THE TRANSIENT RULE OF PERSONAL JURISDICTION: THE "POWER" MYTH AND FORUM CONVENIENS

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THE "RULE": PERSONAL SERVICE WITHIN THE STATE

SITTING in the lounge of his plane on a nonstop flight over New York, a citizen of California is handed a summons. For many years to come, to his great expense and greater annoyance, he will have to defend a law suit in a New York court three thousand miles away from his home, even though the plaintiff may be a spiteful competitor alleging a fanciful claim dating back many years to a trip abroad. For "transitory actions" may be brought in any court that has jurisdiction of the defendant, and anyone "personally present" in a state is subject to its "jurisdiction," "whether he is permanently or only temporarily there."¹

The dogma that will herein be called the "transient rule" has it that in personam jurisdiction of an individual defendant can be acquired by mere physical service of process, even in a forum where neither plaintiff nor defendant resides and which has no connection with the cause of action.² The inadequacy of this rule, and its contrast with the law prevailing elsewhere in the world,³ have often been stressed. A rule compelling the traveler "to run the

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1. RESTATEMENT, CONFLICT OF LAWS §§ 77-78 (1934).

2. The present discussion excludes: the somewhat different rules of jurisdiction over corporations, which involve other problems and will therefore be dealt with only collaterally; jurisdiction over individual defendants who have expressly or impliedly consented to the jurisdiction and can, therefore, hardly complain of inconvenience; and quasi in rem jurisdiction which, though often providing a means of suing a distant defendant, does not entail either the opportunities for a captious choice of the forum or the severe penalties for a judgment by default inherent in the transient rule, since both choice and effect of judgment are limited to the defendant's property situated in the forum state.

3. In civil law countries personal service requirements are procedural in character and do not "go to the jurisdiction"; and personal jurisdiction, or "competency" *ratione personae*, is never based on the mere physical "presence" of the defendant. See NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 192 (1943). For a historical analysis see 2 NEUMEYER, DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT- UND STRAFRECHTS 42 (1916). Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 193, 199, 283 (1912), ignores the difference. Compare WESTLAKE, PRIVATE INTERNATIONAL LAW 90-94 (1858); MICHAELI, INTERNATIONALES PRIVATRECHT 350 (1947) (Swedish law); Pillett, *Jurisdiction in Actions Between Foreigners*, 18 HARV. L. REV. 325, 335 (1905); Francescakis, *Compétence étrangère et jugement étranger*, 42 REVUE

gauntlet of such litigation under threat of snap judgment" offers "premiums to scavengers of sham and stale claims at every center of travel."⁴ The rule "may result in trying the suit in a State in which no part of the operative facts occurred and in which neither of the parties lives,"⁵ so that "the defendant may be called upon to defend in a place with which he is unfamiliar,"⁶ and the forum may not be "in a favorable position to deal intelligently either with the facts or with the law."⁷ To Minor, the best known commentator on conflicts law in the period between Story and Beale, the related rule permitting an administrator to sue a debtor transiently in the state of his appointment was "closer akin to robbery than to justice."⁸ A more recent author can find "nothing so irrational as the doctrine of local and transitory actions conventionally applied in the interstate field,"⁹ and another would reject wholesale the current "archaic legal techniques" of jurisdiction.¹⁰

Some of the apparently insoluble problems of interstate jurisdiction have been caused by these shortcomings. Thus in the case of *Fauntleroy v. Lum*,¹¹ Mississippi was compelled under the full faith and credit clause to enforce a Missouri judgment based on either a deliberate disregard of, or a glaring error about, Mississippi law, in a case involving "acts of residents of Mississippi, done within that state, which were violative of the public policy of the State and which were criminal."¹² This case would never have arisen had the Missouri court not "succeeded in getting personal service upon" a defendant "temporarily in the State."¹³

These shortcomings of the transient rule are serious enough; further dif-

CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (France 1953); and the excellent article by Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146, 147 (1932). In contrast to the RESTATEMENT, CONFLICT OF LAWS, §§ 77-78 (1934), the RESTATEMENT, JUDGMENTS § 7 (1942) has adopted at least the term, if not the concept of "competency." For the law of Louisiana, see *State v. Sandlin*, 21 La. Ann. 258 (1869); HAWES, JURISDICTION OF COURTS 23 (1886). For the "Forum Competens" of older Scottish law, see 11 Mor. Dict. Dec. 4779-81 (1803). But cf. GIBB, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 1 (1926). As to the similarity of early American and civil law concepts of jurisdiction, see text at notes 124-30 *infra*. For an indication of an impending rapprochement, see Boskey & Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940).

4. Hamersley, J., dissenting in *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 143, 34 Atl. 714, 729 (1895).

5. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 100 (1949).

6. STUMBERG, CONFLICT OF LAWS 73 n.23 (2d ed. 1951). See also Ross, *supra* note 3, at 159.

7. Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 438 (1929).

8. MINOR, CONFLICT OF LAWS 285 (1901).

9. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 48 (1930). See also Foster, *Place of Trial in Civil Actions*, 43 *id.* 1217, 1222; text at note 101 *infra*.

10. DEAN, [1954] ANNUAL SURVEY OF AMERICAN LAW 33, 35 (1955).

11. 210 U.S. 230 (1908).

12. *Id.* at 241.

13. *Id.* at 239. See also *id.* at 234.

ficulties are raised by the impact of our law of personal jurisdiction on the entire field of American conflicts law. A systematic analysis of this impact is beyond the scope of this study, but an example may serve here to illustrate the close though often neglected connection between the laws of jurisdiction and of choice-of-law. There is little disagreement as to the unsatisfactory state of our conflicts law bearing upon the statute of limitations. It now seems settled that any state is free to apply its own statute rather than that under which the cause of action arose.¹⁴ Yet by applying the local statute a court may deny the valid claim of a nonresident creditor who was compelled by our law of personal jurisdiction to follow his debtor into the state of the forum. On the other hand, a court may offer its own law for the revival of a stale claim by a nonresident creditor who, again by our law of personal jurisdiction, was enabled to "catch" his unwary debtor in the state of the forum.¹⁵

Choice-of-law problems can no longer be considered to be governed by what Justice Holmes called the "first principles of legal thinking,"¹⁶ or what the Restaters refer to as "legislative jurisdiction."¹⁷ Due process as a vehicle of constitutional control of choice-of-law may be obsolescent,¹⁸ and the same fate may perhaps be expected for the still current use of "full faith and credit to statutes" for a similar purpose.¹⁹ We may have to acquiesce in the fact that

14. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). *But cf.* *Order of Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947); *Hartford Acc. & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See Stewart, *The Federal "Door-Closing" Doctrine*, 11 WASH. & LEE L. REV. 154 (1954).

15. Similarly, a creditor can invoke transient jurisdiction in a foreign forum to garnish debts owed to his debtor, *Harris v. Balk*, 198 U.S. 215 (1905), and may thus be able to take advantage of a lenient statute of limitations in the state where he "catches" his debtor's debtor. *Cf.* Holt, *The Federal Interpleader Act and Conflict of Laws in Garnishment*, 4 U. CHI. L. REV. 403, 421-29 (1937); note 149 *infra*. On the implications for this problem of transfer of venue according to the Judicial Code, 28 U.S.C. § 1404(a) (1952), see Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955).

16. *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922). See Ehrenzweig, *American Conflicts Law in its Historical Perspective*, 103 U. PA. L. REV. 133, 147-50 (1954).

17. See RESTATEMENT, CONFLICT OF LAWS §§ 59-70 (1934).

18. See *Watson v. Employers Liab. Assurance Co.*, 348 U.S. 66, 70-73 (1954). See, generally, Ehrenzweig, *supra* note 16, at 150. For a contrary view of the choice-of-law implications of the *Watson* case, see Note, 64 YALE L.J. 940, 948 (1955).

19. In the light of *Watson v. Employers Liab. Assurance Co.*, *supra* note 18, at 73, *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952), which held that Illinois could not, under the full faith and credit clause, refuse to entertain a wrongful death action brought under a Utah statute, may have to be limited to a case in which "all elements" of the cause of action, *id.* at 400, occurred in the foreign state. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), may also indicate a weakening of the full faith and credit approach of the Court (statutes of limitation), as may the continuing retreat in workmen's compensation cases. *Carroll v. Lanza*, 349 U.S. 408 (1955). See Ehrenzweig, *supra* note 16, at 153; and, generally, Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 786, 790 (1955); *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 133-34.

the Supreme Court with its limited private law jurisdiction will never be able to engage in that meticulous process of analogizing and distinguishing a myriad of cases, which alone can satisfy the needs of an ever-changing and multifarious law of choice-of-law. But does this mean that American conflicts law is to be left forever to the "local" whim of the forum, with its all-purpose tools of "procedure," "remedy," "public policy" and "proper law"?²⁰ The answer cannot lie in the construction of new "logical" formulas for choice-of-law, but must await the result of patient groping from case to case. Meanwhile a reform of the law of jurisdiction may help to minimize the problem by limiting the choice of the forum on rational grounds to one having such contacts with the case as will justify the application of the chosen forum's own law.

Notwithstanding the obvious shortcomings and the virtually unanimous criticism of the law of personal jurisdiction, efforts for judicial or legislative reform have been decisively impeded by the assumption, so forcefully supported by the author of the *Restatement of Conflict of Laws*,²¹ that our rules of personal jurisdiction are of ancient common law origin. I shall try to show that they are not, and that, until the last quarter of the nineteenth century, notwithstanding dogmatic generalizations later sanctioned by the *Restatement*,²² appellate courts hardly ever in fact held transient service sufficient as such. Indeed, courts apparently had occasion only rarely to proceed upon such service, since state statutes, as yet unrestricted by constitutional demand, quite liberally permitted suits against absent defendants, leaving it to the courts to determine whether they properly had jurisdiction in a given case. *Forum conveniens*—to use an unusual, but I believe helpful, phrase—was, in this sense, the basis of all personal jurisdiction.

I shall try to show further that all this did not change fundamentally until 1877, when the Supreme Court in *Pennoyer v. Neff*²³ held unconstitutional all statutes basing in personam jurisdiction over nonresident defendants on less than personal service within the state. Only when transient service, hitherto a harmless adjunct of convenient jurisdiction, thus came to be *required* for the establishment of personal jurisdiction over nonresident defendants, did such service also become generally *sufficient* for this purpose. And if the plaintiff was thus to be compensated by the new transient rule for some of the inconvenience caused to him by the *Pennoyer* requirement, the doctrine of the inconvenient forum was in turn resorted to in order to give the defendant protection against some of the hardship this rule caused him. The common law and common sense jurisdiction of the forum *conveniens* yielded to a dogmatic rule of personal service precariously balanced by a doctrine of forum *non conveniens*.

20. As to the uncertainty left by the "local law" theory of choice-of-law, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 386 (1945); Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 312 (1953); Ehrenzweig, *supra* note 16, at 153.

21. See text at note 45 *infra*.

22. See text at note 1 *supra*.

23. 95 U.S. 714 (1877).

The concepts of "physical power" and "transitory action" which are commonly invoked to justify this structure can, I believe, be shown to be results of an unsuccessful endeavor to give the appearance of rationality to an irrational rule. They are based on a historical misunderstanding which appears to have been caused or perpetuated by a lack of insight into the significance of contemporary events or intervening changes in the functioning of legal rules. In spite of the rationalizations of the rule, however, the rule itself appears to be changing and, reversing the process of its development, returning to an earlier and better form. The present paper is intended to help promote the change by a historical and functional analysis of the law of personal jurisdiction, its myth, its true basis and its needs for the future.

THE MYTH: A COMMON LAW OF "PHYSICAL POWER"

Beale's "Unchangeable" Common Law

In view of the apparently unanimous acceptance of a general transient rule today, it is somewhat surprising at first glance to find that both courts and writers stating it are satisfied either with the citation of doubtful, or with the absence of any, authority.²⁴

Professor Beale in his treatise adduces nineteen cases.²⁵ Four of these concern corporations,²⁶ and for this if for no other reason fail to bear out a rule applicable to individual transients.²⁷ Another case also fails to support the rule because the defendant had been found to be a resident and temporary domiciliary of the state of the forum;²⁸ and three cases likewise fail because "the defendant appeared in the action and answered to the merits and was

24. LEFLAR, *ARKANSAS LAW OF CONFLICT OF LAWS* 100 (1938) (two cases from 1872 and 1895); STUMBERG, *CONFLICT OF LAWS* 72 (2d ed. 1951) (see text at notes 43-44 *infra*); Burdick, *Service as a Requirement of Due Process in Actions in Personam*, 20 MICH. L. REV. 422, 425 (1922) (one unrelated passage from Blackstone); Dodd, *supra* note 7, at 438 (no authority). ALI, *COMMENTARIES ON CONFLICT OF LAWS*, RESTATEMENT No. 2, at 10 (1926) finds "little authority on this proposition."

25. 1 BEALE, *CONFLICT OF LAWS* 339 n.6, 340 nn.1, 2 (1935).

26. *Case v. Smith, Lineaweaver & Co.*, 152 Fed. 730 (E.D.N.Y. 1907); *Reeves v. Southern Ry.*, 121 Ga. 561, 49 S.E. 674 (1904); *Johnston v. Trade Ins. Co.*, 132 Mass. 432 (1882); *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53 (1897). The federal case cited not only concerned a corporate defendant, but the court, in upholding service on a corporate officer on the basis of his mere presence within the state, stressed the fact that he had come to a jurisdiction "in which the cause of action was located." *Case v. Smith, Lineaweaver & Co.*, *supra*, at 732.

27. The history of the law of personal jurisdiction over corporations started with the original denial and then gradual admission of their extraterritorial "existence." See the line of cases from *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); through *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950). Both the older requirement of "presence" and the current one of "fair play" relate to "minimum contacts" that are absent in the transient rule as applicable to individuals.

28. *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12 (1888).

personally present on the trial," and thus "submitted himself in all respects to the jurisdiction of the court in that action."²⁹ In the ninth case the suit was against a nonresident alien³⁰—and so there was an especially good reason for entertaining a transitory action.³¹ In four cases transient jurisdiction may have been supported by such other factors as defendant's membership in a firm doing business in the forum state,³² a domestic cause of action,³³ or "some part of the transaction [taking] . . . place within the state."³⁴ Three cases do not seem to be in point,³⁵ though another comes close: the court refused to enjoin prosecution by a local plaintiff of a local suit against a local defendant in a neighboring forum.³⁶ When the grain has been winnowed from the chaff, there are only two cases holding squarely to the transient rule, neither decided earlier than 1870. In *Peabody v. Hamilton*,³⁷ there was true transient jurisdiction of a defendant who was a citizen of another state, in a suit by an alien. And the court stated that "personal actions, of a transitory nature, may be maintained in any jurisdiction within which the defendant is found so that process is legally served upon him."³⁸ But *Peabody v. Hamilton* goes beyond the authority of the only pertinent case it relies upon—where the suit was against a nonresident alien.³⁹ The second case applying the transient rule was

29. *Reed v. Hollister*, 106 Ore. 407, 413, 212 Pac. 367, 369 (1923) (*semble*); *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098 (1910) (special appearance first, then request for leave to answer on the merits, held to constitute a general appearance); *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S.W. 1049 (1870) (defendant also was doing business in state, and cause of action arose there).

30. *Belden v. Wilkinson*, 44 App. Div. 420, 60 N.Y. Supp. 1083 (1st Dep't 1899).

31. See text at notes 106-07 *infra*.

32. *Mason v. Connors*, 129 Fed. 831 (C.C.D. Vt. 1904). In addition the defendant himself was in the state on "voluntary private business," and the suit apparently arose out of the very business the defendant was engaged in. See also *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S.W. 1049 (1870).

33. *Darrah v. Watson*, 36 Iowa 116 (1873). While the facts of the case do not contain a statement to this effect, its correctness may be inferred from the fact that the only authority relied on by the court is *Bissell v. Briggs*, 9 Mass. *462 (1813), where the theory of the decision upholding personal service upon a transient was in terms limited to cases where the defendant had contracted a debt or committed a tort in the state of the forum and thus owed "temporary allegiance" to the state. In addition defendant had "appeared to the writ and defended the action." *Id.* at *470.

34. *Wertheim v. Clerque*, 53 App. Div. 122, 126, 65 N.Y. Supp. 750, 753 (1st Dep't 1900); *Rice v. Brown*, 81 Me. 56, 16 Atl. 334 (1888) (lease, apparently of forum land).

35. *Molina v. Comisión Reguladora*, 92 N.J.L. 38, 104 Atl. 450 (Sup. Ct. 1918) (quasi in rem); *Miller v. Black*, 47 N.C. (2 Jones) 342 (1855) (plea in abatement not good because of failure to allege that cause of action not local); *Rafael v. Verelst*, 2 Wm. Bl. 1055, 96 Eng. Rep. 621 (K.B. 1776) (English defendant in English court; apparently no objection to jurisdiction over him, but only to jurisdiction of subject matter and of alien plaintiff's suit).

36. *McDaniel v. Alford*, 148 Ga. 609, 97 S.E. 673 (1918).

37. 106 Mass. 217 (1870).

38. *Id.* at 220.

39. *Barrell v. Benjamin*, 15 Mass. 354, 358 (1819). See text at notes 31 *supra*, 106-07 *infra*. The following cases also cited in *Peabody v. Hamilton* concerned the different

Lee v. Baird.⁴⁰ It follows two earlier cases,⁴¹ which in turn rely on *Peabody v. Hamilton*.

Professor Beale adds no further pertinent authority in an article specially devoted to this topic.⁴² Judge Goodrich and Professor Stumberg in their texts add one case which, however, concerned a nonresident alien defendant⁴³ and is therefore as inconclusive as the cases it relies on.⁴⁴

It is evident that although the transient rule has often been mouthed by the courts it has but rarely been applied. In the light of this state of authority and of the functional inadequacy of the transient rule, it is hard to agree with Professor Beale's statement that the rule is so deeply entrenched as to make it,

question, see text at note 23 *supra*, whether personal service within the state in cases other than those based on attachment or the defendant's domicile, was required (rather than sufficient); *Carleton v. Bickford*, 79 Mass. (13 Gray) 591 (1859); *Ewer v. Coffin*, 55 Mass. (1 Cush.) 23 (1848); *Wright v. Oakley*, 46 Mass. (5 Met.) 400 (1843); *Gleason v. Dodd*, 45 Mass. (4 Met.) 333 (1842); *Hall v. Williams*, 23 Mass. (6 Pick.) 232 (1828). Also cited was *Barringer v. King*, 71 Mass. (5 Gray) 9 (1855), which concerned the validity of a New York judgment against a Massachusetts resident transiently served in New York. The plaintiff was apparently a New York resident, however, and the issue was whether defendant had appeared or been served, not whether transient service was sufficient.

40. 139 Ala. 526, 36 So. 720 (1903). A full-blown transient rule was applied to acquire personal jurisdiction over an out-of-state defendant at the behest of an out-of-state plaintiff, on an out-of-state cause of action.

41. *Steen v. Swadley*, 126 Ala. 616, 28 So. 620 (1900); *Smith v. Gibson*, 83 Ala. 284, 3 So. 321 (1888).

42. Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 193, 283 (1912), mentions, in addition to cases in notes 26-40 *supra*, the following: *Badger v. Towle*, 48 Me. 20 (1860) (exceptions sustained against dismissal, it not having appeared "that the plaintiff was not an inhabitant of, and resident within the State at the time the action was commenced," *id.* at 21); *Thompson v. Cowell*, 148 Mass. 552, 20 N.E. 170 (1889) (suit concerning title to real estate in the forum state); *McDonald v. MacArthur Bros. Co.*, 154 N.C. 122, 69 S.E. 832 (1910) (corporate defendant).

Two other early cases, not mentioned by Beale, that applied the transient rule are *Latourette v. Clarke*, 45 Barb. 327 (N.Y. Sup. Ct. 1st Dist. 1865) (see text at notes 114-15 *infra* and note 116 *infra*); *Mussina v. Belden*, 6 Abb. Pr. 165 (N.Y. Sup. Ct. 1st Dist. 1858) (*semble*).

43. *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 92, 34 Atl. 714, 715 (1895); cited in GOODRICH, *CONFLICT OF LAWS* 189 (3d ed. 1949) and STUMBERG, *CONFLICT OF LAWS* 72 n.21 (2d ed. 1951).

44. *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872) (alien's right to recover proceeds of goods seized in rebellion); *O'Sullivan v. Overton*, 56 Conn. 102 (1888) (in rem service binds only the property and not the person); *Easterly v. Goodwin*, 35 Conn. 273 (1863) (same); *Duryee v. Hale*, 31 Conn. 217 (1862) (no personal service); *Bishop v. Vose*, 27 Conn. 1 (1858) (domestic plaintiff); *Hatch v. Spofford*, 22 Conn. *485 (1853) (domestic plaintiff, and contract cause of action having contact with forum state); *Wood v. Watkinson*, 17 Conn. 500 (1846) (refusal to enforce a New York judgment against a defendant not personally served in New York); *Hart v. Granger*, 1 Conn. *154 (1814) (domestic plaintiffs); *Place v. Lyon*, Kirby 404 (Conn. 1788) (conceding a remedy against vexatious suits); *Potter v. Allin*, 2 Root 63 (Conn. 1793) (suit against nonresident alien).

"unlike other principles of the common law, . . . incapable of change by statute."⁴⁵

Holmes' "physical power"

Most expressions of the general transient rule are buttressed by little more than a reference to Justice Holmes' much-quoted statement that the "foundation of jurisdiction is physical power."⁴⁶ This statement is both factually unsupported and functionally unsupportable under modern conditions.⁴⁷ If it should appear that it not only is incorrect today but has never been correct, either in this country or in England, we should have to discard it as just another one of the great jurist's unfortunate aphorisms in the field of conflict of laws.⁴⁸ In so doing, we should find support in an English commentator's conclusions that Holmes' aphorism was only a manifestation of "that courageous cynicism which made the young century feel so grown-up," and that the power myth originated in Dicey's famous red herring, the "principle of effectiveness," rather than in ancient wisdom.⁴⁹

Early judicial procedure depended upon voluntary subjection of both parties to the court's judgment. The Roman *litiscontestatio*, the medieval trial by ordeal, battle and feud,⁵⁰ as well as jurisdictional agreements in (primitive) modern international law,⁵¹ point to the universality of the consent technique. Later developments permitted the courts to obtain consent by inducement and force,⁵² but apparently only a comparatively recent growth of the state's general functions has enabled administration of justice to proceed by self-asserted authority. Lack of self-reliance thus seems to have been the original source of

45. 1 BEALE, *CONFLICT OF LAWS* 275 (1935). See also 1 *id.* at 339-67; and in general Rheinstein, *supra* note 19, at 791-96. COOLEY, *CONSTITUTIONAL LIMITATIONS* *353, *413 derived similar conclusions, prior to *Pennoy v. Neff*, 95 U.S. 714 (1877), from the "law of the land."

46. *McDonald v. Mabey*, 243 U.S. 90, 91 (1915). See GOODRICH, *CONFLICT OF LAWS* § 73 (3d ed. 1949).

47. See Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 428, 434, 435 (1929), finding support for his opposition to the power theory in the existence of declaratory judgments, continuing jurisdiction and jurisdiction by consent. Among many other instances in which jurisdiction is independent of physical power, one particularly worthy of mention is the spreading acceptance of mailing as a proper method of personal service. See, e.g., *Durfee v. Durfee*, 293 Mass. 472, 200 N.E. 395 (1936).

48. See Ehrenzweig, *American Conflicts Law in Its Historical Perspective*, 103 U. PA. L. REV. 133, 147 (1954).

49. Smith, *Personal Jurisdiction*, 2 INT'L & COMP. L.Q. 510, 522 (1953); cf. DICEY, *CONFLICT OF LAWS* 22, 24 (6th ed., Morris 1949).

50. See *Salic Law* (496 A.D.) tits. 1, 56, reprinted in HENDERSON, *SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES* 176, 187 (1896); Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45, 65 (1891).

51. See, e.g., the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, reprinted in BISHOP, *INTERNATIONAL LAW* 704, 708 (1953).

52. See, generally, WENGER, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE* 33-42 (Fisk trans. 1940).

the law's lasting insistence on at least symbolical submission to the court's jurisdiction.

The conclusion that such psychological, rather than Justice Holmes' physical power, was the foundation of the early judge's jurisdiction, is supported on the one hand by the fact that once submission has been obtained the law has always been satisfied with less than actual power,⁵³ and on the other hand by the law's continuing desire for the defendant's "co-operation"—expressed, for instance, in its hesitation in admitting judgments by default.⁵⁴ The jurisdictional rationale thus suggested is equivalent to that English theory which attributes all personal jurisdiction past and present to a theory of express or implied "submission."⁵⁵

The power doctrine might be justified theoretically as offering the defendant some protection against a vindictive plaintiff's unfair choice of forum, for it would limit the scope of the plaintiff's choice to the court of the defendant's voluntary presence. But until recent times the defendant never needed such protection. When migration and progressing commercialization tended to separate the parties from the place where the cause of action arose, the laws of all countries endeavored to protect the defendant by requiring the plaintiff to "lay the venue" at a place connected with the case. Thus it was provided in Justinian's Code that the plaintiff was to follow the defendant to the place where the defendant was domiciled either at the time of the suit or when he executed the contract sued upon.⁵⁶ And later exceptions to this provision remained related to the places of performance, wrong and property situs.⁵⁷ But what later became known as the civilian doctrine of *actio sequitur forum rei*⁵⁸ (the action follows the defendant's court) referred to the defendant's domicile or residence, and not to the place where he was temporarily to be found—and so was far from expressing a power rationale of jurisdiction.⁵⁹

English legal history furnishes little support for the power doctrine. Even when the King's Bench, in competition with the Common Pleas, began to base its personal jurisdiction upon the physical arrest of the defendant, actual physical power over the defendant was not invariably required.⁶⁰ Of course, in

53. See Holmes, J., in *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913); note 141 *infra*.

54. Cf. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 361-73 (1952). A similar desire for the defendant's acquiescence is perhaps expressed in the law's compunctions concerning criminal convictions without confessions. See, generally, Ehrenzweig, *A Psychoanalysis of Negligence*, 47 Nw. U.L. REV. 855, 867 (1953).

55. Smith, *supra* note 49, at 522.

56. CODE OF JUSTINIAN 3.13.2. See WENGER, *op. cit. supra* note 52, at 46.

57. WENGER, *op. cit. supra* note 52, at 47.

58. "*Actor rei forum, sive in rem, sive in personam sit actio, sequitur. . .*" CODE OF JUSTINIAN 3.19.3. The modern use of this phrase in England and the United States does not correspond to its original meaning. See, e.g., CHESHIRE, *PRIVATE INTERNATIONAL LAW* 102 (4th ed. 1952).

59. See MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 292-94 (1932).

60. Constructive custody of a defendant could be acquired by the King's Bench by a mere record of the defendant's bail on the rolls, 3 BLACKSTONE, *COMMENTARIES* *287, and

England there was nothing comparable to the competing, geographically limited jurisdictions of the United States; and the courts with their nationwide jurisdiction might have been said to have at least potential power over all subjects within the realm. But even so, personal jurisdiction, in the words of an English jurist, is thought of as ordinarily depending "on the allegiance of the party or his consent"⁶¹ rather than the court's physical power over him.

The English case most often referred to in support of the transient rule, on both sides of the Atlantic, is *Buchanan v. Rucker*.⁶² Here Lord Ellenborough denied recognition to a default judgment of the Island Court of Tobago over an English subject, because he had not been "subject" to the jurisdiction of the Tobago court "at the time of commencing the suit"⁶³ even though served by publication in accordance with local law. This case is usually cited for the twin propositions that personal service within the state of the rendering court is both required and sufficient for giving that court jurisdiction. But it is certainly anything but clear that Lord Ellenborough would have found "jurisdiction" had Rucker been served in Tobago as a transient on a pleasure trip. The court might well have required some prior contact of the defendant with the island, as indeed the Tobago statute itself seems to have done, being in terms applicable only or primarily to owners of local plantations.⁶⁴ In the very case that is generally regarded as having established the triability in England of foreign causes of action, Lord Mansfield expressly reserved opinion on whether a suit upon a foreign tort against a person "happening casually to be here," "might perhaps be triable only where both parties at the time were subjects."⁶⁵ The first English case that can be claimed to have held transient service sufficient to convey "international jurisdiction" was decided in 1895, long after *Pennoyer v. Neff*, and in that case the defendant had not only appeared but counterclaimed.⁶⁶

this in turn was obtainable without the cooperation of the defendant by the use of an elaborate fiction. See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 219-20 (1922).

61. Wright, J., in *Turnbull v. Walker*, 67 L.T.R. 767, 769 (Q.B. 1892). Allegiance rather than power also seems to have been stressed in such early American cases as *Bissell v. Briggs*, 9 Mass. *462 (1813); *Shumway v. Stillman*, 4 Cow. 292, 296 (N.Y. 1825).

62. 9 East 192, 103 Eng. Rep. 546 (K.B. 1808).

63. *Id.* at 194, 103 Eng. Rep. at 547.

64. The Tobago statute that Lord Ellenborough assumed to be applicable only to "persons who have been present and within the jurisdiction," seemed to take for granted that service would be sought upon defendants maintaining a "plantation in the island." See *Douglas v. Forrest*, 4 Bing. 686 (C.P. 1928), distinguishing *Buchanan v. Rucker* on the ground that in that case defendant had never been in or owned property in Tobago; *Berry v. Shead*, [1886] 7 N.S.W.L.R. 39, 54 (Austr.) ("[I]f . . . the defendant had been resident in the island when he incurred the obligation he would have been bound by the proceedings . . .").

65. *Mostyn v. Fabrigas*, 1 Cowp. 161, 176, 98 Eng. Rep. 1021, 1030 (K.B. 1774). See also *Gardner v. Thomas*, 14 Johns. 134, 137 (N.Y. 1817), relying on Lord Mansfield's distinction in holding the assumption of jurisdiction over a tort committed on the high seas to be a matter of discretion. The latter case is discussed in text at notes 118-23 *infra*.

66. *Carrick v. Hancock*, 12 T.L.R. 59 (Q.B. 1895).

If physical power does not appear to have been alone sufficient to establish personal jurisdiction in English law, neither does it seem to have been required for the purpose. All that can be found in earlier cases is a dictum by Baron Parke in 1834, suggesting that a French judgment might have been entitled to recognition in England if at least the defendant's "temporary presence" in France had been alleged. The question of proper service was not in issue.⁶⁷ And in a series of later cases from 1849 to 1889 English courts found nothing contrary to "natural justice" in foreign judgments based on less than local personal service, as where the defendant had expressly or impliedly consented to substituted service or personal service abroad.⁶⁸

In the English courts themselves there was little occasion for the exercise of a purely transient jurisdiction until, around the middle of the nineteenth century, they began generally to adjudicate foreign causes of action. And then a domestic plaintiff was hardly tempted to lie in wait for his foreign debtor, since as early as 1781 "the practitioners were clear as to the regularity of personal service outside England."⁶⁹ If doubt in this respect should have crept in at any time during the first quarter of the century,⁷⁰ it was soon removed when courts were authorized by statute to acquire jurisdiction over persons outside the realm by service abroad in cases involving sufficient contacts.⁷¹

67. *General Steam Navigation Co. v. Guillou*, [1843] 11 M. & W. 876, 894, 152 Eng. Rep. 1061, 1068 (Ex.).

68. *Vallee v. Dumergue*, [1849] 4 Ex. 290, 303, 154 Eng. Rep. 1221, 1227 (prior agreement of shareholder to accept service at a French corporate domicile); *Copin v. Adamson*, [1875] 1 Ex. D. 17 (same). See also *Tharsis Sulphur and Copper Co. v. Société des Metaux*, 58 L.J.Q.B. (n.s.) 435 (1889) (defendant's contractual agreement to accept service on London agent).

Early English cases went so far as to hold that the defendant impliedly consented to substituted service or in personam service abroad whenever by his actions he led the local plaintiff to believe that if any dispute arose local redress would be available. See *Berry v. Shead*, [1886] 7 N.S.W.L.R. 39 (Austr.); *Schibsbey v. Westenholz*, [1870] L.R. 6 Q.B. 155, 161; *Anderson v. Hodgson*, [1747] 6 Mor. 4779 (Court of Session). However, later English cases seem to evince a change in attitude. Cf. *Emanuel v. Lyman*, [1908] 1 K.B. 302 (C.A. 1907) (refusal to recognize a foreign judgment based on service abroad, even though defendant was a partner in an enterprise in the foreign state). Whether this change is at least partly attributable to American influence is not clear.

69. *Bourke v. Lord MacDonald*, 2 Dick. 587, 21 Eng. Rep. 399 (Ch. 1781). It was not necessary for this case to decide that personal service abroad was sufficient as the plaintiff had later served the defendant personally in England. The *Bourke* case was cited in *Scott v. Hough*, [1820] 4 Bro. C.C. 213, to the effect that the chancellor "thought the service of the subpoena abroad a good service." Smith, *supra* note 49, at 525, states that the *Bourke* case was misquoted in *Scott v. Hough*, but the *Scott* interpretation is strongly supported by *Nichol v. Gwyn*, [1827] 1 Sim. 389 (Ch.).

70. Cf. *Anon.*, 27 LEGAL OBSERVER 387 (1844), where the writer complains, prior to the Act of 1852, see note 71 *infra*, of the number of Englishmen abroad escaping English jurisdiction. The only case refusing an English attachment based on service of process outside England seems to be *Fernandez v. Corbin*, [1829] 2 Sim. 544 (Ch.). For an exhaustive judicial review of the case history, see *Drummond v. Drummond*, [1866] L.R. 2 Ch. 32.

71. In an Act of 23 May 1832, 2 & 3 WILL. 4, c. 33, [1832] PICK. STAT. 99, service of chancery subpoenas within other parts of the United Kingdom was declared permissible

And where service was made locally, English courts have always felt free to protect a foreign defendant against "oppression and injustice" by refusing to assert a mere transient jurisdiction.⁷²

It seems that a "power" rationale, having neither functional nor historical justification, will be of little help in our search for a basis of the transient rule; we must look elsewhere.

The "Transitory Action"

In England and in the United States, sufficiency of personal service within the country is limited to and largely identified with the concept of "transitory actions" which may be brought wherever the defendant is found. Yet this term, though in use for other purposes as early as the sixteenth century,⁷³ has only very recently assumed its present significance.

Most if not all references to transitory actions in texts⁷⁴ and cases⁷⁵ ultimately go back to Blackstone's *Commentaries*, where we learn that in actions "for injuries that might have happened anywhere, as debt, detinue, slander and the like, the plaintiff may declare in what county he pleases, and then the trial must be in that county in which the declaration is laid."⁷⁶ It is the early rules of venue that have been used as the doubtful source of our law of transitory actions in interstate and international conflicts cases.⁷⁷

Originally in English law all actions were local in the sense that they had

in suits concerning English land; an Act of 15 Aug. 1834, 4 & 5 WILL. 4, c. 82, [1834] PICK. STAT. 356, added suits concerning land liens; and a further extension was enacted under 8 & 9 VICT., c. 105 (1845) in Gen. Order 33. Common law courts received the same powers by the Common Law Procedure Act, 1852, 15 & 16 VICT., c. 76, now Order XI, Rules 1 and 2 of the Rules of the Supreme Court, THE ANNUAL PRACTICE 93-117 (1954), under the authority of The Judicature Act, 1875, 38 & 39 VICT. c. 77. For an evaluation of the legislative history, see *Drummond v. Drummond*, [1866] L.R. 2 Ch. 32. See, generally, CHESHIRE, *PRIVATE INTERNATIONAL LAW* 110 (4th ed. 1952); GRAVESON, *CONFLICT OF LAWS* 272 (2d ed. 1952); and concerning other member nations of the Commonwealth, Committee on Foreign Law, *American Judgments Abroad*, 9 RECORD 391-99 (1954).

72. See, e.g., *In re Norton's Settlement*, 1 Ch. 471 (1908); *Egbert v. Short*, 2 Ch. 205, 210 (1907); *Logan v. Bank of Scotland*, 1 K.B. 141 (1906).

73. Cf. *Queen v. Vaux*, 1 Leon. 37, 38, 74 Eng. Rep. 35, 36 (Ex. 1586) (declaring the venue non-traversable upon a bill of intrusion because the property alleged to have been taken was "things transitory, and also the taking of them"); *Collins v. Sutton*, 1 Lev. 149, 83 Eng. Rep. 342, 343 (K.B. 1665) (upholding a demurrer to defendant's plea to the jurisdiction where "transitory matters" involved); *Anon.*, 11 Mod. Rep. 51, 52, 88 Eng. Rep. 878 (Q.B. 1706) (declaring transitory an action on a bond).

74. See, e.g., BOOTE, *AN HISTORICAL TREATISE OF AN ACTION OR SUIT AT LAW* 97 (4th ed. 1805); 1 PAINE & DUER, *NEW YORK PRACTICE* 88 (1830).

75. See, e.g., *Genin v. Grier*, 10 Ohio 209 (1840). In the 1773 Connecticut case of *Stretter* (or *Streeter*), *Superior Court Diary of William Samuel Johnson, 1772-1773*, 4 AM. LEG. REC. 124 (1942), a desertion in Massachusetts was held suable in Connecticut, being "transitory" under the divorce statute of that state.

76. 3 BLACKSTONE, *COMMENTARIES* *294.

77. See Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjudgment*, 44 HARV. L. REV. 41, 48 (1930); and, generally, Annot., 30 A.L.R.2d 1219 (1953).

to be brought at a place closely connected with the cause of action, "because the *Jury* was to come from where the *fact* was committed."⁷⁸ While as to land this venue has remained at the situs,⁷⁹ "transitory" actions concerning chattels were "to follow the defendant wherever he could be found."⁸⁰ But even here the plaintiff was "supposed to lay it where the *Action* accrued," and only "in case the defendant fled from that place, the plaintiff had liberty to try his *Action* in the County wherein the defendant was *summoned*."⁸¹ The subsequent history is characterized by judicial and legislative endeavors to find an equitable balance that would protect both the plaintiff against elusive defendants and the defendant against the whim of vindictive plaintiffs. Thus, a growing practice of permitting the plaintiff to sue at places other than that of the cause of action,⁸² was counteracted by a statute of 1382 which compelled the plaintiff to commence writs of account and debt in the county where the contract had been made.⁸³ And when at the end of the sixteenth century the Court of Exchequer held that violation of venue requirements was non-traversable,⁸⁴ some of the inferior courts continued to enforce the old strict venue rule.⁸⁵ Similarly, a statute of 1665 which limited stays and reversals of jury verdicts on grounds of lack of venue⁸⁶ was, at least for some time, interpreted as preserving the venue requirement by speaking of the "proper county."⁸⁷ And when the statutory venue requirement came to be largely neglected in a judicial practice generally satisfied with some element of the cause of action having occurred in the forum,⁸⁸ courts began to stress their power to *change* the venue when the plaintiff chose a venue contrary to the statute.⁸⁹ Finally, when in 1705 a statute in effect permitted the plaintiff to lay his transitory actions in any county,⁹⁰ courts began to grant motions for such changes of venue to the place of the cause of action as "motions of course."⁹¹ Additional

78. BOOTE, *op. cit. supra* note 74, at 97. See also Sack, *Conflicts of Laws in the History of the English Law*, in 3 LAW: A CENTURY OF PROGRESS, 1835-1935, at 342, 357 (1937); Wicker, *The Development of the Distinction between Local and Transitory Actions*, 4 TENN. L. REV. 55, 61 (1926).

79. See, generally, Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 9 (1949).

80. BOOTE, *op. cit. supra* note 74, at 97.

81. *Ibid.*

82. See the historical account in *Bulwer's Case*, 7 Co. Rep. 1a, 3b, 77 Eng. Rep. 411, 415 (K.B. 1586). The rationale used was that debts and contracts were "*nullius loci*."

83. 6 RICH. 2, c. 2 (1382).

84. *Queen v. Vaux*, 1 Leon. 37, 74 Eng. Rep. 35 (Ex. 1586). See, generally, Sack, *supra* note 78, at 425 n.188.

85. See Sack, *supra* note 78, at 367, 426 n.189.

86. 16 & 17 CAR. 2, c. 8, § 1 (1665); 22 & 23 CAR. 2, c. 4 (1670).

87. *Bailiffs of Litchfield v. Slater*, Willes 431, 432, 435-36, 125 Eng. Rep. 1253, 1255-56 (C.P. 1743). See, generally, Sack, *supra* note 78, at 367.

88. See BOOTE, *op. cit. supra* note 74, at 98; Sack, *supra* note 78, at 428 n.197.

89. See Sack, *supra* note 78, at 368.

90. 4 & 5 ANN, c. 16, § 6 (1705).

91. BOOTE, *op. cit. supra* note 74, at 154. Cf. TIDD, FORMS OF PRACTICAL PROCEEDINGS IN THE COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER OF PLEAS 253 (5th ed. 1819); *Holmes v. Wainwright*, 3 East 329, 330, 102 Eng. Rep. 624 (K.B. 1803).

limitations on the plaintiff's choice were imposed by statutes and city liberties prohibiting plaintiffs to sue their compatriots outside their jurisdiction.⁹²

All through these procedural vagaries, transitory actions thus remained essentially local,⁹³ and in principle tied to the cause of action rather than following the defendant wherever he was found. In other words, the law's solicitude for the defendant prevented the development of a rigid "power" rule basing jurisdiction over the defendant on the fortuity of his location, and favored instead a rule of forum conveniens.

The same results have obtained in England in cases involving foreign causes of action ever since English courts began to adjudicate such cases. True, when foreign causes of action became triable in England this triability applied from the start to transitory actions, as to which it was permissible to lay a fictitious venue in England.⁹⁴ But an analysis of the case law shows that those cases in which English courts in fact assumed jurisdiction had substantial domestic contacts or else were such that plaintiff could not expect justice elsewhere.⁹⁵ In the typical case, suit would be brought against a colonial officer of the Crown, as to whom both these tests would apply.⁹⁶ And where jurisdiction was assumed over a mere transient, an English court would exercise its discretion in protecting him against harassment.⁹⁷

In view of the virtual lack of case law⁹⁸ recognizing jurisdiction based on mere presence, the unanimous opposition of English writers on the subject to transient jurisdiction⁹⁹ probably represents the law in England today. Scottish doctrine has always insisted that something more is needed for personal jurisdiction than "mere transient presence,"¹⁰⁰ and in Canada a suggestion to introduce the transient rule was rejected because the possibility of occasional hardship to the plaintiff would not justify the impairment of the defendant's "right to defend on the merits at his own place of residence."¹⁰¹

92. See JACOB, *CITY-LIBERTIES* 147 (1732).

93. Kuhn, *Local and Transitory Actions in Private International Law*, 66 U. PA. L. REV. 301 (1918).

94. See Sack, *supra* note 78, at 370.

95. *Id.* at 352. See, generally, Graveson, *Choice of Law and Choice of Jurisdiction in the English Conflict of Laws*, 28 BRIT. YB. INT'L L. 273 (1951).

96. See, e.g., *Mostyn v. Fabrigas*, 1 Cowp. 161, 171-72, 98 Eng. Rep. 1021, 1027 (K.B. 1744); *Lord Bellamont's Case*, 2 Salk. 625, 91 Eng. Rep. 529 (K.B. 1700); cf. *Rafael v. Verelst*, 2 Wm. Bl. 983, 96 Eng. Rep. 579 (K.B. 1774).

97. See note 72 *supra*.

98. But cf. *Carrick v. Hancock*, [1895] 12 T.L.R. 59 (Q.B.), discounted by READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 149 (1938), as a decision of a single judge and the only direct English authority. One might add that in that case defendant actually appeared, through counsel, and defended on the merits.

99. CHESHIRE, *op. cit. supra* note 71, at 601; READ, *op. cit. supra* note 98, at 150; WESTLAKE, *PRIVATE INTERNATIONAL LAW* 101-02 (1858). See also Note, 48 COLUM. L. REV. 605 (1948).

100. GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 42 (1926). See also *id.* at 59 as to the requirement of personal service.

101. Sixteenth Annual Meeting of the Conference of Commissioners on Uniformity

The American transient rule must, in sum, be said to lack precedent in the English tradition of the common law as to both of its alleged sources—the doctrine of physical power and the concept of the transitory action. It remains to be seen whether, and if so in what manner, American case law itself supports the rule.

THE FACT: A RELIC OF PENNOYER V. NEFF

Early common and statute law

Early American courts and legislatures were apparently little concerned with the problems whether, and if so when, a non-citizen could be subjected to domestic jurisdiction: there were no early decisions or legislative answers to the question whether suits against foreigners were governed by such statutory venue requirements as that of the Bodie of Liberties of Massachusetts¹⁰²—under which, with certain exceptions, all actions were to be “tryed within that jurisdiction where the cause of the Action doth arise.”¹⁰³

In those cases in which early American courts chose to subject foreign visitors to their jurisdiction upon foreign causes of action, they did so without resorting to fictions and subtle conceptual classifications so obnoxious to their general approach to making and applying law.¹⁰⁴ But on the other hand, there is no indication in the available case law¹⁰⁵ that these courts were willing or anxious to exercise “physical power” in “transitory actions” against a nonresident on a foreign cause of action where the plaintiff was not a citizen of the forum state and so was not entitled to special consideration.

Most of the decisions that have been cited for an early transient rule concern suits against aliens. In such cases jurisdiction would be assumed on the ground that “if the creditor cannot take him here, he may lose his chance of securing the debt”;¹⁰⁶ and perhaps this was a prerequisite to the courts’ assumption of jurisdiction.¹⁰⁷ This rationale was (and still is) particularly pertinent in admiralty, where relegation of the plaintiff to a foreign forum might

of Legislation in Canada (1933), 18 PROC. CAN. B. ASS’N, 225, 307 (1934). See note 107 *infra*.

102. *The Book of the General Lawes and Libertyes concerning &c, Actions* § 1 (1642), reprinted in *THE LAWS AND LIBERTIES OF MASSACHUSETTS* 1 (1929).

103. *But cf.* 2 MASS. GEN. LAWS c. 223, § 1 (1932), which in substance has been the law since 1784. *Guild v. Bonnemort*, 156 Mass. 522, 31 N.E. 645 (1892).

104. See MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 46, 48, 56 (1930).

105. All research in this field, as to both legal history and current case law, is necessarily incomplete in view of the impossibility of ascertaining the practice of trial courts.

106. *Barrell v. Benjamin*, 15 Mass. 354, *358 (1819). Even in such cases earlier judicial practice, following international usage, may have limited jurisdiction over the defendant “to matters relating to his acts and conduct while within that territory.” Hammersley, J., dissenting in *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 142, 34 Atl. 714, 729 (1895), relying on 2 PHILLIMORE, *INTERNATIONAL LAW* 4 (3d ed. 1882), and STORY, *CONFLICT OF LAWS* § 613 (1st ed. 1834).

107. See *Rea v. Hayden*, 3 Mass. 24, 25 (1807), limiting the plea to the jurisdiction to those cases in which “some [other] court of the nation has jurisdiction of the cause of

easily have meant complete loss of remedy.¹⁰⁸ The same reasoning apparently supported the assumption of jurisdiction over citizens of sister states for the benefit of resident plaintiffs whose interest in speedy justice would be deemed to outweigh the transient defendant's preference for his own forum.¹⁰⁹

In almost all other cases in which jurisdiction was purportedly based on transient service, the forum in fact had contacts with either the case or a party, as where the cause of action had arisen within the state and was thus subject to domestic law,¹¹⁰ or where the defendant had himself sought the assistance of the court.¹¹¹ As late as 1874 the Supreme Court of Pennsylvania declared it "the most important principle of all municipal law of Anglo-Saxon origin, that a man shall only be liable to be called on to answer for civil wrongs in the forum of his home, and tribunal of his vicinage . . ." ¹¹² Not only did the writer of a textbook written in 1880 ¹¹³ quote this statement with apparent approval but he also expressed his approval of a vigorous dissent from an 1865 decision of a New York court holding service within the state sufficient to establish jurisdiction in a suit between nonresidents for a tort committed outside the state.¹¹⁴ The dissenting judge, apparently on a theory of lack of jurisdiction rather than *forum non conveniens*, would have declined, at least in the case of a non-citizen plaintiff, to proceed "against the citizen of another foreign state, while seeking our hospitality. . . ." ¹¹⁵

action. . . ." Compare text at note 121 *infra*, discussing the probable practice of early courts to decline jurisdiction in the absence of such reasons for its assertion.

In Canadian practice, transient jurisdiction over aliens has been assumed only where required for the plaintiff's protection, as in a case where a United States citizen resided in a territory without civil courts, so that the forum invoked was "the nearest spot where the plaintiff can litigate his rights." *Macaulay v. O'Brien*, 5 B.C.R. 510, 515 (B.C. 1897). Concerning Australian law, see COOK, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 96 (1949). In general, see READ, *op. cit. supra* note 98, at 151.

108. Compare *Thomson v. The Nanny*, 23 Fed. Cas. 1104, No. 13984 (D.S.C. 1805), with *Heredia v. Davis*, 7 F.2d 741 (E.D. Va.), *aff'd*, 12 F.2d 500 (4th Cir. 1926) (no remedy under law of foreign forum). See, generally, Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORN. L.Q. 12 (1949); Coffey, *Jurisdiction over Foreigners in Admiralty Courts*, 13 CALIF. L. REV. 93 (1925); EHRENZWEIG, FRAGISTAS & YIANNPOULOS, *GREEK-AMERICAN PRIVATE INTERNATIONAL LAW* (forthcoming).

109. Thus, in *Bishop v. Vose*, 27 Conn. 1 (1853), defendant, who had come to Connecticut to try a case against the plaintiff, was served with process in that state in a suit upon a New York contract when about to board a train. The Connecticut court upheld this service. But instead of referring to a transient rule permitting any defendant in a transitory action to be "caught" within the state, the court simply asked itself "why should our citizens be obliged to go into a foreign jurisdiction in pursuit of their debtors, when those debtors are here. . . ?" *Id.* at 12.

110. See note 33 *supra*. In admiralty, the vessel upon which the cause of action arose would ordinarily be within the court's jurisdiction.

111. See, e.g., *Bishop v. Vose*, 27 Conn. 1 (1853).

112. *Coleman's Appeal*, 75 Pa. 441, 458 (1874).

113. 1 WELLS, *JURISDICTION OF COURTS* 79 (1880).

114. *Id.* at 76.

115. *Latourette v. Clarke*, 45 Barb. 327, 331, 333 (N.Y. Sup. Ct. 1st Dist. 1865).

Where and so long as personal jurisdiction was limited to the convenient forum, there was no need, and indeed no room, for a doctrine of forum non conveniens.¹¹⁰ Significantly, it was those cases involving suits between aliens—in which courts inclined to ignore this limitation¹¹⁷—that initiated the gradual change in theory and terminology that ultimately led to a transformation of the concept of jurisdiction itself. This transformation is well illustrated by the interpretative history of the early New York case, *Gardner v. Thomas*,¹¹⁸ which involved the dismissal on jurisdictional grounds of a suit between two British subjects on a tort committed on a British vessel on the high seas. The opinion in the case stated that although New York courts “may take cognizance” of such causes of action, “it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case.”¹¹⁹ This case, it was held, was an improper one for “extending” jurisdiction; the trial court ought to have “refused” jurisdiction.¹²⁰ *Gardner v. Thomas* is frequently cited as the earliest example of a court’s discretionary refusal to exercise an existing jurisdiction—i.e., as the earliest application of a doctrine of forum non conveniens correcting an earlier transient rule. This view overlooks, however, the fact that the jurisdiction to which the words “afford,” “extend” and “refuse” are related, was that jurisdiction under public international law which was discussed in so many decisions of this period;¹²¹ and that here, as in other cases cited for a doctrine of forum non conveniens supplementing a broad rule of personal jurisdiction, American domestic jurisdiction was not declined but denied.¹²²

116. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 911-14 (1947), makes the point that so-called “discretionary” dismissal was often actually nondiscretionary because it turned on a question of law. This is, I suggest, the primary reason for the much discussed fact that the doctrine of forum non conveniens was not adopted until recently and then only with considerable hesitation. See also Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 388 (1947). It may not be a coincidence that the Scottish predecessor of the doctrine, the plea of forum non competens, was applicable to cases of both non-existence and non-exercise of jurisdiction. *Id.* at 387. See also note 122 *infra*.

117. See text at notes 106-07 *supra*. As to the practice of early American courts, “without benefit of the Latin phrase,” to refuse jurisdiction in suits between aliens, see Barrett, *supra* note 116, at 387 n.36; Braucher, *supra* note 116, at 911-15.

118. 14 Johns. 134 (N.Y. 1817).

119. *Id.* at 137-38.

120. *Id.* at 138.

121. See Chief Justice Marshall’s opinions in *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) *240 (1804); *Rose v. Himely*, 8 U.S. (4 Cranch) *241 (1808), and cases relied on therein. See also *The Bee*, 3 Fed. Cas. 41, No. 1219 (D. Me. 1836) (“established principles of the jus gentium”); *Campbell v. Wilson*, 6 Tex. 379, 391 (1851); STORY, COMMENTARIES ON THE CONFLICT OF LAWS 450, 453, 458, 492 (1834). See, generally, Ehrenzweig, *American Conflicts Law in Its Historical Perspective*, 103 U. PA. L. REV. 133, 139 (1954); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 795, 799, 802-09 (1955).

122. The following two types of decisions can, I believe, most properly be rationalized in this sense: (1) Those admiralty cases where refusal to take jurisdiction depended, at least in part, on the merits. *E.g.*, *Mason v. The Ship Blaireau*, *supra* note 121; *Bucker v.*

in close approximation to earlier English theory and practice.¹²³

This apparent self-restraint in the assumption of jurisdiction is perhaps explainable on the ground that, prior to the establishment of the requirement of intrastate service by *Pennoyer v. Neff*, there was little need for the modern rule of catch-as-catch-can. As Justice Hunt so convincingly showed in his vigorous dissent, that case was preceded by a "long established practice under the statutes of the States of this Union,"¹²⁴ whereby substituted service could be had in actions against any nonresident owning property within the state—or in other words in almost all cases where transient jurisdiction would ordinarily be invoked. And these statutes, even without attachment of the property, apparently conferred in personam, not merely quasi in rem, jurisdiction¹²⁵—recognizing in effect what in civil law countries is known as "competency" based on property,¹²⁶ a concept completely foreign to the myth of "power"

Klorkgeter, 4 Fed. Cas. 555, No. 2083 (S.D.N.Y. 1849); *Davis v. Leslie*, 7 Fed. Cas. 134, No. 3639 (S.D.N.Y. 1849); *Thomson v. The Nanny*, 23 Fed. Cas. 1104, No. 13984 (D.S.C. 1805); *Willendson v. Forsoket*, 29 Fed. Cas. 1283, No. 17682 (D. Pa. 1801). See, generally, Bickel, *supra* note 108, at 22; Comment, 31 Tex. L. Rev. 889 (1953). (2) Those cases from *Molony v. Dows*, 8 Abb. Prac. 316 (N.Y. 1859), to *De la Bouillierie v. De Vienne*, 300 N.Y. 60, 89 N.E.2d 15 (1949), and *White v. Boston & M.R.R.*, 283 App. Div. 482, 129 N.Y.S.2d 15 (3d Dep't 1954), in which New York courts have consistently declined jurisdiction on foreign torts in suits between nonresidents while conceding an absolute jurisdictional right to residents.

123. See *Brinley v. Avery*, Kirby 25 (Conn. 1786), perhaps the earliest reported state case on the subject, where defendant's plea in abatement was ruled sufficient in a suit between two British subjects, apparently on grounds of reciprocity, because "by the law of nations, no such action can be supported, nor can the subjects of this state, by the laws of England, or of other nations, maintain any action against each other on any contract made, or for any injury done, within the jurisdiction of said state, in any court of the British dominions, or in any other foreign court." *Id.* at 26.

124. *Pennoyer v. Neff*, 95 U.S. 714, 736, 737 (1877).

125. See, e.g., the law of the Province of East Jersey of 1693, giving the effect of personal arrest with apparent complete personal (rather than quasi in rem) jurisdiction to the service of summons on members of the family of an absent defendant owning realty within the state. *Laws Passed Between 1682 and 1702*, c. IX, reprinted in *THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF NEW JERSEY* 266 (2d ed., Leaming & Spicer 1881); cf. EDSALL, *JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY* 41 (1937). Even the distinction between local and transitory actions had temporarily lost its relevance as to foreign causes of action. See FREEMAN, *JUDGMENTS* § 567 (3d ed. 1886); Kuhn, *Local and Transitory Actions in Private International Law*, 66 U. PA. L. REV. 301, 305 (1918); and particularly the opinion of Hunt, J., in *Pennoyer v. Neff*, *supra* note 124, at 738-40. Many of these statutes are still in effect and are apparently regaining vitality as the *Pennoyer* doctrine loses force. Cf. Ehrenzweig & Mills, *Personal Service outside the State*, 41 CALIF. L. REV. 383 (1953). As to the related practice in admiralty, see ROBINSON, *ADMIRALTY* 357-90 (1939).

126. See, e.g., JURISDIKTIONSFORM § 99 (Austria); ZIVILPROZESSORDNUNG § 23 (Germany); 1 Ekelöf, *KOMPENDIUM ÖVER CIVIL PROCESSEN* 129 (Sweden) (1948); Code of Civil Procedure of the Province of Quebec, art. 94(4). See also note 3 *supra*; Millar, *Jurisdiction over Absent Defendants: Two Chapters in American Civil Procedure*, 14 LA. L. REV. 321 (1954). For a reference in this respect to the "public law of Europe," see Story, J., in *The Jerusalem*, 13 Fed. Cas. No. 7293, at 562 (C.C.D. Mass. 1814).

over the person. Indeed, in many cases early American courts expressly held personal service within the state dispensable for the establishment of personal jurisdiction,¹²⁷ even in the absence of property,¹²⁸ at least for intrastate enforcement.¹²⁹ For "every citizen is entitled to the powers of the courts to enforce his rights of action against nonresidents."¹³⁰ That there was stress on service within the state is of course explainable without resort to power concepts, on the basis that, service by mail not being yet in use, the server's authority had to be limited to the territory of his state.

This parallelism between American and English law¹³¹ could not last forever. The fundamental differences between the international relations of England and the interstate relations of the United States could not but produce different legal rules. It was easy for early English courts in an appropriate case to deny recognition to a judgment issuing from a foreign court "not having jurisdiction," meanwhile asserting much leeway in assuming jurisdiction.

127. See the authorities collected and discussed by Hunt, J., dissenting in *Pennoyer v. Neff*, 95 U.S. 714, 736-37. See also *Bartlet v. Knight*, 1 Mass. 401, 409 (1805). But "decisions in all the states [were] not in unison," *Rogers v. Coleman*, 3 Ky. 413, 415 (1808), and even before *Pennoyer* some of the states required personal service for the establishment of personal jurisdiction. See cases cited in note 39 *supra*, and the following cases cited in 1 BEALE, *CONFLICT OF LAWS* 286 (1935), for the pre-*Pennoyer* validity of the *Pennoyer* doctrine: *D'Arcy v. Ketchum*, 52 U.S. 174 (1850); *Osborn v. Lloyd*, 1 Root 301 (Conn. 1791); *Whittier v. Wendell*, 7 N.H. 257 (1834); *Borden v. Fitch*, 15 Johns. 121 (N.Y. 1818); *Miller's Executors v. Miller*, 1 Bail. Eq. 242 (S.C. 1829). In these cases, lack of notice rather than of power is regularly given as the rationale of the rule requiring personal service within the state. See also *Picquet v. Swan*, 19 Fed. Cas. No. 11134 (D. Mass. 1848); *Aldrich v. Kinney*, 4 Conn. 380 (1822); *Fenton v. Garlick*, 8 Johns. 150 (N.Y. 1811); *Hitchcock v. Aicken*, 1 Caines 460, 473 (N.Y. 1803); and, generally, *Rheinstein*, *supra* note 121, at 793. Other cases cited by Professor Beale are not in point, such as *Miller v. Sharp*, 24 Va. (3 Rand) 41 (1824); *Don v. Lippmann*, 5 C. & F. 1, 7 Eng. Rep. 303 (H.L. 1837); or else leave open the permissibility of either constructive service or of nonresidents owning (unattached) property in the state, *e.g.*, *Hopkirk v. Bridges*, 14 Va. (4 Hen. & M.) 413 (1808); *Skinner v. McDaniel*, 4 Vt. 418 (1832); or of notice by means other than personal service, *Wood v. Watkinson*, 17 Conn. 500 (1846). Thus a Massachusetts judgment was denied recognition in *Kilbourn v. Woodworth*, 5 Johns. 37 (N.Y. 1809), but granted recognition in *Smith v. Rhoades*, 1 Conn. 168 (1803), because notice had not been denied. Perhaps the oldest reported case on the subject is *Kibbe v. Kibbe*, Kirby 119 (Conn. 1786), refusing recognition to a Massachusetts judgment lacking "legal jurisdiction of the cause," *id.* at 126, where personal service had been obtained outside the state upon the attachment of a handkerchief, *id.* at 123. See also *Phelps v. Holker*, 1 Pa. 261 (1788); *Rogers v. Coleman*, *supra*.

128. *Nelson v. Omaley*, 6 Me. 218 (1829); *Butterworth v. Kinsey*, 14 Tex. 495 (1855); *McMullen v. Guest*, 6 Tex. 275 (1851). Cases not recognizing service outside of the state were distinguished in the *Butterworth* and *McMullen* cases on the ground that the plaintiffs in such cases were not residents of the state.

129. *Wilson v. Zeigler*, 44 Tex. 657 (1876); *Jarvis v. Barrett*, 14 Wis. 591 (1861).

130. *Butterworth v. Kenney*, 14 Tex. 495, 500 (1855).

131. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* §§ 543, 554 (1834), while in general relying primarily on continental sources, follows English international conflicts cases concerning the law of jurisdiction. See particularly *id.* at 466.

But American courts were increasingly disinclined to relitigate a sister state's case on jurisdictional grounds and thus to invite similar relitigation of their own decisions elsewhere. If credit was to be given to the sister state judgment even against citizens of the recognizing state, definite standards had to be adopted by which the propriety of such judgments and of the underlying statutes was to be measured. Natural law at first, and later the full faith and credit and due process clauses of the Constitution, supplied the basis for a new concept of "jurisdiction" in which "local" and "interstate" jurisdiction were to merge.¹³²

But, contrary to Professor Beale's assumption, the law concerning the sufficiency and the necessity of personal service within the state in personal actions, far from being an "unchangeable" principle of a common law of "physical power," remained unsettled at least until the decision of the Supreme Court of the United States in *Pennoyer v. Neff* in 1877. In that case, with little warning,¹³³ the Supreme Court declared that in a personal action only personal service within the state would do. And this although England, faced with similar problems created by growing migration and commerce, had twenty-five years before chosen the opposite solution of permitting service of process outside the realm whenever the court had a sufficient contact with the case.¹³⁴

When the law thus came to compel the plaintiff to "catch" his defendant, it quite consistently began to hold this feat sufficient for the establishment of jurisdiction.¹³⁵ Thus and then the transient rule came into being; and only thus and then there also arose the need for a doctrine that would permit the court to alleviate the hardships created by this new rigid system of "personal jurisdiction." Injunctions became necessary and permissible to counter harassment of the defendant or avoidance of domestic law by the bringing of suits

132. See, generally, Rheinstein, *supra* note 121.

133. Only seventeen years earlier, in the much relied-on case, *Nations v. Johnson*, 65 U.S. (24 How.) 195, 203 (1860), the Supreme Court declared that what was "essential to the jurisdiction of all courts" was "notice" to the defendant, actual or constructive, giving the defendant "an opportunity to make his defence"—a far cry from the "power" rule. *But cf.* *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812 (1869), declaring "null and void" an English judgment based on personal service in this country.

134. See note 71 *supra*.

135. This has never been the case in the federal courts. The Judiciary Act of Sept. 24, 1789, § 11, 1 STAT. 78, did not require the defendant's presence within the district, if he was not an "inhabitant of the United States," *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 329 (1838), or was an "inhabitant" of the district. And on the other hand, diversity jurisdiction was never based on mere presence since one of the parties had to be a *citizen* of the state "where the suit is brought." Abolition of the last requirement by the Act of March 3, 1875, 18 STAT. 470, which extended diversity jurisdiction to controversies "between citizens of different States," and thus seemed to facilitate jurisdiction over mere transients, was soon followed by the limitation of this jurisdiction to "the district of the residence of either the plaintiff or the defendant." Act of March 3, 1887, 24 STAT. 552. See, generally, Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 609 (1954); Note, 60 YALE L.J. 183, 186 (1951).

in other states "having" such jurisdiction over the defendant;¹³⁶ and quite generally courts began to claim a right to decline this jurisdiction in their free discretion. The non-law of *forum non conveniens* replaced the law of *forum conveniens*. But when this stage was reached the counter movement was already on its way.

The Rule of Pennoyer v. Neff

"The process of a court of one State cannot run into another. . . . Notice sent outside the State to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery."¹³⁷ Thus the Supreme Court stated the rule of *Pennoyer v. Neff* in 1927, only to honor it in the breach by adding another of the exceptions¹³⁸ that have become so significant in number and weight that they have virtually overwhelmed the rule itself.

There are at least four typical situations in which a state may acquire personal jurisdiction over a person without personal service within the state. (1) The defendant may have "consented" to the jurisdiction prior or subsequent to the service of process, and thus precluded himself from attacking the jurisdiction of the court,¹³⁹ general appearance being equivalent to consent.¹⁴⁰ (2) Jurisdiction may properly be based upon less than personal service within the

136. See, e.g., *Weaver v. Alabama Great So. R.R.*, 200 Ala. 432, 76 So. 364 (1917); *Wabash Ry. v. Peterson*, 187 Iowa 1331, 175 N.W. 523 (1919). See, generally, Messner, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts outside the Territorial Limits of the State*, 14 MINN. L. REV. 494, 495-506 (1930); Note, 27 IOWA L. REV. 76, 99 (1941).

137. *Hess v. Pawloski*, 274 U.S. 352, 355 (1927).

138. *Hess v. Pawloski*, *supra* note 137, upheld the constitutionality of the Massachusetts nonresident motorist statute, permitting substituted service of process upon the state's registrar of motor vehicles, and making such service, together with actual notice to the nonresident motorist, sufficient to confer personal jurisdiction.

139. See *Adam v. Saenger*, 303 U.S. 59 (1938); RESTATEMENT, CONFLICT OF LAWS § 81 (1934). Consent stipulations can, however, easily be abused by parties with stronger bargaining power, particularly through contracts of adhesion. See Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953), cited with approval by Frank, J., dissenting in *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 206 (2d Cir. 1955). Protective legislation has therefore been enacted by several states, and courts have been inclined to interpret such stipulations restrictively. Cf. *Pope v. Hekscher*, 266 N.Y. 114, 194 N.E. 53 (1934).

140. Special appearance may be turned into general appearance by statute. *York v. Texas*, 137 U.S. 15 (1890). Appearance solely for the purpose of defending an interest in attached property may be held to turn jurisdiction quasi in rem into personal jurisdiction. See Frumer & Graziano, *Jurisdictional Dilemma of the Nonresident Defendant in New York—A Proposed Solution*, 19 FORDHAM L. REV. 125 (1950). Appearance to contest foreclosure in mechanics lien proceedings has been treated similarly. *Campbell v. Murdock*, 90 F. Supp. 297 (N.D. Ohio 1950). But see Note, 51 COLUM. L. REV. 242 (1951). Following FED. R. CIV. P. 12(b), some states have enacted legislation securing the defendant's right to attack jurisdiction without consenting to it. See N.Y. JUDICIAL COUNCIL, SIXTEENTH ANNUAL REPORT 197, 215 (1950).

state, if it is held to "continue" from a prior proceeding.¹⁴¹ (3) A state may extend its concept of "proper" personal service within the state to permit "substituted" service—other than service on the defendant from hand to hand.¹⁴² And (4) in a long line of decisions based partly on an illusory concept of "implied consent,"¹⁴³ the requirement of personal service has been diluted by permitting either "constructive service" (service by publication, or upon agents) within the state, combined with deposit in the mail, or personal service outside the state.¹⁴⁴ There are numerous situations in which statutory provisions for such service have been held constitutional as providing a basis for personal jurisdiction, although, notwithstanding much language of the courts to the contrary,¹⁴⁵ physical power fails completely as a rationale. These hold-

141. This lack of insistence on continuing "physical power" has been called by Justice Holmes "one of the decencies of civilization that no one would dispute." *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913). But the concept of retained jurisdiction is anything but clear where it is applied to other actions treated as "essential concomitants" of the original suit. See *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), holding that there was no jurisdiction without personal service in a second action which was separate and distinct from a prior action where there had been personal service. Problems of retained jurisdiction most frequently arise in actions of support and child custody, particularly where ill-conceived notions of finality and comity induce the court of a sister state to refuse sole or concurrent jurisdiction because of "continuing" jurisdiction elsewhere. See Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CALIF. L. REV. 382 (1954); Comment, 41 *id.* at 692 (1953).

142. The traditional English practice favors service by private persons. Millar, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 85 (1952). Both the Federal Rules, FED. R. CIV. P. 4(c), and the majority of states, however, prescribe service by an officer. After a long history of rigidity, a trend toward greater informality and efficiency has been apparent for some time. See Sunderland, *The Problem of Jurisdiction*, 4 TEX. L. REV. 429, 444 (1926). Recent statutes provide for service by mail at least as an alternative method, and a wider use of this most effective means of communication, generally adopted in other countries, has been repeatedly suggested. See N.Y. JUDICIAL COUNCIL, *EIGHTH ANNUAL REPORT* 327, 330 (1942).

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

144. See, e.g., CALIF. CODE CIV. PROC. §§ 412, 413 (1953); *Allen v. Superior Court*, 41 Cal. 2d 306, 259 P.2d 905 (1953). Whatever attempts can be made to secure actual notification are jealously insisted upon by the courts in their solicitude for the defendant. See *Wuchter v. Pizzutti*, 276 U.S. 13, 19 (1928); *McDonald v. Mabey*, 243 U.S. 90, 92 (1917). The rule of the *Wuchter* case, though based on the Constitution, was even applied to a nonresident motorist statute of a foreign country, which did not provide for adequate notice. *Boivin v. Talcott*, 102 F. Supp. 979 (N.D. Ohio 1951). Whether the service statute must provide for a registered return receipt or mailing to the last known address is sufficient, is not clear.

145. See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940), basing the "authority of a state over" a departed citizen on the privileges and protection afforded to him. When the fading distinction between citizens and residents has disappeared this rationale will have lost all remaining justification. Cf. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 87 (1942); GOODRICH, *CONFLICT OF LAWS* 193 n.101 (3d ed. 1949); Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955); Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 569, 580 (1953). This conclusion would be definitively confirmed if the United States Supreme Court were to follow the California

ings concern defendants who were concealing themselves to avoid process,¹⁴⁶ were domiciled,¹⁴⁷ carried on business,¹⁴⁸ owned certain kinds of property¹⁴⁹ or had performed certain acts¹⁵⁰ within the state of the forum.

In view of these "exceptions" there seems to be little left of the rule of *Pennoyer v. Neff* save the amorphous formula of fair play and substantial justice well known to us from the law of jurisdiction over corporations.¹⁵¹ It may well be that in the law of jurisdiction over individuals, as in that of jurisdiction over foreign corporations, a substantial "minimum contact" will ultimately be

Supreme Court in upholding constructive service in certain cases even upon former residents. See *Smith v. Smith*, 45 Cal.2d 259, 288 P.2d 497 (1955); *Ehrenzweig & Mills, Personal Service outside the State*, 41 CALIF. L. REV. 383 (1953).

146. See, e.g., CALIF. CODE CIV. PROC., § 412 (1953); see also GOODRICH, *CONFLICT OF LAWS* 192 (3d ed. 1949).

147. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940). For pre-*Milliken* law to the same effect, see, e.g., *Harryman v. Roberts*, 52 Md. 64, 75 (1879).

148. "Power" language had long prevented progress here, too. Compare *Flexner v. Farson*, 248 U.S. 289 (1919), with *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935). See, generally, BLUME, *AMERICAN CIVIL PROCEDURE* 276 (1955); Culp, *Process against Non-Residents Doing Business within a State*, 32 MICH. L. REV. 909 (1934); Scott, *Jurisdiction over Non-Residents Doing Business within the State*, 32 HARV. L. REV. 871 (1919).

149. In countries in which the defendant's forum is the primary basis of personal jurisdiction, see text at note 56 *supra*, a supplementary "property forum" of non-domiciliaries has been recognized in certain cases. See Millar, *Jurisdiction over Absent Defendants: Two Chapters in American Civil Procedure*, 14 LA. L. REV. 321 (1954). In the United States in personam jurisdiction over one not present or domiciled in the state has occasionally been granted when a cause of action arises in the state from such a person's ownership of certain types of property. *Dubin v. Philadelphia*, 34 Pa. D. & C. 61 (C.P. Phila. Co. 1938). The Restaters, with little support in law or reason, would limit this rule to things "dangerous to life or property." RESTATEMENT, JUDGMENTS § 23 (1942). As to jurisdiction quasi in rem see, generally, STUMBERG, *CONFLICT OF LAWS* 104-09 (2d ed. 1951). The notice rationale of such jurisdiction fails where the thing cannot be readily located, as in the case of intangibles. For a history of garnishment in the United States and in England, see Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 7 (1942). For an attempt at solving the problem caused by a breakdown of both the notice and the power rationales in this field, see STUMBERG, *op. cit. supra*, at 109.

150. Power language originally supported the doctrine of *Hess v. Pawloski*, 274 U.S. 352 (1927), upholding a statute that provided for constructive service upon a state officer against nonresident motorists in actions arising from accidents within the state. An extension of the doctrine to airplanes would still be reconcilable with the *Restatement* limiting this doctrine to acts "dangerous to life or property." RESTATEMENT, JUDGMENTS § 23 (1942). See *Peters v. Robin Airlines*, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953). This would not hold true for the extension advocated by Joiner, *Let's have Michigan Torts Decided in Michigan Courts*, 31 MICH. STATE B.J. 5, 12 (1952), who would provide for in personam jurisdiction through service outside the state in the case of all domestic torts. If this suggestion were adopted, together with a similar proposal that has been made regarding local contracts, Note, 18 U. CHI. L. REV. 792 (1951), we should not be far from the English rule which includes domestic transactions in general, see text at note 71 *supra*; THE ANNUAL PRACTICE 93-94 (1954). As to rules followed elsewhere, see Sunderland, *supra* note 142, at 442.

151. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

the touchstone of permissible jurisdiction. The question will then arise whether this formula, whose extreme flexibility is hardly preferable to the extreme rigidity of the classical rule of physical personal service, will not need to be supplemented by criteria developed within the civilian laws of competency,¹⁵² or, more likely, within the common law of *forum non conveniens*.¹⁵³

But be this as it may, the transient rule, declaring *sufficient* personal service within the state upon nonresidents sued by other nonresidents on foreign causes of actions, is most easily explainable as a relic of the *Pennoyer* rule which declares such service to be *required* for the establishment of personal jurisdiction. Once this requirement, breaking down under an increasing number of "exceptions," ceases to be valid, its creature the transient rule may have reached the end of its course and left the way open for a new approach, satisfying new needs.

THE NEED: INTERSTATE VENUE IN THE FORUM CONVENIENS

Slowly and painfully, American courts are developing a common law of *forum non conveniens* as a corrective of the serious shortcomings in a law of personal jurisdiction based on mere personal service.¹⁵⁴ But the time may have arrived for a more radical reform, reversing the historical process by which, over the last century, this law of jurisdiction has reached its present unsatisfactory state. I have suggested that mere transient service has come to be sufficient for the establishment of personal jurisdiction because personal service had come to be required under the doctrine of *Pennoyer v. Neff*. Once this doctrine has been deprived of its vitality either by a decision overruling it or by the continuing erosion by exceptions, the primary reason for the continued existence of the transient rule will have disappeared. *Forum non conveniens*, which now allows discretionary refusal to "take" existing jurisdiction, may then assume the positive function of identifying the *forum conveniens* in terms of substantial contacts such as the plaintiff's residence, the origin of the cause of action or the presence of property.

Professor Barrett, dealing with the federal courts, suggests that many existing problems in this field would be alleviated by a scheme of nationwide service of process, venue rules looking to the forum's reasonable contacts with the case, and correction of abuses by a discretionary, nonappealable right of trans-

152. See notes 3, 59, 126, 149 *supra* and accompanying text.

153. Judge Learned Hand has, in a series of decisions, stressed the growing similarity of the tests used in determining jurisdiction over corporations and in balancing the conveniences for *forum non conveniens*. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930); *Kilpatrick v. Texas & P. Ry.*, 166 F.2d 788, 791 (2d Cir.), *cert. denied*, 335 U.S. 814 (1948); *Latimer v. S/S Industrias Reunidas F. Mataraze*, 175 F.2d 184, 186 (2d Cir. 1949). For general discussion, and a survey of English practice, see Note, *Service on a Foreign Corporation after Withdrawal from the Forum State: The Merger of Jurisdiction and Forum Non Conveniens*, 47 Nw. U.L. REV. 392, 394 (1952).

154. See Barrett, *supra* note 116, at 410; Braucher, *supra* note 116, at 917.

fer to a more convenient forum.¹⁵⁵ I submit that similar rules could and should be developed for the state courts in order to solve some of the problems created by intrastate service requirements on the one hand, and the transient rule on the other.

It is becoming apparent that the Supreme Court of the United States will be increasingly inclined to uphold legislation providing for out-of-state process if combined with fair notice and if issuing from states with minimum contacts (such as defendant's residence or place of the cause of action).¹⁵⁶ Once "personal jurisdiction" has thus been modified, the plaintiff will no longer be forced into the venture of "catching" the defendant, and there will no longer be any need for transient service.

Chances are good that legislatures might expand the jurisdiction of their courts by providing for out-of-state service.¹⁵⁷ But there is little hope that courts or legislatures will be willing to forego personal jurisdiction over the transient so long as they cannot be certain that the transient's home state will execute a judgment based on out-of-state service, and assist the domestic plaintiff in the prosecution of his claim. A mechanism for the interstate transfer of cases, on the model of the Federal Judicial Code,¹⁵⁸ would offer such certainty by determining and securing what might be called an "interstate venue." Federal legislation to this effect, while desirable and probably constitutional under the full faith and credit clause, is unlikely. Until uniform legislation¹⁵⁹ can be obtained, however, there is no good reason why the legislature of any state should not be willing to consider a statute aimed at a similar result, based on the doctrine of forum non conveniens. At the 1953 session of the California legislature a bill was passed (but vetoed by the Governor) which would have permitted the nonresident defendant in the absence of certain contacts (residence and cause of action) to move for a dismissal of the action accompanied by an interlocutory order based on a party agreement securing the plaintiff effective prosecution of his claim in another jurisdiction.¹⁶⁰ Such a law would at least have mitigated the rigors of the transient rule, assuring the plaintiff of the opportunity to bring his defendant into court yet protecting the defendant against captious choice of forum.

The *Pennoyer* rule is on the way out, having reached the end of its brief usefulness. And when the myth of *Pennoyer* has finally dissolved in rapidly

155. Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 635 (1954).

156. See notes 144-45 *supra*. For detailed analysis, see Ehrenzweig & Mills, *Personal Service outside the State*, 41 CALIF. L. REV. 383 (1953).

157. Such out-of-state service might be combined with the institution of the *curator absentis*, now in operation in four states. See Millar, *Jurisdiction over Absent Defendants: Two Chapters in American Civil Procedure*, 14 LA. L. REV. 321 (1954).

158. 28 U.S.C. § 1404 (1952).

159. See, e.g., Note, *A Proposed Uniform Act for Extra-Territorial Personal Service and Jurisdiction*, 33 VA. L. REV. 187 (1947).

160. Cal. S. Bill No. 1960 (1953) is set forth in the dissent of Carter, J., in *Price v. Atchison*, T. & S.F. Ry., 42 Cal. 2d 577, 600, 268 P.2d 457, 471 (1954).

multiplying exceptions, the time will have come for the dissolution of its submyth, the transient rule, by reversing the process of its creation. Once jurisdiction over nonresidents, no longer tied to the shibboleth of "physical" service within the state, has embraced mail, wire and wireless all through the nation in giving notice of a suit in a convenient court having contacts with the case, there will be no need for "physically" catching an elusive defendant, nor for protecting him against an inconvenient forum. And pseudo-medieval formulas established and perpetuated by nineteenth century conceptualism, which for decades have obstructed the free flow of legal progress, will have been replaced by what may become known as the new and old American common law of interstate venue in the forum conveniens.