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# Jurisdiction Over Absent Defendants: Two Chapters in American Civil Procedure\*

Robert Wyness Millar†

## I.

### THE AMERICAN VERSION OF THE FORUM ARRESTI

1. By the rule generally obtaining and internationally recognized the courts of a given country are entitled, under proper procedure, to adjudicate controversies as to immovables lying within its boundaries in respect of a defendant residing abroad or otherwise not found within these boundaries (*forum rei sitae*). But in certain countries the possession by an absent defendant of either movables or immovables within the territory enables the courts to exercise jurisdiction in respect of such absent defendant, even in the case, at least, of an action upon a mere money demand. Thus in Germany<sup>1</sup> and Austria<sup>2</sup> it is provided in almost identical terms that in the case of claims for money or money's worth (*vermögensrechtliche Ansprüche*) that court is competent within whose district there is found property of the defendant. So in Denmark<sup>3</sup> and Norway,<sup>4</sup> with

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\* This article originally was written for the *Revista de Derecho Procesal* of Buenos Aires, as a contribution to the memorial studies published by that journal in 1951, in honor of the late Professor James Goldschmidt. It there appeared (Año IX, nos. 3-4, being vol. II of these studies, pp. 135-157) in Spanish translation (by Dr. Catalina Grossmann) under the title of "Dos aspectos de la jurisdicción sobre demandados ausentes, según el régimen legal de Estados Unidos de Norteamérica." The fact that it was intended for a Latin-American audience explains its point of view, as also the inclusion, particularly in Part I, of much that will be familiar learning to the present reader. The English version is here published by permission of Dr. Santiago Sentís Melendo, Editorial Secretary of the *Revista*, acting for its Director, Professor Hugo Alsina; in printing it occasion has been taken to effect some minor emendations.

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1. Zivilprozessordnung, § 23.

2. Jurisdiktionsnorm, § 99.

3. Lov om Rettenspleje, § 248; 1 Munch-Petersen, Den danske Retspleje, 54, 2 id. at 33-34 (1923).

4. Lov om rettersgangmaaten for tvistemaal, § 32; 1 Skeie, Den norske civilproces, 260-261 (1929).

respect to demands for money or money's worth,<sup>5</sup> it is declared that the non-resident defendant may be sued in the judicial district "where he has property." Similarly, in Sweden, the rule is that "in actions touching the duty of payment, one who has no known residence within the kingdom may be sued wherever property belonging to him is found."<sup>6</sup> Another instance of the kind takes us to the Canadian province of Quebec, where the Code of Civil Procedure provides that, apart from the case of a cause of action arising in the province, in which case jurisdiction exists on another ground, "the defendant may be summoned before the court of the place where the whole or a part of his property is situated, where he last left his domicile in the province, or has never had such domicile, but has property therein. . . ."<sup>7</sup>

2. In Scotland the same rule obtains for the case of money demands and other personal actions, without qualification as to immovables, but where the property within the country consists of movables the jurisdiction here in question is based upon its arrest (*Scottice* "arrestment") by which it is subjected to the control of the court. This form of arrest is known as arrestment *ad fundandam jurisdictionem* or *jurisdictionis fundandae causa*, and is effective only for this purpose. It has therefore no operation *in securitatem debiti*: if the plaintiff seeks to hold the arrested property as a means of securing the expected judgment, the jurisdictional arrest must be followed by a further arrest directed to this end, the so-called "arrestment on the dependence."<sup>8</sup> The Scottish founding of jurisdiction so accomplished was borrowed of old from the contemporary law of Holland. There it had been introduced at an early day "for safety and for the favoring of commerce."<sup>9</sup> And much the same manner of proceeding obtains in the Union of South Africa,<sup>10</sup> which recognizes the Roman-Dutch law as the basis of its legal system. This arrest of property for the purpose of founding jurisdiction, unknown to

5. The Norwegian law speaks here of "*formueskrav*"; the Danish of "*Sager angaaende Formueretsforhold*."

6. Rättegångsbalk 1948, kap. 10, § 1; Hassler, *Den nya Rättegångsbalken*, 135 (1947); I Ekelöf, *Kompendium över civilprocessen*, 129 (1948). See also Wrede, *Das Zivilprozessrecht Schwedens und Finnlands*, 75 (1924).

7. Code of Civil Procedure, Art. 94 (4) (ed. Gregg, 1935).

8. Mackay, *Manual of Practice in the Court of Session*, 59-61 (1893); Maclaren, *Court of Session Practice*, 42 et seq. (1916); Balfour, *Handbook of Court of Session Practice*, 13-14 (1922); Thomson and Middleton, *Manual of Court of Session Procedure*, 35-39 (1937).

9. I Van der Linden, *Verhandling over de Judiciele Practijcq*, 269 (1794).

10. 4 Nathan, *Common Law of South Africa*, nos. 2030, 2274, 2285, 2286, 2293 (1907).

the Roman law, is manifestly of Germanic derivation. As would appear, it was out of an original practice of arrest that there developed the rule which treats the mere presence of property as a sufficient ground of jurisdiction.<sup>11</sup> Indeed, the modern Swedish law bears the imprint of this origin, inasmuch as the special forum constituted by the presence of the defendant's property is still spoken of as the *forum arresti*.<sup>12</sup>

3. Whenever jurisdiction over the absent defendant thus exists, be it autonomous or, as in the two instances cited, founded by the arrest of his property, it is a jurisdiction in which "the person is subjected to the judicial power, not through his presence, but through the presence of his property within the judicial district."<sup>13</sup> The property, indeed, may be the very object of the action, but whether it is or not is of no moment so far as regards the constitution of this forum.<sup>14</sup> It follows that the jurisdiction thus achieved is a jurisdiction which clothes the court with the same power over the defendant's property rights as if he had been normally found and cited within the judicial ambit. Accordingly, if the plaintiff prevails, the court is entitled to render against the absent defendant what in the Anglo-American law is known as a *personal judgment*—a judgment, that is to say, not restricted in its operation to the property which gave rise to the jurisdiction, but one which may be enforced against any or all of the defendant's estate.<sup>15</sup> We stress this point because of the different principle that obtains in the United States.

4. Under the modern English law jurisdiction over defendants who cannot be summoned in England exists only in the situations specified in the Rules of the Supreme Court.<sup>16</sup> So far as regards actions involving a purely money demand, these situa-

11. See Wach, *Handbuch des deutschen Civilprozessrechts*, 418 note 9 (1885); 1 Hellwig, *System des deutschen Zivilprozessrechts*, 118 (1912); 2 Munch-Petersen, *op. cit. supra* note 3, at 34; 1 Ekelöf, *op. cit. supra* note 6, at 129.

12. Ekelöf, *op. cit. supra* note 6, at 129; Hassler, *op. cit. supra* note 6, at 135.

13. Wach, *op. cit. supra* note 11, at 418.

14. *Ibid.*; Schmidt, *Lehrbuch des deutschen Zivilprozessrechts*, 259 (2d ed. 1906).

15. For Scotland, see *Lindsay v. London & North-Western Railway Co.*, 22 D. 571 (1860); *North v. Stewart*, 17 R. (H. L.) 60 (1890). In the latter case it was said by Lord Watson that the sole purpose and effect of the arrestment *jurisdictionis fundandae causa* in modern practice "is to fix the locality of the subjects arrested in Scotland, and thereby to render their foreign owner liable to be convened in a process issuing from the Court of Session at the instance of the arrester for recovery of a personal debt." (*Id.* at 63.)

16. Rules of the Supreme Court, O. XI, r. 1.

tions include *inter alia* certain cases of the *forum contractus*, as well as the case of a tort committed in England (*forum delicti commissi*). But there is nothing corresponding to the rule above mentioned. The mere presence in England of property belonging to the absent defendant is never of itself a ground of jurisdiction in an action unconnected with that property. Nor is there provided any measure corresponding to the Scottish arrestment *ad fundandam jurisdictionem*, whereby the presence of such property may be utilized to found jurisdiction.<sup>17</sup>

5. In the United States the case is distinctly otherwise. For its better understanding three considerations should be premised:

*First.* The question of jurisdiction over persons who are not residents of the state or found therein is one that assumes its chief importance because of the political relation of the states to each other, since it arises for the most part as an interstate matter. Obviously each of the states is subject to the Federal Constitution. "But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States. . . ."<sup>18</sup> The existence of the several states, each with its own judicial sovereignty, so far as consistent with the Federal Constitution, thus renders them essentially foreign to each other in point of the matters here under attention.

*Second.* In all the states there obtains the measure, variously regulated, known as *attachment on mesne process*, which, corresponding to the *arrest* of certain other systems, and resembling the *embargo preventivo* of the Spanish-American procedures, enables the plaintiff to cause property of the defendant found in the judicial district to be subjected to the interim control of the court, either by actual seizure or otherwise, as a means of securing the ultimate satisfaction of the money judgment sought by the plaintiff. In a small minority of the states, namely, those of New England, no special grounds for the application of this measure need in general be shown, but where such special grounds are required, as they are elsewhere, the fact of the defendant's non-residence is invariably one of them.

*Third.* So far as authorized by statute, a non-resident of the state, made defendant in a judicial proceeding, may be summoned within the state by service upon his agent, expressly or impliedly appointed by him to receive service of process on his

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17. Wolff, *Private International Law*, 69-72 (1945).

18. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

behalf. Such service is tantamount to service upon the defendant himself within the jurisdiction, affording the basis for a personal judgment, and falls outside the present discussion. But in other cases where the state permits a non-resident to be summoned as a defendant in a judicial proceeding, this is usually done by what corresponds to the edictal citation of the civil law countries. It commonly takes the form of publication of notice in a newspaper at successive periods for a stated time, usually accompanied by the sending of notice to the defendant through the post-office, if his address is known. In some quarters, however, it may consist only of the posting of notice in a designated public place. In any case the giving of notice in this manner is spoken of as "constructive service of process," although sometimes it is termed "substituted" rather than "constructive" service. Actual service of the summons upon the non-resident in the state of his residence is generally treated as equivalent to constructive service, but has no other or greater jurisdictional effect than constructive service.

6. "At one time the opinion extensively prevailed that judgments in personam entered after constructive service upon a non-resident, while they were not enforceable beyond the limits of the state where entered, were nevertheless so far valid in that state as to support a sale of the debtor's property situate therein."<sup>19</sup> It had been made clear by certain decisions of the Federal Supreme Court, arising under that clause of the Constitution (Article IV, Section I) which requires the states to give "full faith and credit" to the judicial proceedings of each other, that judgments so rendered were entitled to no recognition outside the state of rendition.<sup>20</sup> The question, however, as to the validity of these judgments within the state itself was necessarily left to be determined by the law of the state. But in 1868 was adopted the Fourteenth Amendment to the Federal Constitution which *inter alia* forbade any state to "deprive any person of life, liberty or property without due process of law." There thus opened a new avenue for scrutiny by the Supreme Court of judgments of the kind, and one which would enable the court to pass upon their intraterritorial validity. Accordingly, under this provision there arose the question

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19. Freeman, *Law of Judgments*, § 1373 (5th ed. 1925). Cases adopting this view: *Cyrus W. Field & Co. v. New Orleans Delta Newspaper Co.*, 19 La. Ann. 36 (1867); *O'Hara v. Booth*, 29 La. Ann. 817 (1877); *Jarvis v. Barrett*, 14 Wis. 591 (1861); *Wilson v. Zeigler*, 44 Tex. 657 (1876) and other Texas cases cited in *Townes, Pleading in the District and County Courts of Texas*, 43 (2d ed. 1913).

20. Particularly *D'Arcy v. Ketchum*, 11 How. 165 (U.S. 1850).

as to what constituted due process of law in respect of a judgment against a non-resident owning property within the state. This question was dealt with and definitely determined in the now celebrated case of *Pennoyer v. Neff*, decided in 1878.<sup>21</sup> There it had been provided by the code of the State of Oregon that, if a defendant could not be found within the state, the court on a proper showing might grant an order authorizing service by publication in the manner particularly designated, "when the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." One Mitchell brought suit in the Circuit Court of Multnomah County, Oregon, against Neff on a claim for attorney's fees. Neff was not a resident of Oregon, but owned a tract of land in the county named. Mitchell therefore obtained an order of court for publication under the code provision, and notice to Neff was published accordingly. This was the only service had on Neff. The latter did not appear, and judgment was rendered against him by default for the amount due Mitchell. Under an execution issued upon this judgment Neff's tract of land was levied upon and sold, and a sheriff's deed made to Pennoyer, the purchaser at the sale. Neff now brought an action against Pennoyer, in the Federal Circuit Court for the District of Oregon to recover the land, asserting that Mitchell's judgment was void for want of jurisdiction and that in consequence the sheriff's deed passed no title to Pennoyer. The last mentioned court gave judgment in favor of Neff, it based this, however, not upon a fundamental lack of jurisdiction, but upon the ground that jurisdiction failed because, in the matter of publication, the Oregon provision had not been properly complied with.<sup>22</sup> The proceeding was one, by way of writ of error, in review of the judgment rendered by the Federal Circuit Court. There was thus presented the question whether the Oregon court in rendering the original judgment against Neff had been proceeding in accordance with due process of law. The court considered that the lower court was wrong in its view of the publication proceedings, but passed to the broader ground contended for that under the circumstances the judgment was void for want of personal service, in the absence of any interim subjection of the property to judicial control, and on this ground held against the Mitchell judgment.

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21. 95 U.S. 714 (1878).

22. *Neff v. Pennoyer*, 3 Sawy. 274, 17 Fed. Cas. No. 10,083 (1875).

In the course of its opinion, the court reached the following conclusions:

(a) Constructive service upon a non-resident defendant is ineffectual to support a personal judgment, a judgment, that is to say, determining the personal rights and obligations of the defendant.

(b) The bare fact that a non-resident defendant owns property within the state does not alter the case: of itself it does not warrant the exercise of jurisdiction over him to render a personal judgment based on constructive service.

(c) In the case of a mere money demand, no jurisdiction whatever over the non-resident defendant arises by virtue of constructive service, unless his property found in the state shall have been brought within the control of the court by attachment or equivalent process.

(d) Any judgment rendered against the non-resident and constructively served defendant, as a result of the jurisdiction so founded, is confined in its operation to the very property which has been attached or, by equivalent means, subjected to the control of the court.

(e) In thus affecting the property so brought under judicial control, the judgment is not a personal judgment, but partakes of the nature of a judgment *in rem*.

By the court below, although, as appears, without bearing on its judgment, the view had been expressed that so long as the non-resident owned property in the state which could be made to answer for the plaintiff's claim, it was immaterial whether this was subjected to judicial control at the outset of the action or was later taken on execution. This, however, was met on the part of the Supreme Court by the consideration that as to the non-resident "the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be determined after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even



if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."<sup>23</sup>

In thus settling what had been a vexed question of jurisdiction, the decision established a uniform jurisdictional rule for the case of personal actions brought against non-residents—a rule which, binding upon all the states alike, is now one of the bases of American civil procedure.

7. In speaking of the judgment in its relation to the attached property as in the nature of a judgment *in rem*, the court placed it on the same basis as the judgment in a case where the property is the direct object of an action *inter partes*. The forum in that case, pursuant to general principles, is that of the situs of the property in controversy, while here it is that of the property attached. Both partake of the nature of a judgment *in rem*, since it is, although in different ways, the *res* that is the operative factor in both kinds of actions. In this regard it was said by the Supreme Court in a later case that there is "a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which the property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment

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23. 95 U.S. 714, 728 (1878).

therein is only conclusive between the parties."<sup>24</sup> And, it may be added, not only in the case of attachment but in all cases of this character, jurisdiction may be obtained over a non-resident by constructive service of process or by personal service outside the state, jurisdiction, that is to say, which does not impose any personal liability upon him.<sup>25</sup>

8. So far as concerns the jurisdiction founded by the attachment, while the term *forum arresti* is not known to the American law, its substance plainly is present. What we have is in reality a species of the *forum arresti*, where the existence within the judicial ambit of the property placed under judicial control by attachment or equivalent procedure enables the court to deal with the action on the basis of constructive service, but only to the extent of subjecting the property to the ensuing judgment. Usually for this purpose there is issued a special writ of execution applicable only to that property. The judgment actually entered may or may not be in a corresponding form; it may be and often is in the ordinary form of a personal judgment; but in any case it has no effect beyond the property brought under judicial control by the means before indicated.

## II.

### A LEGACY OF THE PARTIDAS

9. Our system is not without exhibiting certain special consideration for the non-resident or other defendant over whom jurisdiction has been obtained by constructive service and who fails to appear in the action. For one thing, it is commonly the case that where the absent defendant thus suffers judgment by default, a substantial period is allowed him within which he may later appear, petition to be heard, and present his defense, if any he has. Each state follows its own ideas as to the length of this period. At one extreme is New York, where the period is fixed at seven years from the date of the judgment or one year from the time when the defendant was personally served with written notice of the judgment; at the other, perhaps, is Utah, which allows for this purpose only three months from the date of the judgment. Then, again, in certain states, it is required

24. *Freeman v. Alderson*, 119 U.S. 185, 187 (1886).

25. It is to be noted that under the decision of the Supreme Court in *Milliken v. Meyer*, 311 U.S. 457 (1940), an absent defendant who is domiciled in the state, even though not technically a resident, stands on a parity with the resident as regards the acquisition of personal jurisdiction over him.

that plaintiff, before the default judgment is entered, or at least before it is executed, give bond for the protection of the defendant in the event of the judgment being set aside. But, in general, provisions of this kind mark the extent to which particular consideration for the absent defendant has gone. It never has been native to Anglo-American ideas to make provision for his representation in the action. It is part of the tradition to provide for the appointment of a guardian *ad litem* for the defendant who is a minor or otherwise lacking in competency, but the tradition does not extend any similar protection to the absent defendant who is *sui juris*. In particular the benign principle obtaining in the Latin-American countries, under which a curator for the purpose of defense is either specially appointed for the absentee or takes over that function in virtue of his public office, as in the case of the Argentine *defensor de pobres y ausentes*, has had no roots in the Anglo-American procedure. Yet the United States is not wholly without the benefit of that principle. For there are four states of the Union where, owing directly or indirectly to the Spanish law and, in especial, to the *Partidas*, the statutes give place to the special appointment of a representative of the kind for the absent defendant.

10. First to be mentioned is *Louisiana*. Colonized by France and thus governed by French law, Louisiana passed under dominion of the Spanish law upon its cession to Spain in 1762. Although retroceded to France in 1800, its sale by the latter to the United States followed too closely for any official restoration of the French law. Accordingly, when possession was taken by the United States in 1803, while there was an undoubted tendency on the part of the inhabitants to cling to French law, the Spanish law was the rule of authority and so remained until legislatively displaced. For a time, therefore, it continued to be a subsidiary source of law under the American régime. Whether and to what extent it survived the codifications of 1825 is something upon which there existed difference of opinion, but its authority was definitely brought to an end by a statute of 1828. In any event, the formative legislation of Louisiana, influenced by both the French and the Spanish systems, took from the latter in reliance upon *Partida 3, Título 2, Ley 12*,<sup>26</sup> the idea of ap-

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26. "Vegadas y ha, que catiuan, o non son en la tierra, aquellos contra quien el demandador quiere fazer su demanda, o mueren sin herederos, por que han de fincar sus bienes desmanparados. E porende, el que quisiere fazer tal demanda como esta, deve pedir al Juez del lugar, que de quien guarde, en aquel pleyto, los bienes de aquel a quien quiere demandar, e el

pointing a special curator to represent the absent defendant. Thus the first Civil Code, that of 1808, made it the duty of the judge, in the case of an absent person interested in any suit, who had no estate in the territory susceptible of being administered by a curator, to "appoint a proper person to defend the rights of the absentee, if he be not otherwise represented within this territory, and if he has not himself appointed an attorney."<sup>27</sup> And its successor, the Civil Code of 1825, provided that "if a suit be instituted against an absentee who has no known agent in the State, or for the administration of whose property no curator has been appointed, the judge before whom the cause is pending shall appoint a curator *ad hoc* to defend the absentee in the suit."<sup>28</sup> So, also, the Code of Practice of 1825, after providing that if a minor "against whom one intends to institute a suit has no tutor nor a curator *ad lites*, the plaintiff must demand that a curator *ad hoc* be named to defend the suit," declared that "the same course must be pursued if the person intended to be sued be absent and not represented in the state."<sup>29</sup> And this provision was reinforced by others specifically directing such appointment in certain particular classes of cases.<sup>30</sup>

As revised in 1870, the Civil Code of 1825 and the Code of Practice of the same year remain in force, with various amendments and as supplemented by special statutes. It has long been the rule that the appointment of the curator may be made by the clerk of the court.<sup>31</sup> So, also, provision is now made for the allowance of a fee to the curator *ad hoc* in attachment proceedings, to be taxed as costs.<sup>32</sup> While the statute is still silent as to other cases, the general practice has sanctioned the taxation as

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*deuelo fazer. . . . E quando tal Guardador fuere dado, puede entrar en juyzio con el, e todo quanto razonare, o fiziere por el derechamente, e sin engaño, sera valedero, tan bien como si estouiesse delante aquel cuyos fuessen los bienes. Ca de otra guisa non valdria la demanda, que fiziesse."*

Under date of 1820 and pursuant to authority of the state legislature, there was published an English translation, made by L. Moreau Lislet and Henry Carleton, of such portions of the *Partidas* as were considered still in effect. This included a translation of the foregoing provision. For an account of the work in question, see Tucker, *Source Books of Louisiana Law*, 8 Tulane L. Rev. 401-403 (1934) and 1 Louisiana Legal Archives, LVI-LVIII (1937).

27. A Digest of the Civil Law now in Force in the Territory of Orleans, Book I, Tit. III, Art. 8 (1808).

28. Art. 57, La. Civil Code of 1825; Art. 56, La. Civil Code of 1870.

29. Art. 116, La. Code of Practice of 1825. See Arts. 116, 116.1, 973.67, La. Code of Practice of 1870.

30. See Arts. 260, 294, 737, La. Code of Practice of 1870.

31. Art. 783.1, La. Code of Practice of 1870.

32. Art. 260.1, La. Code of Practice of 1870.

costs of such a fee as fixed by the court upon a hearing.<sup>33</sup> But nothing has occurred which in any way narrows the principle of such an appointment as laid down in 1825.

In Louisiana, due largely to the presence of the curator *ad hoc*, constructive service stands upon a distinctive basis. Where the suit is one of attachment, this species of service is effected by posting notice of the action in a public place, specifically by affixing copies of the attachment writ and citation "on the door of the room where the court in which suit is pending is held; or on a bulletin board located near the entrance to said court room."<sup>34</sup> But for other cases in which constructive service is admissible, this is constituted by serving copies of the petition and citation upon the previously appointed curator *ad hoc*.<sup>35</sup> With but slight exception,<sup>36</sup> the method more commonly obtaining in other states of publishing notice of the action by newspaper advertisement finds here no recognition. The curator *ad hoc* thus occupies an important place as a jurisdictional factor. But the term curator *ad hoc* is in nowise sacramental; under a statute of 1918 its use in the appointment of the representative is not imperative so long as the appointment is of an attorney at law to defend the absentee.<sup>37</sup>

11. The institution also exists in *Kentucky*. Here Spanish rule never obtained, and in the absence of definite data we can only conjecture that the presence of the institution is owed to influence emanating from Louisiana. Before the days of railroads the Ohio and Mississippi rivers formed the main artery of communication with the territory towards the mouth of the Mississippi; and between Kentucky, lying on the south bank of the Ohio, and the important Louisiana seaport of New Orleans, there was carried on an extensive commerce, followed by other forms of intercourse. It would, therefore, have been entirely natural for Kentucky lawyers, brought in contact with Louisiana procedural methods, to become impressed with the essential justice

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33. *Brown v. Furlong*, 166 La. 537, 117 So. 583 (1928).

34. Art. 254, La. Code of Practice of 1870.

35. Art. 195, La. Code of Practice of 1870; *Mason v. Benedict*, 43 La. Ann. 397, 8 So. 930 (1891); *Bartels v. Souchon*, 48 La. Ann. 783, 19 So. 941 (1896).

36. See Arts. 292, 293, La. Code of Practice of 1870.

37. Art. 116.1, La. Code of Practice of 1870. Much the same result had previously been reached by judicial decision. "The words 'attorney *ad hoc*,' 'curator *ad hoc*,' and 'advocate,' when used with respect to an absent defendant, indicate the person named and appointed by the Court to defend him in the suit in which the appointment is made." *Bienvenu v. Factors' and Traders' Insurance Co.*, 33 La. Ann. 209, 255 (1881).

of the institution in question, and so to have occasioned its reception in their own state. However this may be, it appears to have been introduced by a statute of 1837<sup>38</sup> for the case of attachment proceedings. But when Kentucky adopted a code of civil procedure in 1851, to be completed in the version of 1854,<sup>39</sup> this made the principle applicable to civil actions in general.

Under the system of constructive service established by that code, and basically still in force as governed by the present code, adopted in 1876, there is entered upon proper affidavit of the fact of non-residence or other ground of such service, what is known as a "warning order," calling upon the absentee to defend the action within the time appointed by law. There is no publication of the order by newspaper advertisement, posting or otherwise, but the defendant is deemed constructively summoned on the thirtieth day after the making of the order.<sup>40</sup>

By the Code of 1851-54 it was provided as to the principle in question that, in the case of a non-appearing defendant who has been constructively summoned, "it shall be necessary . . . that an attorney be appointed, at least sixty days before the judgment is rendered, to defend for the defendant, and inform him of the action, and of such other matters as may be useful to him in preparing for his defense. The attorney may be appointed by the clerk when the warning order is made, or by the court, and shall receive a reasonable compensation for his services, to be paid by the plaintiff and taxed in the costs."<sup>41</sup> It was further provided that "the attorney appointed . . . shall be a regular practicing attorney of the court; and before an order for his compensation is made, he must make a written statement of all that he has done in the case, which shall be signed by him, and filed with the papers of the action."<sup>42</sup>

These provisions having been to some extent recast in the present code, it is now required that the attorney to represent the absentee shall be appointed at the time when the warning order is made, it being correspondingly provided that the constructive service is deemed complete on the thirtieth day after the making of the order *and* the appointment of the attorney.

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38. Act of Feb. 2, 1837; Ky. Laws 103-106 (1836-37); Digest of Statute Law of Kentucky 18 (Loughborough, 1842).

39. Code of Practice in Civil Cases 1854, amending like named code of 1851.

40. Code of 1876, §§ 57, 58, 60 (Carroll, 1948).

41. Ky. Code of Practice in Civil Cases 1851-1854, § 440.

42. Section 441.

By the existing rule the appointment is to be made by the clerk of the court, subject to the discretionary right of the court to substitute an appointee of its own. Moreover, it is now declared that the attorney so appointed (commonly called the "warning order attorney") must "make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him and must report to the court . . . the result of his efforts." If unable thus to inform the defendant, or if he learn that the defendant is under certain designated disability, he must so report to the court, "and shall make an affirmative defense if he can;" inability to make such defense must likewise be reported.<sup>43</sup>

Under the earlier interpretation of the Kentucky Court of Appeals, the failure thus to appoint an attorney or the failure of the attorney to report to the court, while constituting error and hence ground for setting aside the judgment on appeal, was not jurisdictional.<sup>44</sup> But more recently there appeared a conflict of decision on the point. While the same view has received adherence,<sup>45</sup> it has also been distinctly held that the failure of the warning order attorney to notify the defendant as required by the code renders the judgment void.<sup>46</sup>

12. *Arkansas*, too, possesses the institution. Although its lands were once under Spanish dominion, as part of the old province of Louisiana, it is not this circumstance that accounts for its acceptance of the principle. On the contrary, the explanation simply is that it was borrowed out of hand from Kentucky. For when, in 1868, Arkansas adopted a code of civil procedure,<sup>47</sup> it followed very closely that governing in Kentucky,<sup>48</sup> probably because, among the American codes, it offered the pattern most in accordance, on the whole, with the previous Arkansas development. Hence it is that we find the provisions of the Kentucky code of 1854, on the subject of the appointed attorney for the constructively served absentee, reproduced almost verbatim. To be noted, however, is the substitution of thirty days before judgment for the sixty of the 1854 Kentucky provision, in designating

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43. Code of 1876, § 59 (Carroll, 1948).

44. *Brown v. Early*, 2 Duv. (63 Ky.) 369 (1866); *Thomas v. Mahone*, 9 Bush (72 Ky.) 111 (1872).

45. *First Owensboro Bank & Trust Co. v. Wells*, 282 Ky. 88, 137 S.W. 2d 732 (1940).

46. *Fugate v. Fugate*, 259 Ky. 18, 81 S.W. 2d 889 (1935). See also *Sachs v. Title Ins. & Trust Co.*, 305 Ky. 154, 157, 202 S.W. 2d 384 (1947).

47. Ark. Code of Practice in Civil Actions, approved July 22, 1868.

48. Hepburn, *Historical Development of Code Pleading*, § 114 (1897).

the time limited for his appointment, as also inclusion of a provision declaring that the appointed attorney "may take any step in the progress of the cause except filing answer without it having the effect of entering the appearance of such defendant."<sup>49</sup> More conservative than Kentucky has been, Arkansas exhibits none of the changes made there, but adheres to these provisions as adopted in 1868.

As may be gathered from what has been said, Arkansas follows the Kentucky practice of making a warning order against the absent defendant. This warns him to "appear in the action" within thirty days from the time of its making. But a very significant departure from the Kentucky practice is present in the requirement that the warning order be published weekly for at least four weeks.<sup>50</sup>

In this state compliance with the provisions relating to the attorney *ad litem* is considered essential to the validity of the judgment against the non-appearing absentee. In 1927 it was said by the Arkansas Supreme Court that "we are of the opinion that until the thirty days have expired after the appointment of the attorney *ad litem*, and he has made his report, the court is without jurisdiction to take any affirmative action in the case. In other words, that a compliance with these sections of the Digest is mandatory and jurisdictional. Until they are substantially complied with, the court is without jurisdiction to make any final order affecting the rights of the non-resident defendant."<sup>51</sup>

13. Lastly we come to *Texas*, where the institution is a direct heritage from the Spanish-Mexican law. Prior to 1836, Texas was Mexican territory, forming part of the state of Coahuila and Texas. In that year it succeeded in establishing its independence, and became the Republic of Texas; nine years later it was admitted to the Union as the State of Texas. Cardinal for our present inquiry is a decree of the Congress of Coahuila and Texas under date of 1834 which, with reference to civil actions, provided for citation by posting in a public place, if the defendant could not be otherwise cited (Article 96), or, if he resided in another jurisdiction, by application to the court of that jurisdiction (Article 97), and then enacted (Article 98) that "*si no*

49. Ark. Code of Practice in Civil Actions, §§ 445, 446 (1868); Ark. Stat. Ann. 1947, §§ 29-404, 29-405.

50. Ark. Code of Practice in Civil Actions, §§ 79, 80, 82 (1868); Ark. Stat. Ann. 1947, §§ 27-354, 27-355, 27-357.

51. *Frank v. Frank*, 175 Ark. 285, 289, 298 S.W. 1026, 1027 (1927).



*se sabe donde está el demandado, ó existe fuera del Estado en un lugar de donde se dificulte el que comparezca pronto, ó siendo citado en la forma prevenida por el artículo anterior, no contesta en el termino que señale la citacion, ó si en qualquier estado del juicio, alguna de las partes no comparece cuando tiene obligacion de hacerlo; con informacion del hecho, y á pedimento de la parte interesada nombrará el juez á la ausente curador ad litem con quien seguirá el pleito come si fuera con la parte misma.*"<sup>52</sup> This decree, along with other parts of the Spanish law, remained in force until the general repeal of that law by the statute of January 20, 1840.<sup>53</sup>

After statehood, regulation of procedure to obtain jurisdiction over absent defendants appears in statutes of 1846<sup>54</sup> and 1848.<sup>55</sup> The means adopted was that of newspaper publication. In both of these acts, provision being made for thus citing unknown persons as the heirs, successors or legal representatives of any deceased person, it was further enacted that when such notice was given and no appearance was entered, the court was to appoint an attorney to defend on behalf of such unknown heirs, successors or legal representatives. Further reference to the attorney *ad litem* is found in an act of 1866, which amends that last mentioned, and repeats the provision as to his appointment, adding provision for his compensation.<sup>56</sup> But, whatever may have been the case in the actual practice of the courts, so far there had appeared no statute of the kind for the protection of the constructively served and non-appearing defendant, applicable to civil causes in general. And this did not come until the adoption of the Revised Civil Statutes of 1879. Here it was provided that "where service of process has been made by publication, and no answer has been filed within the time prescribed by law, the court shall appoint an attorney to defend the suit, and judgment shall be rendered as in other cases, but in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the case as part of the record thereof."<sup>57</sup> Complemented by the clause (which apparently dates from the Revised Civil Statutes of 1888)<sup>58</sup> that

52. Decree No. 277, April 17, 1834: *Leyes y decretos del estado de Coahuila y Texas* 265 (1839).

53. *Thouvenin v. Rodrigues*, 24 Tex. 468 (1859).

54. Act of May 13, 1846, Texas Laws 1846, 366-367.

55. Act of March 16, 1848, Texas Laws 1848, c. 95, §§ 13, 14.

56. Act of Nov. 9, 1866, Tex. Laws 1866, c. 124, § 14.

57. Tex. Rev. Civ. Stat. 1879, Art. 1345.

58. Tex. Rev. Civ. Stat. 1888 (Sayles), Art. 1212.

"the court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit," the provision, substantially in this form, was included in the last revision of the civil statutes, that of 1925.<sup>59</sup> The regulation of civil procedure having been committed to rules of court under an act of 1939, the provision in question with but slight verbal change passed into the Rules of Civil Procedure, as adopted in 1941. Thus it is that Rule 244 now provides that "where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit on behalf of the defendant, and judgment shall be rendered as in other cases, but in every such case a statement of evidence, approved and signed by the judge, shall be filed with the papers as part of the record thereof. The court shall allow such attorney a reasonable fee for his services as part of the costs." And a further passage of the Rules (Rule 759) which has its background in a statute of 1879,<sup>60</sup> makes specific provision for such an appointment for the defense of defendants sued as unknown persons in actions for partition of land.<sup>61</sup>

There seems little doubt that failure to comply with the provision in reference to the appointment does not extend to invalidate the judgment. In proper cases, however, it is regarded as error sufficing to cause a reversal of the judgment.<sup>62</sup> Failure of the attorney to discharge his duty toward the absent defendant may likewise bring about a reversal.<sup>63</sup> In the latter regard, interest attaches to the salutary observations of the Texas Court of Civil Appeals as to the duty of the appointed attorney. "The statute requiring the appointment of an attorney to represent defendants cited by publication," said the court, "was enacted for the benefit of such defendants, in order that their legal rights might be protected against snap judgments, and that in the trial of such cases they may have the benefit of every defense, objection, and exception which would be available to them if personally present or if represented by counsel of their own selection. Such purpose was undoubtedly in the mind of the Legislature in enacting the statute, and such is the spirit, if not the letter, of the

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59. Tex. Rev. Civ. Stat. (Vernon, 1936), Art. 2158.

60. Act of March 24, 1879, Texas Laws 1879, c. 51.

61. Franki, Vernon's Texas Rules of Civil Procedure 262, 597 (1942).

62. Garvey v. State, 88 S.W. 873 (Tex. Civ. App. 1905).

63. Lopez v. Calzado, 281 S.W. 324 (Tex. Civ. App. 1926); Madero v. Calzado, 281 S.W. 328 (Tex. Civ. App. 1926).

act. The duty of an attorney appointed in such cases is not merely perfunctory in its nature, notwithstanding the probable fact that it has grown to be a custom to thus lightly treat that office. For it is the duty of such attorney to defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. In suits of this character, nothing can be admitted against the interest of the absent defendant, and the one chosen to represent that interest in a case stands in court to insist that no pleading shall go unchallenged, no step shall be taken, no act done, no evidence produced, which shall in any manner be legitimately the subject of an objection or exception."<sup>64</sup>

14. By way of postscript to the foregoing we should notice the fleeting existence of the institution in *California* under American rule. Like Texas, California, as part of Mexico, had been governed by Spanish law before it passed to the United States. In 1851 enough of the Spanish influence had survived to cause the Practice Act of that year to admit the principle under discussion in a qualified way. The act provided for constructive service by newspaper publication, but also declared that "in actions upon contract for the direct payment of money the Court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his behalf."<sup>65</sup> This provision was apparently carried into the California Code of Civil Procedure of 1872,<sup>66</sup> but was dropped by an amendatory act of 1874,<sup>67</sup> and has never been restored. In any case, apart from its possible application to attachment proceedings, there would have been no room for its operation after the decision in 1877 of the case of *Pennoyer v. Neff*.

15. One cannot doubt that if a wider knowledge of the institution had existed among American lawyers, it would have appeared in other quarters. For it is manifest that the more commonly employed method of service by newspaper publication is of slight use in bringing to the absent defendant notice of the proceedings against him. More often than not the news-

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64. *Madero v. Calzado*, 281 S.W. 328, 330 (Tex. Civ. App. 1926).

65. Calif. Practice Act of 1851, § 31.

66. Section 413.

67. Act of March 24, 1874: Acts Amendatory of the Codes 1873-1874, 299 (1874).

paper selected is one that has little or no circulation outside the borders of the state in which it is printed; very often, indeed, it is a legal journal which seldom or never comes to the eyes of lay readers. In many if not most of the states, the publication is to be accompanied by notice sent through the post-office, but this is possible only when the plaintiff knows the defendant's address, and in general he is under no adequate compulsion to obtain it; while the statute often presupposes "diligent inquiry," this is a condition for the most part easily satisfied. What more logical, what more in keeping with practicality and procedural fairness than to impose this duty of investigation and communication upon an agent appointed by the court and responsible to it for the diligence and rectitude of his conduct, and one who in any case is to see that the rights of the absent defendant are to be protected so far as lies within his power? It is strange that, even without knowledge of the Spanish principle, the idea had not made itself generally felt as a means of achieving that equality of controversial opportunity which should be a cardinal tenet of procedural polity. We can only hope that in the current era of procedural reform in the United States, the present principle will command such attention among those interested in improving the quality of civil justice as will extend its recognition and give it the place it deserves as an appurtenance of our procedural systems.