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Jurisdiction in Personam over Non-Resident Individuals Through Service on a Local Agent

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Dr. E. E. Hilpert, A.B., M.A., LL.B., J.S.D., has been appointed Associate Professor of Law. He will teach the courses in Constitutional Law which were formerly taught by Dean Isidor Loeb. Before entering the legal profession, Dr. Hilpert taught advance courses in Political Science at Western Reserve University. During 1936-37 he was a Sterling Fellow in the Graduate School of Yale University.

Mr. Frederick Reed Dickerson, A.B., LL.B., LL.M., has been appointed Assistant Professor of Law for 1939-40. Upon graduating from Harvard he engaged in the active practice of law for four years and last year did graduate work at Columbia University Law School. He will teach courses in Family Law, Sales, Wills, and Municipal Corporations.

NOTES

JURISDICTION IN PERSONAM OVER NON-RESIDENT INDIVIDUALS THROUGH SERVICE ON A LOCAL AGENT*

On the continent of Europe the rule is almost universally followed that when a non-resident foreigner has become a party to dealings in a country wherein a resident claimant seeks to secure jurisdiction, the absent defendant is amenable to suit in that country on a cause of action arising out of his transaction there.[1] That phase of jurisdiction, which in American law is

* This treatise was awarded the Mary Hitchcock Thesis Prize for 1939.

1. Beale, The Jurisdiction of Courts over Foreigners (1913) 26 Harv. L. Rev. 193, 203, in speaking of causes of actions against non-residents arising within the country, said: "But in spite of an occasional objection it is clear that today, not only in Belgium and France, but in Germany as well, as von Bar has shown, actions may be brought without regard to the presence of the defendant. von Bar, International Law, sec. 423, 424."

Sunderland, The Problem of Jurisdiction (1926) 4 Texas L. Rev. 429, 442, in speaking of service out of the country on a non-resident defendant against whom an action has arisen within the country, said: "This theory of jurisdiction over foreigners who become involved in domestic transactions is almost universal among European Nations. Piggott, Foreign Judgments, c. 13."

The Rules of Order of the Supreme Court of England provide in Order XI, rule 1:

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever—
> e. The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract.

called "due process"—the "notice" factor—is considered satisfied by extraterritorial service of notice. This practice is based on the theory that when people have voluntarily become parties to dealings in a foreign country it is only fair and reasonable that they be answerable to the courts of the foreign country for actions arising out of such dealings.

It is the purpose of this paper to consider the extent of the operation of this or a similar principle in American law as applied to non-resident individuals who are doing business in a foreign state through a local agent. At the outset it is important to recall the historical background and the chronological development of the cases pertaining to this problem. Therefore the first part of the paper will be devoted to a presentation of the leading cases bearing upon this problem; and then, with this background, the second portion of the paper will deal with a more detailed consideration and analysis of the cases with the view of indicating the probable solution of the problem, namely, whether service on the local agent of a non-resident individual doing ordinary business within a state will be upheld by the Supreme Court of the United States.

I

The leading case historically is the Supreme Court case of *Pennoyer v. Neff*,[2] based upon facts occurring just prior to the Fourteenth Amendment. Not only is the discussion of the main problem herein based upon that decision historically, but all subsequent cases have felt its limitations and qualifications. Professor Sunderland even goes so far as to say: "In the United States the possibility of the use of foreign service of process in accordance with the almost universal practice of other nations has been virtually destroyed by the case of *Pennoyer v. Neff*."[3]

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(1) made within the jurisdiction,
(2) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction or,
(3) by its terms or by implication to be governed by English Law or is one brought against a defendant not domiciled or ordinarily resident of Scotland or Ireland in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.

ee. The action is founded on a tort committed within the jurisdiction.

See also, Culp, Process in Actions Against Non-Residents Doing Business Within a State (1934) 32 Mich. L. Rev. 909, 926.

2. (1877) 95 U. S. 714.

3. Sunderland, The Problem of Jurisdiction (1926) 4 Texas L. Rev. 429, 442.

In that case[4] a resident of Michigan owning land in Oregon was sued in the latter state for money owed. It was sought to serve him by publication under an Oregon statute[5] which provided that service might be had on a non-resident defendant, owning property in the state, by publication although he could not be found within the state. While in the state of Michigan, defendant was served by publication in Oregon and judgment was entered by default. The Michigan resident appealed to the Supreme Court of the United States contending that the Oregon judgment was void for want of personal service in Oregon or for want of his appearance in the action in which it was rendered. In holding this statutory process invalid, the Supreme Court adopted the rule that a state cannot acquire personal jurisdiction over a non-resident defendant by service of process outside of the state or by publication within the state, Justice Field using this language:

> Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territories and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation on the non-resident to appear. Process sent out of it are equally unavailing.[6]
>
> * * * proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.[7]

The Court defined due process of law as follows:

> * * * a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.[8]

It must be emphasized that the operative facts of the case arose prior to the Fourteenth Amendment and that "due process of law" as used by the Court refers to that term as a matter of common law and not as a constitutional question. In spite of a vigorous dissent by Justice Hunt, the majority of the Court further indicated that, under this definition, due process requires that, in an action in personam, a non-resident defendant must be subjected to the jurisdiction of the court either by per-

4. Pennoyer v. Neff (1877) 95 U. S. 714.
5. Oregon Code (1870) sec. 56; Oregon Code (1930) tit. 1, sec. 506.
6. Pennoyer v. Neff (1877) 95 U. S. 714, 727.
7. Id. at 733.
8. Id. at 733.

sonal service of process on him within the state or by his voluntary appearance.

At the end of the opinion, however, the Court expressly excluded from the decision non-resident partnerships and individuals who were doing business within the state, and in fact made a guarded intimation that a different rule might apply to them. To quote:

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgment rendered upon such service may be binding upon the non-resident both within and without the State.[9]

By this decision the Supreme Court limited the jurisdiction of state courts over non-residents in personal actions to cases in which the defendant had been personally served within the state or where he had voluntarily entered a personal appearance. It left undecided, however, the possibility of an exception in the instance of statutory control over a non-resident doing business within the state by service upon his local agent.

Soon after the decision in *Pennoyer v. Neff*, several states, acting on the foregoing expression by Justice Field, enacted statutes authorizing substituted service on an agent of a non-resident corporation, association, partnership, or individual doing business in the state in actions in personam arising out of such business.[10]

These statutes were subsequently litigated in Kentucky,[11] Indiana,[12] Iowa,[13] and Tennessee;[14] and, in each of these instances,

9. Id. at 735.

10. Ind. Rev. Stats. (1881) sec. 309; Iowa Code Supp. (1907) sec. 3532; Ky. Carroll's Civil Code (7th ed. 1927) tit. 4, sec. 51, subsec. 6; Del. Rev. Code (1893) tit. 102, sec. 2, c. 192; Tenn. Code (1896) sec. 4535.

11. Guenther v. American Steel Hoop Co. (1903) 116 Ky. 580, 76 S. W. 419; Johnson v. Westerfield (1911) 143 Ky. 10, 135 S. W. 425; Crane v. Hall (1915) 165 Ky. 827, 178 S. W. 1096.

12. Rauber v. Whitney (1890) 125 Ind. 216, 25 N. E. 186; Behn v. Whitney (1890) 125 Ind. 599, 25 N. E. 187; Edwards v. Van Cleave (1911) 47 Ind. App. 347, 94 N. E. 596.

13. Murphy v. Albany Pecan Development Co. (1915) 169 Iowa 542, 151 N. W. 500.

14. Greene v. Snyder (1904) 114 Tenn. 100, 84 S. W. 808.

the court upheld the statute enacted by its state. Each state assumed that its legislature had the power to enact the statute and that it was valid under the implied exception of *Pennoyer v. Neff*.[15] In each case an individual non-resident was doing business in the state through a local agent and service was obtained over the non-resident through his agent.

In the Kentucky case of *Guenther v. American Steel Hoop Co.*[16] the court, passing on the constitutionality of the statute, said:

> We can not see that section 2 of article 4 of the Constitution of the United States has any application. * * * Legal remedies may be allowed against those who are domiciled without the state which are not allowed against those who are domiciled within the state. * * * The legislature of a state may classify litigants according to the impracticability of obtaining personal service of process, and authorize substituted service when necessary to the administration of justice. * * * This right of the state seems to be expressly recognized by the Supreme Court in Pennoyer v. Neff.[17]

On the other hand, some states in which the matter was litigated held that such statutes were unconstitutional.[18] The Minnesota court in the case of *Cabanne v. Graff*,[19] arising under circumstances similar to those in the previously mentioned cases, said:

> Pennoyer v. Neff is the leading authority in support of the now well-settled proposition that, except in proceedings affecting the personal status of the plaintiff, or in rem, * * * no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, no matter what the prescribed mode of service of process against him may be. An attempt to do so is not due process of law.[20]

The court further emphasized that the exception in the opinion of *Pennoyer v. Neff* applied only to corporations which the state

15. (1877) 95 U. S. 714, 735.
16. (1903) 116 Ky. 580, 76 S. W. 419.
17. Id. at 590, 76 S. W. at 421.
18. Caldwell v. Armour & Co. (Del. 1899) 1 Pen. 545, 43 Atl. 517; Flexner v. Farson (1915) 268 Ill. 435, 109 N. E. 327; Aikman v. Sanderson (1908) 122 La. 265, 47 So. 600; Cabanne v. Graff (1902) 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735; see also Joel v. Bennett (1916) 276 Ill. 537, 115 N. E. 5, limiting the validity of the Illinois statute to persons who are non-residents of the county where service was had, but who are residents of the state.
19. (1902) 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735.
20. Id. at 513, 92 N. W. at 462.

had the power to exclude and so could force to consent to such service, thus:

> Such non-resident [natural] person, unlike a corporation, carries on business in this state not by virtue of its consent, but by virtue of the federal constitution which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; hence it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent.[21]

The lower federal courts, without exception, held the state statutes unconstitutional in their application to individual non-residents doing business in the state,[22] the same distinction being made between corporations and individuals as was made in the Minnesota case of *Cabanne v. Graff*;[23] unconstitutionality was based on the discriminatory nature of the statutes as a violation of the privileges and immunities and the due process clauses.

The problem finally reached the Supreme Court of the United States in the 1919 case of *Flexner v. Farson*.[24] After reciting the facts that a money judgment had been rendered in Kentucky against an individual resident of Illinois through service on his agent, that the agency in Kentucky had terminated prior to the time of service, that the action arose out of a transaction in Kentucky, and that the Supreme Court of Illinois had refused to give full faith and credit to the Kentucky judgment, Justice Holmes, speaking for the Court, said:

> It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction sued upon in Kentucky and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies is invoked. *Mutual Reserve Fund Life Association v. Phelps* 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obli-

21. Id. at 514, 92 N. W. at 462.
22. Brooks v. Dun (C. C. W. D. Tenn. 1882) 51 Fed. 138; Rayla Market Co. v. Armour & Co. (C. C. N. D. Iowa 1900) 102 Fed. 530; Moredock v. Kirby (C. C. W. D. Ky. 1902) 118 Fed. 180.
23. (1902) 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735.
24. (1919) 248 U. S. 289.

> gation as a condition to letting them in. * * * The State had no power to exclude the defendants, and on that ground without going further, the Supreme Court of Illinois rightfully held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Insurance Co. v. Dunlevy*, 241 U. S. 518, 522, 523.[25]

The scope of statutory service on the agent of a non-resident doing business in the state was thus limited to corporations. The Court reasoned that, since a foreign corporation can be excluded from doing business within a state, the state may require its consent to such service as a condition to being admitted. But, under the privileges and immunities clause of the Constitution, individuals cannot be excluded. Hence they cannot be required to consent to such service, but rather, under the authority of *Pennoyer v. Neff*, must be served personally within the jurisdiction or make a voluntary appearance.

Several states accepted the decision in *Flexner v. Farson* as conclusive.[26] Kentucky[27] and Tennessee,[28] where statutes had previously upheld service on the agent of a non-resident individual doing business in the state, reversed their prior decisions on the ground that it was not due process of law to enter a personal judgment by substituted service upon a non-resident individual, partnership, or unincorporated association composed of persons none of whom appeared or was served within the jurisdiction.

In these circumstances there would appear to be little doubt that service on the local agent of a non-resident individual would be void. But Mr. Justice Holmes did not carry his analogy far enough. Even in the earlier case of *International Harvester Co. v. Kentucky*[29] the Supreme Court had held valid a statute providing for service through the agent of a foreign corporation engaged in interstate commerce (which cannot be excluded from doing business in a state and in that sense is analogous to an individual). This decision was based upon the ground that al-

25. Id. at 293.

26. Carroll v. Curran (1920) 193 App. Div. 948, 184 N. Y. S. 603; Andrews Bros. v. McClanahan (1927) 220 Ky. 504, 295 S. W. 457; Knox Bros. v. C. W. Wagner & Co. (1918) 141 Tenn. 348, 209 S. W. 638.

27. Andrews Bros. v. McClanahan (1927) 220 Ky. 504, 295 S. W. 457; Greene v. Commonwealth (1938) 275 Ky. 637, 122 S. W. (2d) 523.

28. Knox Bros. v. E. W. Wagner & Co. (1918) 141 Tenn. 348, 209 S. W. 638; Frolich & Barbour v. Hanson (1927) 155 Tenn. 601, 296 S. W. 353.

29. (1914) 234 U. S. 579.

though the state could not refuse entry to such a corporation it could still impose reasonable conditions on it. We may take this ruling and a similar line of cases to be noted as upholding reasonable regulations in the exercise of a state's police power.

This decision throws doubt on the reasoning in *Flexner v. Farson.* Is the power to exclude the true test for jurisdiction?

In the non-resident motorist cases the Supreme Court had also already furnished another possible inroad on the reasoning behind *Flexner v. Farson.* In 1916, *Kane v. New Jersey*[30] had raised the question of the constitutionality of a New Jersey statute imposing upon a non-resident motorist the duty to expressly authorize the Secretary of State to receive service of process in actions against him arising out of the operation of his car within the state. The Court upheld the statute as a valid exercise of the police power and held that the statute did not violate the privileges and immunities clause.

Subsequent to *Flexner v. Farson,* a further advance in the law concerning non-resident motorists was made by the Supreme Court in *Hess v. Pawloski.*[31] There the Court upheld a Massachusetts statute which provided that the mere use of the highways by a non-resident would be deemed an appointment of the Secretary of State to receive process for him in an action arising out of the operation of his car within the state.

But a reasonable qualification on these holdings was made in *Wuchter v. Pizzutti*[32] in which the Supreme Court ruled that, if a "non-resident motorist" statute were to be valid, it must make such adequate provision for notice to the defendant as to satisfy the requirements of due process of law.

The liberal tendency evidenced by these decisions encouraged state courts again to uphold, as not infringing either the privileges and immunities or the due process clause, carefully drafted statutes, providing for substituted service on a non-resident individual doing business in the state in actions arising out of that business.

Pennsylvania and Iowa have such statutes.[33] The courts of these states have recently upheld the validity of substituted service on an individual non-resident engaged in the sale of securities in the state through an agent.[34]

30. 242 U. S. 160.
31. (1927) 274 U. S. 352.
32. (1928) 276 U. S. 13, 53 A. L. R. 1230.
33. Iowa Code (1931) sec. 11946; Pa. Purdon's Stats. (1936) tit. 12, sec. 297.
34. Stoner v. Higginson (1934) 316 Pa. 481, 175 Atl. 527; Davidson v. Doherty (1932) 214 Iowa 739, 241 N. W. 700, 91 A. L. R. 1308.

The Supreme Court of the United States in *Doherty v. Goodman*[35] has upheld the validity of the Iowa statute as applied to a non-resident individual engaged in the sale of securities in the state by an agent, the Court holding that neither the privileges and immunities nor the due process clause was abridged by the statute. The Court unfortunately, however, expressly limited the decision to cases involving the sale of securities.

The most recent case bearing upon the problem is *Dubin v. Lesher*[36] wherein a lower Pennsylvania court upheld the validity of a Pennsylvania statute providing for service on the Secretary of the Commonwealth in an action in tort arising out of the negligent failure of a non-resident owner of Pennsylvania property to keep the property in good repair. But the question of the ultimate validity of such statutes when applied to the ordinary business agency instituted in a state by a non-resident is still undetermined.

II

In the light of this presentation of the leading cases, the decisions may now be analyzed to show the likelihood that the validity, under such statutes, of service on the agent of a non-resident individual engaged in ordinary business activities in another state will be sustained by the Supreme Court of the United States. Since the cases bearing upon the problem are few, it will be necessary to make most of the necessary deductions and inferences from those few which are helpful.

Doherty v. Goodman[37] is the most recent Supreme Court case pertaining to this problem, and it comes the closest to upholding the validity of the statutes as applied to non-resident individuals doing ordinary business in the state through an agent. In that case Doherty, a citizen of New York, employed King as agent to manage an Iowa office for the sale of securities. Goodman sued Doherty in Iowa on a cause of action arising out of the sale of stock through King. Service was had on the agent under the terms of the Iowa statute which provided:

> When a corporation, company or individual has for the transaction of any business, an office or agency in any county other than that in which the principal resides service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency.[38]

35. (1935) 294 U. S. 623.
36. Phila. Legal Intelligencer, Sept. 19, 1938, p. 1: 2; Comment (1938) 87 U. of Pa. L. Rev. 119.
37. (1935) 294 U. S. 623.
38. Supra, note 33.

When the case reached the Supreme Court of the United States, Mr. Justice McReynolds quoted at length from the decision of the Iowa court upholding the statute.[39] His opinion reaffirmed the several possible bases for entertaining jurisdiction:

1. The statute does not abridge the privileges and immunities clause of the Constitution, since both residents and non-residents of Iowa are amenable to suit in the county in which the agency is established in an action arising out of the business of the agency.

2. The statute imposes the same burden upon residents and non-residents and, instead of discriminating against non-residents, tends to put them on the same footing as residents.

3. The statute does not abridge the due process clause of the Constitution, since its provisions are such that there is not only reasonable probability but practical moral certainty that the defendant will receive notice of the pendency of the action in ample time to appear and defend.

4. The establishment of a business within the state is equivalent to the voluntary appointment of an agent to receive service of process under the statute.

5. Four essentials must be established: there must be an office or agency within the state; the office or agency must be in a county other than that in which the principal resides; the action must grow out of or be connected with the business of that office or agency; and the agent must be employed in that office or agency at the time of service upon him.

The Court said that *Flexner v. Farson* could not sustain Doherty's contention. The distinction made was that in the earlier case process was issued to one who was not the agent of the defendant at the time of service. Here King was agent at the time of service. In upholding the validity of the Iowa statute in this particular instance, the Court said:

> Doherty voluntarily established an office in Iowa and there carried on this business. Considering this fact, and accepting the construction given to §11079, we think to apply it as here proposed will not deprive him of any right guaranteed by the Federal Constitution.[40]

The scope of the decision was then limited to rights claimed under the present record, and possible limitations of the statute under different circumstances were not considered.

What has led the Court to reach these conclusions, and how

39. See cases cited supra, note 34.
40. Doherty v. Goodman (1935) 294 U. S. 623, 628.

far may we expect it to go in aplying them? Will they be applied to a non-resident engaged through an agent in business other than the sale of securities?

We have seen that at an early date the courts generally restricted the scope of similar statutes to foreign corporations engaged in intrastate business and usually refused to uphold their validity when directed to non-resident individuals. The reasoning of the earlier cases was that corporations could be excluded unless they were engaged in interstate commerce, and hence conditions could be imposed on their entry into the state; but that under the privileges and immunities clause of the Constitution an individual could not be excluded, and consequently conditions could not be imposed on his entry. So, also, it was thought that the commerce clause prevented extensive regulation of foreign corporations engaged in interstate business.

This theory was overthrown by *International Harvester Co. v. Kentucky*.[41] There a foreign corporation engaged in interstate business was prosecuted in Kentucky by service on its local agent. The corporation contended that, as it could not be excluded from the state, Kentucky had no ground on which it could force the corporation to consent to substituted service. The Supreme Court of the United States upheld the validity of the service, saying:

> We are satisfied that the presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is carrying on business in such sense as to manifest its presence within the State, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the State.[42]

Thus jurisdiction over a foreign corporation engaged in interstate commerce may be had by substituted service on its agent, although it cannot, as in the case of an ordinary corporation, be excluded from entering the state. The state, even though it cannot exclude, may as a part of its police power impose reasonable conditions on the doing of business within its boundaries.[43]

41. (1914) 234 U. S. 579.
42. Id. at 589.
43. Reiblich, Jurisdiction of Maryland Courts over Foreign Corporations Under the Act of 1937 (1938) 3 Maryland L. Rev. 54, 65, 71; Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 124; Farrier, Jurisdiction Over Foreign Corporations (1933) 17 Minn. L. Rev. 270, 296. See also, Board of Trade v. Hammond Elevator Co. (1904) 198 U. S. 424; but, *quaere*, does it involve an inter- or intrastate corporation?

Consequently the analogy drawn by Mr. Justice Holmes in *Flexner v. Farson*[44] was not complete. Even if the Kentucky statute was inapplicable in that particular instance, the reason for the decision is not correct. An interstate commerce corporation that cannot be excluded, and in that sense analogous to an individual, is amenable to suit within the state for actions arising there, through service on its agent.

The cases involving non-resident motorists afford an even closer analogy to individuals engaged in business activities through an agent. Under the privileges and immunities clause a non-resident motorist cannot be excluded; yet the Supreme Court has frequently held that he is amenable to suit in the state in which an accident occurred, by statutory substituted service on the Secretary of State.[45] The state's jurisdiction over him is founded on its right, through a reasonable exercise of its police power, to impose reasonable conditions on the entry of the non-resident motorist.

In *Kane v. New Jersey*[46] the Court said:

> * * * in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of non-resident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners.[47]

And, in *Hess v. Pawloski*,[48] it was said:

> In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use the highways. * * * Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes

44. (1919) 248 U. S. 289.
45. Kane v. New Jersey (1916) 242 U. S. 160; Hess v. Pawloski (1927) 274 U. S. 352; Wuchter v. Pizzutti (1928) 276 U. S. 13, 57 A. L. R. 1230.
46. (1916) 242 U. S. 160.
47. Id. at 167.
48. (1927) 274 U. S. 352.

> no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in this respect is not attainable; it is not required.[49]

Thus a non-resident individual driving his car in a foreign state is amenable there to process in an action arising out of an accident on its highways. His express consent is not needed. Jurisdiction is based on the theory that the state can, through the exercise of its police power, impose reasonable conditions on the operation, by a foreigner, of a dangerous vehicle within the confines of the state. As the Court has pointed out, such statutes are valid if they are limited to causes of action arising within the state and if they adequately provide for notice to the defendant.

The Supreme Court relied on these "non-resident motorist" cases as its authority to uphold the validity of the Iowa statute in *Doherty v. Goodman,* saying:

> The power of the States to impose terms upon non-residents, as to activities within their borders, recently has been much discussed. (Citing Hess v. Pawloski, Wutcher v. Pizzutti and Young v. Masci.) * * * Under these opinions it is established doctrine that a State may rightly direct that non-residents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to receive service of process, provided there is some "provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued."
>
> So far as it affects appellant, the questioned statute goes no farther than the principle approved by these opinions permit.[50]

The Supreme Court of the United States has never decided the effect of a statute of this nature when applied to a non-resident individual doing ordinary business within the state. As pointed out before,[51] there was a great amount of divergency on this point in the earlier decisions of the state and lower Federal Courts.

This confusion is not surprising since the early statutes were passing through an "ironing out" process. The developing statutory types were new to the courts and were for the most part poorly and improperly drafted, nor was it settled as to what

49. Id. at 356.
50. Doherty v. Goodman (1935) 294 U. S. 623, 628.
51. See pages 95, 96, supra.

extent foreign corporations could be regulated without violation of the commerce clause. Neither is it surprising that many of the courts should, under the apparent exception in *Pennoyer v. Neff*, for the most part uphold the statutes to the fullest extent. The welfare of the state was undoubtedly a primary consideration, but the question was as to what extent it could be carried.

The conflict in opinion arose when the federal courts and a few state courts began holding the statutes void as a violation of the privileges and immunities and due process clauses of the Federal Constitution. A typical example is found in *Moredock v. Kirby*[52] in which the court, after refusing to uphold the Kentucky statute on the ground that it was discriminatory in that only non-residents were subject to substituted service, used the following language and cited *Pennoyer v. Neff* as its authority:

> The state of Kentucky being forbidden by the Constitution of the United States to pass any law which would deprive the defendant of his property without due process of law, it is not permissible for the state to enact a statute which enables its courts to render a judgment against him without a personal service of process upon him "within the state," and in this way deprive him of his property. * * * this result is emphasized and vindicated to the moral as well as the legal sense by those principles of law which so equitably require that constructive or substituted service, such as here attempted, shall fail in such case because the principles of natural justice demand personal service of process as an indispensable basis of jurisdiction over a defendant who does not voluntarily enter his appearance.[53]

Several courts considered the above rule to be confirmed in the United States Supreme Court decision of *Flexner v. Farson*.[54] How then can we account for the recent Supreme Court decisions in the cases of the foreign corporations engaged in interstate business, non-resident motorists, and non-resident security dealers?

In the first place, the age-old rule in *Michigan Trust Co. v. Ferry*[55] of physical power as a requisite to jurisdiction, on which the courts in earlier years relied, has been greatly modified by the Supreme Court of the United States. It is no longer an unequivocal test.[56]

52. (C. C. W. D. Ky. 1902) 118 Fed. 180.
53. Id. at 186.
54. See cases cited supra, note 25.
55. (1913) 228 U. S. 346.
56. Dodd, Jurisdiction in Personal Actions (1929) 23 Ill. L. Rev. 427, 434, and cases cited.

There has developed a modern interpretation of due process in its application to service of process on proposed defendants, where personal service cannot be had. Under it the essential elements of due process in this connection are notice to the proposed defendant and opportunity to defend.[57]

The last and most important change to consider is that the statutes under which the recent cases of the foreign corporations engaged in interstate business, non-resident motorists, and non-resident security dealers were decided have been revised and adapted to modern conditions. They were drafted to avoid discrimination between residents and non-residents, and reasonable provision was made to assure adequate notice to the defendant. These developments in statutory drafting are recognized and mirrored in the Iowa case of *Davidson v. Doherty*[58] and the Pennsylvania case of *Stoner v. Higginson.*[59]

The Iowa court recognized that one state may not exclude a citizen of another state from doing business within its boundaries. But it further recognized that the Constitution does not prohibit the imposition of reasonable conditions upon a non-resident who seeks to do business within the forum, and that this is a proper exercise of legislative power, especially when like conditions are imposed on its own citizens. Consequently such a statute, the court said, does not in any way abridge the privileges and immunities of the citizens of the several states. The Pennsylvania court is in accord. We have seen that the Supreme Court of the United States in *Doherty v. Goodman* adopted much of the reasoning of the Iowa court in sustaining the statute in its application to a non-resident dealer in securities but that it limited the validity of the statute to a reasonable exercise of police power.[60]

The court of Common Pleas of Pennsylvania, in the recent case of *Dubin v. Lesher,*[61] has extended the application of the principles discussed above in holding that a non-resident owner of property in Pennsylvania may, by statute, become subject to suit for a tort arising out of his failure to keep property in good

57. Hess v. Pawloski (1927) 274 U. S. 352, 356; Wuchter v. Pizzutti (1928) 276 U. S. 13, 24, 57 A. L. R. 1230; Doherty v. Goodman (1935) 294 U. S. 623, 627.

58. (1932) 214 Iowa 739, 241 N. W. 700, 91 A. L. R. 1308.

59. (1934) 316 Pa. 481, 175 Atl. 527. This and the case in the preceding note arose on almost identical facts involving actions arising out of the sale of securities through an agent in the forum by a non-resident security dealer. Service in each case was had on the agent of the non-resident.

60. See page 99, supra.

61. Phila. Legal Intelligencer, Sept. 19, 1938, p. 1: 2; Comment (1938) 87 U. of Pa. L. Rev. 119.

repair. The statute provides for service on the Secretary of the Commonwealth, notice being sent the non-resident by mail. In upholding the application of the statute the court stated: "It is just as important that a non-resident owner of real estate keep it in good repair as it is that he drive his automobile with due regard to the safety of others." The decision is an extension of the exercise of police power to a new type of activity, and although from an inferior tribunal the decision is indicative of the growing tendency to uphold such statutory service on non-resident individuals by reason of the recognized rights of the state to prescribe reasonable conditions to various activities within its boundaries.

We may now consider the possibility that the Supreme Court of the United States will uphold service, under statutes of the types and with the safeguards discussed, on the local agent of a non-resident individual engaged in business other than the sale of securities within the state.

The Supreme Court has refused to rule on the question until it is brought directly before the Court.[62] It is submitted that the statutes may be upheld in this particular application. Already the Supreme Court in *Doherty v. Goodman* has expressly ruled that *Flexner v. Farson* is not in point. Although the Court has not overruled the *Flexner* case, it has established a basis of jurisdiction over non-residents which appears to have that effect.

It has been seen that the Supreme Court has recognized that an extended basis of jurisdiction lies in the right of a state, through the exercise of its police power, to prescribe reasonable conditions to the doing of certain acts within its boundaries by non-resident corporations engaged in interstate business, non-resident motorists, and non-resident security dealers. The validity of the substituted service on an agent in the state is upheld on the ground that, by entering the state to do business, the non-resident voluntarily submits to the conditions prescribed by the state. And the *Doherty* case clearly shows that a properly drafted statute can avoid conflicting with the due process and the privileges and immunities clauses.

The Supreme Court has thus recognized, as a reasonable and proper basis for the exercise of jurisdiction, the legislative power of a state to exercise its police power in imposing reasonable conditions and regulations on the doing of certain acts within the state. If the Supreme Court adheres to its present theory,

62. Doherty v. Goodman (1935) 294 U. S. 623.

the validity of statutes applying to an individual non-resident engaged in ordinary business in the state by an agent, will depend upon whether such an application is a reasonable exercise of the police power. It is submitted that carefully drafted statutes will be upheld on that ground. The scope of the police power may well be extended to include regulation of ordinary business. "It embraces regulation designed to promote public convenience or the general prosperity or welfare."[63] And it is to be expected that if the Supreme Court does uphold the validity of the statutes in this application, the decision will be based on an extension of the police power.

The question whether the Court will permit an extension of the scope of the police power to include the statutory service of process upon the agent of a non-resident individual doing ordinary business in the state will depend on whether the Court is convinced that there is a need for such an extension.

It is submitted that there is such a need. Unless statutory service of this sort is authorized, a non-resident may engage in business in another state through a local agent; and, unless he owns property within the state or makes a voluntary appearance, he may not be amenable to suit in that state for a cause of action arising out of business there transacted. The resident of the state who has traded with the agent of the non-resident may be required to leave his domicil and go to the domicil of the non-resident to sue there on his cause of action. It is obvious that a situation of this sort is susceptible of abuse. Many residents having claims arising out of business transactions in the state with the agent of the non-resident will not be in a position to enforce them.

The justice of the statutes is undeniable. They do not place a different burden on the non-resident than on the resident of the state. If a resident individual engages, through an agent, in business in a county other than the one in which he lives, he is answerable in that county in an action arising out of his business done there. Why then should not a non-resident be amenable to suit in the same manner? "It may be that a non-resident will not have to go as far as a resident to appear."[64] Furthermore, a non-resident who gets all the benefits of the protection of the laws of the state with regard to the office or agency set up in the state, and with regard to the business there transacted, ought

63. Sligh v. Kirkwood (1915) 237 U. S. 52.

64. Davidson v. Doherty (1932) 214 Iowa 739, 241 N. W. 700, 702, 91 A. L. R. 1308.

to be amenable to the laws of the state as to transactions growing out of such business on the same bases and conditions as govern residents of the state.

If logic and reason prevail, as these questions again come before the Court, it may be expected that properly drafted statutes providing for service on a non-resident engaged in ordinary business in the state, through service on an agent there, will be upheld by the Supreme Court of the United States.

ROY COSPER.

PAYMENT OF ATTORNEY'S FEES BY LUMP SUM AWARD UNDER WORKMEN'S COMPENSATION ACTS

During the past quarter of a century the legislatures of forty-six states passed workmen's compensation acts designed to correct an outmoded system of determining fault by negligence in industrial accidents, but in their plans they gave scant attention to the position of the lawyer. The various schemes usually provided for the lawyer's presence in the hearing before the commission, and many acts contained simple provisions for the payment of his fees. But the draftsmen did not anticipate that payment of attorneys' fees would become a major problem which today faces the administration of workmen's compensation. The size of contingent fees which some lawyers have collected, their attempt to commute an award to secure lump sum payment, their ambulance-chasing activities, have all occasioned a flood of condemnatory criticism.

According to Walter F. Dodd:

> The ambulance-chasing activities of certain runners and lawyers run riot in some jurisdictions, and such persons often succeed in entrenching themselves so firmly upon compensation practice that it is very difficult to shake them off.[1]

Workmen's compensation is designed to award to an injured worker or his family small payments aggregating the most adequate compensation possible in each case, and the very nature of workmen's compensation suggests that attorney fees should account for but a small part of the costs.[2] But that some lawyers

1. Administration of Workmen's Compensation (1936) 304.

2. In Illinois Zinc Co. v. Industrial Comm. (1934) 355 Ill. 253, 189 N. E. 310, 311, the court said: "The fundamental purpose of the Workmen's Compensation Act * * * is to recompense, partially, the workman for his loss of earnings or earning power by reason of the injuries suffered, arising out of and in the course of his employment. In the event that the death