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## NOTES

THE EXTENSION OF SUBSTITUTED SERVICE OF PROCESS  
TO NON-RESIDENT BUSINESS MEN

Until recently it had been well settled that a state could not impute to a non-resident individual consent to personal jurisdiction merely from the circumstance of his doing business within its borders. It is thought that the courts which sustained this proposition were guided by two fundamental considerations. In the first place, they felt that to adopt a contrary position would violate the general rule that a personal judgment against a non-resident individual who was not served within that state, or who did not appear or consent to constructive service is void.<sup>1</sup> Secondly, the decision in *Flexner v. Farson*<sup>2</sup> was interpreted as committing the Supreme Court of the United States to the view that the states lacked the power to extend their processes to non-resident business men on the basis of an implied consent to a statute prescribing substituted service. Upon analysis, however, there no longer seems to be a sound reason for the position that doing business in the state is not a sufficient basis for the imputation of consent to personal jurisdiction.<sup>3</sup>

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<sup>1</sup>*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877) is the foundation case. *McDonald v. Mabee*, 243 U. S. 90, 37 S. Ct. 343, 61 L. ed. 608 (1917); *Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557, 33 L. ed. 918 (1890); *Brooks v. Dun*, 51 Fed. 138 (C. C. W. D. Tenn. 1892). Prior to the decision in *Pennoyer v. Neff*, federal and state courts alike refused to recognize a judgment from the court of another state rendered against a non-resident of that state without personal service therein, a general appearance by the non-resident, or consent to the jurisdiction of the court. A majority of the states, however, refused to question the validity of the judgment when the matter of process had been passed upon and sustained in the state in which it was rendered. *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959 (U. S. 1873); *McCauley v. Fulton*, 44 Cal. 355 (1872); *Kendrick v. Kimball*, 33 N. H. 485 (1856); *Davidson v. Sharpe*, 28 N. C. (6 Ired. L.) 14 (1845); *Butterworth v. Kinsey*, 14 Tex. 500 (1855). A minority of the states followed a contrary view. They reasoned that the lack of jurisdiction over the person which authorized the courts of another state to refuse to recognize the judgment invalidated it even in the state where rendered. *Backman v. Hopkins*, 11 Ark. 157 (1850); *Beard v. Beard*, 21 Ind. 321 (1863); *Dearing v. Bank of Charlestown*, 5 Ga. 479 (1848). This view was adopted by *Pennoyer v. Neff*, which case is regarded as settling the doctrine that was thereafter followed by the majority of the states. However, even after this decision a few courts continued to pay lip service to the former majority view. *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670 (1890); *Hart v. Sanson*, 110 U. S. 151, 3 S. Ct. 586, 28 L. ed. 101 (1884); *Dupont v. Abel*, 81 Fed. 534 (C. C. D. S. C. 1897); *Worthington v. Lee*, 61 Md. 530 (1883). See Note (1901) 50 L. R. A. 577.

<sup>2</sup>48 U. S. 289, 39 S. Ct. 97, 63 L. ed. 250 (1919).

<sup>3</sup>Only incidental references will be made to the bases for jurisdiction over non-resident corporations.

The decision of *Pennoyer v. Neff*<sup>4</sup> definitely established the principle that in a purely personal action for the recovery of money damages jurisdiction could not be obtained over a non-resident defendant through constructive service by publication. The court which decided that case, however, stated:

"Neither do we mean to assert that a State could 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."<sup>5</sup>

The validity of substituted service of process on a non-resident business man was not questioned by the Supreme Court<sup>6</sup> until the case of *Flexner v. Farson*<sup>7</sup> which was decided in 1919. The statute<sup>8</sup> under which that cause arose provided that in actions brought against non-resident individuals, or partnerships and other unincorporated associations the members of which resided in other states, engaged in business in Kentucky, summons might be served on the agent in charge of such business. In an action against a non-resident partnership which was doing business in Kentucky, service of process was made in accordance with this statute. The judgment which the plaintiff recovered in Kentucky was sued upon in Illinois.<sup>9</sup> The Illinois court dismissed the action for

<sup>4</sup>95 U. S. 714, 24 L. ed. 565 (1877). See comment supra note 1.

<sup>5</sup>95 U. S. 714, 735 (1877). To this effect see, *Lafayette Insurance Co. v. French*, 18 How. 404 (U. S. 1855); *Gillespie v. Commercial Mutual Marine Insurance Co.*, 12 Gray 201 (Mass. 1858). In an early English case it was said that ". . . it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them." *Vallee v. Dumerque*, 4 Exch. 290, 303, 154 Eng. Rep. 1221, 1227 (1849).

<sup>6</sup>In *Brooks v. Dun*, 51 Fed. 138 (C. C. W. Tenn. 1892) it was held that substituted service of process upon the agent of a non-resident partnership was ineffective as denying due process of law. Compare *Smith v. Farbenfabriken of Elberfeld Co.*, 203 Fed. 476 (C. C. A. 6th, 1913) in which such service was upheld as against a resident of Canada.

<sup>7</sup>248 U. S. 289, 39 S. Ct. 97, 63 L. ed. 250 (1919), hereinafter referred to as the *Flexner Case*.

<sup>8</sup>Ky. Civil Code (Carroll, 1906) § 51 (6).

<sup>9</sup>268 Ill. 435, 109 N. E. 327 (1915).

want of personal jurisdiction by Kentucky. This position was sustained by the Supreme Court<sup>10</sup> which declared that Kentucky was without power to obtain personal jurisdiction over a non-resident defendant in such a manner.<sup>11</sup>

It has been argued that the principle of the *Flexner* case is fundamentally weak.<sup>12</sup> The statute under which that cause arose was discriminatory in that it applied only to non-residents and ". . . did not restrict the actions in which process might be served to those arising out of transactions within the state. . . ."<sup>13</sup> Had the position of the Court been sustained on a due process objection, or on the basis of a denial of equal protection of the laws, it is thought that subsequent efforts of the states to extend their processes under statutes which did not deny to the non-resident individuals these constitutional guarantees might have been upheld. The *Flexner* decision proceeded, however, upon the theory that a state could prevent a foreign corporation from doing business within its borders<sup>14</sup> and so might require as a condition of admission the appointment of an agent upon whom process might be served;<sup>15</sup> but that it could not prevent a private individual

<sup>10</sup>248 U. S. 289, 39 S. Ct. 97, 63 L. ed. 250 (1919).

<sup>11</sup>This statute had been sustained in *Crane v. Hall*, 165 Ky. 827, 178 S. W. 1096 (1915); *Guenther v. American Steel Hoop Co.*, 116 Ky. 580, 76 S. W. 419 (1903). Cf. *Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186 (1890); *Cook v. Darling*, 18 Pick. 393 (Mass. 1836); *Graves v. Cushman*, 131 Mass. 359 (1881); *Kendrick v. Kimball*, 33 N. H. 485 (1856). Similar statutes had been held unconstitutional in *Brooks v. Dun*, 51 Fed. 138 (C. C. W. D. Tenn. 1892); *Aikman v. Sanderson & Porter*, 122 La. 265, 47 So. 600 (1908); *Cabanne v. Graff*, 87 Minn. 510, 92 N. W. 461 (1902), 59 L. R. A. 735 (1903).

<sup>12</sup>*Culp, Process in Actions Against Non-Residents Doing Business Within a State* (1934) 32 Mich. L. Rev. 909; *Scott, Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 Harv. L. Rev. 871.

<sup>13</sup>*Culp, Process in Actions Against Non-Residents Doing Business Within a State* (1934) 32 Mich. L. Rev. 909, 918.

<sup>14</sup>*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274 (U. S. 1839); *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868).

<sup>15</sup>*Lafayette Insurance Co. v. French*, 18 How. 404, 15 L. ed. 451 (U. S. 1855); *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, 37 S. Ct. 344, 61 L. ed. 610 (1917); *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915). It is of interest to note the development of the rules as to jurisdiction over a foreign corporation. Formerly it was held that a corporation could not migrate, and so the processes of another state could not reach it even though it could make contracts and transact business beyond its borders. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274 (U. S. 1839). Because of the intolerable conditions thus created, several legal "fictions" were adopted by means of which the corporations were made amenable to the processes of the states in which they did business. Professor Scott suggests three possible bases for the acquisition of jurisdiction over foreign corporations. (1) The theory of implied consent, first announced in *Lafayette Insurance Co. v. French*, 18 How. 404, 15 L. ed. 451 (U. S. 1855). Since the

from doing business there,<sup>16</sup> and so could not impose as a condition for his admission his assent to substituted service of process. Thus it was concluded that Kentucky had no power to impose restrictions upon the admission of the out-of-state partnership. This theory of exclusion, however, will appear defective when it is remembered that even though a state may not exclude a corporation engaged in federal employ<sup>17</sup> or in interstate commerce,<sup>18</sup> it may still subject it to reasonable regulations.<sup>19</sup>

Although the position of the Court may be sustained on the basis of the analogy which it chose, the decision seems an unfortunate one. It did not consider the question of the reasonableness of the substituted service or the problem of the denial of equal protection of the laws. Only incidental reference was made to the privileges and immunities of citizens. For this reason, the case should not be conclusive against a state's power to subject non-resident individuals to the jurisdiction of its courts by means of substituted service when process is sought to be extended upon the theory of a reasonable regulation of business.<sup>20</sup>

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state had power to exclude foreign corporations from doing business it had the power to prescribe the terms upon which business could be done. By doing business under such conditions the corporation impliedly consented to be bound by service upon its representatives in that state. (2) The theory of corporate presence within the state. Under this concept a corporation is present and may be served within any state in which it does business. This theory does away with the fiction of implied consent. Its weakness lies in the fact that the courts have never completely abandoned the dictum in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274 (U. S. 1839) to the effect that a corporation can have no legal existence outside the state which created it. (3) The theory of the state's power to subject corporations to reasonable regulations. When a corporation voluntarily does business within a state it is bound by reasonable regulations of that state. Thus it may be said that jurisdiction is based upon the control of the state which results from the voluntary act of doing business within the state. Scott, *Jurisdiction over Nonresidents Doing Business Within a State* (1919) 32 Harv. L. Rev. 871.

<sup>16</sup>*Corfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. 546, No. 3230 (C. C. E. D. Pa. 1823).

<sup>17</sup>See *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650 (1888).

<sup>18</sup>*Crutcher v. Kentucky*, 141 U. S. 47, 57, 11 S. Ct. 851, 35 L. ed. 649 (1891); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239 (1921); *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. ed. 678, 27 L. R. A. (N. S.) 493 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 S. Ct. 57, 59 L. ed. 193 (1914); *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355 (1910).

<sup>19</sup>*International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 197 (1914); *Restatement, Conflict of Laws* (1934) § 92, Comment b.

<sup>20</sup>*Culp, Process in Actions Against Non-Residents Doing Business Within A State* (1934) 32 Mich. L. Rev. 909, 917-920.

In *Hess v. Pawloski*<sup>21</sup> the Supreme Court made a perceptible departure from its principles of jurisdiction when it announced that a state's power extended to reach non-resident motorists who used its highways. However, dicta to the effect that "the mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts"<sup>22</sup> showed that it was not yet willing to delimit the *Flexner* decision. The case arose under a Massachusetts statute<sup>23</sup> which provided that the use of Massachusetts highways by a non-resident motorist was equivalent to the appointment by him of a Massachusetts officer as statutory agent to receive all processes in all actions against him, arising out of accidents or collisions on such highways. This act was upheld as a valid exercise of the state's police power. The Court reasoned that inasmuch as Massachusetts might exclude non-residents from the use of its highways, it could impute to them consent to substituted service upon a statutory agent.<sup>24</sup>

Following the *Hess* case, the numerous decisions which upheld similar statutes,<sup>25</sup> and the decisions of the state courts which sustained similar service upon non-resident brokers,<sup>26</sup> foretold of a more definite

<sup>21</sup>274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927), hereinafter referred to as the *Hess* Case.

<sup>22</sup>274 U. S. 352, 355, 47 S. Ct. 632, 633, 71 L. ed. 1091 (1927).

<sup>23</sup>Mass. General Laws, ch. 90, as amended by Stat. 1923, ch. 431, § 2.

<sup>24</sup>"The state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. . . . And, in advance of the operation of a motor vehicle on its highways by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. ed. 222. That case recognizes power of the state to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served." 274 U. S. 352, 356, 47 S. Ct. 632, 633, 71 L. ed. 1091 (1927).

<sup>25</sup>*Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. ed. 446, 57 A. L. R. 1230 (1928); *Young v. Masci*, 289 U. S. 253, 53 S. Ct. 599, 77 L. ed. 1158 (1933), 88 A. L. R. 170 (1934). See: *McBaine, Service Upon a Non-Resident by Service Upon His Agent* (1935) 23 Calif. L. Rev. 482, 484. "The judicial opinions and commentators are probably not in accord as to the basis for these holdings. Implied consent to service; the police power of the state; and the right of the state to forbid the doing of specified acts within its borders unless the non-resident consents to the authority of the courts of that state, and hence the power of the state validly to provide that the doing of certain acts by a non-resident within the state shall subject him to the jurisdiction of the courts as to causes of action arising out of such acts, have been suggested as sound reasons for these decisions." Cases collected in Notes (1925) 35 A. L. R. 951, (1928) 57 A. L. R. 1239, (1935) 99 A. L. R. 130.

<sup>26</sup>*Riley v. Sweat*, 110 Fla. 362, 149 So. 48 (1933); *Davidson v. Doherty & Co.* 214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1308 (1934); *Stoner v. Higginson*, 316 Pa.

break from the earlier Supreme Court view as expressed in the *Flexner* case. Thus in *Davidson v. Doherty & Co.*<sup>27</sup> the Iowa court upheld an Iowa statute<sup>28</sup> which provided that when any corporation, company, or individual had for the transaction of any business an office or agency in any county other than that in which the principal resides, service could be made on any agent or clerk employed there for all causes of action arising from the business transacted by that office. Service of process in compliance with this statute was made on the Iowa agent of a non-resident broker for a cause of action arising out of a stock transaction consummated in Iowa. The defendant appeared specially and challenged the jurisdiction over his person. The court decided that the service was valid and that it had jurisdiction to render a personal judgment against him. It was argued that although Iowa could not arbitrarily exclude the citizens of another state from doing business there, it was not prohibited by the constitution from imposing reasonable conditions upon non-residents who sought to do business within its borders<sup>29</sup> especially when similar conditions were imposed upon its own citizens.<sup>30</sup> *Pennoyer v. Neff*<sup>31</sup> was distinguished on the ground that the service in that case had been made by publication, while here there was substituted service impliedly consented to when the defendant came into the state to do business. The *Flexner* case was explained away by saying that there the person served had ceased to be the defendants' agent at the time the service was made.<sup>32</sup> Moreover, the statute under which that cause arose was discriminatory in that it applied only to non-residents, and unreasonable in that it was not limited to causes of action arising out of the conduct of the defendants' Kentucky business.

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481, 175 Atl. 527 (1934). Cf. *Thornburg v. Bennett*, 206 Iowa 1187, 221 N. W. 840 (1928); *Dragon Motor Car Co. v. Storrow*, 165 Minn. 95, 205 N. W. 694 (1925).

<sup>27</sup>214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1308 (1934).

<sup>28</sup>Iowa Code (1927) § 11,079.

<sup>29</sup>Compare: "When residents of other states seek to do business in this state, either as individuals or as partners, the state has no power arbitrarily to exclude them. To do so would violate the provision of the federal Constitution which gives to the citizens of each state all the privileges and immunities of citizens in the several states. But this state may impose reasonable conditions upon the exercise of a nonresident's right to do business within its boundaries." *Dicta in Dragon Motor Car Co. v. Storrow*, 165 Minn. 95, 205 N. W. 694, 695 (1925).

<sup>30</sup>The court interpreted the statute to extend to residents and non-residents alike, thus precluding any "equal-protection" objection.

<sup>31</sup>95 U. S. 714, 24 L. ed. 565 (1877).

<sup>32</sup>In the original Illinois suit the defendants pleaded that they had not been served, that the person upon whom service was made was not their agent, that the Kentucky statute was unconstitutional, and that the Kentucky court had no jurisdiction. Plaintiff demurred and stood on his demurrer when it was overruled.

This attempted distinction of the *Flexner* case on the basis of non-agency would appear to be an undesirable one. Mr. Justice Holmes stated in the *Flexner* opinion that the result would have been the same regardless of whether or not the person upon whom the service was made was an agent of the defendants.<sup>33</sup> Nevertheless, the decision reached by the Iowa court seems proper; it recognizes that the basis for the acquisition of the in personam jurisdiction is the power of the state to impose reasonable regulations upon non-resident business men for the protection of its own residents. The court was careful to point out, however, that such service would be upheld only when there had been sufficient notice to the defendants to preclude a denial of due process of law.<sup>34</sup>

This Iowa statute<sup>35</sup> was again attacked in the case of *Doherty & Co. v. Goodman*,<sup>36</sup> in the Supreme Court of the United States. Following the reasoning of the earlier Iowa case, the Court upheld its validity and the service thereunder. The opinion was confined to the particular circumstances and no effort was made to extend its operation. Justification for the decision was found from the fact that Iowa treats the business of selling securities as exceptional and subjects it to special regulation. By its decision the Court felt that it had gone no further than the principles approved in the earlier automobile cases.<sup>37</sup>

Thus it would seem that the Supreme Court was willing to make exceptions to the doctrine of the *Flexner* case only when they could be justified by a reasonable exercise of the state's police power over its highways,<sup>38</sup> or by state control over an exceptional business.<sup>39</sup> How-

<sup>33</sup>248 U. S. 289, 293, 39 S. Ct. 97, 98, 63 L. ed. 250 (1919).

<sup>34</sup>The Court adopted the dicta of *Thornburg v. Bennett*, 206 Iowa 1187, 221 N. W. 840, 842 (1928) to the effect that in order for the service to be upheld as valid "the defendant must: (1) Have an office or agency in the county. (2) A county other than that in which he resides. (3) The action must grow out of or be connected with the business of that office or agency. (4) The agent or clerk upon whom service is made must be employed in such office or agency."

<sup>35</sup>Iowa Code (1927) § 11,079.

<sup>36</sup>294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935).

<sup>37</sup>"So far as it affects appellant [defendant], the questioned statute goes no further than the principle approved by those opinions [*Hess v. Pawloski*, *Wuchter v. Pizzutti*, *Young v. Masci*, supra note 24] permits." 294 U. S. 623, 628, 55 S. Ct. 553, 554, 79 L. ed. 1097 (1935).

<sup>38</sup>*Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927); *Kane v. New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. ed. 222 (1916); *Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. ed. 446, 57 A. L. R. 1230 (1928); *Young v. Masci*, 289 U. S. 253, 53 S. Ct. 599, 77 L. ed. 1158 (1933), 88 A. L. R. 170 (1934).

<sup>39</sup>*Doherty & Co. v. Goodman*, 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935). Later cases arising in the state courts: *Kaiser v. Butchart*, 197 Minn. 28, 265 N. W.



ever, the departure from this doctrine which was begun in the *Hess* case would seem to have been made complete by a federal district court in the recent case of *Doggett v. Peek*.<sup>40</sup> That case would impute consent to substituted service of process whenever the non-resident defendant established a business within the state.

The *Peek* case arose under a Texas statute<sup>41</sup> which was similiar in all material respects to the Iowa statute<sup>42</sup> involved in *Davidson v. Doherty & Co.*<sup>43</sup> and *Doherty & Co. v. Goodman*.<sup>44</sup> It was not an act which provided for service on non-resident motorists. The defendant partners, residents of Illinois, had a business agency in Texas. The plaintiff's parents were killed in an automobile wreck, while riding in a car driven by the defendants' agent at a time when ". . . he was carrying out a mission for the . . . partnership."<sup>45</sup> In the suit against the defendants to recover damages for the death of the plaintiff's parents, process was served on an agent of the defendants pursuant to the terms of the statute. The defendants moved to dismiss on the ground that there had been no proper service of process and that the court was without jurisdiction over them. The court overruled the motion on the grounds that it was bound by the decision of *Doherty & Co. v. Goodman*<sup>46</sup> and that the principles of the *Flexner* case were inapplicable.<sup>47</sup>

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826 (1936) (Stock Broker); *Long v. Sakleson*, 328 Pa. 261, 195 Atl. 416 (1937) (Reciprocal Insurance Exchange).

<sup>40</sup>32 F. Supp. 889 (N. D. Tex. 1940), hereinafter referred to as the *Peek* Case.

<sup>41</sup>Texas Rev. Civ. Stat. (1925) Art. 2033b, as amended, Texas Civ. Stat. Ann. (Vernon, 1935) Art. 2033b, provided that when an individual, partnership, or unincorporated association had for the transaction of business, an office or agency in any county other than that in which the principal resides, service of process to bind the principal could be made on any agent or clerk there employed in all suits growing out of the conduct of that business and brought in the county where the place of business was located; ". . . and the provisions hereof shall apply as well to non-residents of the state as to non-residents of such county. . . ."

<sup>42</sup>Iowa Code (1927) § 11,079 (supra note 34) did not provide that it was to apply equally to residents and non-residents. The Iowa court in *Davidson v. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1308 (1934), and the Supreme Court in *Doherty & Co. v. Goodman*, 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935) interpreted that it did so apply.

<sup>43</sup>214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1308 (1934).

<sup>44</sup>294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935).

<sup>45</sup>32 F. Supp. 889 (N. D. Tex. 1940).

<sup>46</sup>294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935).

<sup>47</sup>The court in the *Peek* Case used language which could be interpreted as limiting the substituted service of process to causes of actions arising out of accidents and collisions which occurred on Texas highways. "In addition to the general doctrine just cited, the Texas statute quoted above [set out supra note 40] is in line with the approved power of the states over their highways and the use thereof by non-residents." 32 F. Supp. 889, 890 (N. D. Tex. 1940). It should be noticed, however, that

It was pointed out that since the service had been made upon the agent, it could be assumed that he had given notice to his principal.

Since it was declared that *Doherty & Co. v. Goodman*<sup>48</sup> went no further than the principles approved by the *Hess* case, and this latter case specifically declared that consent to substituted service of process could not be implied from the mere transaction of business within the jurisdiction by a non-resident individual,<sup>49</sup> it is necessary to investigate the real basis of the *Peek* decision in order to determine how far the federal courts may extend their "Hess concept" of personal jurisdiction.

Of course the ultimate aim of the statutes which authorize the states to extend their power so as to reach certain classes of non-residents is to enable the citizens of that state to have their claims against such non-residents prosecuted locally. The basis for this extension would seem to be the protection of local interests. Whether or not that protection will be afforded depends upon: First, whether the public interest of the forum is sufficient to warrant the extension of substituted service of process to any particular class of non-residents. Second, whether constitutional barriers will prevent such an extension.

Applying this analysis to the *Peek* case, the question first to be determined is whether it is of sufficient public interest to the citizens of Texas that they be enabled to proceed against any non-resident who does business in Texas by service of process upon his Texas agent. Most of the authorities will agree that the public interest of Texas warrants such service.<sup>50</sup> At least one writer has considered that the expense and inconvenience imposed on a prospective plaintiff by a contrary position which would make it necessary to bring suit in a distant jurisdiction, and the fact that such a rule would often lead to a denial of any relief at all, are factors furnishing a sufficient basis upon which to predicate an extension of the state's power.<sup>51</sup> The result of the

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this was not necessary to the decision and it should not be implied that the plaintiff relied upon this statute to effect service of process of the "Hess v. Pawloski" type. Had this been her purpose, service would have been made under Texas Rev. Civ. Stat. (1929) Art. 2039a which provides for service of process on non-resident motorists, their agents, servants, or employees.

<sup>48</sup>294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935).

<sup>49</sup>274 U. S. 352, 355, 47 S. Ct. 632, 633, 71 L. ed. 1091 (1927), supra note 21.

<sup>50</sup>Culp, Process in Actions Against Non-Residents Doing Business Within a State (1934) 32 Mich. L. Rev. 909; Hinton, Substituted Service on Non-Residents (1925) 20 Ill. L. Rev. 1; McBaine, Service Upon a Non-Resident by Service Upon His Agent (1935) 23 Calif. L. Rev. 482; Scott, Jurisdiction Over Nonresidents Doing Business Within a State (1919) 32 Harv. L. Rev. 871; Note (1935) 14 Tex. L. Rev. 71; (1935) 20 Iowa L. Rev. 853.

<sup>51</sup>Scott, Jurisdiction Over Nonresidents Doing Business Within a State (1919) 32 Harv. L. Rev. 871.

*Peek* case seems fair. The defendants who voluntarily come into the state to do business, accepting the protection and the benefits which the state has to offer, should be made amenable to reasonable regulations concerning the conduct of that business. Manifestly, such service will be allowed only for causes of action arising out of the conduct of the Texas business.<sup>52</sup> Moreover service must be upon an agent of the absent defendants.<sup>53</sup> It may then be assumed that notice thereof will be communicated to the defendants.<sup>54</sup>

Secondly, it is thought that there could be no constitutional objection to this extension of jurisdictional power. Fundamentally, the law as regards in personam jurisdiction remains unaffected by the principles which have been developed during the evolution of the *Hess* case. Processes from the tribunals of one state cannot run into another state and compel parties domiciled there to respond to proceedings against them.<sup>55</sup> However, processes of the state may reach non-residents when they have expressly or by implication of law appointed an agent upon whom process may be served.<sup>56</sup>

The solution of the constitutional objection, therefore, depends upon whether Texas could impute to the defendants consent to the substituted service on the basis of the defendants' voluntary act of

<sup>52</sup>*Doherty & Co. v. Goodman*, 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935); *Davidson v. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1308 (1934); *Thornburg v. Bennett*, 206 Iowa 1187, 221 N. W. 840 (1928).

<sup>53</sup>*Thornburg v. Bennett*, 206 Iowa 1187, 221 N. W. 840 (1928) first established this dicta [supra note 33] which was subsequently adopted by the other cases which arose under the Iowa statute.

<sup>54</sup>*State of Washington v. Superior Court*, 289 U. S. 361, 53 S. Ct. 624, 77 L. ed. 1256 (1933), 89 A. L. R. 653 (1934). The Court held that in order to preclude a denial of due process, statutes which provide for substituted service must incorporate reasonable provisions for giving the non-resident individuals notice of the initiation of litigation. The court in the *Peek* case was of the opinion that where service was made on defendants' agent, it was reasonable to suppose that he would communicate this fact to his principal.

<sup>55</sup>*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959 (U. S. 1873); *Penny v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

<sup>56</sup>*Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927); *Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. ed. 446, 57 A. L. R. 1230 (1928); *Restatement, Conflict of Laws* (1934) §§ 84, 85. The Restatement takes the position that a state may exercise jurisdiction over an individual who has done an act within the state, for a cause of action arising out of that act, when by the law of the state, by doing the act, he has thereby subjected himself to the jurisdiction of the state for that cause of action. It then qualifies this position by saying that the state cannot validly provide that by doing certain acts the individual subjects himself to the jurisdiction of the state, when to do so would violate some provision of the Constitution. It is thought that this type of argument contributes nothing to the solution of the problem presented by the *Peek* Case.