
Robert G. Johnston
THE FALLACY OF PHYSICAL POWER

By ROBERT G. JOHNSTON*

INTRODUCTION

According to a recent opinion,1 “the doctrine of Pennoyer v. Neff that the foundation of jurisdiction is physical power, has yielded to a more flexible rule based on ‘forthright and realistic considerations of fairness in the determination of what constitutes jurisdiction to determine personal rights’.2 Despite this salubrious language, the doctrine of physical power persists and pervades the rules of jurisdiction.

Under the physical power doctrine, one need only be physically present within the territorial boundaries of the sovereign in order to be subject to its jurisdiction. The territorial boundaries are, of course, three dimensional. They encompass not only an area on the face of the earth, but extend from the center of the earth to the heavens. Thus a person on a non-stop flight from California to Bimini is within the territorial boundaries, and therefore within the jurisdiction, of every state through which the airplane passes.3

The persistence and pervasiveness of the doctrine of physical power stems, in part, from a failure or inability to delineate and describe the elements of jurisdiction in functional terms. It might be expected that a word such as “jurisdiction,” which defines a fundamental limitation on the court’s function (for without it any order of the court is void),4 would be subjected


2 Id. at 652. See also Kurland, The Supreme Court, the Due Process Clause, and In Personam Jurisdiction of State Courts: 1877-1958, 25 UNIV. CHI. L. REV. 569, 586 (1958): “The International Shoe case, like Erie R.R. v. Tompkins, served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow. Unlike Erie, however, it did not purport to overrule the multitude of cases which rested on the earlier doctrinal errors.”

3 Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959), wherein the court stated: “... [I]t is concluded that at the time the Marshal served the summons on the defendant, Smith, the plane [on a non-stop flight from Tennessee to Texas] and its passengers were within the ‘territorial limits’ of the State of Arkansas. ... Hence, Smith’s motion to quash will be denied.”

4 Faris v. Faris, 35 Ill. 2d 305, 309; 220 N.E. 2d 210, 212 (1966). The court held: “One is justified in refusing to comply with a court order only if such order is utterly void, but it is no defense to show that the order was merely erroneous. [Citation omitted.] If the court had jurisdiction of the subject matter and the parties to the proceedings, then its order must be obeyed until such time as it is set aside by the issuing or reviewing court.”
to careful analysis. But this does not seem to be the case. Apparently it is assumed to have a well-recognized meaning understood by all and so requiring little, if any, explanation. This assumption is ill-founded.

**ELEMENTS OF JURISDICTION**

Jurisdiction is most often defined as the power of a court to adjudicate a legal controversy. A legal controversy, as such, refers to at least two intersecting jural relations. The first refers to the jural relationship between the parties; the second, to the jural relationship between the court and the parties. In order to delineate jural relationships, whether between parties themselves or between the court and the parties, Hohfeld's system of jural relations and its terminology is a useful analytical tool.\(^5\)

Jurisdiction, within Hohfeld's terminology, describes a power. A “power” is not only the ability to control, change, or otherwise affect one's legal relationship with another, but also the ability to control a legal relationship which exists between others. When a court takes jurisdiction of a legal controversy, it is in the position to control a given legal relation between the parties to that controversy. Since the court has a power, the parties have a correlative liability — they are subject to the power of the court to control a given legal relation between them.\(^6\)

This power-liability relationship between the court and the parties is to be distinguished from the power-liability relationship between the parties themselves which provides the substantive content of the litigation. The latter arises when the de-

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\(^5\) Hohfeld described jural relationships in terms of correlatives and opposites. Correlatives are the two ends of a legal relation and indicate the relative positions of the parties to each other; opposites are only one end of the legal relation and indicate the position of one party in the context of the relationship and what his position would be in the absence of the one he assumed. Hohfeld described the relationships with eight terms. A “right” is an affirmative claim imposing a correlative “duty” upon another or others. Its opposite is “no-right,” the absence of an affirmative claim imposing a correlative “duty” upon another or others. The correlative of “no-right” is “privilege,” the freedom from an affirmative claim. A “power” is the ability to control a legal relation which imposes a correlative “liability” upon another or others. Its opposite is “disability,” the absence of the ability to control a legal relationship. The correlative of “disability” is “immunity,” the freedom from the ability of another to control a legal relation. Hohfeld, *Fundamental Legal Conceptions* (1966).

\(^6\) *Id.*
fendant breaches a duty he owes to the plaintiff. For example, assuming A to possess a right in personam against B, interference with that right by B creates a power in A — the power of a plaintiff to subject a defendant to a debt of record. B is under a correlative liability — he is liable to be made subject to a debt of record. The power in personam possessed by the plaintiff is exercised through the court by means of an action in personam.

The power of the court, on the other hand, derives from its relation to the parties and is not contingent upon the existence of the power relationship between the parties. The court will use its jurisdictional power to determine whether the plaintiff's power exists. If the plaintiff establishes the existence of a

7 A "right in personam" is a right residing in persons and answering to duties which are incumbent exclusively on persons specifically determinate. A "right in rem" is a right residing in a person and answering to duties which are incumbent on all other persons generally. The difference can be illustrated by the following example. If B finds a watch that A has lost, the following rights attach: As against all except A, B has a right in rem. As against A, B has no such right. Instead, A has an in personam right as against B, because A is the true owner of the watch.

8 A "power in personam" is a power over a definite person or a number of definite persons. If A makes an offer to B, B has as against A the "power in personam" of acceptance. A "power in rem" is a power that a plaintiff has over a "res" owned or possessed by the defendant and does not come into being by means of an interference of any right, in rem or in personam, possessed by the plaintiff.

9 An "action in personam" is a means provided for vindication of a right in personam. An "action in rem," then, is a means provided for vindication of a right in rem. Under these definitions, an action based on a tort committed or a contract breached would be an "action in personam," while an action to condemn land would be classified as an "action in rem."

10 The relationship between the plaintiff and the court is based on plaintiff's consent or choice to submit to the court's power by filing a claim. This relationship is also created between the defendant and the court when a countersuit is filed. A limited form of the relationship exists when a defendant files a general appearance. In Ex parte Indiana Transportation Co., 244 U.S. 456, 457 (1917) the Court said:

"... [T]his ... was originally a libel in personam ... . The petitioner excepted [to] the amended libel ... because the petitioner could not be called on to answer the amended libel as to 373 additional libellants [who intervened] ... . If a defendant's body were in custody by arrest ... it well might be that new claims would be entered against the person ... in addition to those upon which the arrest was made. [Citation omitted.] But appearance in answer to a citation does not bring a defendant under the general physical power of the court. He is not supposed even by fiction to be in prison. Conventional effect is given to a decree after an appearance because when power has been manifested it is to the advantage of all not to insist upon its being maintained to the end. [Citation omitted.] That, however, is the limit of the court's authority. Not having any power in fact over the defendant it can seize him again, it cannot introduce new claims of new claimants to an existing suit simply because a defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before."

Cf. Lamb v. Schmitt, 285 U.S. 222 (1932), which deals with immunity of individuals from service of summons in an action while present to attend another action.
power in him, the court may exercise its power to create a new right in the plaintiff. The new right — to expect payment of a debt of record — is the remedy for the original right with which the defendant interfered, thus breaching his duty. A correlative duty — to pay the debt of record — is created in the defendant.

The new right is created, or declared, by a judgment either in rem or in personam. The right is enforced by either an in rem or an in personam procedure. The former is used primarily at law; the latter, primarily in equity. In either instance, the power of the court to take cognizance of the action and to control, by means of its adjudication process, a legal relation of the parties, is what is meant by "jurisdiction of the court."

The power of the court, however, is of a dual nature. It encompasses the ability of the court to control both the legal

11 The existence of a right of action is a power which is proved by evidence supporting a cause of action. In COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 90 (1942), the author states:

"Like so many words and phrases in our legal vocabulary, 'cause of action' is ambiguous. At times it is used to denote the group of operative facts to which the law attaches legal consequences which enable the person with reference to whom the facts are true to obtain legal relief through a judicial tribunal. As so used the phrase also connotes the legal relations which the law attaches to such a group of facts. At other times, however, the phrase is so used that it denotes the legal relations which result from the facts and connotes that the facts are true of the one who is asserted to have the 'cause of action.' Codes of civil procedure use the phrase in the former sense when they require a plaintiff to 'state the facts constituting his cause of action' in plain and concise language. A common synonym of the phrase as used in the latter sense is 'right of action.'"

12 Although it has such power, the court may choose for certain reasons to decline to exercise it. Thus, it was pointed out in Ortman v. Stanray Corp., 371 F. 2d 154, 159 (7th Cir. 1967) (concurring opinion), that "... there are several possible reasons why a court cannot, or, in its discretion, will not, assume jurisdiction. First, the court may feel that the claim is based on penal or revenue laws, or that it involves some other form of foreign governmental interest. Secondly, the local judicial machinery may not be suitable to enforcement of the foreign-based claim. Thirdly, the action may be contrary to the public policy of the forum.... And lastly, the court may decline to exercise jurisdiction on the basis of forum non conveniens."

13 A "judgment in personam" is a judgment based upon a personal liability, and is the result of an action in personam. A "judgment in rem" is a judgment through which it is possible to get at a specific property interest which the defendant has. A judgment entered at law for damages arising out of a tort action is a "judgment in personam," while a decree in equity for divorce is a "judgment in rem."

14 The distinction between actions in rem and those in personam is losing much of its practical importance. Indeed, the distinction is one "impossible to grasp." The Monrosa v. Carbon Black Inc., 359 U.S. 180, 184 (1959) (dissenting opinion). The distinction between them is most often viewed in terms of the object which the action seeks to affect. In actions in rem the object is a thing, in actions in personam, a person. Legal relations, however, exist only between persons and in respect of things, not between persons and things.

15 When a procedure seeks to enforce a judgment in personam by acting upon the person of the defendant it is a "procedure in personam." A procedure is a "procedure in rem" when it serves to enforce a judgment in personam or in rem by acting by execution on something owned by the defendant.
relation between the parties and itself and the legal relation between the parties. The former denotes "jurisdiction [power] to determine jurisdiction." The court, when it exercises this power, looks to the legal relationship between it and the parties, and decides whether the necessary elements for it to exercise control are present. The court is in the unique situation of being at both ends of a Hohfeld jural relationship at one and the same time. It is the possessor of a power and at the same time under a liability to this power.

Three component elements are necessary to invoke the jurisdiction of the court. These are: (1) adequate notice to the defendant of the intention of the state to exercise its control over the legal relationship; (2) a grant by the state to the particular court as its instrumentality to control the class of cases to which the particular legal relationship in controversy belongs; and (3) a recognized connection between the parties and the state which intends to assert control over the legal relationship existing between the parties. The first element is described here by the term "personal jurisdiction"; the second, "subject-matter jurisdiction"; and the third, "state jurisdiction." The sum of these constitutes "jurisdiction of the court."

Personal jurisdiction refers to the necessity of fairly and adequately notifying the defendant that a state through its appropriate judicial representative intends to control a given legal relation between the defendant and the plaintiff. At common

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15 The state may also be a party, as in a criminal action. In such an instance, the state has an interest not only in the jurisdictional relation, but also in the substantive relation between the parties.

16 Bigelow v. United States, 267 F.2d 398, 399 (9th Cir. 1959).

17 Ordinarily notice is given the defendant by serving a summons with a copy of the complaint attached. The summons notifies the defendant of the time and place he must appear; the complaint notifies him of the legal relation to be controlled. Summons may be served in an action involving rights in personam by personal or substituted service. Fed. R. Civ. P. 4(d); Ill. Rev. Stat., ch. 110, §13.2 (1965). It may be served in an action involving rights in rem by personal, substituted or constructive service. Fed. R. Civ. P. 4(e); Ill. Rev. Stat., ch. 110, §14 (1965). Personal service is obtained by giving a copy of the summons to a person who is likely to pass it along to the defendant, such as a member of his family or agent of the business, and then mailing a copy to the defendant. Fed. R. Civ. P. 4(d); Ill. Rev. Stat. ch. 110, §13.2 (1965). Constructive service is obtained by posting or publishing and some form of seizure of the res. See Mullane v. Central Hanover Trust Co., 359 U.S. 306, 316 (1950), where the Court said: "... [A]ttachment of a chattel or entry upon real estate in the name of the law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing (citation omitted) or that he has left some caretaker under a duty to let him know that it is being jeopardized." See Schneider v. Schneider, 312 Ill. App. 59; 37 N.E. 2d 911 (1940). For the corollary that if actual notice is given in an action in rem seizure of the property is unnecessary, see Churchill v. Bigelow, 333 Mass. 196, 129 N.E. 2d 903 (1955).
law, service of summons marked the commencement of the action, for at that moment this symbolic gesture advised the defendant that a sovereign intended to control the given legal relation between the parties. The symbolic gesture was substituted for actual seizure of the defendant. Seizure was at once notice and an exercise of the sovereign power. For this reason the element of personal jurisdiction is generally considered in conjunction with the element of state jurisdiction and together these are referred to as in personam jurisdiction.\textsuperscript{18} However, personal jurisdiction is a separate and distinct element of jurisdiction of the court — not merely a part of the larger whole.\textsuperscript{19}

The common law element of personal jurisdiction is now largely governed by statute but the criteria of fairness and adequacy of notice provided for are determined by the due process clause. Due process requires that the notice served must, as far as is practical, provide the defendant with optimal opportunity to become apprised of the action pending against him and, if he chooses, to enter his appearance.\textsuperscript{20} Anything less than full com-

\textsuperscript{18} Jurisdiction of the sovereign and personal jurisdiction are ordinarily treated as a single element and described by the single term "jurisdiction over the person" or "jurisdiction of the person." In People of the State of California v. Western Tire Auto Stores, Inc., 32 Ill. 2d 527, 532; 207 N.E. 2d 474, 477 (1965), the court stated: "The question remains whether the defendant's relation to the State of California was sufficient to satisfy constitutional requirements for in personam jurisdiction. It has long been held that in addition to provisions for timely notice and fair opportunity to be heard, the Constitution requires that a defendant or his activities have some connection with the state of the forum, before a personally binding judgment can be enforced against him. This requirement is thought to arise from the territorial limitations on the state's power, and however fair and convenient the forum may be as a place of trial it will have no jurisdiction in the absence of some 'contact' by the defendant with the State."

Ordinarily both personal jurisdiction and state jurisdiction are contested on the part of the defendant by means of a single motion to quash. Such a motion may direct itself to either element alone or to both elements. It may challenge the means by which service of process was made on the grounds that it did not give fair and adequate notice. See Isaacs v. Shoreline Hotel, 40 Ill. App. 2d 108, 188 N.E. 2d 776 (1963). Or it may assert that no recognized connection exists between the defendant and the state. See Ziegler v. Hodges, 80 Ill. App. 2d 2d 210, reported sub nom. Ziegler v. Houghton-Mifflin Co., in 224 N.E. 2d 12 (1967). In attacking the element of personal jurisdiction, the motion may assert that no summons was ever served on the defendant, see Escue v. Nichols, 335 Ill. App. 2d 244, 81 N.E. 2d 652 (1948); that summons was improperly served on the defendant, see Isaacs v. Shoreline Hotel, 40 Ill. App. 2d 108, 188 N.E. 2d 776 (1963); or that the form of the summons and complaint failed adequately to give notice, see Chamness v. Minton, 89 Ill. App. 2d 325, 188 N.E. 2d 873 (1963).


\textsuperscript{20} Thus, in Mullane v. Central Hanover Trust Co., 339 U.S. 306, 315 (1950), it was held: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation omitted.] The notice must be of such nature as rea-
pliance with this constitutional standard will result in a void determination.\textsuperscript{21}

Jurisdiction of the subject matter, the second element of jurisdiction of the court, refers to the authority of the court to hear a particular class of cases.\textsuperscript{22} In early times, one court heard all cases. This was because most common law civil actions had their origin in criminal actions. As the law evolved and the common law \textit{ex delicto} and \textit{ex contractu} actions took on identities separate and distinct from their criminal action origins, it became necessary to parcel out cases by class to courts designated to hear them. The inherent power of the sovereign to hear all forms of actions was distributed by subject matter or class throughout the various courts. Through this procedure, specialized courts were created that had jurisdiction to hear only particular actions.\textsuperscript{23} Jurisdiction of the subject matter is

sonably to convey the required information [citation omitted], and it must afford a reasonable time for those interested to make their appearance [citation omitted]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

But when notice is a person's due, process which is a mere gesture is not due process. The Court stated in McDonald v. Mabee, 243 U.S. 90, 92 (1917) that "... [t]o dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

In Walker v. City of Hutchinson, 352 U.S. 112 (1956) and Covey v. Town of Somers, 351 U.S. 141 (1956) the Supreme Court held mere compliance with state statutory provisions requiring only service by publication to be insufficient where plaintiff had knowledge of defendant's address and correct place of residence. Under such circumstances, it was held that personal service should have been made notwithstanding the lesser requirements imposed by the state statute.

21 A defendant may directly attack jurisdiction of the court before the court which claims jurisdiction or he may collaterally attack jurisdiction of the court before the court which seeks to enforce the judgment obtained. Whichever means is chosen, however, the defendant is required to pursue his remedies through the appellate or review system once the jurisdictional question is raised. \textit{Cf.} Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

22 Faris v. Faris, 35 Ill. 2d 305; 220 N.E. 2d 210 (1966). In People of the State of California v. Western Tire Auto Stores, Inc., 82 Ill. 2d 527, 530; 207 N.E. 2d 474, 476 (1965). The court noted: "Jurisdiction of the subject matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs." The decision in Pennoyer v. Neff, 95 U.S. 714, 733 (1877), pointed out that "... [t]o give [legal] proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit ..." The following statement appears in Smith, \textit{Personal Jurisdiction}, 2 INT. & COMP. LAW Q. 510, 514 (1953): "... [B]ut the submission is not to the court as an independent body, but rather to the Sovereign whom it represents, and for this reason submission to a court not appointed by the Sovereign to represent him in the type of case in question may give no jurisdiction."

23 In early Norman England, the king administered justice through itinerant judges called Justices in Eyre. These traveling judges had both criminal and civil jurisdiction. "Besides its ... criminal jurisdiction, the justices in eyre also had the jurisdiction of the court of common pleas and so
then contingent upon the prerogative of the state. It is the grant from the state to the court itself of a portion of the state's power.

The third element of jurisdiction of the court is state jurisdiction. Its historic roots are to be found in the allegiance or fealty of the individual to the sovereign. In early England, all of the king's vassals swore fealty to the sovereign. Without this oath of allegiance the vassal would not be doled his feudal lands and benefits. Each subject directly submitted to the regal power of the sovereign or did so indirectly through submission to an intermediate lord. There existed an implied, if not express, covenant between the individual and his sovereign. The individual obtained lands, protection and other benefits from the sovereign or intermediate lord; in return the individual provided services and payments. The king or lord had large areas of control over the enfeoffed vassal. He could, among other things, demand submission of the individual to the adjudication of legal relations with himself or with others in court.24

THE ASCENDANCY OF THE PHYSICAL POWER DOCTRINE

Jurisdiction based on a theory of allegiance was developed for, and dealt with, a population which was stable, consisting of subjects or citizens who were born, lived and died within the territorial limits of the sovereign to whom they owed allegiance.

all civil business affecting the county was also theirs." T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 103 (5th ed. 1956). However, as civilization advanced this consolidated court system proved unworkable. "The eyre was too ponderous and too intermittent a machine to deal with the ever-present problem of bringing royal justice to the shires. For practical purposes the Crown relied on a variety of traveling justices... with limited commissions...." Id. at 104.

24 Thus, in Blackmeer v. United States, 284 U.S. 421, 436 (1932), the Court commented:

"While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States... Nor can it be doubted that the United States possessed the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. [Citation omitted.] What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States. It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving testimony whenever he is properly summoned."

In Mills v. Duryee, 7 Cranch. 481, 486 (1813) (dissenting opinion), it was noted: "There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice can dispense with but when compelled by positive statute. One of these is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits." [Emphasis added]. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 60 (1966).
As such, the theory of allegiance presupposed a fair and convenient forum, the defendant's home, in which the operative facts arose. As a more mobile population emerged in response to the development of commerce and technology, the theory was challenged. With greater frequency legal controversies arose involving transients, who otherwise owed no allegiance to the sovereign within whose territories they were at the moment. However, their duty to submit to that sovereign's court arose not from the transient's physical presence within the sovereign's domain, but rather from acceptance of the protection of such sovereign. The underlying rationale — the obligation owed for benefits extended — was still that of the allegiance concept. At this stage of development the transient ordinarily was defending an action in which the operative facts arose within the territorial limits of the sovereign. Thus, the theory of allegiance still presupposed a fair and convenient forum, one where the operative facts arose.

The theory of allegiance degenerated to the doctrine of physical power in the United States in the case of *Pennoyer v. Neff*. The issue involved was the effect to be given to an Oregon judgment, pursuant to which a sheriff's sale purported to transfer title to the foreign defendant's land located in that state. In the original suit the defendant had been given notice only by publication in Oregon in accordance with a local statute. The Supreme Court held the judgment void. The rationale of the decision was that because the original action was in personam, personal service was required, for, "to give proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." The Court expressly limited the power of the state (sovereign):

"The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally be-

In *An Englishman v. Angelo* (1564), Mor. 4825, jurisdiction was assumed over an Italian casually present in Scotland who objected to the jurisdiction of the court; and in *Linn v. Casandinos* (1881: I.H.), 8 R. 849, jurisdiction was assumed over a Greek who, although itinerantly present, resided neither in Scotland where the action was brought nor anywhere else. See generally, Smith, *Personal Jurisdiction*, 2 INT. & COMP. LAW Q. 510 (1953).

95 U.S. 714, 720 (1877): "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power, and be resisted as mere abuse."

Id. at 733.
longed to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, ch. 2; Wheat. Int. Law, pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."  

As a corollary:

"...[P]rocess from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."  

In addition to limiting the power of the state, Pennoyer v. Neff addressed itself to the question of sufficiency of notice:

"...Without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in a great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instrument of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transaction upon which they were founded, if they ever had any existence, had perished."  

However,

"...[S]ubstituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."  

Pennoyer v. Neff involved an in personam action requiring in personam jurisdiction. In personam jurisdiction could only be obtained by personal service of process. The Court seized upon physical presence, a superficial characteristic of the theory of allegiance, as requisite to personal service of process. This characteristic was the basis of the doctrine of physical power which limited the state's jurisdiction to its territorial boundaries.

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28 Id. at 722.
29 Id. at 727.
30 Id. at 726.
31 Id. at 727.
Physical power meant actual physical control over a physically present person or a physically present thing within the territorial boundaries of the state. If a person or thing was not physically present, the state was powerless. Each state had, as it were, a wall around it beyond which the state's authority could not extend. To step beyond the wall was to step beyond the jurisdiction of the state. To step within the wall was to step within the jurisdiction of the state, regardless of the absence of any other connection with that state. The fair and convenient forum aspect of the theory of allegiance was lost. The rationale behind this doctrine was described by Justice Holmes: "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure."

Implicit in the physical power doctrine as promulgated in *Pennoyer v. Neff*, is the underlying concept that each state is a separate nation with concomitant unlimited sovereignty. Although the Court initially recognized that the states possessed equal but limited sovereignty, it failed to sustain this position with respect to jurisdiction. The territorial integrity of the states was finally equated to the territorial integrity of the nations. As a result, the process of one state could not reach into another state, but conversely, once within the state, nothing further was required to subject each party to its process.

The states in the federal system do not, however, enjoy un-

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32 A "person" is an individual or a corporation. The latter is present "... if it conducts a continuous business in the state of the forum .... But a single transaction is not enough .... There must be some continuous dealings in the state of the forum; enough to demand trial away from home .... In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here." Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141, 142 (2nd Cir. 1930). Physical presence permitted service of process in actions arising within and without the forum state, but only during the time the defendant was present within the state.

33 Commonwealth of Kentucky ex rel. Kern v. Maryland Casualty Co., 119 F. 2d 352, 355 (6th Cir. 1940). The court held that the tribunals of one state have no jurisdiction over individuals of other states unless such persons are found within their territorial limits, and that an attempt to extend process from one state into another state would be treated in other forums as an act of usurpation and of no binding force whatever.


35 Coleman's Appeal, 75 Pa. 441, 458 (1874), wherein the court said: "... [T]he most important principle of all municipal law of Anglo-Saxon origin, [is] 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 .... "

36 Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913).

37 Indirect extraterritorial power of the states was not only recognized in Pennoyer v. Neff, but approved: "But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the
limited sovereignty. The federal constitution imposes limitations on the sovereign power of each of the states. One of the limitations is the requirement of due process imposed on the states in their dealings with their own citizens and those of sister states, all of whom are additionally federal citizens. For purposes of state court jurisdiction the relation of the defendant to the forum state, rather than that of the forum state to the sister state, determines whether the defendant is afforded due process.

The requirement of full faith and credit imposed on states in their dealings with sister states further emphasizes the limitation imposed by the Constitution upon the assertion of sovereignty by the state in the exercise of its judicial process. The emphasis here too is not upon its independent statehood or "territorial integrity," but rather upon its compliance with the federal policy of due process, which knows no boundaries. Full faith and credit requires states to enforce regular judgments only when obtained in the presence of the three elements which are required to establish the jurisdiction of the court issuing such judgments. The constitutional issue initially is whether the state court had jurisdiction so that the defendant was afforded due process — that is, was he given adequate notice and does he have a sufficiently close relationship with the forum state. If due process is afforded the defendant then any judgment obtained is enforceable either within the forum state or without the forum state. In the latter case, the state in which the judgment is sought to be enforced must give full faith and credit to the judgment. If due process is not afforded the defendant, then any judgment obtained is unenforceable within and without the forum state.

The doctrine of physical power expressed in Pennoyer v. Neff was the touchstone for jurisdiction of state courts for seven decades. It was often coupled with meaningless distinctions between actions in rem and actions in personam, which further

jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give extraterritorial operation to its laws, or to enforce an extraterritorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation."

95 U.S. at 723.


89 Mullane v. Central Hanover Trust Co., 339 U.S. 306, 312 (1950), where it was held:

"Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system
The Fallacy of Physical Power

obscured the meaning of jurisdiction. It led to rigid and primitive jurisdictional dogmas based on hard territorial concepts. The courts, in order to relax the rigid rules and render these concepts more adaptable to increased mobility of population and business interests, created alternate theories and legal fictions based on the doctrine of physical power. This further obscured the rules of jurisdiction. The first such alternate theory was that of consent. The consent theory, whether actual or implied, is easily recognized as merely a variation on the theme of physical presence.

Actual consent involves voluntarily and knowingly submitting to the jurisdiction of the state. Such consent, if given to a state court having jurisdiction over the subject matter, will always then give it jurisdiction to control the legal relations of the parties. Parties may consent by agreement to submit to a particular court any controversy arising out of the agreement, or by expressly inviting the court to exercise its control over the legal relations existing between them. Actual consent is given when a party files a claim or general appearance. It is also given when a corporation designates a person upon whom service of process may be made within a state of which it is not a citizen. In the case of actual consent, one is considered fictionally to be physically present within the "territorial limits" of the state either in one's own person or in the person of one's agent. Being physically present he may be sued on any cause of action. Pursuant to this approach, a person may be required to defend an action in the state where he is physically present regardless of convenience and regardless of where the operative facts occurred, as long as consent remains.

quite unlike our own. [Citation omitted.] The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classifications. American courts have sometimes classified actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem. [Citation omitted.] But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state."

40 Neirbo Co. v. Bethlehem Corp., 308 U.S. 165 (1939). His consent is actual consent although extracted as a condition of entering the state. It permitted service of process in actions which did not arise out of transactions within the state where process was served. Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148 (S.D. N.Y. 1915). Implied consent did not have this effect.

41 Ex parte Schollenberger, 96 U.S. 369 (1877). Actual consent is dubious when one, intending to file a special appearance to contest jurisdiction of the court, mistakenly or unwittingly appears for some other purpose.

Implied consent involves engaging in an activity within the territorial limits of a state which that state may exclude or regulate, and thereby submitting to the jurisdiction of the state as a condition of engaging in the activity. On the premise that a state may exclude a nonresident motorist from its highways, a nonresident motorist implicitly consents to appoint a state officer as his statutory agent for service of process. Actual notice is provided by mailing a copy of the process and complaint to the nonresident motorist at his last known address. Similarly, on the premise that a state may exclude a foreign corporation from doing business within its territorial limits, a foreign corporation is deemed to have consented expressly or by implication to appoint a state officer as its statutory agent for service of process. Again, actual notice is provided by mailing a copy of the process and complaint to the corporation. This implied consent theory was derived from the state's acknowledged power to so condition its extension of those benefits and privileges enjoyed by the foreign corporation from its business activity within the territorial boundaries of the state. Since the implied consent is limited to the activity which may be excluded or regulated, a person may be sued only on actions involving such activity, even after leaving the state.

Jurisdiction was also exerted over foreign corporations on the theory of "presence." The test used to determine if a corporation was present was whether it was "doing business" within the state. This test was largely quantitative, being based on the

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44 Stevens v. Television, Inc., 111 N.J. Eq. 306, 307, 162 A. 248, 249 (1932). The court here stated: "But if we assume that the cause is, in a sense, in personam, there is jurisdiction by consent. The three defendants came into the state to carry on in defiance of its laws. Television, Incorporated, opened an office in Newark where and from which the defendant Corbin, as manager, with his corps of high-powered salesmen, exploited the already impoverished in the sale of the company's stock, some of which belonged to the third defendant, Cox, who participated. Though their practices were unlawful and condemned by the statute, they must be held to have submitted to our jurisdiction to the same extent as if their conduct was above reproach. It is held in cases of foreign automobilists that they are amenable to actions for damages in this state for injuries while using our highways and, charged with notice, of our statutes, are held to subject themselves to our jurisdiction by the service of process upon the secretary of state to be forwarded to them by mail. [Citation omitted.] Hess v. Pawloski, 274 U.S. 352 . . . [involved] a statute of the State of Massachusetts, which is substantially the same as ours, providing for service of process against a non-resident driver upon the register and that notice of such service be sent by registered mail to the defendants . . . . "Under the Blue Sky Law the duty of forwarding the process by mail is imposed upon the attorney-general. In substantial legal effect, the methods of service are the same except one is direct, the other indirect . . . ."

number of transactions involved, the number of sales made, or the number of policies written. However, once a corporation was found to be doing business within a state, it was then treated as physically present. It could be sued not only on causes of action arising out of the business conducted, but on any cause of action. The state had obtained “physical control” over the corporation and could submit it to adjudication on any causes of action.

The “doing business” test itself acquired the status of an independent jurisdictional doctrine. It is premised not only upon physical presence but upon the consensual and allegiance aspects of jurisdiction, giving rise to much unnecessary confusion. The usual rationale of the doing business theory was that the foreign corporation was afforded benefits and privileges from the state so that it incurred correlative obligations with respect to the state, including consent to suit in its courts. This rationale was similar to, if not the same as, the “allegiance” theory, and in a more limited sense to the implied consent theory. However, “In the end,” said Judge Learned Hand, “there is nothing more to be said than that the defendant’s local activities, taken together, do not make it reasonable to impose such a burden [that of defending in this forum] upon it.”

The various theories were used by the courts to complement each other to extend and exert their jurisdiction wherever possible. Yet, as a whole, the theories left arbitrary and impractical gaps in state court jurisdiction. These gaps resulted from the doctrine that the foundation of jurisdiction was physical power. The doctrine was borrowed from an international system dealing with unlimited sovereigns. It was awkwardly superimposed on the federal system which dealt with limited sovereigns. The inherently jurisdictional question of convenience of forum, which would have been treated as such under a more

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45 Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 261; 115 N.E. 915, 918 (1917). The court held: “... The defendant corporation is engaged in business within this state. We hold, further, that the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted . . . .”

46 Development — Jurisdiction, 73 Harv. L. Rev. 909, 922 (1960); Hutchinson v. Chase & Gilbert, 45 F. 2d 139 (2nd Cir. 1930).

47 Hutchinson v. Chase & Gilbert, Id.


49 The only restraint imposed on nations is comity, which is nothing more than self-restraint based on reciprocity.

50 Pennoyer v. Neff, 95 U.S. 714, 722 (1877). The Court noted that the several States of the Union are not, in all respects independent, and that many of the rights and powers originally belonging to them are “now vested in the government created by the Constitution.”
realistic approach unobstructed by doctrinaire concepts, was left to venue and the doctrine of forum non conveniens.

Venue refers to the geographic determination of place of trial within the sovereign’s jurisdiction or territorial boundaries. It attempts to determine the most convenient place of civil trial within that jurisdiction or those boundaries. However, under the doctrine of physical power a convenient place of trial may not exist there.

The doctrine of forum non conveniens is an exercise of discretion of the court to decline to exercise its jurisdiction under

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51 The distribution by the sovereign of geographical place of trial within a sovereign's boundaries is called "venue." Neirbo Co. v. Bethlehem, 308 U.S. 165, 168 (1939). The Court noted:

"... [T]he locality of a lawsuit — the place where judicial authority may be exercised — though defined by legislation relates to the convenience of the litigants and as such is subject to their disposition. The basic difference between the court's power and the litigants' convenience is historic in the federal courts. ... Being a privilege, [venue] may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. [Citation omitted.] Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that courts affix to conduct consequences as to place of suit...."

Venue is ordinarily determined at common law by the distinction between local and transitory actions. See 1 Moore, Federal Practice, §10.142 [2-1] (2d ed. 1969): "The true distinction between a local action and a transitory action is the distinction between an action in rem and one in personam."

In United Biscuit Co. of America v. Voss Truck Lines, Inc., 407 Ill. 488, 501; 95 N.E. 2d 439 (1950), it was stated:

"At common law, actions were of two kinds, local and transitory. [Citation omitted.] A transitory action, however, has no location. It can follow the defendant wherever he may be, ... the test is the location of the object suffering the injury, not the subject causing the injury. [Citation omitted] ... and any court in which the defendant is found has jurisdiction. [Citation omitted.] At common law, transitory actions could be brought in any county. [Citation omitted.] A local action must necessarily be tried where the event occurred, so if it involved real estate, or partition of land, it was local because the subject of the lawsuit was local, and hence the place of the object of the controversy was very important...."

And in Livingston v. Jefferson, 15 Fed. Cas. 660, 664, 665, No. 8411 (C.C. Va. 1811) it was held:

"The distinction taken is that actions are deemed transitory, where the transactions on which they are founded might have taken place anywhere; but are local where their cause is in its nature necessarily local ... [Blackstone] expressly classes an action for trespass on lands with those actions which demand their possession, and which are local, and makes only those actions transitory which are brought on occurrences that might happen in any place.

"... They [reasons for local actions] have been ... more than counterbalanced by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court. That this consideration should lose its influence, where the action pursues a thing not within the reach of the court is of inevitable necessity; but for the loss of its influence where the remedy is against the person and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment...."

"... Other judges have felt the weight of this argument, and have
the doctrine of physical power.\textsuperscript{52} It is an attempt to provide a means of obtaining a convenient forum. As such, it considers the interest of the state,\textsuperscript{53} the vexatious nature of the choice of forum,\textsuperscript{54} and the relative convenience of the parties. Some of the factors considered in determining the relative convenience of the parties are the availability of another forum; joinder of actions and parties; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and the possibility of viewing the premises. These factors balanced and weighed against each other give meaning to the concept of a fair forum for trial.

\textbf{THE PERSISTENCE OF PHYSICAL POWER}

The doctrine of physical power was significantly eroded by the Supreme Court in the landmark case of \textit{International Shoe v. Washington}.\textsuperscript{55}

"The facts . . . are not in dispute. Appellants, a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington. Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock or merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were struggled with the distinction which produces the inconvenience of a clear right without a remedy. I must submit to it. The law upon the demurrer [to action of quare clausum fregit] is in favor of the defendant.\textsuperscript{56}"\textsuperscript{56}

\textsuperscript{52}See Ehrenzweig, \textit{The Transient Rule of Personal Jurisdiction: The 
"Power" Myth and Forum Conveniens}, 65 \textit{Yale L. J.} 289, 305-09 (1956). The doctrine of forum non conveniens historically was a factor in determining jurisdiction. As such, the lack of a convenient forum required a mandatory dismissal of the action on jurisdictional grounds rather than a discretionary dismissal.

\textsuperscript{53}See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947), where the Court pointed out that factors of public interest have a place in applying the doctrine. Thus, administrative difficulties follow when litigation is piled up in overburdened centers rather than being handled at its origin. And jury duty ought not be imposed upon a community which has no relation to the litigation. Further, local interest is involved in having localized controversies decided at home. It is appropriate, too, that the trial of a diversity case be held in a forum at home with the state law that must control the case, rather than that some other forum cope with problems in conflict of laws, and law foreign to itself.

\textsuperscript{54}\textit{Id.} at 508. The Court commented: "It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."

\textsuperscript{55}326 U.S. 310 (1946).
compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by the appellant. The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise is shipped f.o.b. from points outside Washington to purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections."

On these facts the Court held that the corporate defendant was subject to the jurisdiction of the state. The corporate defendant was deemed to have been "present" in Washington and to have received fair and adequate notice of the action by substituted service. Service was made on a state officer and actual notice given by mail. In arriving at this finding the Court said:

"Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'...."57

The Court, after making this bold thrust against the concept of physical power, then reverted to a more orthodox analysis in finding that the corporate defendant's activities in Washington were "continuous and systematic," and that the "privilege of conducting activities within a state . . . may give rise to obligations."58 Such language was a reversion to the "doing business" test. The court also said, "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."59

The opinion in International Shoe v. Washington recognized and distinguished the elements of personal jurisdiction and state jurisdiction. In doing so it recognized that due process required

56 Id. at 313, 314.
57 Id. at 316.
58 Id. at 319.
59 Id.
(1) adequate notice, either within or without the forum state, and
(2) an existing legal relation between the defendant and the forum state which made the forum a convenient one and gave the forum state an interest in controlling the legal controversy.

The minimal contact theory as conceived in *International Shoe* looks to the interest of the forum state in controlling the legal controversy⁶⁰ and the relative convenience of the parties.⁶¹ The measure of interest is, of course, qualitative and not quanti-

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⁶⁰ The interest of the state may involve the same principle in determining the applicable law in a conflicts of law question. See *Hanson v. Denckla*, 357 U.S. 235, 263 (1958), holding that “[f]or choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant . . . .” Contrast this with the position of Justice Black in his dissenting opinion at page 258: “True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations.” [emphasis added] Compare this with the position of Justice Traynor in *Sampsell v. Superior*, 32 Cal. 2d 763, 773; 197 P. 2d 739, 750 (1948): “Since the courts of this state do not finally and conclusively determine custody in a divorce proceeding, there is no reason to attempt to arrive at some basis for jurisdiction that should be accepted as final and conclusive in all states. It is sufficient basis for jurisdiction that the state ‘has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part . . . and this jurisdiction may exist in two or more states at the same time.’ (Stansbury, 10 LAW AND CONTEMPT. PROB., supra at 831) . . . .”

⁶¹ *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945): “An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this [the satisfaction of due process] connection . . . . [I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there. [Citation omitted.] To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.”

If a State has a substantial relationship with a transaction, “its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as ‘traditional notions of fair play and substantial justice.’” *Hanson v. Denckla*, 357 U.S. 235, (Black dissenting), 259 (1958).

*See also* *Koplin v. Thomas, Haab & Botts*, 73 Ill. App. 2d 242, 254; 219 N. E. 2d 646 (1966).

However, in *Hanson v. Denckla*, 378 U.S. at 251, the majority opinion recited:

“ . . . [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However, the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that state that are a prerequisite to its exercise of power over him.”
The interest may be that of regulating or controlling the activities of a foreign corporation or nonresident individual whose activities create a risk within the forum state. It may be, as a corollary, that of providing a forum for its own citizens or residents. Whatever the qualitative interest may be, it must be weighed with the relative convenience of the parties. The balancing of the relative convenience of the parties under the rules of jurisdiction is indistinguishable from that under the rules of forum non conveniens.

Although jurisdiction of the state under the minimal contact theory enunciated in *International Shoe v. Washington* is incompatible with the doctrine of physical power and its related theories, the Court in *International Shoe* did not discard the physical power doctrine as presented in *Pennoyer v. Neff* as an independent basis of jurisdiction. Thus, the two exist side by side in today's rules of jurisdiction. The doctrine of physical power, unlike that of minimal contact, requires neither an interest in the legal controversy on the part of the forum state nor convenience of the parties, but mere physical presence.

62 Thus, in Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 438; 176 N.E. 2d 761, 764 (1961), the court stated: "In the case at bar the defendant's only contact with this State is found in the fact that a product manufactured in Ohio was incorporated, in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer. The record fails to disclose whether defendant has done any other business in Illinois, either directly or indirectly; and it is argued, in reliance on the *International Shoe* test, that since a course of business here has not been shown, there are no 'minimum contracts' sufficient to support jurisdiction. We do not think, however, that doing a given volume of business is the only way in which a nonresident can form the required connection with this State. Since the *International Shoe* case was decided the requirements for jurisdiction have been further relaxed, so that at the present time it is sufficient if the act or transaction itself has a substantial connection with the State of the forum."

63 Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). The decision in *Healing v. Isbrandtsen Co.*, 109 F. Supp. 605, 607 (S.D. N.Y. 1952), stated: "That the cause of action has no relation to the defendant's activities here is an important but not conclusive consideration. [Citation omitted.] The non-residence of a plaintiff in actions based on torts which have occurred outside the forum is likewise an important consideration. However, twelve defendants have been served here and only one besides the defendant challenged the validity of the service. It does not appear that this defendant or any of the defendants, excepting one, could have been served in New Jersey where the accident occurred. "The convenience to the plaintiffs in joining all the defendants whose alleged liability arises out of the same state of facts is apparent. "In view of the proximity of both Pennsylvania and the place of the accident to New York City, no serious inconvenience results to this defendant by requiring it to defend this action away from its 'home.'"

64 Kilpatrick v. Texas & P. Ry. Co., 166 F. 2d 788, 790 (2nd Cir. 1948). The opinion pointed out that: "[T]he Court in [*International Shoe*] did not overrule that decision; but it did give a new explanation to corporate 'presence,' for it held that in order to determine that question the court must balance the conflicting interests involved: i.e., whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of 'forum non conveniens.'"
What constitutes physical presence is often ill-defined. The choice of a forum state for a legal controversy may be completely capricious. Under this theory, due process is satisfied if the defendant is served within the physical boundaries of the forum state in which none of the operative facts occurred. Yet, under identical circumstances due process would not be satisfied if the defendant were served outside the physical boundaries of the forum state. In either instance the forum may be inconvenient and the state may have no interest in controlling the legal controversy. Yet the defendant's physical presence within the forum state when served with process, no matter how fleeting or fortuitous, thus performs a magical feat; in and of itself the due process requirement is deemed to have been satisfied. The plaintiff may commence his action against the defendant wherever he can catch him, even in an airplane.\(^{65}\) If due process is denied when a defendant is required to defend an action without having sufficient minimum contact, due process would seem to be denied when the only contact is fleeting and fortuitous.\(^{66}\)

Yet the tradition of physical presence persists. The problem appears to be the inability or failure to analyze the old and traditional concept of physical power no matter how outmoded and nonfunctional in today's society.\(^{67}\) Other than mere tradi-

\(^{65}\) Blount v. Peerless Chemicals Inc., 316 F. 2d 696, 698 (2nd Cir.), cert. denied 375 U.S. 831 (1963), emphasizing that a defendant may not be called upon to defend in a foreign court unless he has the "minimal contacts" with that state necessary to its exercise of power over him. And in Kaye-Martin v. Brooks, 267 F. 2d 394, 397 (7th Cir.), cert. denied 375 U.S. 832 (1959) the court stated:

"Brooks did not come to Illinois for the purpose of negotiating with Hansen or Kaye-Martin but rather to attend a convention. Moreover, no party to this action, insofar as the record shows, had any intention of invoking any of the benefits or protections of the laws of the State of Illinois. The fact that some of the events leading up to the execution of the final contracts in Dallas, Texas occurred in Chicago was wholly fortuitous.

"On this record as it comes to us it is clear that those 'minimal contacts' which are an absolute prerequisite to personal jurisdiction of the courts of Illinois over a defendant are totally lacking as to Brooks."

In either of the above cases the courts would have taken jurisdiction, which they did not, due to the lack of minimal contacts, if the service could have been effected within their territorial limits. The mere fact that one is passing through the territorial limits of a sovereign hardly adds any further interest of the state to the legal controversy or makes it any more convenient to the parties. See also Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

If a Washington resident and a Florida resident are involved in an auto accident in Oregon, both return to their respective residences, the Florida resident files a personal injury action in Florida, and service of process is made on the Washington resident in Washington, due process is denied. However, if the same facts exist except that the Washington resident is served process in an airplane over Florida while on a direct flight to Bimini, due process is not denied.

\(^{66}\) Buckley v. New York Post Corp., 373 F. 2d 175 (2nd Cir. 1967).

\(^{67}\) Id.
tion, the only justification is in providing a forum when one might otherwise be unavailable.

The theory of minimal contact based on the factors of relative convenience of the parties and interest of the forum state assures the plaintiff a forum in which to bring his action and yet protects the defendant against capricious choice of forum. The doctrine of physical power neither assures the plaintiff of a forum, except under fortuitous circumstances, nor protects the defendant from a capricious choice of forum. The only protection afforded the defendant from a capricious choice of forum is the doctrine of *forum non conveniens*, which is indistinguishable in determining the relative convenience to the parties of the forum from "minimal contact." Yet procedural due process is left to an exercise of discretion on the part of the court in the former but not in the latter. In order properly to assure a forum for the plaintiff which is at the same time a relatively convenient forum for the defendant, further legislation is necessary to complement the statutes which provide for service of summons without the forum state. The legislation could take the form of a federal interstate venue provision or uniform interstate venue provisions. Either could provide for transfer of state actions from one state to another in order to ensure a fair forum. Such legislation, complementing extraterritorial service, would completely atrophy the vestigial remains of the doctrine of physical power and its related theories. The theory of minimal contact would then freely provide a relatively convenient forum for the parties in a state with an interest in providing a forum for the legal controversy, thus giving meaning to the due process aspect of state court jurisdiction.

must inevitably seek out the defendant, such a doctrine would not seem to violate basic notions of fair play; any view that it does must rest on an inarticulate premise, which a legislature is free to question, that plaintiffs are much more given to making unjust claims than defendants are to not paying just ones. Indeed, when the operative facts have occurred where the plaintiff sues, the convenience of both parties would often be served by a trial there, and the chief benefit to the defendant of a rule requiring the plaintiff to seek him out is the impediment this creates to the bringing of any suit at all."


68 "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." *Id.* at 313. *See also* Price v. Atchinson, T. & S. F. Ry., 42 Cal. 2d 577, 600; 268 P. 2d 457, 471, (dissenting opinion) *cert. denied* 348 U.S. 839 (1954). For a similar judicial result see *Change of Venue under Sec. 1404(a) of the Judicial Code*, 45 MINN. L. R. 680, 688: "Numerous grants of dismissal in state courts have been conditioned on the moving defendants' promise to submit to the jurisdiction of a foreign court and to waive objection to venue of that court." *Cf. Uniform Enforcement of Judgments Act* and Cook, *The Logical and Legal Basis of Conflict of Laws* 99-100 (1942).