]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Milliken v. Meyer, 311 U.S. 457, 463 (1940).

Only then will the traditional notions of fair play and substantial justice implicit in due process be satisfied.[149]

It has long been established that personal jurisdiction over non-residents will not be consistent with due process unless the method used to notify the defendant of the litigation is calculated to "make it reasonably probable that he will receive actual notice."[150] Service of process upon the Secretary of State, therefore, without any provision for an attempt to communicate with the defendant generally will not meet with the due process test.[151] Similarly, service of process by publication, without further attempt to locate the defendant will not meet the due process test.[152] Personal service, however, is not indispensable.[153] If other methods actually convey notice to the defendant,[154] or if there is no possible way to contact the defendant except by publication or service on the Secretary of State,[155] personal service is not required by the Constitution. In general, however, while the requirement of contact with the forum state has been relaxed, the notice requirement has become more stringent.[156]

Although personal notice is not required to satisfy the due process clause,[157] the new Montana Rules make such notice a requisite for personal jurisdiction.[158] At this point the new Montana Rules impose a greater

[149]Milliken v. Meyer, 311 U.S. 457, 463 (1940); see McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957).

[150]Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928).

[151]*Ibid.*

[152]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Here the address of the defendant was known but no attempt was made to contact him by mail or to make personal service.

[153]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[154]*Ibid.*

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

[156]Even in Montana, the notice requirement was much less rigid under R.C.M. 1947, § 93-3013. This statute was superseded by the new rules.

[157]Several states, including Wisconsin and Texas, provide for substituted service other than personal service when the defendant cannot with reasonable diligence be served personally. WIS. STAT. § 262.06 (1959); TEX. CIV. STAT. art. 2031b (Vernon Supp. 1960).

It should be pointed out that service upon the defendant while he is outside the state is substituted service even though he may have been served personally. See McDonald v. Mabee, 243 U.S. 90 (1917). A summons orders the defendant to appear; if the defendant is outside the boundaries of the state the summons can have no compulsory effect but will be effective only as notice. If the service is binding, the distinction is technical and most courts make no mention of such a distinction. See Wuchter v. Pizzutti, 276 U.S. 13 (1928); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Ehrenzweig suggests the term "personal service" should apply to a hand to hand delivery within the state, the term "substituted service" should apply to all other forms of service within the state, and the term "constructive service" to all forms of service outside the state. EHRENZWEIG, CONFLICT OF LAWS 89 (1959).

[158]R.C.M. 1947, § 93-2702-2D(3) (Rule 4D(3)). "Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. . . ." *Ibid.* Service by publication is still permitted but it is limited to actions involving property located within the state. R.C.M. 1947, § 93-2702-2D(5) (Rule 4D(5)).

diligence than due process requires and, consequently, are more limited than the constitutional requirements.

B. Areas Not Covered

The new Montana Rules do not extend the jurisdiction of the Montana courts to the fullest extent permitted by the Constitution of the United States in other respects. In fact two of the major areas previously discussed in Part I herein have not been included.

First, domiciliation is not included as a basis for obtaining jurisdiction; therefore, a domiciliary of Montana who cannot be found within the state is not expressly subject to the jurisdiction of the Montana courts unless he has committed one of the acts listed in Rule 4B (1).[159] It may be argued that jurisdiction over absent domiciliaries was possible at common law and that an expess statutory authorization is unnecessary. Just such an argument has been made under the old statute; this statute also did not expressly subject absent domiciliaries to the jurisdiction of Montana courts.[160] However, Rule 4B cannot be said to be declaratory of the common law;[161] thus, it would be difficult to ignore the applicable rule of statutory construction, *i.e.*, when the legislature changes one aspect of the common law, it is deemed to have rejected the application of the common law in that particular field.[162]

Also, it could be argued that jurisdiction over an absent domiciliary could be obtained on the authority of subsection 4B (2). Entitled "Acquisition of Jurisdiction" it states: "Jurisdiction may be acquired by our courts over any person through service of process as herein provided; . . ." There is no language in subsection 4D (3), "Personal Service Outside the State," which would prevent effective service on a domiciliary outside the state. Thus, personal service outside the state on a domiciliary seems to be auth-

[159]R.C.M. 1947, § 93-2702-2B(1). The only authorization under the new Rules for jurisdiction over anyone is contained in the following language of Rule 4B(1); "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 cause of action 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;

(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.

[160]Note, *Procedure: Substituted Service on Domiciliary by Notice Outside the State*, 1941 Mont. L. Rev. 112. The proposition that jurisdiction over domiciliaries was permitted at common law is substantiated by Restatement, Conflict of Laws §§ 77 and 79 (1934). Evidently the question was never presented to the Montana Supreme Court under the old statute, so there is no way of knowing what the result would have been.

[161]*Supra*, note 142.

[162]"In this state there is no common law in any case where the law is declared by the code or the statute. . . ." R.C.M. 1947, § 12-104. See Simonson v. McDonald, 131 Mont. 494, 311 P.2d 982 (1957).

orized and such authorization seems to grant jurisdiction to the courts. This argument would raise the question of whether the grounds for jurisdiction as set forth in Rule 4B (1) state the exclusive bases for personal jurisdiction. That subsection simply states that certain persons are subject to the jurisdiction of the Montana courts; it does not say that these are the only persons subject to the courts' jurisdiction. However, if jurisdiction were not limited to the situations specified in 4B (1) the Montana statute would authorize an extention of personal jurisdiction to the limits of permissibility under the Constitution, whenever the defendant could be served personally. This would deprive 4B (1) of all its significance and it cannot be presumed that the legislature intended to enact legislation without meaning.[163] Therefore, it is likely that 4B (1) will be interpreted as stating the exclusive bases of personal jurisdiction except as otherwise provided.

The second major area not expressly included in the scope of the new Rules is jurisdiction over non-residents for actions unrelated to their contact with the state. Rule 4B (1) limits jurisdiction over persons not found in Montana to causes of action arising out of the specified "acts" only.[164] Inasmuch as jurisdiction by substituted service over non-residents for actions unrelated to their contact with the state was unknown at common law[165] such jurisdiction would not be authorized in Montana. A different result would be reached, however, if the Montana Supreme Court does not interpret 4B (1) as exclusive.

C. Statutes Not Repealed

It is particularly significant that serveral existing Montana statutes involving service of process on non-residents were not repealed when the new Rules were enacted. The statute providing for service of process upon foreign corporations which have qualified to do business within the state was not repealed.[166] The non-resident motorist statute was not repealed.[167] The statutes providing for service upon the insurance commissioner as the process agent for an authorized or unauthorized insurer were not repealed.[168] Finally, the statutes providing for service upon the investment commissioner as process agent for foreign investment companies[169] and for broker-dealers, investment advisees, and salesmen of securities[170] were not repealed. These statutes provide for service of process on a state official who is authorized by appointment or by law to receive such service. To the extent the above statutes are inconsistent with the new Rules, the former will probably prevail; although the new rules are later in time the above statutes are more specific and, according to the accepted rule

[163]Montana Life Ins. Co. v. Shannon, 106 Mont. 500, 78 P.2d 946 (1938); Corwin v. Bieswanger, 126 Mont. 337, 251 P.2d 232 (1952).
[164]*Supra*, note 159.
[165]*Supra*, note 142.
[166]R.C.M. 1947, § 93-3008. This statute provides for substituted service upon the Secretary of State under certain specified conditions.
[167]R.C.M. 1947, § 53-202. This statute also provides for service on the Secretary of State.
[168]R.C.M. 1947, § 40-2818; R.C.M. 1947, § 40-3404.
[169]R.C.M. 1947, § 66-2010.
[170]R.C.M. 1947, § 15-2015.

of statutory construction, a general statute must yield to a more specific statute which is inconsistent therewith.[171]

D. The Transaction of Any Business

One area of the new Rules which is certain to cause a great deal of litigation is subsection 4B (1) (a).[172] That subsection includes as one of the acts which will subject a person to jurisdiction "the transaction of any business within this state." It is identical with a subsection of both the Illinois Civil Practice Act,[173] and the First Tentative Draft of the Uniform Extra-Territorial Process Act.

The term "transaction of any business" would appear to be very similar in meaning to the term "doing business." The later is a term found in several of the Montana statutes and it may have different meanings for different purposes. In Montana "doing business" appears in the statutes pertaining to the qualification of foreign corporations,[174] and in the corporation license tax law,[175] and a modified form of the term is found in the new Rule 4B (1) (a).

The new Texas law pertaining to jurisdiction over non-residents uses the term "doing business." In fact, the term is defined in the statute itself. It reads as follows:[176]

> For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

It is apparent that such a definition would extend the concept of doing business nearly to the limits of permissible personal jurisdiction under the constitution.[177] It should be noted that the commission of a tort, even when not wholly committed within the state, is declared to be "doing business." California apparently construes the term "doing business" as synonymous

[171]State *ex rel.* Charette v. District Court, 107 Mont. 489, 86 P.2d 750 (1939); State *ex rel.* State Aeronautics Comm'n v. Board of Examiners, 121 Mont. 402, 194 P.2d 633 (1948). The insurance statutes, R.C.M. 1947, §§ 40-2818 and 40-3404, are included in Table A which lists special statutory proceedings which are expressly excepted from the rules insofar as they are inconsistent with or in conflict with the procedure provided in the new rules. Rule 81 (R.C.M. 1947, § 93-2711-1). Clearly where the procedural details required to perfect service on a specified state official are different from the details required under the new rules it is best to follow the former. See Mason, *The Montana Rules of Civil Procedure*, 23 Mont. L. Rev. 3, 14 (1961).

[172]R.C.M. 1947, § 93-2702-2B(1)(a).

[173]Smith-Hurd Il. Ann. Stat. ch. 110, § 17(1)(a) (1956).

[174]R.C.M. 1947, § 15-1701.

[175]R.C.M. 1947, § 84-1501.

[176]Tex. Civ. Stat. art. 2031b, § 4 (Vernon Supp. 1960).

[177]See the three elements of the due process test suggested in Part II of this article. The only possible area under the due process clause that may not be covered by this statute is a situation resulting from a contractual relationship with a non-resident outside the state, where the non-resident fully intends to ship goods into the state for sale. See note 126 *supra* and accompanying text.

with those business activities required by the due process clause as a basis for jurisdiction.[178]

The Montana Supreme Court, however, has not given such a broad definition to the term. It has interpreted "doing business" as found in the service of process statute in exactly the same way it interpreted "doing business" as found in the corporate qualification statutes.[179] According to the Montana court, doing business requires more than a single sale, more than mere solicitation, and more or less a continuing course of business within the state even though a resident business agent within the state is not required.[180]

Perhaps this same definition will be applied to the words of the new Rule, "transaction of any business." It is unlikely that a definition as broad as the one adopted in California will be applied because such a definition would deprive the remaining subsections of 4B (1) of any meaning or effect; if "transaction of any business" includes everything that the constitution permits, the listing of other items permitted by the statute is meaningless. It should not be presumed that the legislature intended the remaining subsections to be without meaning or effect.[181]

Because Illinois has the same subsection stated in exactly the same words[182] it may be helpful to see how they have defined "transaction of any business." The Illinois courts have looked to "some" business within the state but have not insisted on continuous and systematic business.[183] "The words of subsection (a) of Section 17 cannot be given a restrictive

[178]Kneeland v. Ethicon Suture Lab., Inc., 118 Cal. App. 2d 211, 257 P.2d 727 (1953); Florence Nightingale School of Nursing, Inc. v. Superior Court, 168 Cal. App. 2d 74, 335 P.2d 240 (1959).

[179]"In fact, it seems to us that the meaning of that phrase [doing business], as used in the various sections referred to above, must necessarily be the same in each instance." State *ex rel.* American Laundry Mach. Co. v. District Court, 98 Mont. 278, 285, 41 P.2d 26, 29 (1934), *cert. denied*, 295 U.S. 744 (1935). This case has been followed quite recently by Graham and Ross Mercantile Co. v. Sprout, Waldron & Co., 174 F. Supp. 551 (D. Mont. 1959) and Minnehoma Financial Co. v. C.J. Van Oosten, 198 F. Supp. 200 (D. Mont. 1961).

[180]State *ex rel.* Taylor Laundry Co. v. District Court, 102 Mont. 274, 279, 57 P.2d 772, 775 (1936). "In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process. Isolated transactions do not constitute a doing of business within the meaning of the statute; it contemplates a more or less continuing course of business."

[181]It is interesting to note that the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, adopted by the National Conference of Commissioners on Uniform State Laws in 1962 (this act supplanted the proposed Uniform Extra-Territorial Process Act, the Extra-Territorial Process Act being incorporated into the Interstate and International Procedure Act as Article I) section 1.03 [Personal Jurisdiction Based upon Conduct] provides in part as follows: "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's

(1) transacting any business in this state;

. . .

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him." The Act has thus made it clear that the bounds of "transacting any business" are to be limited, and that the following enumerated acts are to be given full force and effect.

[182]ILL. REV. STAT. ch. 110; § 17(1)(a) (1957).

[183]Berlemann v. Superior Distrib. Co., 17 Ill. App. 2d 522, 151 N.E.2d 116 (4th Dis. 1958).

interpretation based upon the old Illinois 'doing business' cases.'"[184] Courts have often said that this subsection of the Illinois Act extends statutory authorization as far as due process permits.[185] However, where the case clearly involves a tort, statutory authority is said to exist under subsection 17 (1) (b) which is similar to subsection 4B (1) (b) of the Montana Rules.[186]

The Illinois statute differs from the Montana statute in one significant respect. It does not contain subsections (e) and (f) or anything similar thereto. Subsection 4B (1) (e) states: "entering into a contract for services to be rendered or for materials to be furnished in this state by such persons." These words would appear to include any and all isolated business transactions. If Montana were to give a definition to "transaction of any business" similar to the definition Illinois has given those words, subsection (e) would have no meaning unless it were interpreted to include extraterritorial executory contracts where no single act has been consummated in Montana.[187] Therefore, the previous Montana definition of 'doing business," *i.e.,* more or less a continuing course of business within the state, may well be applied to the term "transaction of any business."

E. Characterization of the Word "Act"

Rule 4B (1) reads in part as follows: ". . . any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through an employee, or through and agent,

[184]Haas v. Fancher Furniture Co., 156 F. Supp. 564, 567 (N.D. Ill. 1957).

[185]Orton v. Woods Oil & Gas Co., 249 F.2d 198 (7th Cir. 1957) ; Kaye-Martin v. Brooks, 267 F.2d 394, 397 (7th Cir. 1959).

[186]See Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[187]There is some authority for the contention that subsection 4B(1)(e) was intended to cover the situation in which a wholly executory extraterritorial contract is involved. See Wis. Stat. § 262.05, which provides in part as follows:

> 262.05 PERSONAL JURISDICTION, GROUNDS FOR GENERALLY
> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 262.06 under any of the following circumstances:
>
> . . .
>
> (5) LOCAL SERVICES, GOODS OR CONTRACTS. In any action which:
> (a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or
>
> . . .

See alos the Uniform Interstate and International Procedure Act, § 1.03 (a)(1) and (2). These subsections provide:

> SECTION 1.03. [*Personal Jurisdiction Based upon Conduct.*]
> (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's:
> (1) transacting any business in this state;
> (2) contracting to supply services or things in this state;
>
> . . .

The Comment regarding section 1.03(a)(1) notes that it ". . . is derived from the Illinois Act. Ill. Rev. Stat. c. 110, § 17(1)(a). This provision should be given the same expansive interpretation that was intended by the draftsmen of the Illinois Act and has been given by the courts of that state. See, *e.g., Berlemann v. Superior Distributing Co.*, 17 Ill. App. 2d 522, 151 N.E.2d 116 (1958). . . ." The Comment regarding section 1.03(a)(2) refers to Wis. Stat. § 262.05.

of any of the following *acts*: . . ." (Emphasis supplied). Apparently, jurisdiction over a non-resident could not be obtained unless some "act" were committed. However, included in the "acts" listed by the statute is the "ownership" and "possession" of property. In order to include the ownership or possession of property within the definition of the word "act" it must be presumed a very broad definition of that word was intended.[188]

Also, subsection 4B (1) (b) lists the "commission of any act" which results in accural of a tort action as a basis for personal jurisdiction. It is submitted that the term "commission of any act" should be interpreted to include the "omission fo any act" as well.[189] If this interpretation were not adopted an important part of the torts field would be omitted from the scope of the statute.

F. Accrual Within This State of a Tort Action

The act listed by subsection 4B (1) (b) is stated as follows: "the commission of any act which results in accrual within this state of a tort action." It is submitted that under the test set forth in Part II of this Article,[190] not all acts which result in the accrual within this state of a tort action would meet the due process test for conferring jurisdiction on non-residents. For example, suppose a California tire retailer sells a tire to a Montana resident while the latter is vacationing in California. If the tire later causes an accident in Montana the California dealer would have committed an act which resulted in the "accrual within this state of a tort action." However, as previously stated, the mere selling of a defective tire to a resident in a distant state would not meet the contacts test set forth above.[191]

A statute will always be interpreted to preserve its constitutionality.[192] The phrase "accrual within this state of a tort action" must therefore be construed to extend jurisdiction to the extent permissible under the due process clause of the Constitution and no further. It must meet the three-pronged test set forth above.

No provision is made for obtaining jurisdiction over an act committed or omitted in Montana which results in the accrual of a tort action outside the state. The Wisconsin statute provides expressly for jurisdiction over

[188]The Uniform Interstate and International Procedure Act eliminates the word "act" by stating "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's

(1) transacting any business in this state;
. . . ."

Wisconsin uses the word "circumstances" instead of the word "acts". Wis. Stat. § 262.05 (1959).

[189]The Uniform Interstate and International Procedure Act, § 1.03(a)(4) Provides as follows: "causing tortious injury in this state by an act *or omission* outside this state. . . ." (Emphasis added).

[190]The test, to repeat, has three parts: (1) Is there a governmental interest in providing a forum for the litigation; (2) Does the forum figure favorably in regard to trial convenience; (3) Has the defendant done some purposeful act by which he has obtained the benefit and protection of the forum's laws.

[191]See note 138 *supra* and accompanying text.

[192]State *ex rel.* James v. Aronson, 132 Mont. 120, 314 P.2d 849 (1957); *State ex rel.* Great No. Ry. v. State Bd. of Equalization, 121 Mont. 583, 194 P.2d 627 (1948).

such acts.[103] However, if neither party is a resident of Wisconsin, trial convenience will probably weigh heavily against the courts of the forum and these acts may not meet the test for due process.

CONCLUSION

Since *Pennoyer v. Neff* established the concept of personal jurisdiction based on physical presence, the scope of personal jurisdiction over non-residents has expanded considerably. Development has taken place in several well defined areas, *i.e.*, jurisdiction over domiciliaries, non-resident mortists, foreign corporations, non-resident individuals, and non-resident individuals or corporations for actions unrelated to their contacts with the state. All of these areas were effected by *International Shoe Co. v. Washington* which defined the due process requirement in terms of a relationship between the defendant and the forum state. Finally in *Hanson v. Denckla* this concept of personal jurisdiction was limited and further refined.

From this background of judicial opinion, we have proposed a three-pronged test to determine whether the facts of a particular case meet the "minimum contacts" requirement for due process of law under the Constitution. First, there must be a governmental interest in providing a forum for the litigation. Second, the forum must figure favorably in regard to trial convenience. And third, the defendant must have done some purposeful act by which he has obtained the benefits and protection of the laws of the forum. All three of these elements must be presented in each case to meet the "minimum contacts" test.

Montana's new Rule 4B takes a modern approach to the general question of personal jurisdiction over non-residents. It provides a safe method for insuring the necessary notice requirement by permitting personal service of process outside the state. It gives statutory authorization for all of the general fields in which there has been a general development of expanded jurisdiction except in the area of jurisdiction over domiciliaries and the area of jurisdiction over non-residents for actions unrelated to their contact with the state. It leaves in effect several special statutes which provide for methods of bringing non-residents within the jurisdiction of the court, principally the non-resident motorist statute and the service of process statute pertaining to foreign corporations which have qualified to do business within the state. However, it leaves open a difficult question of interpreting the scope and meaning of the words "transaction of any business within the state" and "accrual of a tort action within the state." Also, there are a few minor problems resulting from the difficulty in characterizing the word "act."

In this rapidly changing field, certainty is nearly impossible. However, within the general outline of Rule 4B the Montana Supreme Court can develop a firm concept of the scope of personal jurisdiction over non-residents in Montana.

[103] WIS. STAT. § 262.05(3) (1959). "[Courts will have jurisdiction over the following circumstances:] In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant."