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The State Interest Theory Of Constitutional Jurisdiction

is popularly known as a "divorce mill," the legislatures are meeting this particular problem with reasonable solutions that ought to be sustained. The reasoning of the New Mexico Supreme Court provides a sound constitutional basis for doing so.

NORMAN C. ROETTGER, JR.

THE STATE INTEREST THEORY OF CONSTITUTIONAL JURISDICTION

In personam jurisdiction[1] of state courts over nonresident defendants is of necessity derived from the state.[2] The power so conferred by the constitution and statutes of the state is limited, however, not solely by those instruments, but by the Federal Constitution as well.[3] It is clear, therefore, that "conferred jurisdiction" may not be extended by the state beyond the limitations imposed by the Constitution—i.e., "constitutional jurisdiction."[4]

Since 1878, when the Supreme Court in *Pennoyer v. Neff*[5] held that a state court could not extend its process beyond its territorial limits so as to subject absent persons to its in personam jurisdiction, the due process clause of the fourteenth amendment has persistently hindered the extension of this conferred jurisdiction.[6] But this constitutional

[1]An action in personam is one in which "the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body...." Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N.E. 812, 814 (1900). See Goodrich, Conflict of Laws § 72 (3d ed. 1949).

[2]Tennessee Coal, Iron & R.R. v. George, 233 U.S. 354 (1914); Pease v. State, 74 Ind. App. 572, 129 N.E. 337 (1921).

[3]McKnett v. St. Louis & San Francisco Ry., 292 U.S. 230 (1934); Whitten v. Tomlinson, 160 U.S. 231 (1895); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

[4]The distinction between the components of this twofold limitation is not within the scope of this comment except insofar as the self-imposed limitations of "conferred jurisdiction" are necessary for an understanding of "constitutional jurisdiction" as treated herein. It should be noted, however, that the point of demarcation is of great consequence with regard to suits brought in or removed to federal courts and where the judgment of one state is sought to be enforced in another state. See Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948); Bomze v. Nardis Sportswear Inc., 165 F.2d 33 (2d Cir. 1948). The unfortunate result of a failure to make the distinction can be seen in Berkman v. Ann Lewis Shops, Inc., 246 F.2d 44 (2d Cir. 1957), in which the federal court sitting in New York undertook to correct a Florida court on what Florida law is.

[5]95 U.S. 714 (1878).

[6]The commerce clause of the Federal Constitution may also be used as a basis for attacking in personam jurisdiction over a nonresident. See Davis v. Farmers Cooperative Equity Co., 262 U.S. 312 (1923).

barrier did not remain fixed.[7] It was gradually reduced by decisions allowing significant, though limited, jurisdictional extensions.[8] These decisions, however, kept within the technical limits of the "power concept," as established by *Pennoyer v. Neff,* by basing jurisdiction on fictional presence,[9] or consent,[10] as shown by the doing of business within the state.[11] Not until 1945, in *International Shoe Co. v. Washington,*[12] was this power concept finally discarded. Along with it went the ficitons theretofore used to support the limited departures from the rigid and restrictive interpretation placed by *Pennoyer v. Neff* upon constitutional jurisdiction.[13]

The *International Shoe* case established a "minimum contacts" test of constitutional jurisdiction to replace the old power concept, and qualitative criteria by which to measure the requisite contacts instead of the mechanical or quantitative tests which had been employed.[14]

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[7]"The slow reduction of this barrier by the courts is one of our most interesting illustrations of the process whereby courts gradually modify cherished legal concepts to bring them into reasonable correlation with the facts of life in our society." Leflar, Conflict of Laws, 1955 Ann. Survey Am. L. 41, 43 (1956).

[8]Milliken v. Meyer, 311 U.S. 457 (1940); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawloski, 274 U.S. 352 (1927); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

[9]International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

[10]Milliken v. Meyer, 311 U.S. 457 (1940); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawloski, 274 U.S. 352 (1927).

[11]The power concept, as applied to foreign corporations, presented difficulties, because a corporation was held to exist only in the state of incorporation. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 277 (1839). As a result, a "consent" theory of jurisdiction arose, predicated on the reasoning that the state might, as a condition to allowing a foreign corporation to do business locally, require the consent of the corporation to be sued. The Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). This was in turn replaced by the "presence" theory, as found by the doing of business within the state. Barrow S.S. Co. v. Kane, 170 U.S. 100 (1897). See Goldey v. Morning News, 156 U.S. 518 (1895); St. Clair v. Cox, 106 U.S. 350 (1882).

For a comprehensive treatment of the nature and volume of activity held to constitute "doing business," see Isaacs, An Analysis of Doing Business, 25 Colum. L. Rev. 1018 (1925); Note, 16 U. Chi. L. Rev. 523 (1949).

[12]326 U.S. 310 (1945).

[13]"To say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities . . . within the state which courts will deem to be sufficient to satisfy the demands of due process." 326 U.S. at 316.

[14]"Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff,* 95 U.S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, 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

This "change in the judicial climate"[15] prompted several states to enact statutes intended to confer an in personam jurisdiction expanded to the constitutional limits permitted by the more flexible interpretation of the due process clause.[16]

Of the more recent statutes, that of Illinois[17] is probably the most

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not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316.

"It is evident that the criteria ... cannot be simply mechanical or quantitative .... 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." 326 U.S. at 319.

The International Shoe doctrine apears to rest not on the old "power" theory but, rather, on the theory that having received the benefits of the laws of a state by having some contact with the state, a nonresident cannot avoid the obligations or liabilities arising therefrom. See 326 U.S. at 319. See also O'Connor and Goff, Expanded Concepts of State Jurisdiction over Non-Residents, 31 Notre Dame Law. 223 (1956).

[15]Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664, 669 (1951). But see Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 506 (4th Cir. 1956), where the court stated: "Though the 'minimum contact' theory may have liberalizing tendencies, it was not so much an innovation on due process as it was a rephrasing of the prevailing fictional tests in order more properly to describe the judicial methodology long employed." This interpretation of the International Shoe case apparently refers to the language of Justice Stone that "to the extent that a corporation exercises the privileges of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations 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." 326 U.S. at 319. Substantially the same language may be found in pre-International Shoe cases which based decisions on fictional consent. See Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1953); Hess v. Pawloski, 274 U.S. 352 (1927); Dubin v. Philadelphia, 34 Pa. D. & C. 61 (C.P. 1938). It would appear, therefore, that to some degree the Court in International Shoe followed the very fictional doctrine it purported to overrule.

[16]E.g., Ala. Code tit. 7, § 199(1) (Supp. 1953); Ark. Stat. Ann. § 27-340 (1947); La. Rev. Stat. Ann. § 13:3479 (1950); Minn. Laws c. 820, § 30 (1955); N.J. Stat. Ann. §34:15-55.1 (Supp. 1954); N.C. Gen. Stat. § 55-145 (Supp. 1957); Pa. Stat. Ann. tit. 2, § 1410 (Supp. 1957). Before the International Shoe case was decided, several states had statutes which extended jurisdiction over nonresidents beyond the traditional situations then recognized by the Supreme Court. But these were not employed sufficiently to bring them to a test of constitutionality. E.g., Fla. Stat. Ann. § 47.16 (1943); Md. Ann. Code art. 23, § 88(d) (1951); Miss. Code Ann. § 1437 (1942); Pa. Stat. Ann. tit. 12, § 331 (1953); Vt. Stat. § 1562 (1947). See Cleary and Seder, Extended Jurisdictional Bases for the Illinois Courts, 50 Nw. U.L. Rev. 599, 603 (1955); O'Connor and Goff, Expanded Concepts of State Jurisdiction over Non-Residents, 31 Notre Dame Law. 223 (1956); Joint Committee Comments, Ill. Rev. Stat. c. 110, § 17 (1955).

[17]Ill. Rev. Stat. c. 110, §§ 16, 17 (1955). The pertinent part of § 16 is as follows: "(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within the State ....

The pertinent parts of § 17 are as follows: "(1) Any person, whether or not a

far-reaching, since it more closely approximates the constitutional limit set by *International Shoe*.[18] The constitutionality of the Illinois statute—specifically of section 17(1)(b) therein, relating to the commission of a single tortious act as constituting a basis of in personam jurisdiction was recently tested by the Illinois Supreme Court in *Nelson v. Miller*.[19]

Defendant, a natural person resident in Wisconsin and engaged in the business of selling appliances, sent an employee into Illinois to deliver a stove. At the employee's request plaintiff assisted him in unloading the stove. In the course of this operation the employee negligently pushed the stove so as to injure the plaintiff. Summons was personally served on defendant in Wisconsin. He appeared specially in the Illinois court and moved to quash service on the ground that the Illinois statute violated the Federal Constitution. The decision of the lower court quashing the service was reversed by the Illinois Supreme Court. It was held that the requirements of due process had been met, and that under the circumstances it was not unreasonable to require defendant to defend the suit in Illinois.

The court noted that as a result of social, technological, and legal developments, the rigid concepts of *Pennoyer v. Neff* had yielded to fiction, and fiction in turn had yielded to the forthright and realistic considerations of fairness established by the *International Shoe* case.[20] The foundation of constitutional jurisdiction, it was held, no longer

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citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts: (a) The transaction of any business within this State; (b) The commission of a tortious act within this State; (c) The ownership, use, or possession of any real estate situated in this State; (d) Contracting to insure any person, property or risk located within this State at the time of contracting."

"(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

[18]Cleary and Seder, Extended Jurisdictional Bases for the Illinois Courts, 50 Nw. U.L. Rev. 599 (1955); Leflar, Conflict of Laws, 1956 Ann. Survey Am. L. 24 (1957); O'Connor and Goff, Expanded Concepts of State Jurisdiction over Non-Residents, 31 Notre Dame Law. 223 (1956).

[19]11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[20]Modern life is breaking down state barriers. As it becomes easier to travel and act within a state, it is only logical that the obligations and liabilities arising out of such activities follow more easily and should be enforceable. Dubin v. Philadelphia, 34 Pa. D. & C. 61 (C.P. 1938). "Extension of the jurisdiction of courts may be expected to continue in the wake of scientific and economic developments. Facility of travel has largely effaced state lines." Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664, 668 (1951).

rests upon physical power or upon fictional presence or consent, but rather upon the minimum contacts doctrine set forth in *International Shoe*. This doctrine, said the Illinois court, includes "the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy."[21] The court indicated that the only limits placed upon the exercise of the jurisdiction so conferred are to be found in the "traditional notions of fair play and substantial justice."[22]

Before the liberalizing influence of the *International Shoe* case, it was almost universally held, at least as to foreign corporations, that isolated activity within a state was insufficient to justify the use of the "presence" or "consent" fictions.[23] Natural persons, however, were subject to a less stringent rule in at least one excepted area.[24] In *Hess v. Pawloski*,[25] the Supreme Court upheld the constitutionality of a Massachusetts statute[26] which rendered nonresidents who merely operated a motor vehicle on a state highway amenable to the in personam jurisdiction of the state for any accident resulting from such operation. Though actually resting its decision upon the doctrine of implied consent, the Court noted additionally that the danger inherent

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[21]143 N.E.2d at 676.

[22]International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), quoting from Milliken v. Meyer, 311 U.S. 457, 463 (1940). Contained within the requirements of "fair play and substantial justice" are two distinct questions: (1) The forum must have the constitutional power to render an in personam judgment; (2) If that power exists, the method of service must be reasonably calculated to give the nonresident defendant notice and an opportunity to be heard. Unless the mode of service is calculated to give actual notice, the question of power is immaterial. Restatement, Judgments § 6 (1942). Since Ill. Rev. Stat. c. 110, § 16(1) (1955) requires personal service of process on absent defendants, a mode of service clearly calculated to give actual notice, the problem of notice and opportunity to be heard is not within the scope of this comment. See Cleary and Seder, Extended Jurisdictional Bases for the Illinois Courts, 50 Nw. U.L. Rev. 599 (1955).

[23]Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923). See Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907). But see International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). The quantity of business which must be done within a state in order to make a foreign corporation amenable to jurisdiction has progressively become smaller and smaller. Charles Zubick & Sons, Inc. v. Marine Sales and Service, 300 S.W.2d 35 (Ky. 1957).

[24]See Hess v. Pawloski, 274 U.S. 352 (1927). It has been suggested that there may be a distinction between corporations and natural persons as to the sufficiency of contacts warranting subjection of the nonresident to jurisdiction. See Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), noted in 12 Wash. & Lee L. Rev. 259 (1955). But see Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Dubin v. Philadelphia, 34 Pa. D. & C. 61 (C.P. 1938).

[25]274 U.S. 352 (1927).

[26]Mass. Ann. Laws c. 90, § 3A (1954).

in the operation of vehicles makes such activity subject to the regulation of the state[27] within the scope of its police power.[28]

After *International Shoe,* in cases involving natural persons whose activities were isolated, the courts, in order to sustain jurisdiction, were forced to rely almost wholly upon the "police power concept."[29] Jurisdiction over nonresident motorists continued to be upheld on this basis,[30] and some decisions extended the purview of police power to include activities not generally thought to be inherently dangerous.[31] This concept was for the most part restricted to activities likely to result in an ex delicto cause of action,[32] but at least two decisions extended jurisdiction to contractual obligations related to the dangerous activity regulated.[33]

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[27]"Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways." 274 U.S. at 356. In Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935), the sale of securities was held to constitute sufficient danger of fraud upon purchasers as to warrant state regulation.

[28]The police power of a state is not susceptible to precise definition since its scope is far-reaching and its limitations are indefinite. It is coextensive with the necessities of the case and the safeguards of public interest, extending not only to regulations which promote public health, morals, and safety, but as well to those which promote the public convenience or the general prosperity. Sligh v. Kirkwood, 237 U.S. 52, 59 (1915). The police power is not without limitation, however, for it must stop when it encounters constitutional prohibitions. Eubank v. City of Richmond, 226 U.S. 137 (1912).

[29]The courts apparently felt that exclusive reliance upon the minimum contacts doctrine in such situations was unwise, since language in the International Shoe decision left the matter of jurisdiction based on isolated acts open to some question. "Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it [citation omitted], other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 326 U.S. at 318.

[30]Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953).

[31]Davis v. Nugent, 90 F. Supp. 522 (S.D. Miss. 1950) (operation of lumber yard); Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d (1948) 212 (clearance of dam site); Ritholz v. Dodge, 210 Ark. 404, 196 S.W.2d 479 (1946) (optometry); Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949) (insect extermination). See Restatement, Judgments § 28 (1942); Goodrich, Conflict of Laws § 73 (3d ed. 1949).

[32]E.g., Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Dubin v. Philadelphia, 34 Pa. D. & C. 61 (C.P. 1938).

[33]Dart Transit Co. v. Wiggins, 1 Ill. App. 2d 126, 117 N.E.2d 314 (1953) (action in contract for indemnification on basis of nonresident motorist statute); McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950) (contribution against joint tortfeasor on implied contract theory). It has been logically argued that jurisdiction over nonresident defendants in ex contractu actions is less easily sustained

If the *Nelson* decision is interpreted to stand only for the proposition that a single, isolated act by a nonresident natural person within the state is a constitutionally sufficient foundation for the exercise of conferred jurisdiction, the nonresident motorist cases relied upon would seem to lend supporting precedent.[34]

From an analysis of the cases basing jurisdiction on police power, it would seem that for two reasons the heavy reliance placed thereon by the Illinois court in *Nelson* is somewhat misplaced. First, no activity sufficiently dangerous to warrant the operation of the state's police power was present in the *Nelson* case.[35] Second, even if the rational

since in a contract action the applicable law may vary with the forum, and it is no more probable that witnesses will be in the state of execution or of performance than elsewhere. Note, 100 U. Pa. L. Rev. 598 (1952). See Goodrich, Conflict of Laws § 110 (3d ed. 1949). However, it has been noted that "Any distinction between jurisdiction founded on doing business in a state which involves danger to life or property or state regulation, and on the other hand contractual obligations arising out of such business, is artificial...." Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233, 237 (5th Cir. 1953), quoting Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615, 624 (1951).

Since § 17 of the Illinois statute requires that the cause of action arise out of the doing of the enumerated act before jurisdiction attaches, the situation wherein the cause of action is unrelated or remote is of no concern here. The dilemma resulting from such situations should not go unnoticed, however. Jurisdiction has generally been defeated in situations in which the cause of action, though arising within the state, is unrelated or only remotely related to the act which confers jurisdiction. Acuff v. Service Welding and Machine Co., 141 F. Supp. 294 (E.D. Tenn. 1956); De Luca v. Consolidated Freight Lines, 132 F. Supp. 863 (E.D.N.Y. 1955); Langley v. Bunn, 225 Ark. 651, 284 S.W.2d 319 (1955); American Farmers Ins. Co. v. Thomason, 217 Ark. 705, 234 S.W.2d 37 (1950); Aldrich v. Johns, 93 Ga. App. 787, 92 S.E.2d 804 (1956); Lindsey v. Teddy's Frosted Foods, Inc., 18 N.J. 61, 112 A.2d 529 (1955); Whalen v. Young, 15 N.J. 321, 104 A.2d 678 (1954). See W. H. Elliott & Sons Co. v. Nuodex Products Co., 243 F.2d 116 (1st Cir. 1957). But see Schefke v. Superior Court, 136 Cal. App. 2d 715, 289 P.2d 542 (1955); Dart Transit Co. v. Wiggins, 1 Ill. App. 2d 126, 117 N.E.2d 314 (1953). Causes of action arising outside the state and unrelated to the activity within the state have been held not to be sufficient. Dragon Motor Car Co. v. Storrow, 165 Minn. 95, 205 N.W. 694 (1925). See Kilpatrick v. Texas & P. Ry., 166 F.2d 788 (2d Cir. 1948). But cf. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[34]Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953); Hess v. Pawloski, 274 U.S. 352 (1927); Kane v. New Jersey, 242 U.S. 160 (1916).

[35]A distinction has been drawn by some writers between those acts properly subject to regulation by a state under its police power and those that are not, on the ground that a state cannot prohibit acts not public in nature. Armstrong, Comment, 22 Tenn. L. Rev. 252 (1952). See Restatement, Judgments § 23, Caveat (1942). Others dissent from this view: "Any act which injures people and property in a state is to that extent dangerous to the people and property in the state. If selling bonds and stocks is such a dangerous type of activity so that it can be regulated to the extent of using the doing of such an act as a basis of personal power [referring to Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935)], then making most any sort of contract can be equally dangerous." Overton, Broadening the Bases of Individual In Personam Jurisdiction in Tennessee, 22 Tenn. L. Rev.

basis of the motorist decisions is broad enough to include *any* tortious act,[36] the fact remains that the act which invokes the conferred jurisdiction is different in the two situations.

In the nonresident motorist cases, and in others which employ the police power theory,[37] the jurisdiction-invoking act, though related, is not the same as the act that gives rise to the cause of action. The act which, if committed, calls into play the conferred jurisdiction does so whether or not an obligation or liability is thereafter incurred to make the jurisdiction exercisable.[38] In the *Nelson* situation, however, the only basis of jurisdiction is the very act which creates the cause of action. To carry police power to this extent would seem patently illogical.[39] A firm footing for the *Nelson* decision, therefore, must lie within the cases involving foreign corporate defendants.[40]

In the corporate field only one case, *Smyth v. Twin State Improvement Corp.*,[41] has been found which lends strong precedent to the de-

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237, 245 (1952). See McBaine, Service upon a Non-Resident by Service on his Agent, 23 Calif. L. Rev. 482, 487 (1935); Notes, 22 U. Chi. L. Rev. 674, 683 (1955); 37 Cornell L.Q. 458, 470 (1952).

[36]143 N.E.2d at 679.

[37]E.g., Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Dubin v. Philadelphia, 34 Pa. D. & C. 61 (C.P. 1938).

[38]In the nonresident motorist situation the act of entering the state in a motor vehicle invokes the conferred jurisdiction, and the accident or collision creates the cause of action. In the Doherty case the act of selling securities invokes the conferred jurisdiction, and fraud or a related act creates the cause of action. In the Dubin case it is the ownership of property which calls into play the conferred jurisdiction, and the injury to which that property is related creates the cause of action. In each of these situations the initial act is of a continuing nature since jurisdiction exists from the time of its commission, needing an additional occurrence for the jurisdiction so conferred to become exercisable.

[39]It is recognized that a state's police power is preventive as well as preservative and that its preventive application is very broad. National Fertilizer Ass'n, Inc. v. Bradley, 301 U.S. 178 (1937); Merchants Exchange of St. Louis v. Missouri, 248 U.S. 365 (1919); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917). It seems only logical, however, that in order for the police power to accomplish its purpose of protecting the public, the regulation must exist before the injury in situations in which the act itself is not regulated. If a "police power" theory were to be applied to the situation in Nelson, it would come into play only after the act has been committed. A striking anomaly would thus be presented, for when the police power acts, there is nothing upon which it can act.

[40]The mere fact that the defendant in Nelson was a natural person does not render decisions involving corporate defendants inapplicable, for the landmark International Shoe case involved a corporate defendant. That decision has been applied without question to natural persons. Leflar, Conflict of Laws, 1956 Ann. Survey Am. L. 24, 26 (1957); Cleary and Seder, Extended Jurisdictional Bases for the Illinois Courts, 50 Nw. U.L. Rev. 599, 603 (1955).

[41]116 Vt. 569, 80 A.2d 664 (1951). Accord, Painter v. Home Finance Co., 245 N.C. 576, 96 S.E.2d 731 (1957).

cision in *Nelson*.[42] On its facts, this case differs from *Nelson* only in that the defendant in *Smyth* was a foreign corporation instead of a non-resident natural person.[43] The reasoning of the two opinions, however, differs substantially. The Vermont court in the *Smyth* case rested its decision fundamentally on a balance between the conflicting interests of plaintiff and defendant. Finding no undue hardship on the defendant, and noting that in the exceptional case the doctrine of forum non conveniens is available,[44] the court declared: "If a foreign corporation voluntarily elects to act here, it should be answerable here and under our laws. The consequences imputed to it lie within its own control, since it need not act within this state at all . . . ."[45]

Although noting that the question involved the power of the State

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[42]The case of Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950), involving a suit against two defendants for an injury caused by the shattering of a grinding wheel, appears at first blush to approximate the result obtained in Nelson. In the Johns case, however, the defendant held amenable to jurisdiction was shown to have had regular and continuous contacts with the state other than its connection with the product which caused the injury. On the other hand, the defendant not held subject to the jurisdiction of the state in which the injury occurred was found to have had no contact upon which the suit could have been based other than its manufacture of the product. Another case in the corporate field, Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), had been cited for the principle that a single contract entered into by a foreign corporation to be performed within the state is sufficient to confer jurisdiction. Leflar, Conflict of Laws, 1955 Ann. Survey Am. L. 41, 43-44 (1956); Notes, 12 Wash. & Lee L. Rev. 259 (1955); 22 U. Chi. L. Rev. 674 (1955). In the Astral case, however, the court found that the defendant had had substantial contacts with the state other than the mere existence of the contract and upon that ground held the conferred jurisdiction to be constitutional. On their facts, therefore, neither the Johns case nor the Astral case can be said to be direct substantiating authority for Nelson.

[43]See note 40 supra.

[44]"Should a case of undue hardship be presented, the doctrine of forum non conveniens is an adequate instrumentality through which justice can be achieved." 80 A.2d at 667. See Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 680 (1957). In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947), the Supreme Court enumerated the various factors to be weighed in applying the doctrine of forum non conveniens—e.g., the nature of the interest which plaintiff is seeking to enforce, whether the cause of action is primary or derivative, the availability of witnesses and evidence, whether plaintiff is a resident, whether the law of the forum governs the facts of the case, and whether the cause of action arose within the forum. These are the identical factors considered by a court in balancing the conflicting interests of plaintiff and defendant in order to determine the minimum contacts required to assert jurisdiction within the confines of the International Shoe decision. The two questions thus appear indistinguishable. Kilpatrick v. Texas & P. Ry., 166 F.2d 788 (2d Cir. 1948). See Notes, 37 Cornell L.Q. 458 (1952); 50 Nw. U.L. Rev. 425 (1955).

[45]80 A.2d at 668. This reasoning was more clearly expressed in International Shoe to the effect that one who acts within a state receives the benefit of the laws of that state and should therefore assume the burdens of those same laws. See 326 U.S. at 319.

of Vermont, the court in *Smyth,* nevertheless, seems to have reached its result by looking more closely at the interests of the plaintiff as an individual. On the other hand, the Illinois court in *Nelson* appears to have emphasized the state sovereignty aspect, looking primarily to the right of a state to provide local redress rather than to the plaintiff's right to have it provided. Were it not for the subsequent Supreme Court decision in *McGee v. International Life Ins. Co.*,[46] this might seem to be a distinction without a difference. But in the light of *McGee,* the *Nelson* decision seems to have made a singular contribution to the law.

In *McGee,* the Court required the State of Texas to give full faith and credit to a California judgment against a Texas insurer, which had been served by registered mail in Texas. The policy had been issued to the insured, a California resident, by an Arizona corporation whose insurance obligations had been assumed by the defendant. The insured accepted reinsurance by defendant, whose sole contact with the State of California was the issuance by mail of that single policy. In a unanimous decision the Court held that the suit was based upon a contract having a substantial connection with that state. It was delivered in the state, premiums were mailed from there, and the insured was a resident thereof when he died. In noting the trend toward expanded jurisdiction, the Court, speaking through Justice Black, reasoned similarly to the Illinois court in the *Nelson* case, emphasizing the aspect of state interest.[47]

Since it involves insurance, an activity within the regulatory power of the states,[48] the *McGee* case cannot be said to affirm directly the determination of the precise issues presented in *Nelson.* This very distinction, however, coupled with the fact that the Supreme Court based its decision on state interest rather than on the well-established concept

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[46]355 U.S. 220 (1957).

[47]"It cannot be denied that California has a manifest interest in providing effective means of redress for its residents . . . ." 355 U.S. at 223. A later case, Pugh v. Oklahoma Farm Bureau Mut. Ins. Co., 159 F. Supp. 155 (E.D. La. 1958), goes a step further. The court there held an insurer amenable to the jurisdiction of the federal court on the sole ground that the *insured* was within the state at the time of the accident which gave rise to the insurance claim. Citing the McGee case, the court said, "Certainly the contact is minimal. In fact, it is singular. But the test as to sufficiency of contact within the state is neither mechanical nor quantitative . . . . It is the nature and the quality of the contact, and the interest of the state therein, which is determinative." 159 F. Supp. at 158.

[48]The McCarran Act, 59 Stat. 34 (1945), 15 U.S.C. § 1012 (1952). Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

of police power, marks the *McGee* case as substantially significant.[49]

The other factors included in the minimum contacts doctrine[50] will no doubt continue to be taken into account in in personam jurisdictional determinations. However, if the *Nelson* and *McGee* decisions are prophetic of a future trend in basic reasoning, it might well be that these other factors will become less influential, and a corollary result would likely attach. Instead of balancing the interests and hardships of an *individual plaintiff* against those of the defendant, the court would then balance the interests of a *state* against those of the defendant, with the consequence that the doctrine of forum non conveniens would offer less protection than it now does.

A state could, if this reasoning were carried to its logical conclusion, proclaim its interests to lie where it chooses.[51] So long as a nonresident has some contact with the state, no matter how remotely bearing on the cause of action, and so long as he has some reasonable notice, that nonresident defendant would be amenable to the in personam jurisdiction of the sovereign state.[52]

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[49]But cf. Note, 22 U. Chi. L. Rev. 674, 683 (1955): "In determining whether requirements of due process have been met, the fact that the activity used as a basis for jurisdiction is regulated by the state should be relevant only insofar as the cause of action is one which is embraced within the state's protective policy."

[50]"The conclusion in each case must be based upon a fair consideration of all the relevant factors, including, among others, the nature and extent of the ... actual activities within the State, and whether sporadic or merely casual or continuous over a substantial period of time, and [the] consequent points of contact or lack thereof with the State, the nature of the particular transaction, contract or tort relied upon by the resident plaintiff occurring within the State, and how such activities affect the general policy of the State with regard to the subject matter, and also importantly the relevant inconvenience to the respective parties dependent upon whether the litigation should be sustained in the local forum or only in some other jurisdiction." Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654, 662 (D. Md. 1950). See International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Kilpatrick v. Texas & P. Ry., 166 F.2d 788, 791 (2d Cir. 1948); McClanahan v. Trans-America Ins. Co., 149 Cal. App. 2d 171, 307 P.2d 1023, 1025 (1957); McGriff v. Charles Antell, Inc., 123 Utah 166, 256 P.2d 703, 705 (1953); O'Connor and Goff, Expanded Concepts of State Jurisdiction over Non-Residents, 31 Notre Dame Law. 223, 247-49 (1956); Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563, 568 (1926); Notes, 37 Cornell L.Q. 458, 467 (1952); 35 Mich. L. Rev. 969, 972 (1937); 4 Vand. L. Rev. 661, 672 (1951).

[51]"To illustrate the logical and not too improbable extension of the problem, let us consider the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires .... It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states." Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956). Cf. Hunt v. Tague, 205 Md. 369, 109 A.2d 80 (1954).

[52]"The Constitution which was ordained 'to form a more perfect union,' contemplates that the boundaries between the states shall have continued significance for