THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 25

SUMMER 1958

NUMBER 4

THE SUPREME COURT, THE DUE PROCESS CLAUSE AND THE IN PERSONAM JURISDICTION OF STATE COURTS*

FROM *PENNOYER* TO *DENCKLA*: A REVIEW

PHILIP B. KURLAND†

When the ignorant are taught to doubt they do not know what they safely may believe. And it seems to me at this time we need education in the obvious more than investigation of the obscure.

—HOLMES, *Collected Legal Papers* 292–93 (1920)

IN MATTERS of personal jurisdiction of state courts, no less than in matters of the jurisdiction of the federal courts,¹ doctrines of federalism have been subordinated by the Supreme Court to concepts of convenience. The result is another major step—in this instance, perhaps a desirable one—toward the limitation of the federal principle. For state lines may be as easily erased by the enhancement of state power as by the expansion of national authority. To the extent that one state's judicial control over a legal controversy is increased, the control of all other states over that controversy is diminished. That this creates serious problems for a federation was recognized early in American constitutional history.

I. "WHAT'S PAST IS PROLOGUE"

In 1813, the Supreme Court of the United States was called upon to decide whether a plea of *nihil debet* was a good defense in the United States Circuit Court for the District of Columbia in a suit brought on a judgment secured

* This paper was prepared as a basis for discussion at a seminar to have been attended by a committee of the Conference of Chief Justices and members of the faculty of the University of Chicago Law School.

† Professor of Law, The Law School, The University of Chicago.

¹ See, e.g., Kurland, *The Supreme Court and the Attrition of State Power*, 10 *Stanford L. Rev.* 274, 292–96 (1958).

in a state court in New York.² The New York judgment had been rendered in a suit in which personal jurisdiction was obtained over the defendant by his arrest within that state. The Supreme Court of the United States held that since the judgment would have been enforced by another New York court, it must also be enforced in the District of Columbia because of Congress' statute implementing the Full Faith and Credit Clause of the Constitution.³ "If," said Mr. Justice Story for the Court, "it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*; and when congress gave the effect of a record to the judgment, it gave all the collateral consequences."⁴ Mr. Justice Johnson dissented. He urged that *nihil debet* was a proper plea in defense to a suit on a foreign judgment. He was led to this dissent by reasons expressed in language which, as in the case of many of his dissents, proved to be of greater appeal to his successors than to his contemporaries. His position was not that the New York judgment was not entitled to full faith and credit, but rather that a court which was asked to enforce it had a right to determine whether the court rendering it had properly attained jurisdiction. This could be done, he said, only if *nihil debet* were available as a defense:

I am induced to vary, in deciding on this question, from an apprehension that receiving the plea of *nul tiel record* may, at some future time, involve this court in inextricable difficulty. In the case of *Holker v. Parker*, which we had before us this term, we see an instance in which a judgment for \$150,000 was given in Pennsylvania, upon an attachment levied on a cask of wine; and debt brought on that judgment, in the state of Massachusetts. Now, if, in this action, *nul tiel record* must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting, then, the object of the constitution, by removing all causes for state jealousies, nothing could tend more to enforce them, than enforcing such a judgment. There are certain eternal principles of justice, which never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute. One of these is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits. But if the states are at liberty to pass the most absurd laws on this subject, and we admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly, an effect will be given that article of the constitution, in direct hostility with the object of it.⁵

By the time of *Pennoyer v. Neff*,⁶ in which are to be found the origins of our modern law of personal jurisdiction, Johnson's thesis had long been accepted by the Court. The case arose on facts similar to those which had troubled

² *Mills v. Duryee*, 7 Cranch (U.S.) 481 (1813). See Morgan, Justice William Johnson 233-34 (1954); Jackson, Full Faith and Credit 11 (1945).

³ The successor statute is now to be found in 62 Stat. 947, 28 U.S.C.A. § 1738 (1948).

⁴ 7 Cranch (U.S.) 481, 484 (1813).

⁵ *Id.*, at 486.

⁶ 95 U.S. 714 (1877).

Johnson. The question was the effect required to be given to an Oregon judgment, pursuant to which a sheriff's sale purported to transfer title to the defendant's land located in Oregon. In the first suit, the defendant had been given notice only by publication in Oregon, in accordance with an Oregon statute. He was domiciled elsewhere, presumably in California. The Supreme Court held the Oregon judgment invalid. The opinion for the Court, written by Mr. Justice Field, relied on Johnson's "eternal principles" to secure the result and cited Story's *Conflict of Laws* to substantiate this conclusion.⁷

No personal jurisdiction was acquired over the defendant:

... where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service . . . upon a non-resident is ineffectual for any purpose. 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. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.⁸

The presence of the property within the state did not authorize personal jurisdiction; it could authorize exercise of jurisdiction over the property if properly invoked:

... the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident has no property in the State, there is nothing upon which the tribunals can adjudicate.⁹

But jurisdiction over the property in the *Pennoyer* case was wanting because of the failure of the plaintiff to levy on the property at the commencement of the action. The jurisdiction of a court cannot attach where its validity will depend upon whether property of the defendant is discovered within the state after the entry of the judgment.¹⁰

Once again a dissent seemed to demonstrate more prescience than the majority. Mr. Justice Hunt would have ruled:

⁷ Id., at 722-23.

⁸ Id., at 727.

⁹ Id., at 723-24. See *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.).

¹⁰ 95 U.S. 714, 727-28 (1877).

It belongs to the legislative power of the State to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law.¹¹

Lest this language be considered more expansive than it really was, it should be noted that Hunt was talking only of suits against defendants owning property within the state, i.e., actions in rem, or quasi in rem. He was not then suggesting that a state legislature could create nationwide in personam jurisdiction for its courts. It fell to later decisions to suggest such extensions of his principles.¹²

The importance of *Pennoyer v. Neff*, however, rests not on its holding, which denied full faith and credit to the Oregon judgment,¹³ but rather on its dicta which read Johnson's "eternal principles" into the Due Process Clause, a provision of the Constitution not applicable to the case then before the Court:

Since the adoption of the Fourteenth Amendment . . . the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. . . . To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance . . . substituted service . . . where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*.¹⁴

Field went further in giving content to the Due Process Clause in this area:

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. . . .

¹¹ *Id.*, at 737.

¹² Cf. Mr. Justice Traynor's opinion for the court in *Atkinson v. Superior Court*, 49 Cal.2d 339, 316 P.2d 960 (1958).

¹³ 95 U.S. 714, 732–33 (1877).

¹⁴ *Id.*, at 733.

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 judgments rendered upon such service may not be binding upon the non-residents both within and without the State. . . . Nor do we doubt that a State on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service on their officers or members.¹⁵

Pennoyer v. Neff thus established the principle that a judgment is entitled to full faith and credit only if it satisfies the requirements of the Due Process Clause, for if it does not meet those requirements it is not properly enforceable even within the State which rendered it. In a fashion not uncommon to the Supreme Court of the United States, it thus purported to decide many questions which were not before it.

Between *Pennoyer v. Neff* and *International Shoe Co. v. Washington*,¹⁶ the courts, both state and national, were occupied in filling the interstices of the doctrines announced by Field and in stretching the concepts of consent and presence to authorize jurisdiction where consent in fact did not, and presence could not, exist. The rapid development of transportation and communication in this country demanded a revision of Johnson's "eternal principles" incorporated by Field in the Due Process Clause: "eternal principles" which were appropriate for the age of the "horse and buggy" or even for the age of the "iron horse" could not serve the era of the airplane, the radio, and the telephone.¹⁷

It was characteristic of our legal institutions, however, that the first approaches to a solution of the problem, both in the legislatures and in the courts, were made not in terms of a bold adjustment of legal concepts to a novel social problem, but in terms that purported to fit the new provisions into the established framework of jurisdictional concepts.¹⁸

By 1945, even the Supreme Court of the United States recognized the necessity for the substitution of appropriate doctrine for the "fictive"¹⁹ rules which had developed under the aegis of *Pennoyer v. Neff*. To help to understand the

¹⁵ Id., at 734-35.

¹⁶ 326 U.S. 310 (1945).

¹⁷ Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957); *Hanson v. Denckla*, 357 U.S. 235, 251, 260 (1958).

¹⁸ Mr. Justice Schaefer, in *Nelson v. Miller*, 11 Ill.2d 378, 386, 143 N.E.2d 673, 677 (1957).

¹⁹ *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340-41 (1953).

changes in doctrine, if not necessarily in result, which have followed the *International Shoe* case, it is proposed to state briefly the guiding rules existent at the time that decision was rendered. If these rules may be stated fairly succinctly, it should be noted that they were not to be applied with equal ease.

A. PERSONAL JURISDICTION OVER INDIVIDUALS

As indicated in Johnson's opinion in *Mills v. Duryee*,²⁰ service of process²¹ on an individual within a state is sufficient to create personal jurisdiction over him, although the state may eschew such power if the defendant's presence was procured by the fraud or force of the plaintiff,²² or if the defendant is afforded a status which immunizes him from service of process.²³ The derivation of the rule was succinctly stated by Mr. Justice Holmes: "The foundation of jurisdiction is physical power. . . ."²⁴ This rule does not exist in civil law²⁵ and has been the object of cogent criticism,²⁶ inasmuch as it affords a basis for jurisdiction over defendants whose relationship to the state may be accidental and fleeting and regardless of the place of origin of the claim asserted. But if any change is to take place in this rule it is more likely to be through the avenue of *forum non conveniens* than the Due Process Clause, although the "new doctrine" of appropriate connection with the state of the forum could well be developed to limit as well as expand state judicial power.²⁷

²⁰ See discussion at 569-70 *supra*. Cf. *Schibsby v. Westenholz*, L.R. 6 Q.B. 155 (1870).

²¹ This article will not be concerned with the appropriate method of service; it is assumed herein that the method of service "most likely to reach the defendant," *McDonald v. Mabey*, 243 U.S. 90, 92 (1917), must be utilized to secure jurisdiction. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Walker v. Hutchinson*, 352 U.S. 112 (1956).

²² See *Commercial Mutual Accident Co. v. Davis*, 213 U.S. 245, 256 (1909); *Blandin v. Ostrander*, 239 Fed. 700 (C.A.2d, 1917); *Jurisdiction over Persons Brought into a State by Force or Fraud*, 39 Yale L. J. 889 (1930); cf. *Jaster v. Currie*, 198 U.S. 144 (1905).

²³ See *Lamb v. Schmitt*, 285 U.S. 222 (1932); *Page Co. v. MacDonald*, 261 U.S. 446 (1923); *Stewart v. Ramsey*, 242 U.S. 128 (1916); *Ray, Privilege of Nonresident Attorney from Service of Civil Process*, 17 Ky. L. J. 197 (1922); *Keeffe and Roscia, Immunity and Sentimentality*, 32 Cornell L. Q. 471 (1947); *Immunity of Non-resident Participants in a Judicial Proceeding from Service of Process*, 26 Ind. L. J. 459 (1951).

²⁴ *McDonald v. Mabey*, 243 U.S. 90, 91 (1917); cf. *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913).

²⁵ See Beale, *Jurisdiction of Courts over Foreigners*, 26 Harv. L. Rev. 193, 283 (1912, 1913).

²⁶ See Dodd, *Jurisdiction in Personal Actions*, 23 Ill. L. Rev. 427 (1929); Rheinstein, *Michigan Legal Studies: A Review*, 41 Mich. L. Rev. 83, 91 (1942); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L. J. 289 (1956). Professors Rheinstein and Dodd attack the reasonableness of the rule. Professor Ehrenzweig's rejection of the historical basis for the rule in this country neglects the fact that the American states have often regarded each other as foreign sovereignties. See, e.g., *Detroit v. Proctor*, 44 Del. 193, 202, 61 A.2d 412, 416 (1948): "Michigan's sovereignty is as foreign to Delaware as Russia's."

²⁷ See opinion of Black, J., in *International Shoe Co. v. Washington*, 326 U.S. 310, 322 (1945).

What Johnson spoke of as "allegiance"²⁸ has also been used for the assertion of personal jurisdiction. Domicile has served state courts as a constitutional base for asserting jurisdiction over absent defendants,²⁹ just as nationality has been the ground for the assertion of authority by federal courts over absentees.³⁰ The rationalizations expressed by the courts would not seem to limit this power to cases having a reasonable connection with the forum state, since the state of domicile or citizenship may well provide the only forum in which an elusive defendant may be sued.

Personal jurisdiction may also be exercised over defendants who voluntarily submit to the jurisdiction of the court, regardless of the absence of other connection between the litigation and the forum. Actual consent creates comparatively little difficulty;³¹ the primary source of problems arises in those cases in which the thesis of consent has been extended to cover cases where in fact consent does not exist.³²

Actual consent may be given in advance of litigation by an agreement which calls for the submission of any dispute arising out of the transactions specified in the agreement, either to a named tribunal or to such tribunal as the future plaintiff may choose.

The mere appearance of a defendant in a law suit for a purpose other than to attack the jurisdiction of the court over him is considered a voluntary submission to the court's power.³³ Indeed, even a special appearance to contest personal jurisdiction may be validly treated as a submission to the court.³⁴ And a plaintiff may be assumed to have agreed to the court's jurisdiction over him not only for the purpose of the claims which he asserts but with reference to claims asserted against him by defendants to the action.³⁵

²⁸ See text at note 5 *supra*.

²⁹ See *Milliken v. Meyer*, 311 U.S. 457 (1940).

³⁰ See *Blackmer v. United States*, 284 U.S. 421 (1932); cf. *United States v. Bowman*, 260 U.S. 94 (1922); *Cook v. Tait*, 265 U.S. 47 (1924); *Skiriotes v. Florida*, 313 U.S. 69 (1941) (state court jurisdiction); *Citizenship as a Ground for Personal Jurisdiction*, 27 *Harv. L. Rev.* 464 (1914).

³¹ Even actual consent has created some problems, as in the case of *cognovit* notes and consent to jurisdiction of a foreign tribunal. See, e.g., *Gavit*, *The Indiana Cognovit Note Statute*, 5 *Ind. L. J.* 208 (1929); *Commercial Arbitration and the Conflict of Laws*, 56 *Col. L. Rev.* 902 (1956); *Grauper*, *Contractual Stipulations Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland*, 59 *L. Q. Rev.* 227 (1943).

³² See *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877); *Scott*, *Fundamentals of Procedure* 40-41 (1922).

³³ See *Western Loan & Savings Co. v. Butte & Boston Min. Co.*, 210 U.S. 368 (1908); *Houston v. Ormes*, 252 U.S. 469 (1920); cf. *Toledo Ry. and Light Co. v. Hill*, 244 U.S. 49 (1917); *Cain v. Commercial Pub. Co.*, 232 U.S. 124 (1914).

³⁴ See *York v. Texas*, 137 U.S. 15 (1890); *Kauffman v. Wootters*, 138 U.S. 285 (1891); *Western Indemnity Co. v. Rupp*, 235 U.S. 261 (1914); *Harris v. Taylor*, [1915] 2 K.B. 580 (C.A.).

³⁵ See *Adam v. Saenger*, 303 U.S. 59 (1938).

The cases dealing with the nonresident motorist statutes have provided a bridge between the consent cases and the cases in which jurisdiction over the person is predicated on the fact that the defendant has engaged in certain activity within the state.³⁶ From the doubtful premise that a state may refuse the use of its highways to nonresident individuals,³⁷ it was thought to follow that a state might condition the use of the highways on receipt of consent to be sued in the state courts for any action arising out of the use of the highways.³⁸ From the right to demand actual consent, the states were held to be free to imply "consent" by any user so long as service was made within the state.³⁹ But "[u]nder the statute," the Supreme Court said, "the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved."⁴⁰ Thirty years later the Court recognized what had long been apparent to others, that "to conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland."⁴¹

A more realistic rationalization of the validity of the nonresident motorists statutes might well have provided a basis for jurisdiction over individuals engaged in activities within the state other than driving automobiles. In 1919,⁴² Professor Austin W. Scott wrote a most persuasive article in support of the thesis "that a state might constitutionally provide that the doing of business within the state by a nonresident should subject him to the jurisdiction of the courts of the state *as to causes of action arising out of such business*; and that a nonresident by doing business within a state which had made such a provision subjected himself to the jurisdiction of the courts of the state as to such causes of action."⁴³ In 1926, he concluded another article with the following language:

It would seem that a state may subject a nonresident doing *acts within the state, involving danger to life or property, to the jurisdiction of the courts of the state as to causes of action arising out of those acts*. In particular, it would seem that a state may subject a nonresident operating an automobile within the state to the jurisdiction

³⁶ See Carey, A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents' Estates, 24 Ill. L. Rev. 170, 177 et seq. (1929).

³⁷ See *Edwards v. California*, 314 U.S. 160 (1941).

³⁸ *Kane v. New Jersey*, 242 U.S. 160 (1916).

³⁹ *Hess v. Pawloski*, 274 U.S. 352 (1927).

⁴⁰ *Id.*, at 356; see Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563 (1926); Scott, Hess and Pawloski Carry On, 64 Harv. L. Rev. 98 (1950).

⁴¹ *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 341 (1953).

⁴² Scott, Jurisdiction over Nonresidents Doing Business within a State, 32 Harv. L. Rev. 871 (1919).

⁴³ Scott, Jurisdiction over Non-resident Motorists, 39 Harv. L. Rev. 563 (1926) (emphasis added).

of the courts of the state as to causes of action arising out of the operation of the automobile.⁴⁴

The latter concept was more palatable to the Court. Even while talking about implied consent in *Hess v. Pawloski*, the Court emphasized the fact that "[m]otor vehicles are dangerous machines . . . their use is attended by serious dangers to persons and property."⁴⁵ At the same time, however, the Court was careful to state that the "mere transaction of business in a State by non-resident natural persons does not imply consent to be bound by the process of its courts."⁴⁶ And without "consent" no jurisdiction would attach⁴⁷ because "a State may not withhold from nonresident individuals the right of doing business therein."⁴⁸ By 1935, however, the Court was beginning to accept the notion that doing business within a state was sufficient basis for jurisdiction over a nonresident individual, at least where "the business" done could be validly treated by the state as "exceptional" and, therefore, subject to regulation, and service could be made within the state on an agent appointed to carry out that business.⁴⁹

B. IN PERSONAM JURISDICTION OVER CORPORATIONS

A domestic corporation is subject to suit in the courts of the state of its incorporation, whether because it is a creature of that state and therefore necessarily subject to its control, or because it is "domiciled" there, or because it is "present" there.⁵⁰

Foreign corporations have proved more difficult to fit into the concepts which underlie the principles of personal jurisdiction relating to individuals, for it has been thought necessary to speak in "fictive" terms whether the term used is the corporation's "citizenship,"⁵¹ its "domicile," its "consent," or its "presence." "Until toward the middle of the [nineteenth] century, the idea seems to have been widely prevalent that foreign attachment was the only process available against them."⁵² In some measure the difficulties flowed from a notion phrased by Mr. Chief Justice Taney in *Bank of Augusta v. Earle*:

⁴⁴ Id., at 586 (emphasis added).

⁴⁵ Id., at 355.

⁴⁶ 274 U.S. 352, 356 (1927).

⁴⁷ See *Flexner v. Farson*, 248 U.S. 289 (1919).

⁴⁸ 274 U.S. 352, 355 (1927).

⁴⁹ *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935). It should be noted that the Court distinguished the *Flexner* case on a tenuous ground suggested by Professor Scott. See Scott, *Fundamentals of Procedure*, 68-69 (1922); see also *Nelson v. Miller*, 11 Ill.2d. 378, 388-89, 143 N.E.2d 673, 678-79 (1957).

⁵⁰ See quotation from *Pennoyer v. Neff* in text at note 15 supra; *Goodrich, Conflict of Laws* 209 (3d ed., 1949); Scott, *Fundamentals of Procedure* 47 (1922).

⁵¹ See, for another aspect of the problems of the fiction of corporate "citizenship," McGovney, *A Supreme Court Fiction, Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 Harv. L. Rev. 853, 1090, 1225 (1943).

⁵² Henderson, *The Position of Foreign Corporations in American Constitutional Law* 77 (1918).

... a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation; and cannot migrate to another sovereignty.⁵³

This apparently did not mean that a corporation was precluded from engaging in activities beyond the borders of the state of its incorporation, but only that any activity which it conducted outside the state of its incorporation was dependent upon the permission of the government within whose jurisdiction it desired to operate. Strange conclusions, in terms of in personam jurisdiction, necessarily flowed from this strange principle.

As the corporate form of business became more and more the common method of carrying on economic activity, it became incumbent on the courts to make provision for suits by and against such entities in foreign states. Two major theories evolved and merged into a third, none of which proved satisfactory. The first was the "consent" theory, which quickly prevailed in the Supreme Court. The second was a theory of "presence," which became necessary in order to fill the gaps which the "consent" theory did not cover, but which required the rejection of the Taney dictum in *Bank of Augusta v. Earle*. The third was the "doing business" notion.

1. "*Consent*."—The consent thesis rested on the proposition that, since a foreign corporation could not carry on business within a state without the permission of that state, the state could impose as a condition of engaging in business within its borders a requirement that the corporation appoint an agent to receive service of process within the state. Thus, in *Lafayette Insurance Co. v. French*,⁵⁴ Mr. Justice Curtis, speaking for all but one member of the Court, said:

A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence.⁵⁵

The limitations of "public law" and "natural justice" were necessarily vague, and were ultimately to be merged into the Due Process Clause when the Fourteenth Amendment became effective.⁵⁶ No really difficult problem was presented by the *Lafayette Insurance* case, for there suit was in Ohio on an insurance policy issued by a resident agent in Ohio on Ohio property with service of

⁵³ 13 Pet. (U.S.) 519, 588 (1839).

⁵⁴ 18 How. (U.S.) 404 (1855).

⁵⁵ *Id.*, at 407.

⁵⁶ See *Riverside Mills v. Menefee*, 237 U.S. 189 (1915).

process made on the agent in accord with the terms of an Ohio statute which authorized suits on insurance policies in the county in which "the contract may be made." The important limitations on the conditions which could be imposed by the state were set forth later by Mr. Justice Field in *St. Clair v. Cox*:

The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation *arising out of its transactions in the State*, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed.⁵⁷

Field reiterated the primary limitation that "the corporation be engaged in business in the State, and the agent be appointed to act there."⁵⁸ The Court later made it clear, too, that the agent must be one who would be likely to inform the corporation of the receipt and content of the process and if service were made on an official or person designated by the state that such person be required to forward notice of the suit to the defendant.⁵⁹ The "consent" which a state could demand was held to be a valid base for jurisdiction of the federal courts within that state as well as of state courts.⁶⁰

One of the questions resulting from the adoption of this thesis was whether, if implied consent was confined to cases arising out of transactions within the state as stated in *St. Clair v. Cox*, the consent secured by the actual appointment of an agent by the corporation was similarly limited. Three of America's greatest jurists answered the question in the negative. Lengthy quotation from an early opinion of Judge Learned Hand in *Smolik v. Philadelphia and Reading Co.*⁶¹ will state both the problem and the solution which became the law; it also suggested a doctrine which reappeared in the *International Shoe* case:

The defendant here argues that the terms of such an implied consent cannot be supposed to be other than that which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the defendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute.

The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent . . . must be interpreted in the light of

⁵⁷ 106 U.S. 350, 356 (1882) (emphasis added).

⁵⁸ *Id.*, at 357.

⁵⁹ *Commercial Mutual Accident Co. v. Davis*, 213 U.S. 245, 255 (1909); cf. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

⁶⁰ *Railroad Co. v. Harris*, 12 Wall. (U.S.) 65 (1840); *Ex parte Schollenberger*, 96 U.S. 369 (1877).

⁶¹ 222 Fed. 148 (S.D.N.Y., 1915).

the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar residents of New York may . . . sue foreign corporations on any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state?

These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.⁶²

Judge Cardozo, as he then was, reached the same conclusion, saying that "[t]he distinction is between a true consent and an imputed or implied consent, between a fact and a fiction."⁶³ And Mr. Justice Holmes spoke for the Supreme Court in arriving at the same destination.⁶⁴ One may wonder how, in rejecting the fiction of consent for the corporations which have not appointed agents, these three could have found "a true consent" in the appointment of an agent in conformity with statutes, especially when the statutes have not suggested different treatment for extorted actual consent and the equally unwilling implied consent. Holmes said only that:

. . . when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act.⁶⁵

One may wonder, too, why, if it is the Due Process Clause—or a "principle of natural justice"—which denied the power of the state to imply consent to suit on claims arising out of transactions occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing.

⁶² *Id.*, at 150-51.

⁶³ *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432, 437, 111 N.E. 1075, 1076 (1916).

⁶⁴ *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

⁶⁵ *Id.*, at 96.

Certainly the *St. Clair* case on which these cases are predicated drew no such distinction.

There was still another major difficulty with the consent thesis. The Privileges and Immunities Clause did not prohibit a state from excluding a foreign corporation. This point was made pellucidly in *Paul v. Virginia*⁶⁶ in language quite reminiscent of Taney's in *Bank of Augusta v. Earle*:

The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.⁶⁷

But insurance, which was the subject of the business involved in that case, was not then considered "interstate commerce."⁶⁸ And it soon became established law that a foreign corporation could not be prevented by a state from carrying on interstate commerce within its borders.⁶⁹ It would seem to follow that if the state's power to exact consent to be sued depended on its power to exclude, and it could not exclude, it could not exact such consent.⁷⁰ Nonetheless, the Court continued to hold that foreign corporations were subject to the jurisdiction of state courts, even if the business they carried on within the state was interstate commerce.⁷¹

The major defects in the consent thesis were obvious. The failure of its conceptualism was recognized long before the Supreme Court took official notice of it. In 1855, for example, the New Jersey Supreme Court described the notion, in terms equally applicable to the "presence" notion, which should have proved hard to refute:

If a corporation may sue within a foreign jurisdiction, it would seem consistent with sound principle that it should also be liable to be sued within such jurisdiction.

⁶⁶ 8 Wall. (U.S.) 168 (1868).

⁶⁷ *Id.*, at 181.

⁶⁸ *Id.*, at 183. See Powell, Insurance as Commerce in Constitution and Statute, 57 Harv. L. Rev. 937 (1944).

⁶⁹ *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1877); *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910); cf. *Woodruff v. Parham*, 8 Wall. (U.S.) 123 (1868).

⁷⁰ By 1922, the Supreme Court had made it quite clear that there were many limitations on a state's power to exclude foreign corporations unless they complied with state limitations. See, e.g., *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922); *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926), *Frankfurter, J.*, concurring in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 74 (1954).

⁷¹ *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910).

The difficulty is this, that process against a corporation must, at common law, be served upon the principal officer of the corporation within the jurisdiction of that sovereignty by which it was created. The rule is founded upon the principle, that the artificial, invisible, and intangible corporate body is exclusively the creature of the law; that it has no existence, except by operation of law, and that, consequently, it has no existence without the limits of that sovereignty, and beyond the operation of those laws by which it was created, and by whose power it exists. The rule rests upon a highly artificial reason, and, however technically just, is confined at this day in its application within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal; nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has then existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in the case of a private individual, and that the corporation itself is not present, the answer is, that a corporation acts nowhere, except by its officers and agents. It has no tangible existence, except through its officers. For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty that created it that it may within it. Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has, no body which may exist in one place and be served with process while its agents and officers are in another. Process can only be served upon the *officers* of a corporation within its own jurisdiction, not upon the corporation itself.⁷²

Nonetheless, the consent theory continued to dominate the opinions of the Supreme Court. As late as 1933, the Court was still speaking the pure language of *Bank of Augusta v. Earle* and *St. Clair v. Cox*.⁷³

2. "Presence."— The presence doctrine afforded an equally defective pattern, for it necessarily rejected the theme of *Bank of Augusta* and *Paul v. Virginia*, that a corporation cannot exist beyond the limits of the state which created it. From time to time, however, the Supreme Court spoke as though the issue were one of presence rather than consent.⁷⁴ Thus, Mr. Justice Brandeis said in *Philadelphia and Reading R.R. v. McKibbin*,⁷⁵ "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent

⁷² *Moulin v. Trenton Mutual Life and Fire Insurance Co.*, 25 N.J.L. 57, 60–61 (1855).

⁷³ *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U.S. 361, 364 (1933).

⁷⁴ See *New England Mutual Life Ins. Co. v. Woodworth*, 111 U.S. 138 (1884); *Barrow Steamship Co. v. Kane*, 170 U.S. 100 (1898); *Philadelphia & Reading R.R. v. McKibbin*, 243 U.S. 264 (1917); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *Bank of America v. Whitney Central National Bank*, 261 U.S. 171 (1923). See Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 Harv. L. Rev. 676 (1917).

⁷⁵ 243 U.S. 264 (1917).

as to warrant the inference that it is present there."⁷⁶ And very distinguished authorities in other courts adopted this approach to the problem.⁷⁷ The presence theory, unlike the consent doctrine, would sustain jurisdiction against corporations on claims which did not arise out of the business done within the state,⁷⁸ a position which the Supreme Court never openly espoused. On the other hand, under that doctrine, the departure from the state by the corporation by ceasing to do business therein would preclude later assertion of jurisdiction even as to claims which grew out of the business it had once done there.⁷⁹ The implied consent theory would sustain jurisdiction under such circumstances.⁸⁰

In the same fashion in which he had removed the mask of the consent theory,⁸¹ Judge Hand exposed the false face of the presence thesis. In *Hutchinson v. Chase and Gilbert*,⁸² he wrote for a court made up of three of the most capable judges ever to sit on any American bench:

It scarcely advances the argument to say that a corporation must be 'present' in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes. The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent it, and we can see no qualitative distinction between one part of its doings and another, so they carry out the common plan. If we are to attribute locality to it at all, it must be equally present wherever any part of its work goes on, as much in the little as in the great.

When we say therefore, that a corporation may be sued only where it is 'present,' we understand that the word is used, not literally, but as shorthand for something else. It might indeed be argued that it must stand suit upon any controversy arising out of legal transactions entered into where the suit was brought, but that would impose upon it too severe a burden. On the other hand, it is not plain that it ought not, upon proper notice, to defend suits arising out of foreign transactions, if it conducts a continuous business in the state of the forum. At least the Court of Appeals of New York seems still to suppose this to be true. . . . But a single transaction is certainly not enough, whether a substantial business subjects that corporation to jurisdiction generally, or only as to local transactions. There must be some continuous dealings in the state of the forum; enough to demand trial away from its home.

This last appears to us to be really the controlling consideration, expressed shortly

⁷⁶ *Id.*, at 265.

⁷⁷ See, e.g., Judge Cardozo's opinion in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917), which secured a wide following in other states.

⁷⁸ *Ibid.*

⁷⁹ *Chipman v. Thomas B. Jeffrey Co.*, 251 U.S. 373 (1920).

⁸⁰ *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U.S. 361 (1933).

⁸¹ See discussion at 579-80 *supra*.

⁸² 45 F.2d 139 (C.A.2d, 1930).

by the word 'presence,' but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts. Nor is it anomalous to make the question of jurisdiction depend upon a practical test. . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is 'present,' but at least it puts the real question, and that is something. In its solution we can do no more than follow the decided cases.⁸³

In his conclusion, Judge Hand once again foreshadowed the doctrine which the Supreme Court would later adopt:

In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no *vade mecum*.⁸⁴

3. "*Doing Business*."—The courts thus came round to using either the consent thesis or the presence thesis, depending largely upon which would support jurisdiction over the nonresident corporation. No notice was taken of the underlying inconsistency between the two doctrines. The application of either created difficulties, for whichever was chosen it became necessary to determine whether the foreign corporation was "doing business" within the state, either to decide whether its "consent" could properly be "implied," or to discover whether the corporation was "present." The law reports became cluttered with decisions as to what constituted "doing business." The cases drew fine lines which made little sense in terms of either theory. A fair sampling is afforded by Judge Learned Hand in *Hutchinson v. Chase and Gilbert*:

Possibly the maintenance of a regular agency for the solicitation of business will serve without more. The [negative] answer made in *Green v. C.B. and Q.R.R. Co.*, 205 U.S. 530 . . . and *People's Tob. Co. v. Amer. Tobacco Co.*, 246 U.S. 79 . . . perhaps becomes somewhat doubtful in the light of *International Harvester Co. v. Kentucky*, 234 U.S. 579 . . . and, if it still remains true, it readily yields to slight additions. In *Tauza v. Susquehanna Coal Co.* . . . there was no more, but the business was continuous and substantial. Purchases, though carried on regularly, are not enough (*Rosenberg Co. v. Curtis Brown Co.*, 260 U.S. 516 . . .), nor are the activities of subsidiary corporations (*Peterson v. Chicago, R.I. and P. Ry. Co.*, 205 U.S. 364 . . .; *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 . . .), or of connecting carriers (*Philadelphia and Read. Co. v. McKibbin*, 243 U.S. 264 . . .). The maintenance of an office, though always a make-weight, and enough when accompanied by continuous negotiation, to settle claims (*St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218 . . .), is not of much significance (*Davega, Inc. v. Lincoln Furniture Co.*, 29 F. (2d) (C.C.A.2).

⁸³ *Id.*, at 141.

⁸⁴ *Id.*, at 142.

It is quite impossible to establish any rule from the decided cases, we must step from tuft to tuft and across the morass.⁸⁵

The myriad of cases dealing with the question of "doing business" soon substituted that shibboleth for any theory. Without looking back of the words, the courts held that jurisdiction existed if the corporate defendant was "doing business" within the jurisdiction but no jurisdiction existed if it were not "doing business."⁸⁶ Even when so broadly defined as in the *Restatement of the Conflict of Laws*,⁸⁷ this concept provided no basis for growth since it offered a conclusion rather than a reason. The only reasons were those implicit in the doctrines of "consent" or "presence" and these were obviously unsatisfactory.

The real difficulty underlying these attempts to work out a rationale for personal jurisdiction lay in the fact that the doctrines were borrowed from laws relating to wholly independent sovereignties which were not relevant to jurisdictions joined in a federation.⁸⁸ The basic premise for such decisions was "that a judgment . . . is necessarily something to be enforced and that a state which is physically impotent to enforce its judgments should be treated as legally incompetent to adjudicate. . . ."⁸⁹ But with the Full Faith and Credit Clause as an overriding principle, such a premise only puts the question; it does not answer it.⁹⁰ The real question becomes not whether a state could itself enforce a judgment, but rather under what circumstances the national power should be used to assist the extraterritorial enforcement of a state's judicial decrees.⁹¹ The great importance of *Pennoyer v. Neff* is that it identified the test under the Full Faith and Credit Clause with the test under the Due Process Clause, making a judgment which would not be enforceable beyond the borders of the state unenforceable within its boundaries. If there are reasons, concerned with the state's relationship with the litigation, why a judgment is not entitled to extrastate enforcement, those reasons should be sufficient to sustain attack within the state. Although *Pennoyer* suggested this principle, there remained the necessity for fixing criteria for determining when the absence of the state's physical power would be supplemented by the command of the national sover-

⁸⁵ *Id.*, at 141-42.

⁸⁶ See Rothschild, *Jurisdiction of Foreign Corporations in Personam*, 17 Va. L. Rev. 129 (1930).

⁸⁷ §167, Comment a (1934): "Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts." See also Rest., Judgments §30, comment b (1942).

⁸⁸ See Sobeloff, *Jurisdiction of State Courts over Non-Residents in our Federal System*, 43 Cornell L. Q. 196 (1958), who would continue the pre-federal notions.

⁸⁹ Dodd, *op. cit. supra* note 26, at 429.

⁹⁰ Cf. Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. of Chi. L. Rev. 620, 622 (1954).

⁹¹ See *id.*, at 666-67.

eign, criteria which must necessarily change with the basic changes in our methods of carrying on economic activity and with the changes in means of transportation and communication. The attempts to adapt old language to new problems proved unhappy in their result.

With doctrine in so bad a state of disrepair,⁹² the time had long since passed for the Supreme Court to acknowledge the truth of Holmes' dictum that "[t]he Constitution is not to be satisfied with a fiction."⁹³ *International Shoe Co. v. Washington*⁹⁴ afforded the Court an opportunity to begin to set its house in order in this field.

II. *International Shoe Co. v. Washington*

The *International Shoe* case, like *Erie R.R. v. Tompkins*,⁹⁵ served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow. Unlike *Erie*, however, it did not purport to overrule the multitude of cases which rested on the earlier doctrinal errors. It is noteworthy primarily for its belated recognition of the fictive nature of the principles of "implied consent" and "presence" and not for the discovery of that "vade mecum" which Judge Learned Hand had found so elusive.⁹⁶

The facts, as Mr. Justice Black pointed out,⁹⁷ presented an issue which could have been readily resolved under existent precedent. The defendant was a Delaware corporation with its principal place of business in St. Louis, Missouri, and with additional places of business in several states other than Washington.⁹⁸ It had neither offices nor property—except for shoe samples—in Washington. It made no contracts there. It did not deliver the goods in that state, but shipped them f.o.b. from outside the state. It did, however, employ salesmen in Washington to solicit orders there. These salesmen were residents of Washington and their time was fully engaged by the defendant for services to be performed primarily within that state. The salesmen rented display rooms within the state, for the cost of which they were reimbursed by the defendant. Their commissions for the years in question exceeded \$31,000 per annum. The record clearly suggests that the method of doing business in Washington was adopted with a view to avoiding both the legislative and judicial power of that state.⁹⁹

⁹² See, e.g., Haffer, *Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court*, 17 B. U. L. Rev. 639 (1937).

⁹³ *Hyde v. United States*, 225 U.S. 347, 390 (1912).

⁹⁴ 326 U.S. 310 (1945).

⁹⁵ See discussion at 584 *supra*.

⁹⁶ 304 U.S. 64 (1938).

⁹⁷ 326 U.S. 310, 322 et seq. (1945).

⁹⁸ These were Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York, and New Hampshire. Transcript of Record at 15, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁹⁹ "Salesmen are employed from the head office in St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are required as part

On these facts, the state of Washington sought to recover unemployment compensation taxes from International Shoe based on the compensation paid to its salesmen as commissions during the years in question. The amount of taxes involved was approximately \$3,600. The Washington Unemployment Compensation Act¹⁰⁰ authorized the issuance of an order and notice of assessment to delinquent taxpayers, to be served on the employer in the same fashion as prescribed by the general service statute, i.e., by personal service on employers found within the state and by registered mail on employers not so found. The statute provides for review of the assessment by appeal within the state administrative body and by further appeals through the courts of Washington on questions of law. The shoe company was served with notice by personal service on one of its salesmen within the state and by registered mail at its St. Louis office. It appeared "specially" to contest the jurisdiction of the state to assess the tax and to contest the in personam jurisdiction of the Washington tribunals. Throughout the state proceedings, the shoe company asserted that the Commerce Clause and the Due Process Clause proscribed the state's legislative jurisdiction and that the Due Process Clause prevented the state from asserting personal jurisdiction over the corporation. After judgment against it in the Supreme Court of Washington,¹⁰¹ the shoe company appealed to the

of their duties to spend certain time each year in St. Louis, Missouri, for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and the expense of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities in which they travel. . . .

"Each salesman is given a designated territory in which to solicit orders. The authority of the salesmen is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If order(s) are obtained, to transmit them to the office of the International Shoe Company outside the state of Washington for acceptance or rejection and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F.O.B. shipping point, from outside of the State of Washington. . . . The merchandise which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salesmen's duties and authority being limited strictly to the solicitation of orders.

"The salesmen are under the direct control and direction of the International Shoe Company and are not permitted to be engaged in independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company." Transcript of Record at 16-17, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁰⁰ Wash. Rev. Code (1951) Title 50.

¹⁰¹ 22 Wash.2d 146, 154 P.2d 801 (1945).

Supreme Court of the United States, which noted probable jurisdiction,¹⁰² informed counsel that it did not want to hear argument on the Commerce Clause question, and transferred the case to its summary docket.¹⁰³

In its opinion, the Supreme Court quickly disposed of the Commerce Clause question on the basis of congressional legislation:

. . . 53 Stat. 1391, 26 U.S.C. §1606 (a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334; *Perkins v. Pennsylvania*, 314 U.S. 586; *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 308; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 679; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769.¹⁰⁴

The Court might as easily have disposed of the question of in personam jurisdiction. Washington had laid no claim to a power to exclude International Shoe from carrying on its business within the state, and therefore did not rest on a power to extort the corporation's consent to service. Instead, the Washington court found the defendant to be "present" within the jurisdiction by reason of the business which it carried on there:

While we are of opinion that the regular and systematic solicitation of orders in this state by appellant's agents, resulting in a continuous flow of appellant's product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process of the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule.¹⁰⁵

These additional activities were "the salesmen's . . . display rooms, and the salesmen's residence within the state, continued over a period of years. . . ." ¹⁰⁶ In reaching its conclusion, the Washington court relied heavily on *Tauza v. Susquehanna Coal Co.*,¹⁰⁷ and Mr. Justice Rutledge's opinion for the Court

¹⁰² 65 S.Ct. 1579 (1945) (not officially reported).

¹⁰³ " . . . the Court has what is termed a 'regular' and 'summary' docket. These designations signify no more, however, than the amount of oral argument to be allowed. In all cases, on the regular docket . . . one hour is allowed on each side for oral argument, unless the Court grants more time. Two counsel, and no more, are permitted to be heard for each party. When a case is transferred to the summary docket, only a half-hour argument on each side is allowed and only one counsel will be heard on the same side." Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States 924 (Wolfson and Kurland ed., 1951).

¹⁰⁴ 326 U.S. 310, 315 (1945).

¹⁰⁵ 22 Wash.2d 146, 169-70, 154 P.2d 801, 812 (1945).

¹⁰⁶ 325 U.S. 310, 314 (1945).

¹⁰⁷ 220 N.Y. 259, 115 N.E. 915 (1917).

of Appeals for the District of Columbia in *Frene v. Louisville Cement Co.*,¹⁰⁸ as giving a proper interpretation to *Green v. Chicago, B. and Q. R.R.*,¹⁰⁹ which had held that "mere solicitation" was inadequate to sustain personal jurisdiction over a foreign corporation, and *International Harvester Co. v. Kentucky*,¹¹⁰ which had held that "solicitation plus" provided a sufficient base. It was certainly within reason for the Supreme Court of the United States to have adopted the same thesis and dismissed the appeal for want of a substantial federal question on this ground, in reliance on the *Harvester* case, as Mr. Justice Black would have had it do.¹¹¹

Instead, Mr. Chief Justice Stone, for all the participating members of the Court except Mr. Justice Black, wrote an opinion in which he rejected the earlier notions of "presence" and "implied consent" in the same terms as, and in reliance on, Judge Learned Hand's opinions in *Hutchinson v. Chase and Gilbert*¹¹² and *Smolik v. Philadelphia and Reading R.R.*¹¹³ In their place he offered a doctrine sufficiently amorphous to call forth Mr. Justice Black's objection on the ground that it might prove unduly restrictive of state judicial power. But after demolishing the "presence" doctrine, in characteristic fashion,¹¹⁴ Stone proceeded to use that very word in sustaining the jurisdiction of the Washington tribunals.¹¹⁵ Implicit in the opinion is the position that the Court was not overruling the earlier precedents, but was substituting an appropriate rationale to demonstrate their consistency. Stone's rationalization was this:

Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an *individual or corporate defendant* with which the state had *no contacts, ties, or relations*. . . .

But to the extent that a *corporation* exercises the *privilege* of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that *privilege* may give rise to obligations, and, *so far as those obligations*

¹⁰⁸ 134 F.2d 511 (App. D.C., 1943). The Washington court also relied on a plethora of state authorities, including *Hormel & Co. v. Ackman*, 117 Fla. 419, 158 So. 171 (1934); *Wheeler v. Boyer Fire Apparatus Co.*, 63 N.D. 403, 248 N.W. 521 (1933); *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N.W. 28 (1928); *Dobson v. Maytag Sales Corp.*, 292 Mich. 107, 290 N.W. 346 (1940); *International Shoe Co. v. Lovejoy*, 219 Iowa 204, 257 N.W. 576 (1935); *West Pub. Co. v. Superior Court*, 20 Cal.2d 720, 128 P.2d 777 (1942); *Dahl v. Collette*, 202 Minn. 544, 279 N.W. 561 (1938); *In re Petition of Northfield Iron Co.*, 226 Wis. 487, 277 N.W. 168 (1938).

¹⁰⁹ 205 U.S. 530 (1907). See discussion at 584-85 *supra*.

¹¹⁰ 234 U.S. 579 (1914). See discussion at 584-85 *supra*.

¹¹¹ 326 U.S. 310, 322 (1945).

¹¹² See discussion at 583-85 *supra*.

¹¹³ See discussion at 579-80 *supra*.

¹¹⁴ See Dunham, "Mr. Chief Justice Stone," in *Mr. Justice* (Dunham and Kurland eds., 1957).

¹¹⁵ 326 U.S. 310, 320-21 (1945).

arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.¹¹⁶

It is to be noted, too, that however far Stone was travelling from original notions of consent, he continued to use the old language of "privilege." It was in sustaining the jurisdiction of the Washington tribunals over this particular action that the language of the "fairness" test was utilized. For here there "were sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligations which appellant has incurred there."¹¹⁷ Mr. Justice Johnson's "eternal principles" thus reappeared.

The Court held that service of process was proper whether considered to have been accomplished by the personal service on the corporation's salesman within the state or by the notice mailed to the corporation's home office in St. Louis. In suggesting that service outside of the state without more would suffice, the opinion offered the states an opportunity to dispense with the cumbersome procedure of service on a state official plus extraterritorial notice, the method suggested in *Pennoyer* and utilized extensively by the states since. But otherwise, the Court's conclusions on personal jurisdiction were hardly revolutionary.

Mr. Justice Black, however, thought otherwise. For him the rules were clear. "Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries. . . ."¹¹⁸ There is no suggestion that "tax and sue" were joint rather than several, for he went on to assert that states had power "to open the doors of its courts for its citizens to sue corporations whose agents do business in those States."¹¹⁹ Here there is no limitation on the nature of the suit, no requirement that the suit grow out of the business done within the state, but the proposition is limited to actions by citizens of the state and not outsiders. For him it followed that the "elastic standards" of "fair play," "justice," and "reasonableness" could not be used as a "measuring rod" of state power, for to do so would be to substitute "notions of 'natural justice' " for the specific mandates of the Constitution. Due process, for him, did not imply such limitations on state power.¹²⁰ So long as "proper service can be had" and the corporation is "doing business" in the state, jurisdiction may be exercised by the state's courts, though he did not say where the criteria for "proper service" were to be found, nor whether he was using the phrase "doing business" in the same sense that his predecessors had done. In considering Mr. Justice Black's position, it should not be forgotten that he was once of the

¹¹⁶ *Id.*, at 319 (emphasis added).

¹¹⁷ *Id.*, at 320.

¹¹⁸ *Id.*, at 323.

¹¹⁹ *Id.*, at 324.

¹²⁰ See Cardozo, *The Reach of the Legislature and the Grasp of Jurisdiction*, 43 Cornell L. Q. 210 (1958).

mind that the Due Process Clause afforded no protection to corporations in any event, whatever its content.¹²¹

The third issue presented to the Court evoked no disagreement. Washington clearly had the right to impose a tax "on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages. . . . The right to employ labor has been deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution."¹²²

If the *International Shoe* case was the beginning of a new formulation of doctrine for personal jurisdiction, it contains only a statement of policy when "what are needed are rules of a fairly definite character . . . policy alone will not suffice [though] any such rules must be firmly based upon considerations of policy."¹²³ There are several specific rules which might be derived from the Court's judgment in *International Shoe*.

At one point the opinion suggests that the mere fact that the cause of action arose out of activities of the corporation within the state was sufficient to sustain jurisdiction.¹²⁴ The grandfather of the *International Shoe* doctrine, Judge Learned Hand, thought that such a rule would "impose . . . too severe a burden."¹²⁵ The argument in its favor is that such a rule would provide the forum in terms of the fact that "the law to be applied is local law" and the "facts are local facts."¹²⁶

If not the majority, Mr. Justice Black at least seemed to suggest that the state of the plaintiff's residence was entitled to provide him with a forum. To use Professor Dodd's language once again, certainly the "state of plaintiff's domicile . . . is vitally interested in obtaining justice for its inhabitants . . . and it may be argued that a plaintiff has as much right as a defendant to claim that the legal battle ought to be fought at his home."¹²⁷ This factor alone as a basis for jurisdiction would indeed be a startling innovation in Anglo-American jurisprudence. It is more likely to be viewed as a factor which together with some other or others would be sufficient to warrant jurisdiction.

With the state itself as plaintiff, it might be argued that legislative jurisdiction, i.e., the jurisdiction to impose the tax, ought to carry with it the judicial jurisdiction to enforce it. It is possible that the courts of the taxing state might well provide the only forum available, since the Supreme Court, which has said that a judgment secured on a tax claim must be enforced in other states,¹²⁸ has not yet said that one state's courts must enforce the tax claims of another

¹²¹ See *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 83 (1938).

¹²² 326 U.S. 310, 321 (1945).

¹²³ See discussion at 583 *supra*.

¹²⁴ Dodd, *op. cit.* *supra* note 26, at 437.

¹²⁵ Dodd, *op. cit.* *supra* note 26, at 439.

¹²⁶ See discussion at 589 *supra*.

¹²⁷ *Ibid.*

¹²⁸ *Milwaukee County v. White Co.*, 296 U.S. 268 (1935).

state.¹²⁹ Certainly if no other forum is available, there is much to be said for allowing this forum to exercise jurisdiction. Even if, however, other courts were prepared to enforce the Washington tax claim,¹³⁰ sound argument might be made that one state ought not to be compelled to submit its claims to another state's tribunals for adjudication.

Another important factor to be considered is the extent of the business done by the defendant within the jurisdiction. When the defendant is prepared to spend money, time and effort extensively within the state, it does not behoove him to complain about the necessity for appearing therein to litigate, and especially is this true where the claim in litigation grows out of the business done therein.

Since the *International Shoe* case involved all these factors, it is not possible to determine whether any one of them or any combination of them short of all would sustain jurisdiction, except insofar as it is clear that those factors which would properly have grounded jurisdiction under the earlier doctrine would probably prove satisfactory under *International Shoe*.

Presumably, however, there are negative factors to be taken into consideration as well, factors which, in other cases, would weaken the effect to be given to those items already listed. Only two appear to have existed in the *International Shoe* case itself, and neither of them seems of great importance. The first is the distance between the defendant's executive offices and the place of trial and the second that defendant's records relevant to the issues here were located in St. Louis.

Whether this sort of analysis of the equities was what was anticipated by the "fairness" doctrine is difficult to ascertain. The Supreme Court's own decisions suggest that a much narrower interpretation might be afforded the *International Shoe* case. At the very same term of court, Mr. Justice Rutledge described its holding as being only that "'mere solicitation' where it is regular, continuous and persistent, rather than merely casual, constitutes 'doing business', contrary to formerly prevailing notions."¹³¹

¹²⁹ See *Moore v. Mitchell*, 281 U.S. 18 (1930); but cf. *Massachusetts v. Missouri*, 308 U.S. 1 (1939).

¹³⁰ *Missouri*, where *International Shoe Co.* had its principal offices, might have afforded Washington a forum for the collection of its taxes. See *State ex rel. Oklahoma Tax Comm. v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946); but cf. *California v. St. Louis Union Trust Co.*, 260 S.W.2d 821 (Mo. App., 1953). So, too, might Kentucky, where the defendant also maintained offices. *Ohio ex rel. Duffy v. Arnett*, 314 Ky. 403, 234 S.W.2d 722 (1950). Delaware and New York might not have proved so hospitable. See *Detroit v. Proctor*, 44 Del. 193, 61 A.2d 412 (1948); *Wayne County v. American Steel Export Co.*, 277 App.Div. 585, 101 N.Y.S.2d 526 (1st Dept., 1950). See, generally, Rest., Conflict of Laws § 610 (1934); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932); Daum, *Interstate Comity and Governmental Claims*, 33 Ill. L. Rev. 249 (1938); Roesken, *Out of State Collections*, 27 Taxes 955 (1948).

¹³¹ *Nippert v. Richmond*, 327 U.S. 416, 422 (1946).

It was to be several years before further light—or darkness—was to be shed by the Supreme Court on the scope of its new doctrine.¹³²

III. *Traveler's Health Association v. Virginia*

The first full-dress opinions to deal with the question of personal jurisdiction after *International Shoe* were rendered in *Traveler's Health Association v. Virginia*.¹³³ This case gave the Court no little trouble, for four months after argument it was ordered reargued and no opinion was forthcoming until seven weeks thereafter. When the case was decided it revealed a thoroughly divided court. The majority opinion was written by Mr. Justice Black. Mr. Justice Douglas wrote a separate concurring opinion, though he also joined in the opinion of the Court. Mr. Justice Minton, who was joined by Mr. Justice Jackson, thought that there was no case or controversy presented for review, and disagreed on the merits as well. Justices Reed and Frankfurter thought the case ripe for adjudication but joined with Minton and Jackson on the merits. The vote on the merits was thus five to four, with one of the five feeling it necessary to file an opinion of his own.

Traveler's was a Nebraska nonprofit corporation "having its principal and only office for the transaction of business in Omaha, Nebraska."¹³⁴ It had no "office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia."¹³⁵ All applications for membership in the Association were received by mail in Omaha. Members were entitled to health insurance benefits on the payment of regular assessments. All assessments were payable in Omaha; all claims were to be submitted in Omaha, whence payments were made by mail. New members were "usually obtained through recommendations of existing members. . . ."¹³⁶ Recommended prospects were sent application blanks and returned them by mail to Omaha, where they were acted upon and if approved certificates were sent by mail. At the time of the proceedings, Traveler's had about eight hundred "members" in Virginia.

Virginia law¹³⁷ required all those selling certificates of insurance in Virginia to obtain a license from the State Corporation Commission, which license was obtainable only after providing detailed information satisfactory to the Commission and filing a consent to be sued in Virginia courts on claims filed

¹³² In the interim the state courts and lower federal courts were trying to apply the new law. See *The Growth of the International Shoe Doctrine*, 16 U. of Chi. L. Rev. 523 (1949).

¹³³ 339 U.S. 643 (1950).

¹³⁴ Transcript of Record at 2, *Traveler's Health Association v. Virginia*, 339 U.S. 643 (1950).

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Acts of General Assembly of Virginia, 1928, c. 529, p. 1373, as amended, Acts of General Assembly of Virginia, 1932, c. 236, p. 434.

against the licensee, with service of process to be made on the Secretary of the Commonwealth. Traveler's did not have the necessary permit nor had it applied for one.

Proceedings were initiated before the State Corporation Commission by the issuance of an order to show cause why a cease and desist order should not be entered which would restrain Traveler's from advertising for sale and selling certificates of insurance in Virginia, by mail or otherwise.¹³⁸ Notice of the entry of the order to show cause was served on Traveler's in Omaha by registered mail. The defendant appeared specially to contest the jurisdiction of the Commission. After a hearing, on stipulated facts, the cease and desist order was entered by the Commission and the Commission was "authorized to give such publicity to the order as it sees fit for the 'information and protection of the public.' (Section 6, Virginia Securities Law. . . .)"¹³⁹ In characterizing its order, the Commission said:

There is no element of compulsion except such as may flow from a dread of publicity attending such an order. In such cases, the only weapon available to the Commonwealth is to publicly advise that the securities of the respondent do not bear the stamp of the state's approval and are being presented to the public without regard to the regulatory laws enacted to protect them. Section 6 . . . imposes no penalties, exacts no direct toll from those against whom its orders proceed. Its purpose, admittedly limited, is, after a full consideration of facts adduced in support of charges, to call on those found to be violating the provisions of the statute to halt and to fully apprise the public of Virginia that to deal with such violators is to deal at their peril.¹⁴⁰

It, therefore, went on to rule that no personal jurisdiction over the defendant was necessary to the exercise of its jurisdiction in this matter.

The Supreme Court of Appeals of Virginia affirmed the action of the State Corporation Commission.¹⁴¹ It held that both legislative and judicial jurisdiction existed by reason of the fact that members of the Association acted in Virginia as agents to secure new members of the Association there; that remittances were received in Virginia; that the membership certificates mailed from Omaha were subject to approval by the certificate holder and thus the contracts were made in Virginia; that the Association investigated claims made by Virginia members which investigations must have taken place in Virginia. It held that its authority over the Association was justified under *International Harvester Co. v. Kentucky* and *International Shoe Co. v. Washington*. It did not suggest that the power of the Commission was limited to publicity, but

¹³⁸ Transcript of Record at 7-9, *Traveler's Health Association v. Virginia*, 339 U.S. 643 (1950).

¹³⁹ Transcript of Record at 20, *Traveler's Health Association v. Virginia*, 339 U.S. 643 (1950).

¹⁴⁰ Transcript of Record at 27, *Traveler's Health Association v. Virginia*, 339 U.S. 643 (1950).

¹⁴¹ *Traveler's Health Ass'n v. Virginia*, 188 Va. 877, 51 S.E.2d 263 (1949).

noted that a penal sanction in the nature of a \$500 fine was available against violators of the act, and that penal sanctions might be enforced by extradition.

In the Supreme Court of the United States, the appellant raised two issues. It relied not at all on the Commerce Clause, but asserted that the Due Process Clause protected it against Virginia jurisdiction and that Virginia was barred by the Postal Clause¹⁴² from prohibiting it from making use of the mails. But the postal issue was not dealt with in appellant's brief on the merits and was treated as abandoned.¹⁴³

Despite his dissent in the *International Shoe* case, Mr. Justice Black said:

We hold that Virginia's subjection of this Association to the jurisdiction of that State's Corporation Commission in a §6 proceeding is consistent with "*fair play and substantial justice*," and is not offensive to the Due Process Clause.¹⁴⁴

No line of distinction was drawn by the majority between legislative and judicial jurisdiction. Lumping the two as if they were one, the Court said:

In *Osborn v. Ozlin*, 310 U.S. 53, 62, we recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the "state action may have repercussions beyond state lines. . . ." and in *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316, we rejected the contention . . . that a state's power to regulate must be determined by a "conceptualistic discussion of theories of the place of contracting or of performance." Instead we accorded "great weight" to the "consequences" of the contractual obligations in the state where the insured resided and the "degree of interest" that state had in seeing that those obligations were faithfully carried out. And in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, this Court, after reviewing past cases, concluded: "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁴⁵

Had the opinion said no more than this, a conclusion might be justified in the terms suggested earlier¹⁴⁶ that legislative jurisdiction carries with it the power of the state to enforce its regulatory policy in its own courts. But the Court, anticipating the question which was to come before it at a later time,¹⁴⁷ went on to state:

Moreover, if Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit.

¹⁴² U.S. Const. Art. 1, § 8.

¹⁴³ 339 U.S. 643, 651 n. 4 (1950).

¹⁴⁵ *Id.*, at 647-48.

¹⁴⁴ *Id.*, at 649 (emphasis added).

¹⁴⁶ See discussion at 591-92 supra.

¹⁴⁷ See Section V., *International Life Insurance Co. v. McGee*, at 606 infra.

In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would be most likely to live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of *forum non conveniens*. . . . And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated. The Due Process Clause does not forbid a state to protect its citizens from such injustice.¹⁴⁸

There can be no doubt that this question was not before the Court and need not have been decided. But Supreme Court dicta, especially in this area, have proved as efficacious as statements which may properly be classified as holdings. And once again we have involved another element which was previously discussed: the relevance of the right of the plaintiff's state to impose judicial jurisdiction on the defendant, especially where it may be said that the claim arises out of business done within the state by the defendant. The conclusion reached by the Court on this issue, in addition to being dicta, however, was inconsistent with the case of *Minnesota Commercial Men's Association v. Benn*,¹⁴⁹ which the Court purported to distinguish rather than to overrule.¹⁵⁰ In the *Benn* case, on which appellant relied very heavily, the Court had said:

... we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough "to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted."

It also seems sufficiently clear . . . that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. . . .

We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment.¹⁵¹

Two other items in the Black opinion are noteworthy. First is the analogy to the doctrine of *forum non conveniens*. The suggestion that the question of jurisdiction over the person and the question of *forum non conveniens* are the same was one which Judge Learned Hand had also expressed.¹⁵² It would add to the authorities which may provide content for the rule resulting from *International Shoe*, but it hardly would give a sufficiently fixed contour for guidance of future actions, especially since that amorphous doctrine differs from jurisdiction to jurisdiction. More than this, however, it contains the seeds of a proposition that federal courts' in personam jurisdiction may be far more

¹⁴⁸ 339 U.S. 643, 648-49 (1950).

¹⁵⁰ See 339 U.S. 643, 647 (1950).

¹⁴⁹ 261 U.S. 140 (1923).

¹⁵¹ 261 U.S. 140, 145 (1923).

¹⁵² See *Kilpatrick v. Texas and P. Ry.*, 166 F.2d 788, 791 (C.A.2d, 1948).

extensive than that of state courts, a proposition which will have to be examined at some other time.¹⁵³ The other matter of note is the implication that one of the factors to be taken into consideration is the relative economic abilities of the defendant and plaintiff to underwrite the costs of the lawsuit, probably in terms of the class to which each belongs rather than his individual capacities.

The majority opinion went on to hold that the service by mail was adequate notice, as previously indicated by the *International Shoe* case. And it foreclosed consideration of what powers the State of Virginia might have in the event that the cease and desist order were not obeyed by the Association.

Mr. Justice Douglas' concurring opinion, despite the fact that he also joined the majority opinion, shows a more careful approach to and analysis of the problem presented by the immediate issues of the case. He carefully drew the line between legislative jurisdiction and judicial jurisdiction. Of the former he said:

The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to appellant. I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate. . . . It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process. What is necessary to sustain a tax or to maintain a suit by a creditor . . . is not in my view determinative when the state seeks to regulate solicitation within its borders.¹⁵⁴

He went on to say that the judicial power of the state may properly be used to enforce its legislative powers:

The requirements of due process may demand more or less minimal contacts than are present here, depending upon what the pinch of the decision is or what it requires of the foreign corporation. . . . Where the corporate project entails the use of one or more people in the state for the solicitation of business, in my view it does no violence to the traditional concept of due process to allow the state to provide protective measures governing that solicitation. That is all that is done here.

I cannot agree that this appeal is premature. Virginia has placed an injunction on appellants, an injunction which may have numerous consequences, e.g., contempt proceedings. There is an existing controversy—real and vital to appellants.¹⁵⁵

Were it not for the last paragraph, it might be inferred that Mr. Justice Douglas was suggesting that administrative jurisdiction might be broader than judicial jurisdiction. But the recognition of the judicial nature of the controversy in the case necessarily rejected such a notion.

¹⁵³ The Supreme Court has never resolved the question whether personal jurisdiction in federal courts is a matter governed by Erie principles. See *Riverbank Laboratories v. Hardwood Products*, 350 U.S. 1003 (1956).

¹⁵⁴ 339 U.S. 643, 652-53 (1950).

¹⁵⁵ *Id.*, at 654-55.

The Court being so closely divided, the minority interpretation of the *International Shoe* doctrine is necessarily important for future litigation. Although two members of the minority rested on the Corporation Commission's statement that nothing more was involved here than the power of the state to publicize Traveler's default,¹⁵⁶ and therefore would have held that no judicial issue was presented for decision,¹⁵⁷ all four were in agreement that judicial jurisdiction did not exist in this case. They, too, drew a careful line between legislative jurisdiction and judicial jurisdiction, and apparently were unwilling to draw the conclusion that the existence of the former was sufficient to establish the latter.¹⁵⁸ Nor were they willing to accept the proposition that extraterritorial service alone was sufficient notice to a nonresident defendant.¹⁵⁹ On the issue of judicial power, Mr. Justice Minton, speaking for the entire minority said:

An in personam judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia. *Pennoyer v. Neff*. . . .

Service by registered mail is said by the majority to be sufficient where the corporation has "minimum contacts" with the state of the forum. How many "contacts" a corporation or person must have before being subjected to suit we are not informed. Here all of appellants' contacts with the residents of Virginia were by mail. No agent of appellant corporation has entered the State, nor has the individual appellant. The contracts were made wholly in Nebraska. Under these circumstances, I would hold that appellants were never "present" in Virginia.

"For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *International Shoe Co. v. Washington*. . . .

As I understand the *International Shoe Co.* Case, the minimum contacts . . . must be "activities of the corporation's agents within the State." There were such contacts by agents within the State in that case. . . .¹⁶⁰

The *Traveler's Health* case did little to make specific the criteria necessary to make of *International Shoe* a doctrine which might be applied with some certainty by other courts in the American judicial system. It clearly indicated, however, that the new doctrine would be a broader base for sustaining judicial jurisdiction than had the older doctrines of "presence" and "implied consent."

IV. *Perkins v. Benguet Consolidated Mining Co.*

The third in the series of important recent Supreme Court decisions involving personal jurisdiction of state courts over nonresident defendants was *Perkins v. Benguet Consolidated Mining Co.*¹⁶¹ Once again the issue proved

¹⁵⁶ See discussion at 594 *supra*.

¹⁵⁷ But cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

¹⁵⁸ 339 U.S. 643, 659 (1950).

¹⁵⁹ *Id.*, at 658-59.

¹⁵⁹ *Ibid.*

¹⁶¹ 342 U.S. 437 (1952).

a troublesome one. Only six members of the Court were represented by the majority opinion written by Mr. Justice Burton. Mr. Justice Black concurred in the result, which may be read as an objection to some of the language included by the Court in its opinion or to the failure of the opinion to take any notice whatsoever of the arguments in the *Traveler's Health* case. Mr. Justice Minton wrote a dissent, in which he was joined by Mr. Chief Justice Vinson, on the ground that the Supreme Court lacked jurisdiction to entertain the case on the merits.

The *Benguet* case was one of a series of lawsuits which had plagued the courts of many jurisdictions, some so distantly separated as Manila and New York City.¹⁶² The plaintiff was a resident of and presumably a citizen of Connecticut.¹⁶³ The defendant was a "sociedad anonima" of the Philippines, which was treated for the purposes of the decision as a corporation created under the laws of that country. The suit was brought in Ohio. Plaintiff's claim was that as a shareholder of the corporation she had been wrongfully denied cash dividends and stock dividends of a value approximating 2.6 million dollars. Although the facts about the operations of the corporation in the state of Ohio were disputed,¹⁶⁴ both the Supreme Court and the Ohio courts relied on the following as a basis for their decisions:

The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During the interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president

¹⁶² See *Perkins v. Perkins*, 57 Phil. 205 (1932); *Perkins v. Guaranty Trust Co.*, 274 N.Y. 250, 8 N.E.2d 849 (1937); *Perkins v. Benguet Consolidated Mining Co.*, 55 Cal.App.2d 720 132 P.2d 70 (1942); see also Seavey, *Res Judicata with Reference to Persons Neither Parties nor Privies*—Two California Cases, 57 Harv. L. Rev. 98 (1943).

¹⁶³ Brief for Petitioner at 9, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

¹⁶⁴ Brief for Respondent for Rehearing at 3-7, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

and general manager, both during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons.¹⁶⁵

As indicated, service of process on the corporation was made in Ohio by service on its president and general manager.

The defendant appeared specially in the Ohio Court of Common Pleas, where the action was initiated, to quash service of summons. The motion was granted:

... on the grounds that (1) defendant is a foreign corporation and, therefore, cannot be served with summons in accordance with the provisions of the Ohio statutes with reference to service on a partnership, and (2) the business done by the defendant in Ohio was insufficient to legally authorize service of process upon defendant in Ohio.¹⁶⁶

The orders of dismissal were affirmed by the Ohio Court of Appeals¹⁶⁷ which was in turn affirmed by the Supreme Court of that state.¹⁶⁸

At the threshold of this case, as in *Traveler's Health*, it became necessary for the Supreme Court of the United States to resolve a question of its own jurisdiction, for the decision of the Ohio Supreme Court was in the form of syllabi, none of which purported to rest decision on the Fourteenth Amendment. If the decision of the Ohio court rested on adequate, independent state grounds, there was no basis for the jurisdiction of the United States Supreme Court.¹⁶⁹ Ordinarily, where it appears that the state court judgment might have rested on an adequate state ground, the Supreme Court has refused to review the case.¹⁷⁰ Occasionally, under such circumstances, the Supreme Court had remanded or continued the case in order to obtain from the state court a clarification of its basis for decision.¹⁷¹ In the instant case, the Court, over

¹⁶⁵ 342 U.S. 437, 447-48 (1952). ¹⁶⁶ 155 Ohio St. 116, 118, 98 N.E.2d 33, 35 (1951).

¹⁶⁷ 88 Ohio App. 118, 95 N.E.2d 3 (1950).

¹⁶⁸ 155 Ohio St. 116, 98 N.E.2d 33 (1951).

¹⁶⁹ *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

¹⁷⁰ See *Klinger v. Missouri*, 13 Wall. (U.S.) 257, 267 (1871); *Johnson v. Risk*, 137 U.S. 300, 307 (1890); *Allen v. Arguimbau*, 198 U.S. 149, 154-55 (1905); *Adams v. Russell*, 229 U.S. 353, 358-62 (1913); *Cuyahoga Power Co. v. Northern Realty Co.*, 244 U.S. 300, 303-304 (1917); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Woolsey v. Best*, 299 U.S. 1 (1936); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 2 (1940); *White v. Ragen*, 324 U.S. 760, 765-67 (1945); *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Hedgebeth v. North Carolina*, 334 U.S. 806 (1948).

¹⁷¹ See *Loftus v. Illinois*, 334 U.S. 804 (1948); *Young v. Ragen*, 337 U.S. 235 (1949); cf. *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Parker v. Los Angeles*, 338 U.S. 327, 322-33 (1949); See also Wolfson and Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111 (1949).

Even when a certificate is secured, the result may be an unhappy one unless it reveals an

the dissents of Vinson and Minton, chose to violate its position on rendering decisions which might be purely advisory:

The only opinion accompanying the syllabus of the court below places the concurrence of its author unequivocally upon the ground that the Due Process Clause of the Fourteenth Amendment *prohibits* the Ohio courts from exercising jurisdiction over the respondent corporation in this proceeding. That opinion is an official part of the report of the case. The report, however, does not disclose to what extent, if any, the other members of the court may have shared the view expressed in that opinion. Accordingly, for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.¹⁷²

It was undoubtedly true that Mr. Justice Taft of the Ohio Supreme Court rested his opinion on an interpretation of *International Shoe* which was patently erroneous.¹⁷³ He believed that *International Shoe* had held *Tauza v. Susquehanna Coal Co.* to be error in allowing in personam jurisdiction to attach where the cause of action did not arise out of the business done by the defendant corporation within the state. But there was no indication that any of the other six justices of that court agreed with this conclusion.

The opinion of the Supreme Court in the *Benguet* case may reflect nothing more than a specific approval of the *Tauza* rule:

. . . if the . . . corporation carries on . . . continuous and systematic corporate activities as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings *in personam* in that state, at least insofar as the proceedings *in personam* seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state.

The instant case takes us one step further to a proceeding *in personam* to enforce a cause of action not arising out of the corporation's activities in the state of the forum. Using the tests mentioned above we find no requirement of federal due process that either *prohibits* Ohio from opening its courts to the cause of action here presented or *compels* Ohio to do so. This conforms to the realistic reasoning in *International Shoe*. . . .¹⁷⁴

unambiguous resolution of a federal question as an indispensable ingredient of the state court's judgment. For the futility of the Supreme Court's judgment in *Covey v. Somers*, 351 U.S. 141 (1956), which was properly disregarded by the New York Court of Appeals, see 2 N.Y.2d 250, 140 N.E.2d 277 (1957), review denied 354 U.S. 916, 919 (1957).

¹⁷² 342 U.S. 437, 443 (1952).

¹⁷³ Ohio St. 116, 120, 98 N.E.2d 33, 35, (1951). On remand, after judgment, it was Mr. Justice Taft who alone of that court wanted to hold that it was state law which had called for the result. 158 Ohio St. 145, 107 N.E.2d 203 (1952).

¹⁷⁴ 342 U.S. 437, 445-46 (1952).

The necessity for stating that due process did not compel the Ohio courts to take jurisdiction was in response to an argument of petitioner, who urged discrimination as a ground for reversal an argument which might have rested better on the Equal Protection Clause.

By way of dictum, a form of indulgence which seems to be practiced by the Court with uncommon regularity in cases involving questions of in personam jurisdiction, the opinion suggested that the mere presence of a corporate official within the state on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and if service were made on him within the state.¹⁷⁵

Two other factors were present in this case which might well have called forth comment from the Court. In the *Traveler's* case, Mr. Justice Black had hinted that the possibility of suit by way of a quasi-in-rem action within the state, because of the existence there of property of the defendant, tangible or intangible, would suffice as a basis for asserting in personam jurisdiction.¹⁷⁶ Such a position would directly overrule the holding in *Pennoyer v. Neff*¹⁷⁷ and, aside from the Black dictum, there is no reason to suppose that the Court is yet prepared to take such a step. The other factor is one suggested but not elucidated by petitioner's brief: whether an alternative forum existed for the assertion of the plaintiff's claim. It has already been suggested that the absence of another appropriate forum is a proper factor to consider, at least in terms of a state's own action under its legislative jurisdiction. It would have been starkly presented here if the Philippines had been still occupied by enemy forces at the time the action was instituted, for in that event there might be no other forum available to plaintiff. Since the Philippine courts were open, however, the petitioner's suggestion was rather that because the Philippine Court was a foreign tribunal, there was an absence of an adequate alternative forum.¹⁷⁸ Strangely enough this suggestion, which properly derives from the doctrine of forum non conveniens,¹⁷⁹ was offered by the petitioner as an argument for the proposition that the Ohio courts should be prevented from elevating the doctrine of forum non conveniens to a constitutional status. Again, however, it points up the possibility, already suggested,¹⁸⁰ of a close identity of the *International Shoe* doctrine with the doctrine of forum non conveniens.

¹⁷⁵ Id., at 444-45.

¹⁷⁶ 339 U.S. 643, 649 (1950).

¹⁷⁷ See discussion at 570-73 supra. But cf. *Atkinson v. Superior Court*, 49 Cal.2d 339, 316 P.2d 960 (1958).

¹⁷⁸ Brief for Petitioner at 14, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

¹⁷⁹ See *Dismissal of Suits Brought by a United States Citizen Where Alternative Forum Is Abroad*, 25 U. of Chi. L. Rev. 377 (1958); *Forum Non Conveniens—Trial Court's Discretion Limited Where Forum Non Conveniens Would Force American Plaintiff to Sue in Foreign Courts*, 103 U. of Pa. L. Rev. 830 (1955).

¹⁸⁰ See discussion at 596 supra.

In the 1952 Term, a case came to the Court, not from a state court, but from the Court of Appeals for the Fifth Circuit, in which the majority of the Court refused to deal with any issue of in personam jurisdiction, over the vehement dissent of Mr. Justice Black, speaking for himself and for Mr. Justice Jackson. In *Polizzi v. Cowles Magazines, Inc.*,¹⁸¹ the petitioner had sued the respondent in a state court of Florida for an alleged libel. The plaintiff lived in Florida. The defendant was an Iowa corporation. The allegedly libelous materials appeared in *Look* magazine, a publication with wide national circulation, including Florida. The defendant maintained no offices in Florida. It sold its magazines to two wholesalers for distribution throughout the state. (Presumably, it delivered magazines by mail to its subscribers in Florida.) The only employees of the defendant who entered the state were two "circulation roadmen" whose job it was to visit retail outlets to encourage and check on retail sales. These men worked a multi-state area which included Florida.

The defendant corporation removed the action to the federal district court on the ground of diversity of citizenship. After the removal, service of process was made on one of the "circulation roadmen." In the state action, service had been made on an agent of one of the distributors. In the federal court, the defendant "moved the court 'to dismiss this action or in lieu thereof to quash the return of purported or attempted service of the additional summons. . . .'"¹⁸²

Although the section patently deals with matters of venue,¹⁸³ the district court "dismissed the action on the ground that it did 'not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code' because Respondent 'was not, at the time of the service of the summons doing business in [the Southern District of Florida].'" The Fifth Circuit affirmed on the same ground.¹⁸⁴ Mr. Justice Minton, writing for himself, Mr. Chief Justice Vinson and Justices Reed and Clark, a majority of the Court,¹⁸⁵ held that in an action removed to the federal court from the state court, the governing venue provisions were contained in Section 1441 (a)¹⁸⁶ and not in Section

¹⁸¹ 345 U.S. 663 (1953).

¹⁸² *Id.*, at 664.

¹⁸³ 62 Stat. 935, 28 U.S.C.A. § 1391(c) (1948): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

¹⁸⁴ 197 F.2d 74 (C.A.5th, 1952).

¹⁸⁵ Justices Frankfurter and Douglas did not participate. 345 U.S. 663, 667 (1953).

¹⁸⁶ "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 62 Stat. 937, 28 U.S.C.A. § 1441(a) (1948).

1391 (a). For that reason, venue was proper and the courts below had erred in dismissing the action under Section 1391 (c). The Court refused to pass on the question of personal jurisdiction, saying that it had not been decided by the two lower courts and had been specifically renounced as an issue by both petitioner and respondent.¹⁸⁷ It remanded the case to the district court for a determination of the question whether that court had acquired jurisdiction over the defendant "by proper service."¹⁸⁸

On the majority's construction of respondent's motion in the trial court, no question of personal jurisdiction need have been litigated on the remand. The defendant having moved—according to the majority's construction—for dismissal for improper venue and to quash service of the summons, defendant was precluded from thereafter raising the issue of in personam jurisdiction.¹⁸⁹ The question which was remanded to the trial court was rather whether the person served by plaintiff was such an agent as would be likely to inform the defendant of the service. That is, the question was one of adequacy of notice and not one of jurisdiction over the person. The distinction had been carefully drawn by Mr. Chief Justice Stone in the *International Shoe* case.

Mr. Justice Black read the record very differently. First, he assumed that the issue of in personam jurisdiction over the defendant was raised by the defendant's motion in the trial court and resolved by the two lower federal courts adversely to the plaintiff. Second, he assumed that the issue of in personam jurisdiction—in terms of "doing business"—would be open on the remand of the case to the trial court. He indicated quite clearly that he was prepared to resolve the question of in personam jurisdiction in favor of the plaintiff. And he did so in rather strident terms. He had, by this time, apparently become enamored of the *International Shoe* doctrines which he had originally rejected so forcefully: "Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness, unless, as seems possible, this case represents a throwback to what I consider less enlightened practices."¹⁹⁰ Then, merging the questions of adequacy of service with the question of jurisdiction over the person, he found it "ludicrous" that any such question should be considered after three years of litigation.

The more interesting portion of his opinion, however, is concerned not with the in personam jurisdiction of state courts but rather with that of the federal courts. It contains the suggestion, similar to that which he had put forth in *Traveler's Health*, that the new federal forum non conveniens statute¹⁹¹

¹⁸⁷ 345 U.S. 663, 667 n. 3 (1953).

¹⁸⁸ *Id.*, at 667.

¹⁸⁹ See Rule 12(h) of the Federal Rules of Civil Procedure; 2 Moore's Federal Practice ¶ 12.23 (2d ed., 1948). Rule 12(b) carefully distinguishes between improper service and want of personal jurisdiction as a basis for a motion to dismiss.

¹⁹⁰ 345 U.S. 663, 670 (1953).

¹⁹¹ 62 Stat. 937, 28 U.S.C.A. § 1404(a) (1948): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other

resolved all problems of this sort for federal courts. Since the defendant had not denied that it could be sued in some court, the case should be remanded to the federal district court "unless Cowles can show that court that it would be in the interest of justice to try the case in another district."¹⁹² The failure of the Court so to use the new statute was labelled by Black as a refusal "to discard old outdated concepts for the new rule of convenience and fairness."¹⁹³ The interesting content of this suggestion is threefold: first there is the previously suggested analogue between the standards of *forum non conveniens* and those of the Due Process Clause for personal jurisdiction; second is the rejection of the notion that the jurisdiction of the district court in removal actions is derivative and thus dependent upon the jurisdiction of the state court; and third that a federal district court's in personam jurisdiction is nationwide, since any defect could be cured by transfer to the appropriate district.¹⁹⁴ There is no suggestion in other Supreme Court opinions that so radical a change is likely to come about. There is certainly nothing in the legislative history of Section 1404 (a) to suggest that it was intended to accomplish so broad a revision of in personam jurisdiction.¹⁹⁵ Indeed, there is nothing in that history to suggest that it intended any changes whatsoever in matters of in personam jurisdiction.

Mr. Justice Burton wrote a short, calm opinion reaching the same conclusion as Mr. Justice Black, that the majority should have ruled on the question of in personam jurisdiction. But unlike Black he found in the majority's opinion no animadversions on the *International Shoe* rule or any

district or division where it might have been brought." Cf. § 1406(a): "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

"There are grounds for suggesting that the section should not be applied to cases removed from state courts. See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 934-35 (1947). But cf. *Ex parte Collett*, 337 U.S. 55 (1949); *White v. Thompson*, 80 F.Supp. 411 (N.D. Ill., 1948); *Rhodes v. Barnett*, 117 F.Supp. 312 (S.D.N.Y., 1953); *Chicago, R.I. & P. Ry. Co. v. Igou*, 212 F.2d 378 (C.A.7th, 1954)." Currie, *Change of Venue and the Conflict of Laws*, 22 U. of Chi. L. Rev. 405, 408 n. 14 (1955).

¹⁹² 345 U.S. 663, 671 (1953).

¹⁹³ *Ibid.*

¹⁹⁴ Prior to 1948, Mr. Justice Jackson, who joined Black's opinion, had stated, on behalf of the Court, that requirements of jurisdiction and venue must be met before any question of choice of forum under *forum non conveniens* could be put. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). And Judge Learned Hand, who had earlier suggested the similarity of tests for *forum non conveniens* and in personam jurisdiction did not think it followed that § 404(a) created nationwide jurisdiction in federal courts, which would be the result of the view expressed by Black in *Polizzi*. See *Foster-Milburn Co. v. Knight*, 181 F.2d 949 (C.A.2d, 1950).

¹⁹⁵ See Currie, *op. cit. supra* note 191, at 416-38. The exacerbation of the problem dealt with by Professor Currie in his admirable article, were the changes implicit in Black's suggestion to take place, is awesome.

suggestion that the case could not be tried in the district court for want of in personam jurisdiction.

V. *McGee v. International Life Insurance Co.*

The fourth Supreme Court case in this series was the first of two decided during the 1957 Term of Court: *McGee v. International Life Insurance Co.*¹⁹⁶ Like the cases on in personam jurisdiction which immediately preceded it, the case presented the Court with a serious question of its own jurisdiction. The Court overcame that difficulty this time, however, by ignoring it and was able to produce an opinion in which all the participating members of the Court could join.¹⁹⁷

The facts were not in contest. In April, 1944, the petitioner's son, Franklin, took out an insurance policy on his life with the Empire Mutual Insurance Company, described by the Court as an Arizona corporation. The policy called for payment of \$5,000 in the event of the accidental death of the insured and for specified benefits for loss of time during illness.¹⁹⁸ It also provided specifically that no payments would be made in the event of death by suicide.¹⁹⁹ Premiums were to be paid at the rate of one dollar per month.²⁰⁰ The policy also provided that it should be deemed to have been made in Phoenix and that any liability thereon should be deemed to arise there.²⁰¹ In 1948, the respondent, a Texas corporation, undertook to assume Empire Mutual's insurance obligations and issued a reinsurance certificate by mail to Franklin in California after he acquiesced in the substitution. The new agreement called for the same terms as its predecessor, except that Austin, Texas was substituted for Phoenix, Arizona as the place of "making" and the place where liability should be deemed to arise.²⁰² Thereafter, respondent mailed premium notices to Franklin in California who, in turn, mailed his premium payments to respondent in Texas. Franklin died in 1950. Petitioner, the beneficiary under the policy, presented her claim by mail. It was rejected on the ground that death had occurred by suicide.²⁰³

Petitioner then filed suit in California and made service on respondent only by mail, in accordance with the California Unauthorized Insurers Process Act.²⁰⁴ The respondent did not appear and a default judgment was entered against it.²⁰⁵ Unable to execute on the judgment in California, however,

¹⁹⁶ 355 U.S. 220 (1957).

¹⁹⁷ The Chief Justice had recused himself. *Id.*, at 224.

¹⁹⁸ Transcript of Record at 21-36, *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

¹⁹⁹ *Id.*, at 30.

²⁰⁰ *Id.*, at 21-36.

²⁰¹ *Id.*, at 35.

²⁰² *Id.*, at 33.

²⁰³ *Id.*, at 17.

²⁰⁴ 1 Cal. Insurance Code (Deering, 1950) §§ 1610-20.

²⁰⁵ Transcript of Record at 18-20, 50-52, *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

petitioner brought suit on the judgment in Texas. Both the trial court and the Texas Court of Civil Appeals denied relief on the ground that the California judgment violated the Due Process Clause.²⁰⁶

Mr. Justice Black wrote the opinion for the Court. At the outset he stated: "It is not controverted that if the California court properly exercised jurisdiction over respondent the Texas courts erred in refusing to give its judgment full faith and credit."²⁰⁷ Indeed, it was not controverted, for the ample reason that no issue of full faith and credit had been raised by the petition for certiorari or in petitioner's brief on the merits or, so far as the record reveals, in the Texas courts. Nor was there any indication whatsoever in the opinion of the Texas court that it passed on any such question. Thus, no federal ground for enforcement of the California judgment was in issue and in its absence the Supreme Court of the United States lacked jurisdiction to entertain the case.²⁰⁸

Ignoring the jurisdictional defect, the Court acknowledged "that neither Empire Mutual nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited nor done any insurance business in California apart from the policy involved here."²⁰⁹ Thus, the connection of the law suit with California was more tenuous than in any case in which the Supreme Court had ever sustained jurisdiction over an absent defendant. In the opinion, Mr. Justice Black once again reverted to the language of *International Shoe* which he had at first considered anathema. And he found that jurisdiction properly attached in the California court.²¹⁰ He placed specific emphasis on the propriety of jurisdiction where the defendant is called on "to defend himself in a State where he engaged in economic activity,"²¹¹ apparently however slight that engagement might be:

It is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State. . . . The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.²¹²

He also reverted to the proposition that an insured was not in a position to bear the cost of litigation away from home so well as the insurer and to the fact that the evidence necessary to the resolution of the contest was to be found in California. The latter must be weighed more heavily than the former since, under the circumstances of a case such as this, the insured or beneficiary will

²⁰⁶ 288 S.W.2d 579 (Tex.Civ.App., 1956).

²⁰⁷ 355 U.S. 220, 221 (1957).

²⁰⁸ 62 Stat. 929, 28 U.S.C.A. § 1257(3) (1948). See text and cases cited at note 170 supra; *Cox v. Texas*, 202 U.S. 446, 451 (1906); but cf. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

²⁰⁹ 355 U.S. 220, 222 (1957).

²¹⁰ Ibid.

²¹¹ Id., at 223.

²¹² Ibid.

be forced, even if he secures a judgment, to take it elsewhere in order to enforce it.

The opinion does not suggest that California was an appropriate forum because in part the subject of the insurance policy was located there and was given the protection that California laws and facilities afforded. If the citation of *Zacharakis v. Bunker Hill Mutual Ins. Co.*²¹³ by the Court was meant as an indication of approval, however, the presence of the subject of the insurance within the state was not a necessary factor. There suit had been brought in New York pursuant to a statute similar to the one involved in the *McGee* case. The insurance was secured by an agent of the insured by a telephone call to the defendant insurance company in Philadelphia. The subject of the insurance was property located in New Hampshire. The insured, however, lived in New York, the policy was mailed to New York from Philadelphia, and premiums were mailed from New York to Philadelphia. These factors, said the New York court, partially in reliance on *Traveler's Health*, were sufficient ties with New York to warrant the exercise of jurisdiction there over the Pennsylvania corporation in a suit on the policy.

If it did nothing more, *McGee* disposed finally of the *Benn* case,²¹⁴ which had been cited with approval in *International Shoe*,²¹⁵ and distinguished in *Traveler's Health*.²¹⁶ Although relied upon by the respondent in *McGee*, it went to its death unnoticed in the Court's opinion. Equally irrelevant, so far as the Court was concerned, were the terms of the contract specifying the "place" of the "making" and "liability."

The importance of the commercial element noted in the opinion is underlined by a decision of the Court at the previous Term which also had been written by Mr. Justice Black. In *Vanderbilt v. Vanderbilt*,²¹⁷ the Court was asked to decide whether Nevada, which had jurisdiction over the husband who was domiciled there, could render a judgment binding on the wife who had been served in New York, which judgment would foreclose her rights to alimony. There was no question but that under the decisions of the Court, the wife's relation to the State of Nevada was adequate under the circumstances to warrant the Nevada court's power to end the marital status of the parties. Nonetheless, the Court held Nevada without authority to enter a personal judgment against the wife foreclosing her claims for support:

It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the

²¹³ 281 App.Div. 487 120 N.Y.S.2d 418 (1st Dept., 1953), cited at 355 U.S. 223 n. 2; cf. *Schutt v. Commercial Travelers Mutual Accident Ass'n*, 229 F.2d 158 (C.A.2d, 1956).

²¹⁴ *Minnesota Commercial Men's Ass'n v. Benn*, 261 U.S. 140 (1923).

²¹⁵ 326 U.S. 310, 319 (1945). ²¹⁶ See discussion at 596 *supra*. ²¹⁷ 354 U.S. 416 (1957).

divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void. . . .²¹⁸

There is no discussion of why the wife was not subject to the jurisdiction of the Nevada court under the circumstances. It is true that the result in this case is perfectly consistent with earlier decisions of the Court.²¹⁹ But no reason is offered why the rigid doctrines of *Pennoyer* have been modified in all other areas by *International Shoe* but not in this one.²²⁰ It is indeed difficult to distinguish *McGee* from *Vanderbilt*, in terms of the defendant's connection with the forum, except on the ground that International Life's relationships with California grew out of its "economic activity." A second possibility exists, that the expansion of the jurisdiction of the state courts is to be limited to cases in which the defendant is a foreign corporation. But this would seem to be rebutted by Mr. Justice Black's own language in *McGee*: "Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."²²¹ To say that the commercial element is an important one is not, of course, to

²¹⁸ *Id.*, at 418-19.

²¹⁹ "Possibly the most flagrant misapplication that the term in rem has ever received is in matrimonial actions. . . . To sustain the constitutional power to grant relief on constructive service against non-residents, the courts found a res in the marital status or marital relation and then proceeded to give it a situs at the marital domicile. There is no more a res here than between persons to any contract. It is all a fiction. The formula evolved in *Pennoyer v. Neff* is, however, satisfied. The truth is that the courts saw the necessity, if divorce laws were to be carried out in any measure, of permitting divorces to be obtained in that way under certain circumstances. The fictions led to trouble in this class of cases with the result that we have parties married in one state and divorced in another. The difficulty came with the conception of a divisible res after the initial conception of a res. Courts will eventually reach the point of permitting a conclusive adjudication by the courts of the state in which one of the married parties is domiciled although the defendant, a non-resident, is served constructively." Carey, *op. cit.* supra note 36, at 171. Professor Carey was a true prophet with regard to the dissolution of the fiction with reference to divorce; the fiction would seem to have had continued effect so far as alimony is concerned.

²²⁰ Mr. Justice Frankfurter's stinging dissent points out the lack of warrant for suggesting that there was jurisdiction to grant the divorce but no jurisdiction to resolve the issue of alimony between the parties. "No explanation is vouchsafed why the dissolution of the marital relation is not so 'personal' as to require personal jurisdiction over an absent spouse, while the denial of alimony incident thereto is. Calling alimony a 'personal claim or obligation' solves nothing. I note this concern for 'property rights,' but I fail to see why the marital relation would not be worthy of equal protection, also as a 'personal claim or obligation.' It may not be translatable into dollars and cents, but that does not make it less valuable to the parties. It cannot be assumed, by judicial notice as it were, that absent spouses value their alimony rights more highly than their marital rights. Factually, therefore, both situations involve the adjudication of valuable rights of an absent spouse, and I see no reason to split the cause of action and hold that a domiciliary State can *ex parte* terminate the marital relation, but cannot *ex parte* deny alimony. . . ." *Id.*, at 424. See also the dissents of Mr. Justice Harlan, *id.*, at 428 et seq., and Judge Fuld, in the New York Court of Appeals, 1 N.Y.2d 342, 353, 135 N.E.2d 553, 559 (1956).

²²¹ 355 U.S. 220, 222 (1957).

suggest that it is a *sine qua non* to a state's jurisdiction over nonresident defendants, as the nonresident motorist statutes, from which the new doctrine springs, clearly demonstrate.

The Court quickly disposed of the only other issue in the *McGee* case. The fact that the statute was not applicable until after the contract between Franklin and the insurance company had been consummated did not bar its application in this case: "The statute was remedial, in the first sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent."²²²

From *International Shoe* to *International Life*, the Supreme Court had evolved a doctrine of non-interference with the exercise of jurisdiction over non-resident defendants by state courts. By use of the "fairness" test, suggested by Mr. Chief Justice Stone in derivation from Judge Learned Hand, the Court had made the question of the propriety of such personal jurisdiction a matter of fact which, for all practical purposes, was not reviewable in the Supreme Court. With the exception of the single area of alimony decrees, no limitation on state action of this form had been derived from the Due Process Clause during that time. But in the very Term in which *International Life* was decided the Court rendered another decision which, unless it proves to be a sport, forebodes some change in the Court's approach to these problems.

VI. *Hanson v. Denckla*²²³

The unusual unanimity displayed in the *International Life* case proved to be illusory. *Hanson v. Denckla*²²⁴ and *Lewis v. Hanson*²²⁵ were written by the Chief Justice for a bare majority of five. Mr. Justice Black, the author of the *International Life* opinion, dissented on behalf of himself and Justices Burton and Brennan. Mr. Justice Douglas offered a dissent of his own.

The facts, though not in dispute, were complicated, not the less for the reason that the contest was conducted in two separate states at the same time, arriving at the Supreme Court by different routes: the *Denckla* case came by appeal from the Supreme Court of Florida and the *Lewis* case on certiorari to the Supreme Court of Delaware. The controversy involved a family dispute over the distribution of \$400,000, part of an estate left by the testatrix-settlor, Dora Browning Donner.

In 1935, Mrs. Donner, then a domiciliary of Pennsylvania, purported to create a trust for which the Wilmington Trust Company, a Delaware corporation, was named trustee. Mrs. Donner reserved a life estate in herself and retained the power to appoint the remainder, either by testamentary disposition or by inter vivos instrument. She also retained the right to alter, amend, or

²²² *Id.*, at 224. Cf. *Nelson v. Miller*, 11 Ill.2d 378, 382-83, 143 N.E.2d 673, 675-76 (1957).

²²³ 357 U.S. 235 (1958).

²²⁴ 357 U.S. 235 (1958).

²²⁵ *Ibid.*

revoke the trust and the right to change the trustee. In addition, the trustee's powers over the trust property were restricted by the requirement that before it could sell or buy securities or engage in certain other specified activities it must first secure the approval of an "advisor" to be appointed by the settlor.

Shortly after executing the trust in 1935, Mrs. Donner exercised her power of appointment. In 1939, the power of appointment was revised. In 1944, she established her domicile in Florida where she remained until her death in 1952. In 1949, while in Florida, she executed a new will and a new power of appointment under the trust. There was no question but that the execution of the power of appointment did not satisfy the formalities necessary for a testamentary disposition under Florida law. The issue presented by the litigation was whether the property should pass pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will. This, in turn, depended upon whether the reservation of powers over the trust assets by the settlor made the trust illusory. In both Florida and Delaware this was considered a question of "first impression."²²⁶ Under the power of appointment, the assets of the trust would pass to two trusts for the benefit of two of Mrs. Donner's grandchildren, Donner Hanson and Joseph Donner Winsor. The trustee of these trusts, which were already in existence, was the Delaware Trust Company, a Delaware corporation. Under the will, the \$400,000 in issue would go to trusts for the benefit of two of Mrs. Donner's daughters, Katherine N. R. Denckla and Dorothy R. B. Stewart.

Upon Mrs. Donner's death in 1952, the Wilmington Trust Company transferred the assets in the 1935 trust to the Delaware Trust Company as trustee for Donner Hanson and Joseph Donner Winsor. Fourteen months after Mrs. Donner's death, Mrs. Denckla and Mrs. Stewart, the latter through her guardian, initiated a proceeding in the Florida courts for a declaratory judgment "to determine the question of what portion of the trust property involved herein passes under the residuary clause of the will of the decedent."²²⁷ The will had been probated in Florida. Elizabeth Donner Hanson, a daughter of Mrs. Donner and mother of Donner Hanson and Joseph Donner Winsor, had been appointed executrix under the will.²²⁸ In the declaratory judgment action, personal juris-

²²⁶ Transcript of Record at 187, *Hanson v. Denckla*, 357 U.S. 235 (1958); Transcript of Record at A-244, *Lewis v. Hanson*, 357 U.S. 235 (1958). See note 273 *infra*.

²²⁷ Transcript of Record at 12, *Hanson v. Denckla*, 357 U.S. 235 (1958).

²²⁸ The family relationships are indicated by the following chart, which does not purport to be an accurate reflection of the relative birth dates of the persons named.

diction was secured over Mrs. Hanson, Donner Hanson and Joseph Donner Winsor, and over William Donner Roosevelt and Curtis Winsor, Jr., who were also children of Mrs. Hanson and contingent beneficiaries of the Delaware trusts for their brothers. All of these were domiciliaries of Florida and service was made on them there. Neither the Wilmington Trust Company nor the Delaware Trust Company was served with process in Florida,²²⁹ but a copy of a "Notice to Appear and Defend" together with a copy of the complaint were mailed to each of them, by ordinary mail, and notice was published in a Palm Beach newspaper, pursuant to Florida law.²³⁰ Neither of the trust companies appeared in the Florida litigation or participated in any way.²³¹

Mrs. Hanson and her children, as to whom the Florida court undoubtedly secured personal jurisdiction, moved to dismiss the suit on the ground that the nonresident defendants were indispensable parties over whom the Florida court had failed to secure personal jurisdiction.²³² This, of course, was a question of state law. On this base, the resident defendants also raised a constitutional claim, asserting that an exercise of jurisdiction over the nonresident defendants would be a violation of the Due Process Clause of the Fourteenth Amendment.²³³ They did not suggest that the exercise of such jurisdiction would deprive the resident defendants of any constitutional rights. The Florida chancellor dismissed the action as to the nonresident defendants for want of personal jurisdiction,²³⁴ but retained jurisdiction over the resident defendants.

²²⁹ There were other nonresident defendants who were not served in Florida, but they may be ignored in the consideration of the problems presented to the Court by these cases.

²³⁰ Fla. Stat. Ann. (1957) §§ 48, 48.01, 48.02, set out at 357 U.S. 241 n. 3 (1958).

²³¹ A default judgment was entered against them. Transcript of Record at 41-42, *Hanson v. Denckla*, 357 U.S. 235 (1958). The final order in the trial court dismissed the case as to them. *Id.*, at 110-11. But the default judgment was reinstated by the decision of the Florida Supreme Court. *Id.*, at 181-92.

²³² *Id.*, at 112-19. At this point there was no suggestion that the exercise of jurisdiction over the resident defendants in the absence of indispensable parties contravened the Due Process Clause; indeed, no such contention is to be found in the record at all. The constitutional attack took the form set out in the following footnote.

²³³ "These defendants are informed and believe that the defendants hereto sought to be served by constructive process will not submit themselves to the jurisdiction of this Court by appearing herein. The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section I of the Fourteenth Amendment to the United States Constitution." Motion to dismiss, Transcript of Record at 41, *Hanson v. Denckla* 357 U.S. 235 (1958); see also *id.*, at 53, 127, 195. It is noteworthy that in the resident defendants' petition for rehearing after the trial court had ruled against them on the merits and in their favor on the issue of jurisdiction over the nonresident defendants, the Due Process argument was not offered. See *id.*, at 112.

²³⁴ "As to jurisdiction, the trust assets and the trustees are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over these assets in Delaware or the Trustees. Hence, this court considers that it has jurisdiction over the non-answering defendants." *Id.*, at 110-11.

He held, as to the latter, that the attempted exercise of the power of appointment was a testamentary disposition which did not satisfy the requirements of Florida law.²³⁵ His conclusion, therefore, was that the \$400,000 passed pursuant to the will and should go to the Denckla and Stewart trusts.²³⁶

After the initiation of the Florida proceedings but prior to the decree, Mrs. Hanson and her children initiated a suit in Delaware for a declaratory judgment as to which parties were entitled to the proceeds of the 1935 trust. All the parties to the Florida suit, except Mrs. Denckla and Mrs. Stewart, appeared in the Delaware action.²³⁷ The Florida court then enjoined Mrs. Hanson from proceeding with the Delaware action, but it was carried forward by the other parties. After the Florida decree was entered by the trial court, it was offered as a ground for *res judicata* in Delaware. But the plea was rejected and the Delaware chancellor ruled that the trust was a valid trust under Delaware law and that the power of appointment had been properly exercised to pass the trust assets to the trusts in favor of Mrs. Hanson's children.²³⁸ The prevailing parties in the Florida suit then urged, on a motion for a new trial in Delaware, that the

²³⁵ "It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid *inter vivos* trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition." *Id.*, at 111.

²³⁶ *Ibid.*

²³⁷ Mr. Chief Justice Warren noted the appearance in Delaware of all but Mrs. Denckla. 357 U.S. 235, 242 (1958). But it would seem that the only appearance for Mrs. Stewart was by a guardian ad litem appointed by the Delaware court, without any apparent authority from the guardian in Florida where Mrs. Stewart was domiciled.

²³⁸ *Hanson v. Wilmington Trust Co.*, 119 A.2d 901 (Del.Ch., 1955). The Delaware court in speaking of doctrines of *res judicata* and collateral estoppel raised questions relevant to the problem of full faith and credit, though the issue had not been presented at that point: "The doctrine of *res judicata* is not applicable because the Florida action and this action involve different causes of action." *Id.* at 905. "It is my opinion that it would be contrary to sound public policy for this Court to consider itself bound and divested of its duty to determine the essential validity of a Delaware *inter vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule. I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as to the validity of the Trust. . . . Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It could mean that the parties who were before the Court in the Florida action would be subjected to one conclusion of law while Wilmington Trust Company, Delaware Trust Company and other appointees and beneficiaries, who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercise of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See Restatement of Judgments, § 70 Comment f, 1948 Supp.; Scott 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1, 10." *Id.*, at 907.

Florida decree was entitled to full faith and credit in Delaware. The motion was denied. The executrix, Mrs. Hanson, then moved the Florida Supreme Court for an order remanding the case to the Florida trial court with orders to dismiss the Florida action on the basis of the Delaware judgment. She did not urge that the Florida court was compelled to abide by the Delaware decree under the Full Faith and Credit Clause. The motion was denied.²³⁹

On appeal, the Florida Supreme Court sustained the trial court's determination that the trust was invalid, that the power of appointment was invalid, and that the property passed pursuant to the terms of the will.²⁴⁰ But it reversed the trial court on the jurisdictional issue and held that the Florida courts could properly exercise in personam jurisdiction over the Delaware corporations.²⁴¹ The Full Faith and Credit Clause was raised by Mrs. Hanson for the first time on a petition for rehearing²⁴² which was denied without comment by the Florida Supreme Court.²⁴³

Thereafter, on appeal, the Supreme Court of Delaware sustained the result reached by its trial court and rejected the contention that it was bound to comply with the Florida decree by reason of the Full Faith and Credit Clause.²⁴⁴

²³⁹ Transcript of Record at 192, *Hanson v. Denckla*, 357 U.S. 235 (1958).

²⁴⁰ *Id.*, at 182-86; see note 273 *infra*.

²⁴¹ "We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustees and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher* . . . we upheld constructive service of a citizen of New York, although the trust 'res,' consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident herein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So.2d 488." *Id.*, at 191-92.

²⁴² *Id.*, at 198.

²⁴³ *Id.*, at 204.

²⁴⁴ "The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability." 128 A.2d 819, 831 (Del., 1957). "It is, of course, true that the courts of Florida may adjudicate with respect to a res within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. Restatement, Conflict of Laws, § 429. But a judgment which has the force of a judgment in rem with respect to assets located in

Thus, these inconsistent opinions of the highest courts of two sovereign states of the Union were brought to the Supreme Court of the United States for resolution.

On the appeal from the Florida judgment, the Supreme Court properly refused to consider the question whether Florida had to give full faith and credit to the Delaware judgment, inasmuch as that issue had not been timely raised in the Florida courts.²⁴⁵ The Supreme Court also held that since the appellants had not contended that the Florida jurisdictional statute had been unconstitutionally applied, but only that the Florida courts had improperly exercised in personam jurisdiction, they had failed to raise a question which was a proper subject for an appeal.²⁴⁶ The Court, therefore, dismissed the appeal, but treating the appeal papers as a petition for certiorari, as required by statute, granted certiorari.²⁴⁷ This left but one question for consideration on the Florida appeal: were the nonresident defendants properly subjected to the jurisdiction of the Florida courts? This in turn depended upon whether the resident defend-

Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U.S. 343. . . . To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U.S. 394. . . . The res, over which these parties are contending consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts." *Id.*, at 331-32.

On the question of privity between the trustees and the beneficiaries, the Delaware Supreme Court said: ". . . it is impossible to accept on principle the argument that a judgment against a cestui que trust binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants." *Id.*, at 835.

In discussing the issue of collateral estoppel, the court announced the public policy of Delaware in the following terms: "Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. . . . To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretence of jurisdiction." *Ibid.*

²⁴⁵ See discussion at 614 *supra*. The Court cited *Radio Station WOW v. Johnson*, 236 U.S. 128 (1945), for this proposition. See also *Robertson and Kirkham*, *op. cit. supra* note 103, at § 75.

²⁴⁶ The Court here cited *Wilson v. Cook*, 327 U.S. 474, 482 (1945), and *Charleston Federal Savings and Loan Ass'n. v. Alderson*, 324 U.S. 182 (1945). See also *Robertson and Kirkham*, *op. cit. supra* note 103, at § 11.

²⁴⁷ See *Robertson and Kirkham*, *op. cit. supra* note 103, at § 20.

ants, who were properly the subject of Florida judicial jurisdiction,²⁴⁸ could assert the constitutional defect as to the nonresident defendants who had never appeared or participated in that litigation at all.

The Supreme Court had, theretofore, on numerous occasions held that where Supreme Court review of the decision of a state court was sought, the party seeking review "must show that enforcement of the challenged judgment would deprive it—not another—of some rights arising under the Constitution or laws of the United States."²⁴⁹ In this instance, however, the Court held that the resident defendants had standing to raise the question because if the nonresidents were not subject to the jurisdiction of the Florida courts, there would be, according to Florida law, an absence of indispensable parties, and the action could not go to judgment. The Court thus shifted the test from whether the resident defendants were asserting a constitutional right of their own to whether a holding of want of jurisdiction over other defendants would affect the judgment entered against the resident defendants.²⁵⁰ The suggested test put the Supreme Court in a very difficult position. The judgment of want of jurisdiction over the nonresident defendants would affect the judgment against the resident defendants only if the nonresidents were indispensable parties according to Florida law. The Court undertook to resolve that question of state law for itself.²⁵¹ It decided that the nonresident trustees were indispensable parties under Florida law although the Florida trial court had clearly held to the contrary in the judgment it rendered in this very litigation²⁵² and although the Florida Supreme Court had announced the question as an open one.²⁵³ Mr. Justice Black's suggestion that the case be remanded to the Florida courts for the resolution of this question of state law²⁵⁴ was rejected, though the Supreme

²⁴⁸ "With personal jurisdiction over the executor, legatees and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so." 357 U.S. 235, 254 (1958).

²⁴⁹ *Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Marketing Ass'n*, 276 U.S. 71, 88 (1928); *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900).

²⁵⁰ The Court here relied on *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 235, 245 (1958), where the *Liberty Warehouse* test was not and could not be in issue.

²⁵¹ 357 U.S. 235, 254-55 (1958).

²⁵² See notes 234 and 235 *supra*.

²⁵³ See note 241 *supra*.

²⁵⁴ "Even if it be assumed that the Court is right in its jurisdictional holding, I think its disposition of the two cases is unjustified. It reverses the judgment of the Florida Supreme Court on the ground that the trustee may be, but need not be, an indispensable party to the Florida litigation under Florida law. . . . The Florida judgment is thus completely wiped out even as to those parties who make their homes in that State, and even though the Court acknowledges there is nothing in the Constitution which precludes Florida from entering a binding judgment for or against them. . . . In my judgment the proper thing to do would be to hold the Delaware case until the Florida courts had an opportunity to decide whether the trustee is an indispensable party. Under the circumstances of this case I think it is quite

Court has, in recent years, frequently if not consistently refused to indulge the privilege of telling the state courts what the state law should be, especially where, as here, one construction of the state law leads to the necessity for deciding a constitutional question and another construction would avoid it.²⁵⁵

On the doubtful assumption that the due process question was properly raised, the Court first addressed itself to the question whether the Florida judgment could be sustained on the basis of *in rem* jurisdiction. To put that question, however, was to continue to use a fiction which necessarily hinders rather than helps to formulate an appropriate body of doctrine to guide the courts in determining whether a given forum is an appropriate one for the determination of the legal and factual issues which are presented by a law suit. The nature of the fiction was long ago revealed by Mr. Justice Holmes, among others:

All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence the *res* need not be personified and made a party defendant, as happens with the ship in admiralty; it need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendants are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result, nothing more.²⁵⁶

However true it may be that the situs of property should be a factor in the determination of the appropriate forum for the trial of an action relating to that property, it ought not to be the exclusive factor.²⁵⁷ To speak in terms of *in rem* jurisdiction was a reversion to the concept that a court must have physical power to effectuate its judgment, a concept which contravenes the very principles of the Full Faith and Credit Clause²⁵⁸ and which rejects the notions underlying the broadening of jurisdiction over the person which was reflected in the Supreme Court's decisions from *International Shoe* to *International*

probable that they would say he [sic] is not. See *Trueman Fertilizer Co. v. Allison*, 81 So. 2d 723. I can see no reason why this Court should deprive Florida plaintiffs of their judgment against Florida defendants on the basis of speculation about Florida law which might well turn out to be unwarranted." 357 U.S. 235, 261-62 (1958).

²⁵⁵ "The Court will not 'anticipate a question of constitutional law in advance of the necessity for deciding it. . . . It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. . . ." Brandeis, J., concurring in *Ashwander v. T.V.A.*, 297 U.S. 288, 346-47 (1936). Cf. Jackson, J., concurring in *Herb v. Pitcairn*, 324 U.S. 117, 127-28 (1945). *Herb v. Pitcairn* was purportedly distinguished in the majority opinion, see 357 U.S. 235, 255 (1958).

²⁵⁶ *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 76-77, 55 N.E. 812, 814 (1900).

²⁵⁷ Some of the unfortunate and unnecessary difficulties created by the use of the situs of property as the sole forum competent to deal with litigation relevant to that property have been cogently demonstrated by Professor Currie. See Currie, *op. cit. supra* note 90.

²⁵⁸ See discussion at 585 *supra*.

Life.²⁵⁹ In the *Denckla* case, the Supreme Court said that a court's in rem jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States."²⁶⁰ But it did not suggest any reason why this should be more or less true of in rem jurisdiction than of in personam jurisdiction. In either event the proper test must relate to whether the forum is an appropriate one for resolving the controversy before it, whatever the rubric attached to the law suit. On the ground that there was "nothing in the record . . . sufficient to establish a situs in Florida"²⁶¹ for the trust res, the Court held that there was no in rem jurisdiction in the Florida courts. Strangely enough, however, in discussing whether some other in rem concepts would be available to establish jurisdiction in the Florida courts, the Supreme Court returned to the appropriate question of the relation of the forum to the controversy:

The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of the Florida will. Whatever the efficacy of a so-called "*in rem*" jurisdiction over assets admittedly passing under a local will, a State acquires no *in rem* jurisdiction to adjudicate the validity of *inter vivos* dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicile of the owner is a fiction of limited utility. . . . The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that the probate decree of the State where decedent was domiciled has an *in rem* effect on personalty outside the forum State that could render it conclusive on the interests of nonresidents over whom there was no personal jurisdiction. . . . The fact that the owner is or was domiciled within the forum State is not sufficient affiliation with the property upon which to base jurisdiction *in rem*.²⁶²

In fact, the in rem argument was something of a straw man; it had not been strongly urged by the appellants and neither of the dissenting opinions chose to rest on this dying notion. So far as the Florida probate proceedings were concerned, it was Mr. Justice Black's view that they were relevant factors in deciding the appropriateness of the Florida forum to determine the litigation in question, but he did not purport to accept the thesis that the estate was a res over which the state had power sufficient to affect the interests of nonresident

²⁵⁹ See Mr. Justice Jackson's opinion for the Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 312-13 (1950).

²⁶⁰ 357 U.S. 235, 246 (1958).

²⁶¹ *Id.*, at 247.

²⁶² *Id.*, at 247-49.

defendants.²⁶³ Mr. Justice Douglas' approving reference²⁶⁴ to Mr. Justice Traynor's opinion for the California Supreme Court in *Atkinson v. Superior Court*²⁶⁵ would seem to imply adoption of the result rather than the means of achieving it, which had been by way of an ingenious doctrine of quasi-in-rem jurisdiction.²⁶⁶

On the question of in personam jurisdiction, both the majority and the Black minority expressed concurrence—if with somewhat different emphasis—in the proposition that the states were not authorized to exercise nationwide in personam jurisdiction. The Chief Justice asserted that “it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt*. . . .”²⁶⁷ The author of the *Vanderbilt* opinion, Mr. Justice Black, said: “Of course we have not reached the point where state boundaries are without significance, and I do not mean to suggest such a view here. There is no need to do so.”²⁶⁸

These two groups were united on another point, that jurisdiction over defendants does not flow as a necessary concomitant of jurisdiction to apply local law to the controversy. But again the emphasis was different. The Chief Justice acknowledged that Florida could apply its own law to the question of the validity of the trust on the ground that the execution of the power of appointment took place there. “For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a non-resident defendant.”²⁶⁹ Mr. Justice Black thought the choice of law principles relevant if not controlling on the question of personal jurisdiction: “True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree

²⁶³ “Florida’s interest in the validity of Mrs. Donner’s appointment is made more emphatic by the fact that her will is being administered in that State. It has traditionally been the rule that the State where a person is domiciled at the time of his death is the proper place to determine the validity of his will, to construe its provisions and to marshal and distribute his personal property. Here Florida was seriously concerned with winding up Mrs. Donner’s estate and with finally determining what property was to be distributed under her will. In fact this suit was for that very purpose.” 357 U.S. 235, 259 (1958).

²⁶⁴ 357 U.S. 235, 263–64 (1958).

²⁶⁵ 49 Cal.2d 338, 316 P.2d 960 (1957), cert. denied 357 U.S. (1958). The *Atkinson* case was pending in the Supreme Court on petition for certiorari and appeal at the time the *Denckla* case was decided. It had been held without decision for a long time. Review was subsequently denied. The case presented serious questions whether the Supreme Court could properly entertain jurisdiction, including questions of mootness and finality.

²⁶⁶ “For the reasons stated above, . . . the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question.” 49 Cal.2d 338, 348, 316 P.2d 960, 966 (1957).

²⁶⁷ 357 U.S. 235, 251 (1958).

²⁶⁸ *Id.*, at 260.

²⁶⁹ *Id.*, at 253.

depend upon similar considerations."²⁷⁰ Under the circumstances presented by the case, if the issue were characterized as one of the validity of the trust, Delaware law would seem to be the most appropriate law to be applied.²⁷¹ A characterization of the problem as one of the validity of the exercise of the power of appointment would seem to warrant the application of Florida law.²⁷² One of the major differences between the majority and minority derives from the difference in the way each characterizes the problem, with Warren choosing the first and Black the second.²⁷³

These differences in emphasis reveal the essential conflict between the majority and minority in their construction of the "minimal" contacts test which both purport to derive from *International Shoe*. Warren specifically rejects the notion of a parallel between forum non conveniens and the appropriate forum under

²⁷⁰ *Id.*, at 258. See Professor Currie's recent articles on choice of law which would support Black's thesis of the relevance of choice of law criteria to choice of forum criteria. *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *Stanford L. Rev.* 205 (1958); *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 *U. of Chi. L. Rev.* 227 (1958).

²⁷¹ See, e.g., *In re Pratt's Trust*, 5 App.Div.2d 501, 172 N.Y.S.2d 965 (1st Dept., 1958); *National Shawmut Bank of Boston v. Cumming*, 325 Mass. 457, 91 N.E.2d 337 (1950); *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766, 771 (C.A.5th, 1947); *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del.Ch. 397, 24 A.2d 309 (S.Ct., 1942) (this case also involved a Donner family trust); *Rest.*, *Conflict of Laws* §294(2) (1934).

²⁷² See, e.g., *Maynard v. Farmers' Loan & Trust Co.*, 208 App.Div. 112, 203 N.Y.S. 83 (1st Dept., 1924), *aff'd* 238 N.Y. 592, 144 N.E. 905 (1924); Goodrich, *Conflict of Laws* §177 (3d ed., 1949).

²⁷³ Thus, it was Warren's position that "It is the validity of the trust agreement, not the appointment, that is at issue here." 357 U.S. 235, 253. But Black took this position: "In my judgment it is a mistake to decide this case on the assumption that the Florida courts invalidated the trust established in 1935 by Mrs. Donner while she was living in Pennsylvania. It seems quite clear to me that those courts had no such purpose. As I understand it, all they held was that an appointment made in Florida providing for the disposition of part of the trust property made after Mrs. Donners' death was (1) testamentary since she retained complete control over the appointed property until she died, and (2) ineffective because not executed in accordance with the Florida statute of wills." *Id.*, at 256-57, n. 1. Whatever Mr. Justice Black's understanding, the Florida Supreme Court certainly stated that they were passing on the validity of the trust: "The validity of an attempted inter vivos trust such as this is a matter of first impression in this state." No. 170, R. 187. "Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid . . . the cumulative effect of the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory." *Id.*, at 189. "We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning." *Id.*, at 191. Cf. the quotation from Mr. Justice Black's opinion at note 263 *supra*, where he suggests that the place of probate of the will offers a basis for applying Florida law.

Due Process Clause: a state court "does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation."²⁷⁴ and, more fully:

Those restrictions [on in personam jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. . . .²⁷⁵

Thus, for Warren and the majority, the test was whether there were sufficient contacts between the nonresident defendants and Florida to warrant Florida to its exercise of power over him. . . .²⁷⁵

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.²⁷⁶

For Black and his group, on the other hand, the primary test was not the sufficiency of contacts between the nonresident defendant and the state of the forum, but rather the sufficiency of the relationship of the subject of the litigation to the state of the forum, a sort of combination of the principles of choice of law with those of *forum non conveniens*:

It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless the litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice." . . . I can see nothing which approaches that degree of unfairness. Florida . . . was a reasonably convenient forum for all.²⁷⁷

. . . we are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.²⁷⁸

If the Warren test quoted above suggests a greater concern with the federal nature of the nation, and if it is more restrictive of a state's judicial jurisdiction than that urged by Black, it is nonetheless a workable and not unduly confining expression of the limitations of the Due Process Clause. Before stating this test, however, Warren engaged in an unfortunate attempt to distinguish the

²⁷⁴ 357 U.S. 235, 254 (1958). ²⁷⁶ *Id.*, at 253-54.

²⁷⁵ *Id.*, at 260.

²⁷⁷ *Id.*, at 251.

²⁷⁸ *Id.*, at 258-59.

McGee case.²⁷⁹ The distinctions he urged were hardly persuasive²⁸⁰ and the language he used was most unfortunate, for it was a return to the "exceptional" activities notions of *Doherty & Co. v. Goodman*²⁸¹ and *Hess v. Pawloski*,²⁸² both of which he cited as authority for his position.²⁸³ As Mr. Chief Justice Warren once wrote: "In approaching this problem, we cannot turn the clock back. . . ."²⁸⁴ In this very case he acknowledged the existence of the change which had taken place in the evolution from "the rigid rule of *Pennoyer v. Neff* . . . to the flexible standards of *International Shoe*."²⁸⁵ It is possible but not necessary to read the Court's opinion in this case as a return to the standards which Professor Scott condemned forty years ago. It is more likely that it will be read, even by the Court, as a stopping place—whether permanent or temporary—on what had been the road toward nationwide in personam jurisdiction for state courts.

After disposing of the Florida case in this manner, the Delaware case was easy of resolution. "Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment."²⁸⁶ Thus the Court disposed of the only federal question presented by the Delaware certiorari. But the result is one which does not yet put this family battle to a final rest. For if Florida, on the remand of the case, decides that the trustees were not indispensable parties, it could enter judgment against the resident defendants in favor of Mrs. Denckla and Mrs. Stewart. The Supreme Court of the United States did not hold, for it was not properly called upon to hold, that the Delaware decree is entitled to full faith and credit in Florida. Moreover, Mrs. Denckla, and perhaps Mrs. Stewart,²⁸⁷ were not parties to the Delaware litigation and were not subject to the in personam jurisdiction of the Delaware courts, according to the decision in the *Denckla* case. Thus, unless the Delaware decree is to be held binding on

²⁷⁹ *Id.*, at 251-52.

²⁸⁰ The one factual distinction which stands up is the fact that in the *Denckla* case the defendant did "no solicitation of business in that State either in person or by mail." *Ibid.* But the cause of action in *Denckla* arose "out of an act done or transaction consummated in the forum State," *ibid.*, to the same degree as in *McGee*, for the claim in Florida is based on the will. The relationships of the trustee with Florida, by interchange of mail with Mrs. Donner, were even more extensive than the contacts of the insurance company with California in *McGee*. The trustee "chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust, including the very appointment in question." *Id.*, at 259. The fact that California had enacted a special jurisdictional statute for nonresident defendants can hardly effect a difference in the application of the Due Process Clause to the transaction in question. All that the statute could do, so far as the federal issue is concerned, is to give notice to a future litigant of his potential liability to the jurisdiction of the California courts. But in the *McGee* case, the statute was retroactively applied with the approval of the full court. See also, *Allen v. Superior Court*, 41 Cal.2d 306, 259 P.2d 905 (1953); *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957).

²⁸¹ 294 U.S. 623, 627 (1935). ²⁸² 274 U.S. 352 (1927). ²⁸³ 357 U.S. 235, 253 (1958).

²⁸⁴ *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

²⁸⁵ 357 U.S. 235, 251 (1958).

²⁸⁶ *Id.*, at 255.

²⁸⁷ See note 237 *supra*.

Florida on some thesis of in rem jurisdiction,²⁸⁸ the result will be that in Delaware the children of Mrs. Hanson, who are domiciliaries of Florida, will be entitled to the assets of the 1935 trust, but in Florida Mrs. Hanson will be under the compulsion of the Florida courts to turn the assets of the 1935 trust over to Mrs. Denckla and Mrs. Stewart, pursuant to the terms of the will. The Supreme Court of the United States may well be called upon again to attempt to unravel this Gordian knot resulting from the difference of opinions of the Delaware and Florida courts.

VII. CONCLUSION

The cases from *International Shoe* to *Denckla* reveal that although old dogma has been destroyed new doctrine to replace it has not been firmly fashioned. The language of "reasonableness" and "fair play" to which the Court has resorted is rather a statement of a conclusion than a reason. The nationalization of American society has been reflected in the trend toward greater power of the states over defendants who neither owe them "allegiance" nor are subject to their physical power. But *Denckla* and *Vanderbilt* reveal that the concept of territorial limitations on state power is still a vital one.²⁸⁹ The state courts and the lower federal courts are thus left to decide the cases which come before them by the traditional legal reasoning by analogy.²⁹⁰ The Supreme Court opinions have revealed some if not all of the factors which are to be taken into consideration in reaching a conclusion on the issue of in personam jurisdiction. They do not reveal how each factor is to be weighed in combination with the others. It may be that it is not possible to do so and that here as elsewhere in our constitutional law the Supreme Court must depend on the good faith and good judgment of the other courts in the American judicial system. The fact is that, thus far at least, no one outside of the Court has been able to do better. The want of a "synthesis" of the decisions under the Due Process Clause²⁹¹ has not been provided except by those who would read their personal predilections into the Constitution.²⁹² Thus, in this area as in others, the emphasis must continue to be, as Dean Levi has told us, "on the process" by which the result is to be reached:

Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences

²⁸⁸ "Properly speaking such assets are intangibles that have no 'physical' location. But their embodiment in documents treated for most purposes as the assets themselves makes them partake of the nature of tangibles. Cf. *Wheeler v. Sohmer*, 233 U.S. 434, 439." 357 U.S. 235, 247 n. 16 (1958).

²⁸⁹ Cf. *Davies v. British Geon, Ltd.*, [1957] 1 Q.B. 1.

²⁹⁰ See Levi, *An Introduction to Legal Reasoning* (1949).

²⁹¹ See Swisher, *The Supreme Court in Modern Role* (1958).

²⁹² See, e.g., Pritchett, *The Political Offender and the Warren Court* (1958).

or similarities. Social theories and other changes in society will be relevant when the ambiguity has to be resolved for a particular case. Nor can it be said that the result of such a method is too uncertain to compel. The compulsion of the law is clear; the explanation is that the area of doubt is constantly set forth. The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely. The loyalty of the community is directed toward the institution in which it participates. The words change to receive the content which the community gives to them. The effort to find complete agreement before the institution goes to work is meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned. This should be remembered as a world community suffers in the absence of law.²⁹³

²⁹³ Levi, *op. cit.* *supra* note 290, at 73-74.