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THE SHIFTING BASIS OF JURISDICTION

By G. W. C. Ross

"The foundation of jurisdiction is physical power." This statement is supposed to sum up with characteristically succinct accuracy the most orthodox common law tradition. If a state has a given thing or person actually present within its physical power, then its courts have jurisdiction to dispose of that person or thing; conversely, the state's courts have no jurisdiction over any person or thing not thus within its physical power. Put most baldly: If John Doe is in Minnesota, any plaintiff can sue him in Minnesota court on any transitory cause of action and acquire valid jurisdiction; if Doe is not and does not live in this state, no plaintiff can sue him here and get personal judgment by default. Either way, it is immaterial where the plaintiff lives, or is, or where the events occurred, out of which the litigation has grown, or where the necessary witnesses live, or are, or whether to decide the case the Minnesota court will apply its own domestic law or will determine the rights of the parties by the rules of some foreign law. If Doe is in Minnesota, it is immaterial whether he lives here or is only found here, however temporarily.

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1 For a definition and discussion of "jurisdiction" see American Law Institute, Conflict of Laws Restatement, sec. 43. But here the word will be used specially, to mean a state's right to summon a person before its courts as defendant to respond to litigation, and to enter valid default judgment against him if he fails to do so.


3 Characteristic, i.e., of Mr. Justice Holmes.

4 Cf. Pennoyer v. Neff, (1877) 95 U. S. 714, 24 L. Ed. 565. The same idea will be found expressed in many cases cited in footnotes following. Cf. Story, Conflicts, ch. 2.

5 Jurisdiction in rem and quasi in rem are passed over.

or does or has ever done any business here. But if Doe is not in this state, it may be very material whether he lives here or not.

Civil-law jurists approach these problems very differently. To them our idea that jurisdiction depends on the court's ability to catch and hold the defendant physically seems "putting the cart before the horse." To determine whether his court may entertain this litigation between these parties the Continental European judge asks the very questions that we deem negligible and brushes aside the facts that we hold crucial. A French court in such case inquiries: Who are these parties,—Frenchmen or foreigners? By the rules of what law should their rights be determined,—French law or some foreign law? What is the nature of the case,—where did the facts transpire, on which it rests? Finding the dispute to be between Frenchmen over events that happened in France, it will not deter the French court that the defendant now is in Japan; it will "declare itself competent" to entertain the action. It will try to give the defendant reasonable notice, affording him practicable opportunity for defense; but that it must give this notice to a defendant outside France will not strike the court as an obstacle to or restriction of its jurisdiction. In a nutshell,

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8Darrah v. Watson, (1873) 36 Iowa 116; Fisher v. Fielding, (1895) 67 Conn. 91, 34 Atl. 714. In this case the further plea, that defendant being only temporarily in England and about to depart thence, the plaintiff sued him there with malice, expressly to hamper his defense and augment its expense, was held demurrable. There are certain qualifications: Cf. American Law Institute, Conflict of Laws Restatement, secs. 83, 45.

9Cf. McDonald v. Mabee, (1917) 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608. The distinction between domicile and citizenship is here neglected. The United States government claims personal jurisdiction over its citizens domiciled abroad (Blackmer v. United States, (1932) 284 U. S. 421, 52 Sup. Ct. 252), and the trend internationally is to minimize the materiality of domicile as compared to citizenship. But citizenship of any one of the United States depends on domicile (U.S. Const., amdt. XIV, sec. 1): hence among the several United States domicile and citizenship became virtually synonymous. Whether one of the United States would be held competent to exercise personal jurisdiction over an American citizen domiciled abroad, Quaere: Cf. Goodrich, Conflicts 139-40; 1 Wharton, Conflicts, 3rd ed., secs. 7 & 8. Cf. American Law Institute, Conflict of Laws Restatement, sec. 49. Cf. Post, notes 19 to 27.

10Pillet, Jurisdiction over Foreigners, (1905) 18 Harv. L. Rev. 325, 335. It will be understood that the present writer does not assume to speak as an expert on civil law doctrine in any detail. Cf. Pillet, Jurisdiction over Foreigners, (1905) 18 Harv. L. Rev. 325, 335-37. "The Anglo-American point of view, according to which a defendant may be sued on a personal cause of action in any state in which service of process can be made upon him, without reference to his domicile or to the place where the cause of action arose or the property to which it may relate is situated, is rejected by all other countries. . . ." "Service of process within the state is not a jurisdictional requirement in countries of the civil law for
our conception of jurisdiction seems based on the feeling that "might makes right." Our questions concern the court's power: What can we do to this defendant;—specifically, can we now, if need be, lay him by the heels? The civil law rules proceed from considerations of ethics and convenience. Their questions run in terms of "ought:" Ought this case to be adjudicated by a French court? Is the issue such that a French court is peculiarly fitted to try it, because the operative facts took place here and it is French law that ought to be applied to them? Ought the defendant to be willing to submit this matter to French tribunals? Formulated thus, the two doctrines seem fundamentally opposed. But the foregoing statement of the common law is extreme. It is not and never has been true that physical power is the foundation of jurisdiction, and it becomes less and less true. Our plain trend is toward the civil law position.11

Jurisdiction may rest on consent as well as power.12 It is not always recognized that jurisdiction by consent is an exception to the maxim of "power:" by consenting, defendant is thought of as having put himself in the power of the court. But that would be literally true only where the consent was accompanied by defendant's physical entry into the state, within reach of its court officers. But that is not at all necessary. Jurisdiction may be founded on the consent of a defendant who never has been and any cause of action. If jurisdiction exists the defendant may be cited to appear and defend, although absent from the state:" Lorenzen, Cases on Conflicts, 2nd ed., 126-127, n.

11Between independent countries questions of jurisdiction are matter of "comity" only (i.e., of the local, internal law of each country for itself): Hilton v. Guyot, (1895) 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95; Fisher v. Fielding, (1895) 67 Conn. 91, 34 Atl. 714; Schibsby v. Westenh holz, (1870) L. R. 6 Q. B. 155, 159-60, 40 L. J. Q. B. 73, but between the several United States jurisdiction is of constitutional obligation. If in the opinion of the United States Supreme Court the Minnesota court, e.g., had jurisdiction to entertain a given action its judgment therein must be enforced throughout the country under the "full faith and credit clause:" (U.S. const., art. IV., sec. 1) but if it did not have jurisdiction, then by virtue of the "due process clause." (U.S. const., amdt. XIV., sec. 1) the judgment cannot be enforced even in Minnesota: Pennoyer v. Neff, (1877) 95 U. S. 714, 24 L. Ed. 565; Roche v. McDonald, (1927) 275 U. S. 449, 48 Sup. Ct. 142, 72 L. Ed. 365; American Law Institute, Conflict of Laws Restatement, sec. 44. But for divorce purposes it seems a judgment may be valid within the State, yet not entitled to "full faith and credit" in other States: Haddock v. Haddock, (1906) 201 U. S. 562, 569-70, 572, 26 Sup. Ct. 525, 50 L. Ed. 867.

12American Law Institute, Conflict of Laws Restatement, secs. 82(d).
never will be in the state,—e.g., on his written cognovit.\textsuperscript{13} or on his appearance by attorney, he remaining abroad. In such cases (and they are the typical ones) consent does not confer actual, physical power. The court has no more such power over an absent defendant who has consented than it has over one who has not consented. It is not because the court can do anything to him that it has jurisdiction; it is because, having consented, he ought to be bound. The jurisdiction rests on obligation, not compulsion.

Jurisdiction is related to venue, and the earliest common law seems to have held the geographic incidence of the operative facts at least as material as the defendant's present whereabout. The royal courts at Westminster could entertain an action only if the operative facts had occurred in Middlesexshire, and the whole development of the "transitory" cause of action proceeded on a highly characteristic common law fiction.\textsuperscript{14} And the default judgment is an innovation; it seems the common law courts originally could give judgment only on defendant's actual appearance.\textsuperscript{15} In Plantagenet days, when the sheriff arrested the defendant and held him till brought into court unless he gave "gages and safe pledges"\textsuperscript{16} for his appearance, such a rule corresponded to reality. But under modern conditions the whole notion of the court's physical power over the defendant becomes largely fictitious; at least, highly conventionalized. Summons may be served on John Doe in Minnesota today; tomorrow he may be in Chicago, and he may never enter Minnesota again. Yet the Minnesota court will


\textsuperscript{14}Per Mitchell, J., in Little v. Chicago, etc. Ry., (1896) 65 Minn. 48, 50, 67 N. W. 846. Cf. Scott, Fundamentals of Civil Procedure, ch. I. The rule of criminal law is still, that the trial shall be held, not where defendant is at the time of indictment, or lives at the time of indictment, but where the alleged crime was committed. This is now a constitutional rule, (U.S. const., amdt. VI; Cf. Minn. const. art. I., sec. 6) but apparently it represents the original common law doctrine for both civil and criminal cases.

\textsuperscript{15}Cf. Hammersley, J., dissenting, in Fisher v. Fielding, (1895) 67 Conn. 91, 133, 34 Atl. 714. Again, in criminal cases still, the court will proceed to trial only if defendant is personally present in its court-room, a rule enshrined in the constitutional privilege of "confrontation" (Cf. ante, note 14). For this purpose the court can bring the absent criminal defendant from abroad only by comity of the foreign government (extradition); but that necessity does not inhibit his indictment while still abroad, nor is his consent to return for trial essential.

\textsuperscript{16}Cf. Morgan, Introduction to the Study of Law 41.
have unquestioned competence to enter a default judgment that every other American state will be required to honor and enforce. The jurisdiction obviously does not rest on any physical power of the court to enforce its judgment; Doe may have no property in Minnesota, that the court can reach. It does not rest on any physical power ever actually exercised over Doe (other than the trivial act of handing him the summons, which could be done as well outside as inside the state). All that can be said is that the Minnesota court could have seized Doe instead of merely handing him the summons, which could be done as well outside as inside the state. All that can be said is that the Minnesota court could have seized Doe instead of merely handing him the summons, and held him; and that merely potential act, not performed, is conceived to found the jurisdiction. In effect the Minnesota court says to all other courts: "We could, when this action began, have arrested the defendant and held him till we had determined his obligations and seen to it that he performed them; therefore, you ought now to treat our determination as final and conclusive." To the civilian the conclusion seems by no means so obvious as it does to us.

Consent aside, it is not the law that a defendant who lives in the state must also be here, to found personal jurisdiction. Most states doubtless use a "substituted service," by which the summons is left at defendant's home with a member of his household, and its validity is unquestioned against a defendant even outside the state or the country at the time. It has been thought that this is the only constitutional mode of summoning an absent defendant personally; so unless he has a visible household now actually here, he is exempt from the state's personal jurisdiction. But that

17It is uniformly held that jurisdiction acquired at the beginning of litigation will persist to its end regardless of the court's continuing power over the defendant: Mich. Tr. Co. v. Ferry, (1913) 228 U. S. 346, 33 Sup. Ct. 550, 57 L. Ed. 867; Turner v. Even, (1924) 160 Minn. 238, 199 N. W. 751; American Law Institute, Conflict of Laws Restatement, sec. 81.

18The writ ne exeat is not entirely obsolete; Cf. Minn. G. S. 1923, sec. 156; 14 Encycl. Pl. & Pr. 318; 45 C. J. 588.

19Cf. ante, note 8.


21Cf. Raher v. Raher, (1911) 150 Iowa 511, 129 N. W. 494. But there is no force in the service of process on somebody other than the defendant (member of defendant's household or anybody else) within the State or outside it, unless the defendant is amenable to the jurisdiction. And if he is, service on him outside the State must be as good as service on any proxy for him, within the State. In the case of State v. Belden, (1927) 193 Wis. 145, 211 N. W. 916, the plaintiff was required by the statute to mail summons and complaint to the defendant, abroad, and also to file a copy with the local Secretary of State; but the Secretary was not required to forward it to defendant or notify him. Urging that this method of service was not "due process," Eschweiler, J., dissentiente, said:
plainly confuses the fact of jurisdiction with the requirement of due process in its exercise. If this court has the right to summon this person as defendant at all, the mode by which it may actually summon him into a particular litigation requires merely giving him "reasonable notice and opportunity to be heard," and that does not depend on the ability to hand the summons to him or to anyone for him, within the state. If he is not subject to the jurisdiction, no notice given him, however reasonable, actual and personal, will obligate him to respond. In an attachment action against an absent non-resident, personal service on him outside the state accomplishes no more than newspaper publication in the state. The personal service abroad is much better notice; but since he is not subject to the court’s jurisdiction (though his property is), no notice or service the court can make will subject him to it.  

Suppose a (prospective) defendant in the state, so that jurisdiction is assured. The statutes usually require that he be summoned by handing the notice (summons) to him or to a member of his household. But that is not by constitutional obligation. Service on his stenographer at his office instead of on his maid at his house would indubitably do as well—or service by mail, or oral notification by telephone. So the important question anent the state’s domiciled citizen temporarily abroad is the one of jurisdiction. If the state has not personal jurisdiction

"Without some such ceremony as service on the secretary of state" (to wit, in Wisconsin) "no one could possibly contend [italics, the author's] that the other provisions of the statute authorizing the plaintiff to mail summons and complaint to a defendant outside the state, could be sufficient to confer jurisdiction." (at pp. 160, 921). Sed Quaere: In Blackmer v. United States, (1932) 284 U. S. 421, 52 Sup. Ct. 252, the subpoena was served on the defendant in France. As to the supposed distinction between "substituted" and "constructive" service, cf. (1919) 3 MINNESOTA LAW REVIEW 277-78. Cf. post, notes 22 to 27, 44.  

Against an absent non-resident, "process sent to him out of the State and process published within it, are equally unavailing in proceedings to establish his personal liability:" Pennoyer v. Neff, (1877) 95 U. S. 714, 727, 24 L. Ed. 565.  

Our usual "personal service," by merely handing defendant a copy of the summons (not technical "process" at all), perhaps even without having the original at hand, represents a relaxation of the early common law, which required that the original (bearing the court’s seal) be exhibited to defendant, if not also read to him: Cf. 19 ENCYL. PL. & PR. 613-14; Williams v. Van Valkenberg, (1857) 16 HOW. (N.Y.) 144, 152; Hanna v. Russell, (1866) 12 Minn. (Gilf. 43) 80; First Nat'l Bank of Whitewater v. Estensen, (1897) 68 Minn. 28, 70 N. W. 775.
over him, handing the summons to his wife at his house (in the state) could not confer it. If the state has personal jurisdiction (as it seems clear it has) any mode of summoning "reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard" will be constitutionally available. But this jurisdiction cannot rest on power. The State has no more actual, present power over its absent citizen than it has over the absent alien. Like jurisdiction by consent, domiciliary jurisdiction rests on obligation, not compulsion.

If jurisdiction can be founded on duty instead of power, why should consent, or allegiance by birth, naturalization or residence be its only bases? Why should not the defendant's voluntary participation in the operative facts brought to pass within the state entitle its courts to summon him from abroad to defend the litig-

25Cf. de la Montanya v. de la Montanya, (1896) 112 Cal. 101, 109-10, 44 Pac. 345: "Constructive service upon a party who is within the State does not raise the question" (of jurisdiction). "The question there is simply whether a defendant had such reasonable opportunity to be heard as will constitute due process. . . . Domicil has never, so far as I am aware, been made the test of jurisdiction to render a personal judgment." (Sed Quaere: Cf. ante, note 20 and post, note 27.) "Substituted service may be valid upon those within the state when the same service would be void as to those without the state. As to those within the state the question would be whether it has afforded a defendant a reasonable opportunity to be heard. But the process cannot go beyond the state and compel any person in another state to resort to the state where the action is pending, there to make his defense. No service will be recognized, made there, whether actual or constructive." (i.e., for personal jurisdiction).

26American Law Institute, Conflict of Laws Restatement, sec. 80.


28If defendant left a family in the state, they could (physically) be seized as hostages.
gation ensuing thereon? Before *Pennoyer v. Neff* and *Flexner v. Farson* were decided, state statutes were not uncommon that purported to authorize summoning personally an absent and non-resident defendant who did business in the state, by serving his agent who had done the business out of which the litigation grew. After those decisions some state courts deemed such statutes unconstitutional under those decisions. But it has been recognized that they do not squarely foreclose the question, and some states have refused so to hold. The Iowa supreme court has very recently decided a case which, if carried to the United States Supreme Court, can hardly fail to help clear up the remaining obscurities in the subject. Henry L. Doherty, of New York City, maintained an office and agency at Des Moines for the sale of securities. A dissatisfied purchaser brought personal action against him in Iowa court, serving the agent in charge of Doherty's Des Moines office. An Iowa statute purports to authorize this procedure, and the Iowa court declares it constitutional.

It is now thoroughly settled that a corporation is subject to the personal jurisdiction of every state in which it does business.

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29(1877) 95 U. S. 714, 24 L. Ed. 565.
30(1918) 248 U. S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250.
33 Later, the Iowa secretary of state was also served, under the local "blue-sky law," but the decision is based wholly on the earlier service on Doherty's actual employe, which the "blue-sky law" did not provide for.
34 Iowa, Code 1927, sec. 11079: "When a corporation, company or individual [italics, the author's] has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency." The opinion says that this statute in Iowa goes back to 1851. Cf. ante, note 31. Cf. Joel v. Bennett, (1916) 276 Ill. 537, 115 N. E. 5; Alkman v. Sanderson, (1908) 122 La. 265, 47 So. 600; Rauber v. Whitney, (1890) 125 Ind. 216, 25 N. E. 186; Cabanne v. Graf, (1902) 87 Minn. 510, 92 N. W. 461; Moredock v. Kirby, (C.C. Ky. 1902) 118 Fed. 180; State v. Adams Express Co., (1896) 66 Minn. 271, 68 N. W. 1085. Cases are collected in Goodrich, Conflict of Laws 145, note 97. Cf. Scott, Business Jurisdiction over Non-Residents, (1919) 32 Harv. L. Rev. 871; Scott, Jurisdiction over Non-resident Motorists, (1926) 39 Harv. L. Rev. 563, 583; Hinton, Substituted Service on Non-residents, (1925) 20 Ill. L. Rev. 1. The discussion has not seemed to appreciate that this situation presents the focal point of collision between the (supposedly traditional) common-law and the civil law theories of jurisdiction, and that the tendency to broaden the basis of jurisdiction to cover it indicates an unmistakable movement toward the general civil-law attitude.
At first, basis for this jurisdiction was found in an "implied consent." Since the state, it was said, could if it chose exclude foreign corporations from doing business in the state, it could impose any reasonable terms for its admission of them, and exacting a consent to the state's personal jurisdiction was not unreasonable. Then, the consent could be "implied" from the bare fact of the corporation's doing business in the state. But when the jurisdiction was upheld against a corporation that transacted only inter-state commerce in the state (which the state could not prohibit), the "consent" theory broke down. Then the jurisdiction was rested on a theory of corporate "presence." The corporation is said to be "present" wherever it acts. But in what

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37 i.e., sustainedly and habitually conducts a substantial part of its business. Mere isolated or sporadic acts will not found jurisdiction. Cf. Brush Creek Co. v. Morgan Co., (C.C. Mo. 1905) 136 Fed. 505 (this case must be deemed overruled); James Dickinson Co. v. Harry, (1927) 273 U. S. 119, 122, 47 Sup. Ct. 308, 71 L. Ed. 509; Rosenberg Co. v. Curtis Co., (1923) 260 U. S. 316, 43 Sup. Ct. 170, 67 L. Ed. 372. Cf. Atkinson v. U. S. Operating Co., (1915) 129 Minn. 232, 152 N. W. 410; Dow v. First Nat. Bank of Malta, (1922) 153 Minn. 19, 189 N. W. 653; U. S. Rubber Co. v. Gregory, (1931) 205 Wis. 189, 236 N. W. 524; Hutchinson v. Chase & Gilbert, (C.C.A. 2nd Cir. 1930) 45 F. (2d) 139. The British courts apparently enforce much the same distinction: Cf. Dunlop Pneumatic Tyre Co. v. Achtien-gesellschaft, etc., [1902] 1 K. B. 342, 71 L. J. K. B. 284; Aktiesselskabet, etc., v. Grand Trunk Ry., [1912] 1 K. B. 222, 81 L. J. K. B. 189. Manifestly it rests on considerations, not of power, but of fairness and convenience: Cf. L. Hand, J., in Hutchinson v. Chase & Gilbert, (C.C.A. 2nd Cir. 1930) 45 F. (2d) 139, that the "controlling consideration" is an "estimate of the inconveniences that would result from requiring it to defend where it has been sued." Otherwise, "we can see no qualitative distinction between one part of its doings and another. . . If we are to attribute locality to it" (the corporation) "at all it must be equally present wherever any part of its work goes on." (at p. 141.) So the important distinction between jurisdiction to litigate any and all (transitory) causes, or only those arising out of business done in the state rests on considerations of obligation and convenience (or consent), rather than power; Cf. Penn. Fire Ins. Co. v. Gold Issue Co., (1917) 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610; Dragon Co. v. Storrow, (1925) 165 Minn. 95, 205 N. W. 694. The whole doctrine of jurisdiction over corporations is shot through
sense is it true that a corporation is present wherever it acts, in which it is not equally true that an individual is present wherever he acts? It is replied that the individual has a physical presence where his body is located in space, while the corporation has no such actual, physical presence anywhere. Its "presence" at all is a figure of speech. That may be conceded. Yet the individual has that same figurative presence wherever he acts that a corporation has. It has been acutely pointed out that if I in Minnesota do business with "Doherty and Co." of New York, the business is the same, the manner of Doherty and Co.'s participation in it is the same, my relation to it and all its incidents and effects are the same, whether "Doherty and Co." be the trade name of Mr. Doherty alone or the name of an unincorporated association or of a limited liability company. Supposing I did the business with Doherty agents, it is all the same (in a business way) whether Doherty, or the members of the firm or company, do really live in New York or in Minnesota. It may well be that I have no knowledge of the truth as to any of these matters. If the figurative "presence" is a moral presence sufficient to found jurisdiction in case "Doherty and Co." turns out to be a corporation, why should it not equally suffice when "Doherty and Co." is merely the name used by Mr. Doherty for his business transactions? If it be said, because the plaintiff can go to New York and there serve Mr. Doherty personally, and hence he should be required to do that if he finds his proper defendant is just Mr. Doherty, it remains true that plaintiff can always go to the State of the corporation's charter and there sue it, just as he can go to Mr. Doherty's personal residence to sue him. Even there, he must serve


Whatever be the final theory in physics, the principle of "action at a distance" is well recognized in the law, e.g., by correspondence, by throwing a projectile, by acting through an agent.


Henderson, Jurisdiction over Foreign Corporations, (1917) 30 Harv. L. Rev. 676, 684-86.
the corporation's agents. But going to New York to sue Mr.
Doherty, the plaintiff may actually hand the summons to Mr.
Doherty's wife or valet, not to Mr. Doherty himself.

The problem of jurisdiction over partnerships puts further
stress and strain on the belief that the corporation's juridical but
intangible personality makes the basis of jurisdiction over it pec-
culiar. Many states doubtless have statutes similar to Minne-
sota's section 9180.41 Given a firm composed of members A, B
and C. A in Minnesota is served with summons in a Minnesota
action. B and C live and are elsewhere. It seems settled that on
this service the Minnesota court may have jurisdiction to enter a
default judgment which will be binding to some extent and in
some sort on B and C,—to-wit: on their "interests in the firm and
its property," and which under the "full faith and credit" clause
can be made binding on their interests in property of the firm that
is outside Minnesota and has never been in it.42 But the theory
and precise limits of this jurisdiction are unsettled. Suppose A
does not live in Minnesota either, but is merely found and served
here, e.g., vacationing in our north woods, or, suppose A does
live here, but the firm is not in business here. Are these facts
material to the jurisdiction? Our statute does not say so.43 In-
escapably, the jurisdiction must rest on some formula that allows
service of an agent to bind his non-resident principal. If its scope
is to be limited to firms doing business in the state, we have a
precise analogue to the jurisdiction over corporations. By having
done business here through their firm, B and C are given a moral

41Minn. G. S. 1923, sec. 9180: "When two or more persons transact
business as associates under a common name, whether such name comprises
the names of such persons or not, they may be sued by such common name
and the summons may be served on one or more of them. The judgment
in such case shall bind the joint property of all the associates, the same as
though all had been named as defendants." Cf. the Iowa statute quoted
ante, note 34.

42(Semble) Sugg v. Thornton, (1889) 132 U. S. 524, 10 Sup. Ct. 163,
804; State v. Adams Express Co., (1896) 66 Minn. 271, 68 N. W. 1085;
Taylor v. Order of Ry. Conductors, (1903) 89 Minn. 226, 94 N. W. 684.
Beaver Board Co. v. Imbrie & Co., (D.C. N.Y. 1931) 47 F. (2d) 271;

43In Taylor v. Order of Ry. Conductors, (1903) 89 Minn. 226, 94 N. W.
684, service was made on a member of the Order who happened to be in
Minnesota. He was not here representing or doing any business for the
Order, and non constat that the cause of action arose out of any business
done here. Cf. Magruder & Foster, Jurisdiction over Partnerships, (1924)
37 Harv. L. Rev. 793; Holdoegel, Jurisdiction over Partnerships, (1920)
11 Iowa L. Rev. 193.
presence here exactly like the moral presence of a corporation wherever it does business. But if B and C as partners can be given such a moral presence here by having done business here (perchance only through agents and employees), why cannot B alone be given the same moral presence here if he has done business here through his individual agents?

The urge to apply some such theory of jurisdiction to individual defendants became irresistible after the advent of the automobile, and it is now settled that the non-resident motorist who is involved in an accident in the state, but who has left the state before litigation was begun, can nevertheless be summoned personally into the courts of the state where the accident occurred, though original process cannot be served in that state on him or on anybody actually living with or working for him. But again, the theoretical foundation and exact limits of this jurisdiction are in doubt. Can the foreign owner who, without coming into the state himself, sends his car here in charge of an employee or a member of his family be so summoned before our courts to litigate the accident ensuing here? Taken most broadly, the auto decisions can lend support to the contention that any individual who does business in the state, of whatever sort, can be summoned personally before the courts of that state to litigate that business. More conservatively, those decisions can be rested on the automobile's dangerous and fugitive character and the state's wide police power over its highways, amounting to virtual proprietorship. So construed they hardly prove that a Chicago merchant who owns a clothing store in St. Paul, which he operates through hired employees, can be summoned personally to litigate in Minnesota court.

44 And if B can thus be held subject to the jurisdiction, the fact that he is not here and does not live here will not, it is submitted, be an obstacle to its valid exercise. Any mode of "reasonable notice" will answer the purpose. In Esteve Bros. v. Harrell, (C.C.A. 5th Cir. 1921) 272 Fed. 382, an employee of the firm was served, not a partner. Sed Cf. Flexner v. Farson, (1918) 248 U. S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250. Cf. ante, notes 21, 24, 25, 27, 34.


business done at the St. Paul store. He has a constitutional right to do business, absente, in Minnesota. But so has the Illinois motorist a right to use Minnesota highways on terms not unreasonably discriminating between him and Minnesota residents. The limits of the police power are exceedingly vague. While the state may not prohibit, it may regulate ("reasonably") any and every line of business. Why is it not a reasonable regulation to subject the owner of the business to the state's personal jurisdiction for litigation growing out of the business? The business of selling securities, regulated by the "blue-sky laws" and involved in Davidson v. Doherty is not a business "affected with a public interest," whatever that justly famous phrase may be taken to mean. It is regulated merely incidentally to the general police power. If its regulation can include subjecting the absent and non-resident vendor to the personal jurisdiction of any state where his agents negotiate his sales, the same can be done with any and every line of business.

Whether the United States Supreme Court will take this broad position cannot be predicted with certainty. The trend of the decisions and the pressure of modern business both run strongly in that direction. Taking it would adopt in large measure the civil law conception of jurisdiction, yet would not depart so widely from authentic common law tradition as might be sup-

47 (Iowa 1931) 241 N. W. 700.
48 The opinion mentions the state's regulatory power expressed in its "blue-sky law" as a basis for the jurisdiction; though, as noted ante, (note 33) the service made on the secretary of state specifically pursuant to that law is ignored and the jurisdiction is rested flatly on the service made on Doherty's own employee under a wholly different statute long antedating the "blue-sky law." American Law Institute, Conflict of Laws Restatement, sec. 89, holds that any act done in the state may subject the actor to that state's jurisdiction to litigate causes of action growing out of that act (semblé, N.B., not necessarily a continuous course of business, as for corporations; Cf. ante, note 37). But at sec. 90 the qualification is made that one of the United States cannot constitutionally use this principle except for acts which it can "make the doing of"... "within the state illegal unless the person doing the acts... has consented to the jurisdiction of the courts of the state as to causes of action arising out of such acts." That is a cautious statement of the law of last evening. But the difficulty is to specify any acts that the state cannot "make the doing of illegal" except under regulations that will include subjectation to the jurisdiction. Sanitary regulations, e.g., can be imposed on the clothing store, or the grocery store, and then to assure their observance by the non-resident owner why cannot he be subjected to the jurisdiction? It is submitted no stopping place will be discoverable. It will be noted that the partnership statutes (e.g., Minn. G. S. 1923, sec. 9180; cf. ante, notes 41 and 34) and the decisions under them (cf. ante, note 42) are not limited to any peculiar sorts of business. Cf. ante, note 44.
posed. Opinions enunciating emphatically the doctrine of "physical power" have been likely to contain "weasel words," used apparently ex industria, to leave a loophole for basing jurisdiction on more ethical grounds. It may be said that the notion that power (meaning, the ability to serve original process on the defendant within the state) should be the primary and fundamental basis of jurisdiction is of rather late growth in the common law; the extreme doctrine of such cases as Fisher v. Fielding, that a defendant found however temporarily at a place however remote from his home, his business or the scene of the operative facts must submit to litigation there and shall have no plea of forum non conveniens or improper motives on plaintiff's part, is later still. Such a doctrine is out of line, not only with the law of

49 "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 . . . in the state to receive service of process . . . in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made . . ., and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer . . ., 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." Pennoyer v. Neff. (1877) 95 U. S. 714, 735, 24 L. Ed. 565. [Italics the author's.] This language is quoted and relied on in Davidson v. Doherty, (Iowa 1931) 241 N. W. 700, 703. The same theory is applied to torts by the automobile decisions (ante, note 45). Cf. Douglas v. Forrest, (1828) 4 Bing. 686, 703, "The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Cf. Schibsby v. Westenholz, (1870) L. R. 6 Q. B. 155, 161, 40 L. J. Q. B. 73. "If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued." The doctrine of "power" is constantly referred back to the case of Buchanan v. Rucker, (1808) 9 East 192: in which it did not appear that the defendant had ever been within the territory of the foreign court that had rendered the judgment sued on, nor that any of the operative facts had occurred there, and in which Lord Ellenborough exclaimed, "Can the island of Tobago pass a law to bind the rights of the whole world?"—a judicial emanation, it may be suggested, that shed more heat than light.

50 (1895) 67 Conn. 91, 34 Atl. 714.

51 It may be noted, however, that the defendant in that case did not tender those pleas to the British court. That court's jurisdiction need not be denied; but a judgment from a foreign country can constitutionally be reviewed here on the merits, apart from questions of jurisdiction or fraud: Hilton v. Cuyot, (1895) 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. The unfortunate enouncement in that opinion of an illiberal doctrine of retaliation has obscured the real merit of the decision. It rests at bottom on the ancient common law rule that in an action on a domestic judgment the general issue pleads null tiet record, but to an action on a foreign judgment the plea is nil debet: 34 C. J. 1098, 1117, 1118. Undoubtedly in this re-
the Roman world, but with the best administration of justice under modern conditions. A practical difficulty in this country is the inelasticity of our judicial system and our scant legislative authority over it. The present writer has noted before, in another connection, that the Australians patterned their new national constitution fundamentally upon our own; as with us, their national (Commonwealth) government has only enumerated, delegated powers, and the states retain the general, reserved powers. But the Australians (doubtless on careful survey of the American scene) unified their judicial system. They not only made their national supreme court ("the high court") a court of general appeal from the state courts in all fields and not simply for "federal questions;" they also empowered their Commonwealth Parliament to confer federal jurisdiction on the state courts, thus minimizing the need to create separate inferior federal courts. Still more, Parliament is empowered to provide for and regulate the running and service of process from the state courts throughout the country. That cuts at one stroke through all the difficulties that are the subject of this paper. It need not be feared that the Australian Parliament is likely to authorize Queensland process to bind a defendant in Tasmania without some good reason for requiring the Tasmanian to respond to a Queensland court,—in the incidence of the operative facts, the convenience of witnesses and of trial, the location of the property in controversy, or something else. But all these problems become matter of national legislaspect the "full faith and credit clause" makes our state judgments domestic judgments throughout this country. But it would seem that a broader theory of jurisdiction might have been developed.


Ross, Has the Conflict of Laws Become a Branch of Constitutional Law, (1931) 15 Minnesota Law Review 161, 166.

Commonwealth of Australia Const. Act (1900) ch. I, sec. 51 (xxiv., xxv.); ch. III., secs. 71, 73 (ii.), 77 (iii.).

Nothing prevents the Australian Parliament from adopting (and adapting) our rules, e.g., against unduly burdening inter-state commerce (Cf. ante, note 36), forbidding jurisdiction over non-residents founded on isolated acts and requiring a settled, substantial course of business (Cf. ante, notes 37, 48), and limiting the right to serve process extraterritorially to causes of action growing out of business done in the state (Cf. ante, note 37). But in Australia these and any other rules can be adopted, amended and abandoned legislatively. In this country Congress for most purposes has not even seen fit to give the federal district courts a national jurisdiction, though its right to do so "is not open to question:" Eastman
tive policy, alterable and to be moulded at changing need and on broad considerations of justice and policy, unhampered by archaic doctrines of "power," the principle stare decisis or any artificial logic-chopping of lawyers. Who that has struggled with the intricate technicalities of federal and state jurisdiction in America will not sigh for the free and simple flexibility of the Australian constitution?56


56We hear an echo of the civil law in the doctrine that the only court competent to decree nullity of a marriage is a court of the state by whose law the validity of the marriage at its inception is to be determined: The American Law Institute Conflict of Laws Restatement, sec. 121. Sed Cf. (1932) 16 MINNESOTA LAW REVIEW 398; Goodrich, Conflicts pp. 301-04. In general it is an undoubted advantage to have litigation tried in a court whose domestic law is the proper law applicable to the operative facts. That court knows (should know) its own law better than any foreign court can. Cf. Chubbuck v. Holloway, (1930) 182 Minn. 225, 234 N. W. 314, 868. But obviously, to make the court's jurisdiction depend on such incidence of the operative facts is to go over bag and baggage to the civilians. Apart from that, it is hardly practicable to make the relevance of one or another system of law to the operative facts the test of jurisdiction to litigate them. With respect to marriage, the Restatement's doctrine can hold only of a direct proceeding attacking the validity of the marriage. Any court anywhere (otherwise competent) will unhesitatingly consider and determine collaterally, the validity of any marriage, wherever and between whomsoever celebrated; Cf. Hall v. Industrial Commission. (1917) 165 Wis. 364, 162 N. W. 312; Royal v. Cudahy Pck. Co., (1922) 195 Iowa 759, 190 N. W. 427; Ex. rel. Devine v. Rodgers, (D.C. Pa. 1901) 109 Fed. 886.