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# COMMENTS

## SUBSTITUTED SERVICE OF PROCESS: NON-RESIDENTS DOING BUSINESS WITHIN THE FORUM

### INTRODUCTION

State jurisdiction over foreign corporations and other nonresidents has a long history of litigation in the Supreme Court of the United States.<sup>1</sup> A careful study of the decisions reveals that the Court has gradually expanded its concept of the permissible scope of state jurisdiction.<sup>2</sup> The importance of this trend cannot be overemphasized when viewed in relation to the rapid technological and economic development of the United States. The purpose of this comment is to examine the present status of a small segment of the overall problem—the power of a state to acquire personal jurisdiction over a nonresident not present within the forum, by substituted service of process, where the cause of action has arisen as a result of business contacts of the nonresident within the state.<sup>3</sup> Emphasis will be placed upon an analysis of Florida law within the area defined.<sup>4</sup>

### GENERAL

The problem must be examined in the light of its historical development. The Supreme Court in 1877, in the case of *Pennoyer v. Neff*,<sup>5</sup> formulated the rule that absent a voluntary appearance or consent to be served, the due process clause of the fourteenth amendment required personal service

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1. *E.g.*, *Corporations*: *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, c. V (1918).

*Individuals*: *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927); *Flexner v. Farson*, 248 U.S. 289 (1919); *Pennoyer v. Neff*, 95 U.S. 714 (1877). See also *dicta* *McGee v. International Life Ins. Co.*, *supra*, and *International Shoe Co. v. Washington*, *supra*.

2. See discussion in Ellman, *Blithe Spirit—The Foreign Corporation In The Michigan Courts*, 35 U.DET. L. J. 281(1958). See also *McGee v. International Life Ins. Co.* *supra* note 1, at 222 (in the words of Black, J., "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.")

3. If a state does not have the power to acquire personal jurisdiction over a nonresident (exceeding its jurisdictional limitations) then the attempt to assert the power is invalid under the U. S. CONST. amend. XIV, § 1, which states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ." Judgments obtained where a state attempts to acquire personal jurisdiction in violation of § 1 of the XIV amendment, *supra*, will not be entitled to the "full faith and credit" required by the U. S. CONST. art. 4, § 1.

4. FLA. STAT. § 47.16 (1957).

5. 95 U. S. 314 (1877).

of a nonresident individual defendant within the forum to give a state jurisdiction to render an in personam judgment. Thus was enunciated the requirement of "presence" for individuals which later was applied to foreign corporations.<sup>6</sup> The failure of the Court to clearly limit the requirement of *physical* presence to cases where the nonresident had no other contacts with the state of the forum led many legislatures to enact substituted service statutes to circumvent the supposed "due process" requirement of the decision.<sup>7</sup> Subsequent decisions of the Court engrafted many limitations upon the "presence" test,<sup>8</sup> culminating in its abandonment in *International Shoe Co. v. Washington*.<sup>9</sup> Having abandoned "presence" as essential to "due process" in acquiring jurisdiction in actions in personam, the more nebulous test of "minimum contacts" was advanced.<sup>10</sup> "Minimum contact" was reached in *McGee v. International Life Ins. Co.*,<sup>11</sup> decided by the Court in 1957. In the words of Justice Black, "It is sufficient for purposes of due process that the suit was based on a contract which had *substantial connection* with that state."<sup>12</sup> (Emphasis added.) "Due process" is thus the key which opens the jurisdictional lock of a state as to a nonresident defendant.

What is the "due process" requirement that the Court so often discusses? Is it a legal standard for which the Court fixes the determinative criteria, or is it a criterion by which the Court determines its own ever shifting legal standard? The suspicion persists that the latter premise is correct. Legislation, however, must be designed upon the former. This is the basis of the so-called "doing business" statutes which have been enacted by a great majority of the states to enable them to secure personal jurisdiction over absent nonresidents where a cause of action arises out of the business contacts of the nonresident within the state of the forum.<sup>13</sup>

6. E.g., *Louisville & N. R. R. v. Chatters*, 279 U. S. 320 (1929); *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914); *Pana v. Bowler*, 107 U. S. 529 (1883); *St. Clair v. Cox*, 106 U. S. 350 (1882).

7. E.g., ALA. CODE, Tit. 7, § 199 (1) (Cum. Supp. 1953); ARK. STAT. § 27-340 (1957); FLA. STAT. § 47.16 (1957); MISS. CODE. § 1437 (1942). See also, Dambach, *Personal Jurisdiction: Some Current Problems And Modern Trends*, 5 U.C.L.A. L. REV. 198, 199 (1958).

8. E.g., *Milliken v. Meyers*, 311 U.S. 457 (1940). The Court upheld a personal judgment of a Wyoming court against a domiciliary who had been personally served in Colorado. See also, *Hess v. Pawloski*, 274 U.S. 352 (1927) where the Court upheld the validity of a Massachusetts' statute wherein a nonresident using the state's highways was held to have impliedly consented to appointment of the secretary of state as agent in the state to receive service of process in proceedings growing out of accidents on a highway in which the nonresident was involved.

9. 326 U. S. 310 (1945).

10. *Id.* at 316.

11. 355 U. S. 220 (1957).

12. *Id.* at 223.

13. The "doing business" theory was formulated in *Philadelphia & R.Ry. v. Mc Kiblen*, 243 U. S. 264 (1917) as a test for determining the "presence" of a corporation within a state.

DOING BUSINESS WITHIN THE FORUM AS A BASIS  
OF PERSONAL JURISDICTION OVER NONRESIDENTS

Many jurisdictions have enacted substituted service statutes wherein the justification of the state's jurisdiction is the business of the nonresident conducted within the forum.<sup>14</sup> These legislative enactments fall within two broad classifications: those regulating "special type businesses,"<sup>15</sup> and those concerned with the doing of business generally by a nonresident within the state.<sup>16</sup> Statutes within the first category have been held to be within the purview of the state's police power,<sup>17</sup> or to constitute a valid exercise of a state's power to regulate a business which it "treats as exceptional and subjects to special regulation."<sup>18</sup>

It is primarily with the second type statute, and jurisdiction thereunder, that the controversies have continued to rage.<sup>19</sup> They depend for their constitutional efficacy upon whether the state's application of its "doing business" statute constitutes a compliance with the "due process" clause of the fourteenth amendment as interpreted by the Court.<sup>20</sup> What does the Supreme Court consider are the permissible limits of a state's in personam jurisdiction over a nonresident "doing business" therein, and what constitutes "doing business" to effectuate such jurisdiction?

*Jurisdiction Over Foreign Corporations Doing Business Within a State.*

Under the common law, jurisdiction over a foreign corporation could not be obtained in an action in personam in the absence of a voluntary submission to a state's jurisdiction; the corporation was deemed to have legal existence only in the state creating it.<sup>21</sup> State legislatures circum-

14. See notes 15 and 16 *infra*.

15. E.g., FLA. STAT. § 625.30 (1957) (insurance); IND. STAT. ANN. § 42-1803 (1957 Supp.) (collection agencies); MASS. ANN. LAWS ch. 227 §§5, 5A (1955) (construction work); VA. CODE ANN. § 13-139 (1950) (advertising securities within state); MINN. STAT. ANN. § 80.14 (1) (1946) (violation of "blue sky" law).

16. See, e.g., ALA. CODE, Tit. 7, § 199(1) (Supp. 1953); ARK. STAT. ANN. § 27-340 (1957); FLA. STAT. § 47.16 (1957); TENN. CODE ANN. §§ 20-221-223 (1954).

17. *Doherty & Co. v. Goodman*, 294 U. S. 623 (1935). Cf. *Hall v. Geiger-Jones Co.*, 242 U. S. 538 (1917). See also, Scott, *Business Jurisdiction Over Non Residents*, 32 HARV. L. REV. 871 (1919).

18. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

19. See, e.g., *Robbins v. Benjamin Air Rifle Co.*, 209 F. 2d 173 (5th Cir. 1954); *Vanity Fair Mills v. T. Eaton & Co.*, 133 F. Supp. 522 (S.D.N.Y. 1955); *Impaco v. Lauro*, 129 F. Supp. 543 (D. Mass. 1955); *Mulhern v. Gerald*, 116 F. Supp. 22 (D. Mass. 1953); *Forsgren v. Gellioz*, 110 F. Supp. 647 (W.D. Ark. 1953); *Armi v. Huckabee*, 266 Ala. 91, 94 So. 2d 380 (1957); *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S. W. 2d 820 (1949); *Wm. E. Strasser Const. Corp. v. Linn*, 97 So. 2d 458 (Fla. 1957); *Guardian Indemnity Corp. v. Harrison*, 74 So. 2d 371 (Fla. 1954); *Weber v. Register*, 67 So. 2d 619 (Fla. 1953); *McGuff v. Charles Antell, Inc.*, 256 P. 2d 703 (Utah 1953).

20. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See text *p.* 208 *infra*.

21. *Bank of Augusta v. Earle*, 13 Pet. 519 (1839). Taney, C. J. stated the rule at 588: "[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in its place of creation, and cannot migrate to another sovereignty."

vented the common law rule by requiring a foreign corporation's consent to be "found" within its territory for the purpose of service of process as a condition to its doing business within the state.<sup>22</sup> The statutes required that consent be manifested by the appointment of a local agent to receive service. Such statutes were ineffective where a corporation transacted business within the state without expressly appointing an agent.<sup>23</sup> The Supreme Court, in *Lafayette Ins. Co. v. French*,<sup>24</sup> resolved this difficulty by holding that consent to service of process upon an agent of the corporation designated by the statute was "implied" if the corporation transacted business within the state and refused to appoint an agent.

The Court subsequently abandoned the "implied consent" test and applied the *Pennoyer v. Neff* requirement of service of process within the forum to foreign corporations.<sup>25</sup> Since corporations could only be present by the activities of its agents, due process required that the corporation be doing business within the state before the agent could be considered "present" for the purpose of asserting jurisdiction.

#### *What Constitutes a Foreign Corporation Doing Business Within A State?*

Prior to the *International Shoe Co.* decision<sup>26</sup> it was necessary to establish that the foreign corporation was "present" in order to give the state jurisdiction. "Doing business" constituted presence only where there was "continuous and systematic activity."<sup>27</sup> Isolated acts were not enough.<sup>28</sup> Mere "solicitation" of business within a state without more did not constitute doing business,<sup>29</sup> but "solicitation plus" established the presence of the corporation within the forum.<sup>30</sup> A defendant foreign corporation's

22. *Ex parte Schollenburger*, 96 U. S. 369 (1877). See generally SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 52-54 (1922).

23. HENDERSON, *supra* note 1.

24. 59 U.S. (18 How.) 404 (1856).

25. *St. Clair v. Cox*, 106 U.S. 350 (1883).

26. 326 U. S. 310 (1945).

27. E.g., *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856).

28. *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918) (where the Court stated: "As to the continued practice of advertising its wares in Louisiana, and sending its *soliciting* agents into that State, we think the previous decisions of this Court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it.") (Emphasis added.); *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727 (1885) (A corporation of Ohio contracted in Colorado to manufacture machinery at its place of business in Ohio and to deliver it in Ohio. *Held*, this act did not constitute carrying on of business in Colorado).

29. *Green v. Chicago, B. & O. Ry. Co.*, 205 U.S. 530 (1906) (hiring an office and employment of an agent for the solicitation of freight and passenger traffic, not doing business). See also *MacInnes v. Fontainebleau Hotel Corp.*, 257 F. 2d 832 (2d Cir. 1958).

30. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914). Authorized agents' solicitation of orders, receipt of payments for the company and the taking of customers notes, etc. constituted doing business in Kentucky. *But see*, *Green v. Chicago, B. & O. Ry. Co.*, *supra* note 29.

ownership of a subsidiary "doing business" within a state did not equal business activity of the parent<sup>31</sup> unless the subsidiary was the agent,<sup>32</sup> or they were in reality not separate entities.<sup>33</sup>

In *International Shoe Co. v. Washington*<sup>34</sup> the Court adopted a liberalized concept of the jurisdictional basis of doing business, stating:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within 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.<sup>35</sup> (Emphasis added.)

This "minimum contacts" concept, after being reaffirmed in two subsequent decisions,<sup>36</sup> has recently been extended in *McGee v. International Life Ins. Co.*<sup>37</sup> In this case the beneficiary, a resident of California, sued a foreign insurance corporation to recover on a reinsurance contract, accepted in California and delivered there to the insured who was a resident of that state. The insurer, a Texas corporation, had no agents or offices in California. The California court based its jurisdiction on a state statute which subjected foreign corporations to suits in California on insurance contracts with residents of that state even though such corporations could not be served with process within its borders. Service of process was by registered mail. The California court entered a default judgment against the insurer. Suit to enforce the judgment was filed in Texas, the domicile of the corporation. The Texas courts refused to enforce the judgment holding that it violated due process under the fourteenth amendment because service of process outside of California could not give that state jurisdiction over the foreign corporation. In reversing the Texas court, Justice Black stated:

[T]he Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that *the suit was based on a contract which had substantial connection with that State*. . . . The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay.<sup>38</sup> (Emphasis added.)

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31. *Cannon Mfg. Co. v. Cudahy Pack. Co.*, 267 U. S. 333 (1925); *Harris v. Deere and Co.*, 223 F.2d 161 (4th Cir. 1956). See Notes 34 Tex. L. Rev. 946 (1956); 1956 Wis. L. Rev. 668.

32. See, e.g., *Williams v. Campbell Soup Co.*, 80 F. Supp. 865 (W.D. Mo. (1948).

33. Cf. *Henderson v. Rounds & Porter Lumber Co.*, 99 F. Supp. 376 (W.D. Ark. 1951).

34. 326 U.S. 310 (1945).

35. *Id.* at 316.

36. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n v. Virginia*, 339 U.S. 634 (1950).

37. 355 U.S. 220 (1957).

38. *Id.* at 223.

The implications of this decision cannot be overestimated. Admittedly this was an action arising out of the regulation of a business that the state treated as exceptional and subjected to restrictive legislation. But Justice Black's opinion does not suggest that this is a special rule to be applied to insurance companies. The Court approved cases which did not involve insurance contracts, thus indicating by implication that the same rule would be applied to other nonresidents.<sup>39</sup>

### *Nonresident Natural Persons Doing Business Within a State as a Basis of Jurisdiction*

A natural person cannot be excluded from doing business within a state upon the basis of nonresidence alone.<sup>40</sup> Consequently it might be argued that the "doing business" concept has no jurisdictional basis as to them. The Court sustained the validity of this argument in *Flexner v. Farson*,<sup>41</sup> decided in 1919. However, with the establishment of "contacts" as a jurisdictional test there is no reason to believe that the Court would not hold doing business within the forum to constitute a jurisdictional basis applicable alike to corporations and natural persons.<sup>42</sup> That this is a

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39. The Court in support of its conclusion that: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [California] that State," cited in a footnote the following cases which do not involve insurance contracts: *Compaina de Astral, S.A. v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (1954), cert. denied, 348 U.S. 943 (1954) (Maryland Court of Appeals held that Maryland statute providing that a foreign corporation shall be subject to an action in the state by a resident or person having a usual place of business in the state, on a cause of action arising out of any contract made within the state, was not a denial of due process as applied to a Panamanian Corporation on a contract made in Maryland where the contract specifically provided that the substantive law of Maryland was to be applied); *S. Howes Co. v. W. P. Milling Co.*, 277 P.2d 655 (Okla. 1954) (Oklahoma Supreme Court held nonresident manufacturing corporation subject to jurisdiction of Oklahoma court in action arising out of breach of warranty of fitness of machine which manufacturer had sold to Oklahoma resident. Commission broker in Oklahoma suggested purchase and sent order to manufacturer for acceptance. Manufacturer accepted order, and shipped machine direct to customer routed in accordance with brokers' directions. A salesman was later sent to correct defects complained of by the customer. The court held the corporation was "engaging in or transacting business" within the meaning of the state statute subjecting foreign corporations "doing business" in Oklahoma to local process); *Smyth v. Twin State Improvement Co.*, 116 Vt. 559, 80 A.2d 664 (1951) (Vermont Supreme Court held Vermont statute, which provides that a foreign corporation committing a tort in Vermont against a resident of that state shall be deemed to be doing business therein and to have appointed secretary of state as agent for service of process in any action growing out of such tort, was not violative of the due process clause of the fourteenth amendment. See also RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 88.92 (1958).

40. Holmes, J., in *Flexner v. Farson*, 248 U.S. 389 (1919) stated: "The state [Kentucky] had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held . . . that the Kentucky judgment was void." Exclusion on the basis of nonresidency is violative of the "privileges and immunities" clause of the fourteenth amendment to the Constitution. Cf. Douglas, J. concurring opinion in *Edwards v. California*, 314 U.S. 160 (1941).

41. 248 U.S. 289 (1919).

42. RESTATEMENT (SECOND), CONFLICT OF LAWS § 85 (1958). BEALE, *THE CONFLICT OF LAWS* § 84.3 (1935 ed.). See also, McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 COLUM. L. REV. 331, 337 (1946).

valid assumption is indicated by the decisions in *Doherty & Co. v. Goodman*,<sup>43</sup> *International Shoe Co. v. Washington*,<sup>44</sup> and *McGee v. International Life Ins. Co.*<sup>45</sup>

A number of states have passed substituted service statutes which purport to subject nonresident individuals who do business within the state to the jurisdiction of their courts.<sup>46</sup> If these statutes provide for adequate notice to the nonresident defendant,<sup>47</sup> and the state courts adopt an attitude of reasonableness in regard to the convenience of the forum,<sup>48</sup> there is no denial of "due process," when a state requires a nonresident individual to defend a suit where the cause of action arises out of the business conducted within the state.<sup>49</sup>

*Substituted Service and What Constitutes Doing Business in Florida:  
The Florida Statute*

The Florida statute as amended by the legislature<sup>50</sup> is comprehensive in scope. The statute as first enacted subjects,

any person . . . a co-partnership or any other type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident [who accepts] the privilege extended by law . . . to operate, conduct, engage in, or carry on a business or business venture within the state. . . .

to acceptance of the appointment of the secretary of state as their agent to accept service of process,

in any action, suit or proceeding against them, . . . arising out of any transaction or operation connected with or incidental to such business venture. . . .

43. 294 U.S. 623 (1935) (The Supreme Court upheld a state's claim of jurisdiction over a nonresident individual engaged in selling securities within the state. The Court sustained the jurisdiction as a reasonable exercise of the state's power to regulate an activity which affected the economic interest of its citizens.

44. 326 U.S. 310 (1945). See text page 208 *supra*. The Court in stating the due process requirement obviously is including both nonresident corporations and individuals.

45. 355 U.S. 220 (1957). In the words of Justice Black: "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and *other nonresidents*. . . . At the same time modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (Emphasis added.) The implication is clear that the Court is considering nonresident individuals in the same category as nonresident corporations.

46. See note 16 *supra*.

47. The notice must be reasonably calculated to inform the parties of the suit. Cf. *Walker v. City of Hutchinson*, 352 U. S. 112 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950).

48. See *International Shoe Co. v. Washington*, 326 U.S. 310,319 (1945).

49. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

50. FLA. STAT. § 47.16 (1957).

Paragraph two of the statute, the amendment enacted by the 1957 legislature, states:

Any person, firm or corporation which through brokers, jobbers, wholesalers or distributors sells, consigns, or leases, . . . tangible or intangible personal property to any person, firm or corporation in this state, shall be *conclusively* presumed to be operating, conducting, engaging in or carrying on a business or business venture in this state. (Emphasis added.)

The statute provides for notification of the nonresident by sending by registered mail a notice of the service upon the secretary of state and a copy of the process. The defendant's return receipt, and an affidavit of the plaintiff or his attorney of such action must be filed with the papers in the case within a specified period of time<sup>51</sup>.

The jurisdictional basis in the Florida statute is probably as comprehensive as that thus far enacted by any other state. There is reason, however, to believe, after the *McGee* decision, that the statute in its entirety will survive the constitutional test. It should be noted that the Florida statute is subject to the same general criticism applicable to all substituted service statutes. There is no constitutional basis for substituted service today. The fictionalized agency concept as a method of circumventing the lack of actual presence of a nonresident defendant within the forum in effectuating personal service of process is *functus officio*. The requirement of the statute that service be upon the secretary of state, as far as any federal constitutional requirement is concerned, is mere surplusage. If the nonresident defendant has actual notice of the suit and a reasonable opportunity to defend the requirement of the fourteenth amendment as to due process has been complied with.<sup>52</sup> Actual notice in the view of the Supreme Court can be accomplished by service by registered mail.<sup>53</sup> It is worthy of note that in the *McGee* case no mention is made of the service upon the Insurance Commissioner of California. On the contrary the Court stated: "Respondent was not served with process in California but by registered mail at its principal place of business in Texas."<sup>54</sup> Here is a complete negation of any requirement of substituted service upon a fictionalized agent present within the state.

#### *Florida Decisions Construing the Florida Statute.*

The comprehensive scope of the Florida statute has been matched by the liberality of the Florida Supreme Court in its construction and application. Looking backward, its decisions seem to have been uncannily

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51. FLA. STAT. § 47.16 provides for service of process in accordance with FLA. STAT. § 47.30 (1957).

52. *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957).

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

54. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957).

anticipatory of the holding of the United States Supreme Court in *McGee v. International Life Ins. Co.*<sup>55</sup> The Florida court in three decisions has specifically interpreted paragraph one of the statute.

In *State ex rel. Weber v. Register*<sup>56</sup> decided in 1953, a nonresident individual purchased an orange grove and operated it as a business venture in Florida. Subsequently he caused it to be listed with the plaintiff, a Florida real estate broker. The plaintiff sued for his commission on the ground that he had a purchaser ready, willing and able to buy, but that the defendant had refused to complete the sale. The Florida Supreme Court held that the listing of the property was not part of the business of operating an orange grove, but the purchase of the grove and the listing of it for sale was a business venture within the meaning of the Florida statute.<sup>57</sup> One year later, in *State ex rel. Guardian Indemnity Corp. v. Harrison*,<sup>58</sup> the court decided that a foreign corporation was engaged in a business or business venture within the state of Florida where the corporation furnished its "brokers" with instructions and supplies for use in presenting a certain "credit indemnity plan" to clients and made contracts with these clients to be performed in Florida.

*Wm. E. Strasser Const. Corp. v. Linn*<sup>59</sup> is the latest decision in which the Florida Supreme Court defines what constitutes "doing business in Florida." Individual nonresidents of the state, through their attorney in fact, a resident of New York, entered into a construction contract with a Florida corporation. The contract covered the construction of an apartment building on a lot previously acquired in Miami. The contractor, alleging money due as a result of a breach of the contract, brought suit in Florida. Service was obtained upon the nonresident individual under the Florida substituted service statute.<sup>60</sup> The supreme court held that the investment in the real estate and the execution of the construction contract plus the expressed intent of operating an apartment rental business in Florida constituted doing business in Florida within the meaning of the statute.

The decision of the Florida Supreme Court in the *Weber* case has been criticized by some legal writers.<sup>61</sup> Unless one adopts the position that the *McGee* case formulates a rule which is only applicable to insurance companies or "businesses in which the state has a special interest," the

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55. 355 U.S. 220 (1957).

56. 67 So.2d 619 (Fla. 1953).

57. *Id.* at 621. The court stated: "We are constrained to the view that petitioners engaged in a *business venture* within the State of Florida when they made a contract with respondent Driver in and by which they employed him as a real estate broker to find a person, or persons, ready, able and willing to purchase the citrus grove owned by petitioners in this state *which contract is enforceable in this jurisdiction.*" (Emphasis added.) See FLA. STAT. § 47.16 (1957).

58. 74 So.2d 371 (1954).

59. 97 So.2d 458 (1957).

60. See note 51 *supra*.

61. Dambach, *supra* note 7, at 220; Stern, *Conflict of Laws*, 8 MIAMI L. Q. 209, 214-216 (1954).

criticisms lost their validity with the rendition of that decision. Certainly a real estate sales contract with a Florida real estate broker for the sale of Florida real estate should be construed as having a "substantial connection" with the state of Florida. The minimum contact can be a single transaction if the court, as it did in the *Weber* case, construes such a transaction to be within the purview of the statute.

The decisions in the *Guardian* and *Strasser* cases are sustainable on the basis of the *International Shoe* doctrine. In each of those decisions a course of conduct was involved which did not require judicial imagination to bring them within the realm of "doing business" or engaging in a "business venture" in Florida.

#### *Florida Judgments and "Full Faith and Credit."*

In *Berkman v. Ann Lewis Shops*<sup>62</sup> a court of another jurisdiction was asked to give "full faith and credit" to a Florida judgment wherein jurisdiction of a nonresident was obtained under the substituted service statute.<sup>63</sup> A federal district court in New York held that ownership of a subsidiary corporation in Florida did not constitute doing business by the parent corporation in Florida within the meaning of the Florida statute, even though concededly the parent sold merchandise to the subsidiary for resale. The court quoted from a decision of the court of appeals of the fourth circuit:

It cannot be said that a corporation is doing business within a state merely because a wholly owned subsidiary is selling its products there, if the separate corporate entities are observed and the subsidiary has purchased the goods it is selling and is not selling them as agent of the manufacturer.<sup>64</sup>

The federal court's decision was rendered prior to the enactment of paragraph two of the Florida statute.<sup>65</sup> The court's holding was based upon the Supreme Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*<sup>66</sup> and previous decisions of the Florida Supreme Court construing section 47.16 of the Florida Statutes.<sup>67</sup> The court, however, went on to state:

This is not to say that a statute might not constitutionally be drawn which would make the presence in a state of a foreign corporation sufficient basis to assert jurisdiction over the parent company. All that the due process clause would require is that the defendant have certain minimum contacts with [the territory

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62. 142 F. Supp. 417 (1956).

63. See note 51 *supra*.

64. *Harris v. Deere & Co.*, 223 F.2d 161 (4th Cir. 1955).

65. FLA. STAT. § 47.16 (2) was enacted by the 1957 legislature.

66. 267 U.S. 333 (1925).

67. The court examined the construction placed upon the statute by the Florida Supreme Court in *Guardian Indemnity Corp. v. Harrison*, 74 So.2d 371 (1954), and *Weber v. Register*, 67 So. 2d 619 (1953).

68. *Berkman v. Ann Lewis Shops*, 142 F. Supp. 417, 422 (1956).

of the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'<sup>68</sup>

Under paragraph two of the Florida statute<sup>69</sup> it is believed the Florida courts would have jurisdiction. The subsidiary in this case was distributing for the parent corporation and thus would fall squarely within the provision that "Any . . . corporation which through . . . or distributors sells . . . tangible or intangible personal property to any person, firm or corporation in this state, shall be conclusively presumed" to be doing business in Florida.<sup>70</sup> "Minimum contacts" would certainly be satisfied within the *McGee* concept.

#### HANSON V. DENCKLA — A RESTRICTION OF THE MCGEE DECISION?

Anyone who reads the recent decision of the Court in *Hanson v. Denckla*<sup>71</sup> must have a feeling of nostalgia for the merry-go-round of his childhood. The Court, speaking through the Chief Justice, in discussing the implications of the *McGee* decision stated:

But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on personal jurisdiction of state courts . . . . 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 minimal 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*.<sup>72</sup> (Emphasis added.)

And later in distinguishing the *McGee* case the Court continued:

[T]he State [California] had enacted special legislation . . . to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the state treats as *exceptional and subjects to special regulation*.<sup>73</sup>

What does the Court mean? Does inconvenient and distant litigation immunize a nonresident defendant, corporate or individual, against the assertion of a state's jurisdiction regardless of the quality or quantity of the contacts, or is the quality and quantity of the contacts to be construed to override the convenience of the defendant, or is weight to be given to each and the limits of a state's territorial jurisdiction determined on this basis? Again, does the Court intend to say that the *McGee* decision is limited to businesses which the state treats as exceptional and subjects

69. FLA. STAT. § 47.16(2) (1957).

70. FLA. STAT. § 47.16(2) (1957).

71. 357 U.S. 235 (1958).

72. *Id.* at 252.

73. *Id.* at 253.

to special legislation, or does it apply where it is to the manifest interest of the state to protect its residents but the business is not exceptional and not subjected to special regulation—the “doing business” statutes?

Some legal writers have interpreted the *McGee* decision to mean a virtual demise of any substantial restriction upon a state's jurisdiction over nonresident defendants, assuming the requisite contact.<sup>74</sup> Courts have applied the rule laid down in the light of the broad language of the decision.<sup>75</sup> Is the Court now trying to restrict the application of the rule? Admittedly what is being discussed here is largely dicta. The answer to that is “remember *Pennoyer v. Neff*.”

One thing is clear: state legislatures in enacting jurisdictional statutes, and state courts in their construction and application must weigh the implications of *Hanson v. Denckla* when applying the rule of *McGee v. International Life Ins. Co.*<sup>76</sup> The necessary minimum contact must always be present to give the state a jurisdictional basis not violative of the due process requirement of the fourteenth amendment. But, assuming the requisite contact, the *Hanson* case seems to imply that the question of whether the litigation is inconvenient or distant for the defendant is to be given added weight in determining whether assertion of jurisdiction by the state deprives the defendant of due process of law.

#### CONCLUSION

Recent decisions of the Supreme Court of the United States makes it difficult to evaluate the present status of a state's jurisdiction in actions in personam where the basis is the business of a nonresident done within

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74. See, e.g., Wilson, *In Personam Jurisdiction Over Non-Residents: An Invitation And A Proposal*, 9 BAYLOR L. REV. 363 (1958); Hoffman, *The Plastic Frontiers of State Judicial Power Over Non-Residents: McGee v. International Life Insurance Company*, 24 BROOKLYN L. REV. 291 (1957-58); Ellmann, *supra* note 2; Freeman, *McGee v. International Life Insurance Co. And The Amenability of Foreign Corporations To Suit*, 13 BUS. LAW 515 (1958); Reese, *Judicial Jurisdiction over Non-Residents; The Impact of McGee v. International Life Insurance Company*, 13 REC. ASS'N BAR CITY OF N.Y. 355 U.S. 220 (1957) (1958).

75. See, e.g., *W.S.A.Z. v. Lyons* (6th Cir. 1958) (Virginia television station held to be doing business in Kentucky where it sought advertising contracts in Kentucky which were performed by televising to certain areas of Kentucky. The nonresident corporation was subjected to substituted service of process in libel action in Kentucky growing out of news broadcast.); *Pugh v. Oklahoma Farm Bureau Mut. Inc. Co.*, 159 F.Supp. 155 (E.D. La. 1958) (District court held that a direct action in Louisiana, under Louisiana statute permitting service of process on nonresident liability insurance company through secretary of state, against Oklahoma liability insurer issuing a policy to an Oklahoma resident covering a car later involved in an accident in Louisiana, did not violate due process or equal protection of the law. The Oklahoma insurer had not registered or qualified to do business in Louisiana.); *Ross v. American Income Life Ins. Co.*, \_\_\_\_\_ S.C.\_\_\_\_\_, 102 S.E. 2d 743 (1958) (Supreme Court of South Carolina held that a South Carolina statute authorizing service of process upon insurance commissioner in action against foreign insurer did not violate insurer's constitutional rights, though foreign insurer's only contact with the state's resident consisted of issuance and delivery by mail of a single policy. Each of the foregoing decisions cited the *McGee* decision.

its boundaries. The decision in the *McGee* case led many to falsely assume that national service of process was just around the corner. If it accomplishes nothing else, the dicta in the *Hanson* case will serve to dispel this illusion.

It appears that any territorial limitation placed upon a state's jurisdiction in actions in personam predicated upon business of a nonresident done within the forum, proceeds on a false premise. The nonresident of his own volition chooses to avail himself of the privilege extended by the state's statute governing doing business within the state. When litigation arises as a result of these transactions, why should due process shelter the nonresident?

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