Procedure—Service of Process—Jurisdiction for in Personam Judgment Obtained by Service on Resident outside State—[Federal].—The plaintiff instituted a suit in a Colorado state court to obtain equitable relief from a personal judgment of a Wyoming court against the plaintiff's testate, alleging that the Wyoming court had lacked personal jurisdiction and that there was a conflict between the findings and the decree. In the former action the plaintiff's testate, a Wyoming resident, was personally served in Colorado in accordance with the Wyoming statute permitting personal service out of the state where the resident defendant has left the state to avoid service or to defraud creditors.[1] The Colorado district court dismissed the plaintiff's bill, finding that the Wyoming statutes regarding service were constitutional and that since the Wyoming court had had jurisdiction its judgment was valid. The Colorado Supreme Court reversed on the ground that there was an irreconcilable conflict between the findings and the decree, but it did not decide the question of the Wyoming court's jurisdiction over the defendant, the plaintiff's testate.[2] On review by certiorari the United States Supreme Court *held*, that the Wyoming provision for personal service out of state met all the requirements of due process, since domicile is sufficient to afford jurisdiction for purposes of a personal judgment over an absent resident served by appropriate substituted service; that the Wyoming court having had jurisdiction, the Colorado holding that the Wyoming judgment was void for inconsistency was not warranted. Judgment of the Colorado Supreme Court reversed. *Milliken v. Meyer*.[3]

The principal case settles a question long doubtful, inasmuch as the rather few cases directly in point are in conflict.[4] This previous diversity of opinion is difficult to explain in view of the well-settled requirements of due process in regard to service. The Federal Constitution does not prescribe certain methods the states must employ;[5] due

[1] Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 89–817(6) and 89–822.

[2] 101 Colo. 564, 76 P. (2d) 420 (1937); 105 Colo. 532, 100 P. (2d) 151 (1940).

[3] 61 S. Ct. 339 (1940).

[4] Cases in accord with the holding in the principal case: In re Hendrickson, 40 S.D. 211, 167 N.W. 172 (1918); Becker v. Becker, 218 S.W. 542 (Tex. Civ. App. 1920); Northern Aluminum Co. v. Law, 157 Md. 641, 147 Atl. 715 (1929). Contra: Raher v. Raher, 150 Iowa 511, 129 N.W. 494 (1911); Moss v. Fitch, 212 Mo. 484, 111 S.W. 475 (1908); Smith v. Grady, 68 Wis. 215, 31 N.W. 477 (1887); de la Montanya v. de la Montanya, 112 Cal. 101, 44 Pac. 345 (1896). In the de la Montanya case the majority opinion mentions only service by publication, but the minority opinion states that copies of the complaint and summons were sent to France where the defendant was staying. Service outside the state upon a non-resident has uniformly been held insufficient. Wilson v. Seligman, 144 U.S. 41 (1892); Scott v. Streepy, 73 Tex. 547, 11 S.W. 532 (1889); Denny v. Ashley, 12 Colo. 165, 20 Pac. 331 (1889); McEwan v. Zimmer, 38 Mich. 765 (1878). In Harkness v. Hyde, 98 U.S. 476 (1878), the defendant resided on an Indian plantation and thus could not be considered a resident of the Territory of Idaho. In at least one case denying the validity of such service it does not appear whether the defendant was a resident or a non-resident. Bischoff v. Wethered, 9 Wall. (U.S.) 812 (1869); cf. Rand v. Hanson, 154 Mass. 87, 28 N.E. 6 (1891) (no affirmative showing that service on a non-resident was had within the state); Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N.W. 373 (1894) (statute permitting service outside the state only in in rem proceedings); Dunn v. Dunn, 4 Paige (N.Y.) 425 (1834) (personal service of subpoena outside state on resident defendant in divorce case held irregular).

[5] See Honeyman v. Hanan, 302 U.S. 375, 378 (1937); Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928).

process requires only that the procedure adopted afford the defendant reasonable notice and a fair opportunity to be heard before the issues are decided.[6] If personal service is not practicable the substitute method employed must be that most likely to reach the defendant.[7] It has been uniformly held that when personal service cannot be had on a resident defendant, leaving a copy of the summons at his usual place of abode constitutes due process, even though the defendant be outside the state at the time.[8] Clearly in some cases the defendant will be unaware of the institution of proceedings against him despite such service. On the other hand there is no possibility of his not knowing of the suit if he is personally served outside the state. And other methods likewise less likely to give the defendant actual notice have been upheld: the practice of mailing the summons to the defendant's address,[9] and that of appointing a curator ad hoc.[10] There are even indications that publication is sufficient in the case of a resident temporarily absent from the state, particularly if he has absented himself for the purpose of avoiding service.[11] Apart from the question of due process, it certainly seems more fair to the defendant that he be sued in the state of his domicile rather than in some other jurisdiction in which he happens to be temporarily.

The main obstacles to the acceptance of the position taken in the principal case have been twofold: dicta such as in *Pennoyer v. Neff*,[12] and the notion that jurisdiction is

[6] See Jacob v. Roberts, 223 U.S. 261, 265 (1912).

[7] McDonald v. Mabee, 243 U.S. 90, 92 (1917).

[8] Continental Nat'l Bank v. Thurber, 74 Hun (N.Y.) 632, 26 N.E. 956 (1893); Harryman and Schryver v. Roberts, 52 Md. 64 (1879); Huntley v. Baker, 33 Hun (N.Y.) 578 (1884); Hurlbut v. Thomas, 55 Conn. 181, 10 Atl. 556 (1887); Sturgis v. Fay, 16 Ind. 429 (1861). In the last three cases the defendants were outside the state. But cf. Amsbaugh v. Exchange Bank, 33 Kan. 100, 5 Pac. 384 (1885) (defendant had left state intending never to return); Settlemier v. Sullivan, 97 U.S. 444 (1878) (officer's return failed to state affirmatively that the defendant was not to be found). This form of service was impliedly upheld in McDonald v. Mabee, 243 U.S. 90, 92 (1917).

[9] Bickerdike v. Allen, 157 Ill. 95, 41 N.E. 740 (1895) (service by publication and mailing in revival action); Nelson v. Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N.E. 109 (1906) (service on domestic corporation by publication and mailing where officers and agents could not be found).

[10] Ory v. Bosio, 178 La. 221, 151 So. 187 (1933); Hunt v. Hunt, 72 N.Y. 217 (1878) (involving a divorce judgment treated as in personam).

[11] Fernandez v. Casey & Swasey, 77 Tex. 452, 14 S.W. 149 (1890); Stockwell v. McCracken, 109 Mass. 84 (1871) (joint debtors); Glover v. Glover, 18 Ala. 367 (1850) (defendant had left state apparently for the purpose of avoiding service). The defendant in Pennoyer v. Neff, 95 U.S. 714 (1877), was a non-resident, and in McDonald v. Mabee, 243 U.S. 90 (1917), the defendant had left the state intending to establish a domicile elsewhere. Cf. Frothingham v. Barnes, 9 R.I. 474 (1870); Henderson v. Staniford, 105 Mass. 504 (1870).

[12] "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed illegitimate assumption of power, and be resisted as mere abuse." "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them." Pennoyer v. Neff, 95 U.S. 714, 720, 727 (1877). A careful reading of the opinion seems to make clear, however, that the Court is discussing the case of a non-resident only. See also Denny v. Ashley, 12 Colo. 165, 20 Pac. 331 (1889).

based upon physical power over the body of the defendant.[13] A familiar dictum is that the defendant, to be subject to personal jurisdiction, must be served by process within the state or must make a voluntary appearance.[14] But the cases have dealt with non-residents, and the distinction between residents and non-residents, while often left implicit, has been a decisive factor in the actual decisions.[15] Unless so restricted, the statement is not accurate, for the Supreme Court has explicitly recognized the need for substituted service.[16]

The physical power theory of jurisdiction, although enunciated by Mr. Justice Holmes,[17] is not an adequate explanation of a court's power. Jurisdiction obtained by leaving a copy of the summons at the defendant's usual place of abode and the various instances of jurisdiction by consent[18] indicate a trend away from the physical power theory. Furthermore, domicile has been held a sufficient basis for taxation, since a resident is under an obligation, in return for the privileges and benefits he receives, to share in the costs of government.[19] The courts thus appear to have worked out a partial theory of domiciliary allegiance.[20] In view of this tendency it is surprising that the decision in *Blackmer v. United States*[21] was not accepted as settling the question presented in

[13] See Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913); McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[14] See Harkness v. Hyde, 98 U.S. 476, 478 (1878); Pennoyer v. Neff, 95 U.S. 714, 721 (1877).

[15] See notes 4, 8, and 11 supra. See Knowles v. The Gaslight and Coke Co., 19 Wall. (U.S.) 58, 61–62 (1873).

[16] See Knowles v. The Gaslight and Coke Co., 19 Wall. (U.S.) 58, 61–62 (1873); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

[17] Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913), and McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[18] See Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 428–34 (1929). Cf. Lafayette Ins. Co. v. French, 18 How. (U.S.) 404 (1855); Copin v. Adamson, 9 L.R. Ex. 345 (1874).

[19] New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Com'n, 286 U.S. 276 (1932).

[20] See Blackmer v. United States, 284 U.S. 421, 438 (1932); Lawrence v. State Tax Com'n, 286 U.S. 276, 279 (1932); Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U.S. 287, 297–98 (1890); Hunt v. Hunt, 72 N.Y. 217, 239 (1878). Cf. the suggestion in Schibsby v. Westenholz, 6 L. R. Q. B. 155, 161 (1870), to the effect that if the defendants had been citizens or residents of the country whose judgment is sought to be enforced against them they would have owed allegiance to that country and would have been bound by its laws concerning substituted service.

[21] 284 U.S. 421 (1932). Both Beale and Cheshire insist upon distinguishing between the conceptions of nationality and of domicile. Admittedly these must be kept separate for some purposes, for a person may change his nationality without altering his domicile and vice versa. The distinction seems especially necessary in a federal system of government. The ties of domicile may in certain instances be closer than those of citizenship, for while an American citizen may reside abroad and have relatively little contact with his native land (apparently as in the Blackmer case), there can be no such thing as a citizen (that is, a resident) of an American state with a domicile elsewhere. But the jurisdiction of the state of a person's domicile would appear to apply to him only while he is within the borders of the federal system of which his state is a part. Smith v. Grady, 68 Wis. 215, 31 N.W. 477 (1887); Grubel v. Nassauer, 210 N.Y. 149, 103 N.E. 1113 (1913). Here judgments by foreign courts against their nationals

the principal case. There an American citizen was subpoenaed in France, being ordered to appear as a witness in a criminal trial in the United States. The Supreme Court held that since the United States has jurisdiction over an absent citizen, such a citizen, if given adequate notice, might be punished for contempt for failure to appear.

In what is perhaps the leading case contrary to the holding of the principal case, *Raher v. Raher*,[22] the fundamental objection voiced by the majority seems to be that the serving of process took place in another state, rather than that the defendant served was in the other state; if the latter were the objection, service by leaving a copy of the summons at the defendant's usual place of abode would be ineffectual if the defendant happened to be out of the state. Since notice personally served in a foreign state in an in rem proceeding[23] or a divorce action[24] has some effect (to notify the defendant, for the court already has jurisdiction), it is difficult to understand how the same extraterritorial action may be considered a nullity merely because the proceeding is in personam. Nor can it be argued that personal service within another jurisdiction is an invasion of any right of the other government, for this contention was expressly rejected in the *Blackmer* case.[25] While admitting a theoretical difference between the allegiance of a national and that of a domiciliary, the very fact that this distinction has been obscured in some cases indicates that the obligations involved are essentially the same.[26]

This notion of domiciliary obligation seems less unfamiliar if thought of in terms of implied consent. The only difference then between the consent of a resident and that of a foreign motorist,[27] for example, is one of scope; the privileges granted the resident are greater and consequently his consent to the jurisdiction of the state courts is not limited.

The decision in the principal case is entirely in keeping with present-day needs. If, as has been suggested,[28] the physical power theory has its origin in the early develop-

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in the United States were declared void, perhaps, as Beale suggests, because the foreign courts involved were courts of constituent states within federal systems, Ontario in one case and Bavaria in the other. The same question would arise if an American state attempted to serve process on an absent resident in a foreign country and not in a sister state as in the principal case. See Cheshire, Private International Law 155–76 (2d ed. 1938); 1 Beale, Conflict of Laws, 100, 291, 344–45 (1935).

[22] 150 Iowa 511, 129 N.W. 494 (1911).

[23] Roller v. Holly, 176 U.S. 398 (1900).

[24] See White v. White, 65 N.J. Eq. 741, 55 Atl. 739 (1903); cf. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913) (notice given to executor outside state held sufficient since administration of estate considered one proceeding). A domestic corporation may be subjected to an in personam judgment where an officer of the corporation is served outside the state. Bennett v. Chicago Lumber & Coal Co. 201 Iowa 770, 208 N.W. 519 (1926); Straub v. Investment Co., 31 S.D. 571, 141 N.W. 979 (1913).

[25] This objection was expressed in de la Montanya v. de la Montanya, 112 Cal. 101, 109, 44 Pac. 345, 346 (1896).

[26] Cf. Northern Aluminum Co. v. Law, 157 Md. 641, 147 Atl. 715 (1929); de Meli v. de Meli, 120 N.Y. 485, 24 N.E. 996 (1890).

[27] Cf. Hess v. Pawloski, 274 U.S. 352 (1927); Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[28] Beale, The Jurisdiction of Courts over Foreigners, 26 Harv. L. Rev. 283, 284 (1913).

ment of the English monarch as a territorial sovereign in contrast to the continental feudal kings, its historical justification no longer exists. The increasingly artificial nature of state boundaries, the spreading of metropolitan areas into two or more states, and the ever more universal and rapid methods of transportation all demand a modern approach to the problem of process.

Receivers—Priorities—Wage Claims Preferred over Debts Due the United States—[Missouri].—In a Missouri state court receivership proceeding,[1] wage claimants sought priority under a state statute.[2] The Federal Housing Authority, as assignee of a note of the debtor, claimed priority under Section 3466 of the Revised Statutes[3] which gives priority to debts due the United States in cases, among others,[4] "in which a debtor . . . . makes a voluntary assignment . . . . [and] cases in which an act of bankruptcy is committed." *Held*, that the wage claims should be paid before the claims of the United States. The priority given the claims of the United States by Section 3466 is to be interpreted with reference to Section 64(a) of the National Bankruptcy Act, to which Section 3466 is linked. Section 64 of the Bankruptcy Act[5] gives priority to wage claims over debts due the United States; and a proper construction of Section 3466 requires that under it the claims of the United States be given only that priority which is granted them in bankruptcy proceedings. *Emory v. St. James Distillery, Inc. (United States, Intervenor)*.[6]

The court's construction of Section 3466 is unsupported by precedent. In *Kupshire Coats, Inc. v. United States*,[7] the New York Court of Appeals held that Section 64 of the Bankruptcy Act did not modify the apparent priority, under Section 3466, of United States tax claims over wage claims; and in other situations the courts have uniformly refused to construe the priority given under Section 3466 as being limited by the provisions of the Bankruptcy Act.[8]

Section 3466, however, does expressly apply in situations which are "acts of bankruptcy." In order to determine the scope of that term in Section 3466 at any given

[1] The proceeding was instituted in accordance with the provisions of Mo. Stat. Ann. (1929) § 4960.

[2] Mo. Stat. Ann. (1929) § 1168.

[3] Rev. Stat. § 3466 (1875), 31 U.S.C.A. § 191 (1927).

[4] The other cases include insolvency, insufficiency of decedent's estate to meet all debts, attachment of effects of absconding, concealed, or absent debtor by process of law.

[5] As amended, 52 Stat. 874 (1938), 11 U.S.C.A. § 104 (Supp. 1940).

[6] 143 S.W. (2d) 318 (Mo. App. 1940). [7] 272 N.Y. 221, 5 N.E. (2d) 715 (1936).

[8] In re Assignment of Simpson, Inc., 258 App. Div. 148, 15 N.Y.S. (2d) 1021 (1939) (United States allowed tax penalties in assignment for benefit of creditor proceedings, while such penalties not provable in bankruptcy proceedings); Spokane County v. United States, 279 U.S. 80 (1929); People of New York v. United States, 106 F. (2d) 210 (C.C.A. 3d 1939); In re Lincoln Chair & Novelty Co., Inc., 274 N.Y. 353, 9 N.E. (2d) 7 (1937).

The court in the instant case does not explain its holding that the wage claims, in order to be entitled to priority, must meet the requirements of both the state act and the Bankruptcy Act. It may be urged that since the position of claims of the United States in the scale of priorities is exclusively for Congressional determination, the presence or absence of a state statute is of no significance.