Kentucky Law Journal

Volume 54 | Issue 1 Article 2

1965

Conflict of Laws--A Rationale of Jurisdiction

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The law, procedural and substantive, is full of historic survivors. Some of these principles have held on for a century or more largely because of a lazy following of stare decisis; rules which have long lost all reason for their continuance and which repeatedly reach unfortunate results in their application hang on because of a continued failure to re-examine them in the light of changed conditions and modern thinking. One of the divisions of the law where this is most apparent has been in the numerous outmoded rules and principles having to do with jurisdiction in the field of Conflict of Laws. Max Rheinstein was expressing a common appraisal of the situation when he spoke of the "irrational rules of jurisdiction which presently prevail in the United States."[1]

Recently, however, in the last fifteen to twenty-five years, much change has taken place in the law as to jurisdiction in Conflict cases. Indeed, the entire Conflict field is in a state of flux and change, most noticeable in the areas of jurisdiction, torts and contracts. The law is moving rapidly in each of these categories. It is the purpose of this study to note these changes in the jurisdiction phase of the subject, to point out their desirability and effect, and to suggest further developments which seem to be needed.

A. Introduction

The word "jurisdiction" is a term of much ambiguity and varied employment. In fact, it is often used improperly. For

* Appreciation is expressed for a research fellowship in the amount of $1200 granted from the Faculty Research Fund of the University of Kentucky, which was materially helpful in this study and the preparation of this paper.

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[1] Book Review, 41 Mich. L. Rev. 83, 91 (1942).

example, suppose that X hires Y, a skilled artist, to paint his portrait for $10,000. Y later decides that he will not carry out the contract and so informs X who sues for specific performance on the ground that Y's services are unique. In such cases equity courts sometimes say that they do not have *jurisdiction* to grant that kind of relief. Such a statement is in error as the court does have jurisdiction of the parties and the subject matter, which is jurisdiction in the proper sense.

If one feels that he *must* use the word "jurisdiction" in such a case he should use it as does Clark in his Principles of Equity where he states that "equity will not *exercise* its jurisdiction in such cases."[2] The court has jurisdiction of the parties and the subject matter, but it will not *give the relief asked for* because it is not feasible or practicable. Personal services involuntarily rendered are usually unsatisfactory. In addition, a decree for specific performance of a personal services contract is in violation of the constitutional prohibition against involuntary servitude. Such cases deal with matters having to do with whether the court *should* give relief, whether it has the ability to make an *effective decree,* or whether it has the *power* to do so. To state what the court refuses to do in terms of refusal to exercise *jurisdiction* simply enlarges the ambiguity of a word already too broad. Better to say the court will refuse to give the relief asked for—and give the reasons. Anything that will help save the word "jurisdiction" for its narrow primary meaning is a step in the proper direction.

Therefore, it is the purpose of this paper to limit the discussions of jurisdiction as narrowly as possible and to use the word in its technical and primary meaning. Even then the problem is not an easy one for the narrowed use of the word still leaves a term of considerable breadth and ambiguity. The Restatement of Conflicts of Laws, Second, *defines* jurisdiction as the power "to create or affect legal interests when a state's contacts with a person, thing or occurrence are sufficient to make such action reasonable."[3] This statement is sufficiently professorial to be cloudy but the word admittedly is difficult to define,[4] even when

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[2] Clark, Principles of Equity § 62 (1948).
[3] Restatement (Second) Conflict of Laws § 42 (1958).
[4] *Id.* at Comment.

an attempt is made to use it in a narrow and primary sense. One of the most helpful aids to an understanding of the word and its limitations is to keep constantly in mind that there is a close connection in Conflict of Laws cases between the rules and principles of jurisdiction and the requirements of the due process clauses of the fifth and fourteenth amendments. Any action in a particular state which does not meet the requirements of due process is void in that state for lack of jurisdiction and will be refused recognition in other states, except in a few instances.[5]

So in a Conflict case in considering whether a court has jurisdiction to entertain an action it is helpful to break jurisdiction down into the following categorization:

(1) Does the state have jurisdiction of the *parties defendant* according to the requirements of due process of law?

(2) Does the court have jurisdiction of the *subject matter*—in other words is the court authorized to hear the case?

(3) If the conditions enumerated above have been satisfied, have the requisites of due process as to service and notice been satisfied?[6]

To point out, as in this analysis, the close relationship between jurisdiction and due process does not go very far toward solving the problems ahead. It does, however, correctly set the stage in showing that the rules of jurisdiction are dependent to a great extent upon the requirements of due process. The details of the two fundamental problems still remain. These are: What are the reasonable *bases* of jurisdiction, and, what are the tests or principles to be applied in determining whether reasonable standards of *due process* are used in making service and giving notice in particular cases? It would be well if these questions could be discussed separately and the principles as to each developed on its own. But this is an impossibility for jurisdiction and due process are so closely connected and related in Conflict cases that it is rare that one can discuss one without the other arising. So there is a constant action and re-action between the

[5] See, for example, *id.* at illustration 3. Divorce cases where the court admittedly does not have jurisdiction since there is no bona fide domicile but the defendant spouse appears and the principle of *res judicata* is applied would appear to be exceptions also.

[6] See Cheatham, etc., Cases and Materials on Conflict of Laws, 75 (4th ed. 1957).

two concepts in a Conflict jurisdiction case. This will be apparent in a discussion now of several well-known cases which are introduced to illustrate certain fundamental principles as to each concept. It will be equally apparent in later pages of the paper in the discussion of "reasonable bases of jurisdiction."

B. SOME GENERAL PRINCIPLES

It must be kept in mind that jurisdiction and due process are not strictly American terms; they were used long before the United States came upon the scene. For that reason the terms have an international background; foreign cases have interpreted the words and will continue to do so. That does not change the fact that when the terms are used in a determination in the United States they will receive our own interpretation under the federal constitution. Nevertheless the terms have historic and international meaning and foreign interpretations lend their flavor and aid to their understanding. For that reason, it is helpful to read decisions like the old leading case of *Buchanan v. Rucker,* decided in 1808.

In *Buchanan,* the plaintiff sued in England on a judgment rendered by the Island Court of Tobago. The action was in personam but the defendant had never been in Tobago. Summons in the action was served by nailing a copy to the courthouse door following local procedure. England refused to recognize the judgment. First, there was no basis of jurisdiction over the defendant. As Lord Ellenborough said: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" To sustain an action in personam the court must have a reasonable basis for assuming jurisdiction, there must be sufficient contact to justify making a non-resident defendant defend a suit in the local jurisdiction. Here there was no contact whatever, not even a minimum contact. The case fails also in due process. Nailing a summons to the local courthouse door could have no expectation of giving notice to a foreign defendant. So the case is about as extreme as can be imagined in *failure of a basis of jurisdiction* and in *lack of due process in method of service.*

While the *Buchanan* case presents an extreme situation where there has been no contact with the foreign defendant, not even

a minimum or casual one, which might serve as a basis of jurisdiction and where the service of process held no hope whatever of notice to the non-resident, there are naturally many cases which present much less extreme situations as to one or both factors and yet the local court is unable to render a valid judgment or one entitled to recognition in other states because there is either no *acceptable* basis of jurisdiction or no satisfactory service of process or neither.

Indeed it is difficult to determine in some cases whether acceptable standards are satisfied, since the decision is necessarily a close one, as matters of debatable policy are often involved. So it becomes important to determine from a reading of the cases just what are the acceptable standards as to basis of jurisdiction and service of process—not only what are the rules and principles to be employed but what are their limits and limitations. The commonly accepted *bases of jurisdiction* will be used to discuss these matters.

C. BASES OF JURISDICTION OVER PERSONS

1. Presence

What is the rationale of mere presence as a basis of jurisdiction? Well, geographically the defendant is *there*. Since he is there, the court has physical power over him. Justice Holmes once said: "The foundation of jurisdiction is physical power."[7] On another occasion he stated that "ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize the person and imprison him to await the sovereign's pleasure."[8]

Such statements undoubtedly represent the original historical concept of jurisdiction. Migration for the purpose of suit or for the purpose of evading suit were practically unknown in early societies. Besides, as Holmes points out, it appears that the early suit had its jurisdictional inception in an arrest of the defendant or personal direction to him to compel his presence for the trial.[9] But aside from these early technicalities, it seems that presence

[7] McDonald v. Mabee, 243 U.S. 90, 91 (1916).
[8] Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913).
[9] See Philadelphia B. & W. R. Co. v. Gatta, 85 Atl. 721, 724 (Del. 1913). Stumberg, Principles of Conflict of Laws, 70 and fn. 20 (3rd ed., 1963); Ehrenzweig, Conflict of Laws, fn. 41 (1962). Ehrenzweig at pp. 77-78 is critical of Holmes' presence-physical power concept, but see Cheatham, Goodrich, etc., Conflict of Laws 95, fn. 2 (4th ed., 1957).

would naturally be the simplest and earliest basis of jurisdiction for suit. Domicile, for example, would seem to be a refinement of, and extension of, the presence concept. The domicile concept is much more complicated and sophisicated than the presence one as will be found in subsequent discussion.

Surely, one who thinks he has been wronged should be able to sue somewhere. What could be more simple and natural than that the suit should be brought where the defendant is present, unless the presence is merely temporary and the facts indicate that the forum is inconvenient. So presence, as such, is not a basis of jurisdiction about which one should quibble.

When, however, one turns from substantial presence as a basis of jurisdiction to mere temporary or casual presence, the situation becomes immediately debatable. And yet, the law is temporary presence may serve as a basis of jurisdiction. Knowing the technicalities of the definition of domicile, one would not wish to make domicile a necessary requisite of jurisdiction. And present continued presence is not a requisite of domicile anyway! But to go to the extreme extent of making a mere temporary presence, even a casual one, a basis of jurisdiction is another matter. It would seem to be hard to justify!

Numerous cases support, however, the rule and the Restatement gives credence to it: Sec. 78. Presence Within The State. "A state has jurisdiction over an individual who is present within its territory, whether permanently or temporarily."[10] In *Peabody v. Hamilton*[11] the defendant was a transient en route from Nova Scotia to New York. Service was made on him on board a British steamer in Boston harbor, after the boat had reached her dock but before she was moored to it. Jurisdiction and personal service were upheld, the court saying: "When the party is in the state, however transiently, and the service is actually served upon him there, the jurisdiction of the court is complete, as to the person of the defendant."[12] In fact, statutes providing for something less than *personal* service on one temporarily within the state have been held sufficient to bring the defendant within the jurisdiction of the court. Thus, in *Durfee v. Durfee*,[13] the defendant, a

[10] Restatement (Second) Conflict of Laws, § 78 (1956).
[11] 106 Mass. 217 (1870). Accord, Darrah v. Watson, 36 Iowa 116 (1872).
[12] 106 Mass. 217, 220 (1870).
[13] 293 Mass. 472, 200 N.E. 395 (1936).

resident of Rhode Island, was served, while on business in Massachusetts, by registered letter mailed to his Massachusetts post office address and was held to be properly before the court. If temporary presence is accepted as a *basis* of jurisdiction in such a case, service by registered letter undoubtedly satisfies the requisites of due process.[14] A more important question is whether service reasonably calculated to reach the defendant, but which does not, in fact, do so, would be sufficient in such a case. This will be discussed later.

Some courts have even gone so far with the transient presence rule as to permit its use as a basis of jurisdiction when the purpose of the plaintiff in suing the defendant who was temporarily present was to obtain an advantage over him by preventing him from making his defense unless he prolonged his stay indefinitely.[14a] This, it is submitted, is definitely in error. The courts should not be used to harrass defendants. This is technicality, not justice. To say that *motive* makes no difference is reminiscent of language used by Justice Holmes in a somewhat similar situation.[15] In that case the plaintiff had lawfully caused a notice to take depositions in Ohio to be served on the defendant, who was a resident of Nebraska. When the defendant went to Ohio for that purpose, plaintiff had him served in an action brought in that state, which was his motive for having the defendant come to the state for the depositions. Justice Holmes in his opinion said that the the plaintiff's *motive* made no difference, so long as his act was lawful. A better view is expressed in a Kentucky case where the court said: "It is not the truth or falsity of the representation that constitutes the fraud. It is the concealed motive lying in the breast of the appellant which prompted him to make the representation."[16]

a. Limitations on the exercise of jurisdiction based upon presence.

(1) Fraud and force.

A state does not always exercise jurisdiction over individuals within its territory. There are situations where the state, as a

[14] This is the view of the Restatement. Restatement (Second), Conflict of Laws, § 78, comment b (1958).

[14a] Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895).

[15] Jaster v. Currie, 198 U.S. 144 (1905).

[16] Wood v. Wood, 78 Ky. 624, 629 (1880).

matter of policy, may refuse to exercise jurisdiction. An example is where a non-resident is brought into the state by fraud,[17] although, unfortunately the rule is different on the criminal side.[18] It is commonly stated in civil suits that in fraud cases the court has jurisdiction but refuses to exercise it as a matter of policy, but that, if the court *does* exercise jurisdiction in such a case, a sister state should give full faith and credit to the judgment. That is the position of the Restatement of Conflicts, Second.[19] In such a case, it is argued that the local state has physical power over the defendant and if it chooses to exercise jurisdiction rather than refrain from doing so, other states should give recognition to the judgment.[20] While this is the prevailing view and this is its rationalization, it is submitted that a better and more direct view would be that the fraud *vitiated* jurisdiction. Fraud vitiates in a number of other instances in the law and a plaintiff who has practiced fraud on the defendant—and the court—should not be permitted to profit by his own opprobrious conduct.

It is also the better view that a court will not exercise jurisdiction as a matter of policy when the defendant is brought into the state by force,[21] but the law—or at least the language of the courts—on this point is not too clear.[22] Unfortunately, as in the case of fraud, the rule is otherwise on the criminal side.[23]

A Caveat in the Restatement of Conflicts that "the Institute expresses no opinion whether a state has jurisdiction over a nondomiciliary brought within its territory by the use of unlawful force"[24] is responsible for much of the current unclarity in the law on the question, it is believed. Stumberg mentions an illustrative situation that may be responsible for the Caveat—the type of situation that might well have been put from the floor when section 78 of the Restatement was being considered at the meeting of the Institute to consider this portion of the work by the Conflicts Restatement Reporter. Stumberg creates the situation

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[17] Blandin v. Ostrander, 239 Fed. 700 (2d Cr. 1917).
[18] U.S. ex rel. Voight v. Toombs, 67 F.2d 744 (5th Cir. 1933).
[19] Restatement, Second, Conflict of Laws § 117c, comment f (1957).
[20] Note, Blake, 33 Ky. L.J. 126, 127 (1945); Note, 39 Yale L.J. 889, 897 (1930).
[21] Note, Blake, 33 Ky. L.J. 126, 128 (1945). See *Ex parte* Edwards, 278 Pac. 910 (Cal. 1929).
[22] Restatement, Second, Conflict of Laws, § 78, Caveat (1956).
[23] Ex parte Lopez, 6 F. Supp. 342 (S.D., Tex., 1934).
[24] Restatement, Second, Conflict of Laws, § 78, Caveat (1956).

of a non-resident brought into a state by force. While leaving the state in a car and before a reasonable time for his departure has elapsed, he negligently runs down and injures B who serves him with process before his exit. Should the fact that he was brought into the state by force serve as an immunity to a suit by B in the state for the negligent tort? This, it is submitted, would seem unfair to B.[25] Various other possible situations may be suggested and it is doubtless illustrations such as these which caused the framers of the Restatement to utter the Caveat rather than an affirmative rule of immunity, where the defendant is brought into the jurisdiction by force.

It should be pointed out that similar situations may arise where the defendant is brought into the state by fraud. Before a reasonable time has elapsed for his departure he may also be guilty of negligence or some other legal wrong which is injurious to third persons, just as when he is brought into the state by force. And yet, the Restatement utters no Caveat as to whether a state has jurisdiction in fraud cases. Why not?

It is believed that if the Restatement utters a Caveat in the "force" cases, it should issue one in the "fraud" cases as well. However, it is submitted that the problem should not be handled by a blanket Caveat in either instance. A refusal to take a position at all as to whether the state has jurisdiction in cases where the defendant is brought into its territory by fraud or force is unfortunate. The defendant should be immune from local jurisdiction in such cases except in a situation injurious to a third person—where on the facts the scales of justice incline toward the protection of the interests of the third person more than those of the defendant.[26] But how is the limitation to be stated?

It is suggested that two changes in section 117c of the Restatement of Conflicts would achieve a more equitable and fair result than the present handling of the problem of fraud and force in the Restatement. Such a suggested revision of the Restatement might then read somewhat as follows: "A state does not have judicial jurisdiction over a defendant who is brought into the jurisdiction by fraud or force, except where he is himself guilty

[25] See Stumberg's discussion, Stumberg, Principles of Conflict of Laws, 74 (3d. ed., 1963). See also Note, 39 Yale L.J. 889, 896 (1930).
[26] See Note, 39 Yale L.J. 889, 897 (1930).

of negligence or some other legal wrong while in the state which is injurious to a third person or where he remains within the territory of the state after a reasonable time has elapsed for his departure."[27]

(2) Parties and witnesses.

Persons within the state as parties and witnesses in a suit are exempt from service during such proceedings and for a reasonable time thereafter to permit them to leave the state.[28] Since such persons are physically present within the state, the courts, as in the case of fraud and force, are granting them immunity as a matter of policy to leave parties free to come into the state as parties litigant and to serve as witnesses. This policy, which has generally been construed liberally, has been extended to persons appearing in the taking of depositions and other legal procedures.[29]

(3) Inconvenient forum. Its relation to jurisdiction based upon presence.

A possible limitation on presence as a basis of jurisdiction over non-residents is the doctrine of inconvenient forum.[30] Where the cause of action arose in another state, or the defendant is domiciled in, a resident of, or has his business in another jurisdiction, it is highly arguable, and even decisive in many cases, that the local state where he is served because of his presence there, is not a proper or fair ground wherein to litigate a case which has no relation to the local state other than he was served while present in that jurisdiction. The doctrine of inconvenient forum is, however, a doctrine of discretion and where a local lawyer has filed a suit representing the plaintiff considerable pressure is upon the local court to take jurisdiction, based upon the technicality of presence.[31] In addition presence as a basis of jurisdic-

[27] Jaster v. Currie, 198 U.S. 144 (1905), which is cited in fn. 15, supra, and criticized in the text at that point because the court grounded the decision on what is considered as a bad motive, may be right in result in its decision, the court holding that the court had jurisdiction, because the defendant lingered several days within the jurisdiction, during which time he was served, although a reasonable time had elapsed for his departure after the taking of the depositions.

[28] Stewart v. Ramsey, 242 U.S. 128 (1916); Restatement, Second, Conflict of Laws, § 117d, comment b (1957). See Note, 73 Harv. L. Rev. 909, 940

[29] Note, Blake, 33 Ky. L.J. 126, 128 (1930).

[30] See Schlesinger, 9 Journal of Public Law 313, 322-327 (1960). (1960).

[31] *Id.* at 323.

tion is an old, established doctrine, never questioned until very recently. So, while the doctrine of inconvenient forum should serve as an efficient and effective limitation upon the exercise of jurisdiction in all presence cases, and especially where the defendant is a transient, it has failed, as a practical matter to do so.[32]

(4) Need for further limitation upon temporary presence as a basis of jurisdiction.

Currently the rule that jurisdiction can be obtained over non-residents based upon their presence within the state, is under intense criticism. The current attack was engendered largely by Ehrenweig in a series of articles[33] and it is being vigorously continued by him. His attack appears unsound on historical grounds in that it overlooks the fact that the "English courts for centuries obtained personal jurisdiction over the defendant by arresting him."[34] Be that as it may, it makes little difference, if the rule is unsound *under modern conditions.* There is little to be said for the continuance of a historic rule, other than that it is long-standing, if the reason for its creation no longer exists and there is no sound rationalization for its continues existance.

So the question is, Is the rule sound today? The writer takes a firm position that the rule stated without limitation is unsound today. Ehrenweig's attack and discussions aroused by it led to round table, panel discussion of jurisdiction over non-residents temporarily within the state under the topic heading of "Transient Jurisdiction," which appears in 9 Journal of Public Law.[35] The panelists in this discussion support Ehrenweig's thesis in the large, but one finishes the readings in a somewhat defeatist frame of mind—the transient jurisdiction rule is bad, it is said, but it is so firmly established that it will be impossible to overthrow it for a long time—if ever. Schlesinger, one of the panelists, pessimistically says: "As yet no lawyer has been bold enough to risk his client's money in a frontal attack upon the rule."[36]

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[32] *Ibid.*

[33] See Ehrenweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L.J. 289 (1956); and Pennoyer is Dead —Long Live Pennoyer, 30 Rocky Mt. L. Rev. 285 (1958). See also fn. 9, supra, and the text at that point.

[34] See Cheatham, etc., Cases and Materials on Conflict of Laws, 111, fn. 1 (5th ed., 1964).

[35] 9 Journal of Public Law 281-337 (1960).

[36] *Id.* at 316.

Such talk is over-defeatist, to say the least, it is believed. It fails to take into account the fact that the rule has not been seriously questioned until quite recently. Now it *is* seriously questioned by most of those who write upon it. If the rule, as historically stated, has a current friend, he is not speaking up. The wonderful capacity of the law for growth and change which has been demonstrated so many times in so many different areas in the last thirty-five years may manifest itself here much sooner than might be expected. When the writers in legal periodicals and professional texts make a concerted attack upon an outmoded doctrine, it usually causes a change or modification in the rule. Ehrenzweig's attack remains the major one. The panel discussion on transient jurisdiction in 9 Journal of Public Law contributes a brilliant and persuasive discussion of the most important phases of the problem. Twenty years ago Max Rheinstein took a vigorous swing at the historical rule when he said in a book review: "Under the irrational rules of jurisdiction which presently prevail in the United States, a defendant may be sued in a state with which he has no contact other than that of his just happening to be there when a process server catches up with him . . ."[37] The fight against the historic rule is not only on; it is gaining in intensity.

Should the rule that transient presence may serve as a basis of jurisdiction be abolished? The writer takes the view that perhaps the rule should be continued at least for the present but with decided limitations. The rule broadly stated causes repeated instances of great injustice to particular defendants who are forced because of a technical rule of procedure to defend suits in jurisdictions which are not only inconvenient but manifestly unfair. And yet, there are situations where it is not only fair but just that a non-resident should stand suit in a jurisdiction where he was only temporarily present when served in the action. Professor Richardson, procedure professor at the University of Kentucky Law School, puts the case where a non-resident from Ohio on a day's hunting trip into Kentucky negligently shoots the cow of a Kentucky farmer. He is served in an action upon the jurisdictional fact of presence before he gets out of the state. In such a case he should be forced to stand trial in Kentucky. Other

[37] Rheinstein, Book Review, 41 Mich. L. Rev. 83, 91 (1942).

instances where temporary presence should serve as a basis of jurisdiction suggest themselves, for example, where an elusive defendant is finally caught in a jurisdiction where he is temporarily present.

On the other hand, situations may be suggested where a defendant is forced to defend a suit because he was served in a state with which he had no relation whatever, other than the fact that he was served therein while temporarily present. *Peabody v. Fisher*[38] is such a case. There are numerous others.

The problem is how to limit the rule that presence may serve as a basis of jurisdiction so that the jurisdictional interests of both plaintiffs and defendants may be protected, so far as that is objectively possible.

It is suggested that this might be done by restating section 78 of the Restatement of Conflicts, Second, so that it would read: "A state has jurisdiction over an individual who is present within its territory, whether permanently or temporarily, provided that, balancing the interests of the parties[39] it appears that there has been sufficient contact with the state to justify a suit therein, or the defendant is so elusive that it would be difficult to "find" him in a state which would have jurisdiction of the case under ordinary, more acceptable principles."

The suggested provision provides that the presence of a defendant in a state without further connection would no longer in itself confer jurisdiction upon its courts,[40] unless the defendant were so elusive that it would be difficult to "find" him in a state having a more satisfactory basis of jurisdiction.

This modification of the historic presence rule is in accord with the criterion enunciated by Justice Holmes in *McDonald v. Mabee*[41] and repeated by Justice Douglas in *Milliken v. Meyer*[42] and in *International Shoe Co. v. State of Washington*[43] that bases of jurisdiction as well as methods of service should satisfy reasonable standards of "fair play" and "substantial justice." This standard has been repeated in a number of recent decisions and repre-

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[38] 106 Mass. 217 (1870).

[39] See the discussion, Stumberg, Principles of Conflict of Laws, 68 (3d ed., 1963) and fn. 12 thereon.

[40] *Id.* at 69.

[41] McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[42] Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[43] International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

sents the current conception of the reasonable requirements of due process. The historic presence rule does not satisfy this criterion in numerous cases. It is believed that the suggested modification of the rule does satisfy it reasonably well.

In conclusion, it is suggested that a re-examination should be made to determine whether the time has come to *entirely* abolish transient presence as a basis of jurisdiction. Ehrenzweig apparently is of this opinion[44] and some others are inclining toward that view. The doing of an act, introduced into the law about thirty-five years ago in *Hess v. Pawlosky*[45] as a basis of jurisdiction, would take care of many of the transient presence cases, for example, the one put by Professor Richardson, where the Ohio hunter, on a day's hunting trip into Kentucky kills the plaintiff's cow. Of course, there is no reason why the doing of an act cases should be limited to situations coming within the state's police power. Any substantial act within the state should be sufficient to give jurisdiction and the rule has been extended so that this is pretty much the law now. Domicile may also serve as a reasonably satisfactory basis of jurisdiction in some non-resident cases now grounded on presence. It is possible that in some transitory causes of action, where the defendant is elusive, no recognized basis of jurisdiction other than temporary presence would suffice. But the question of the entire abolishment of the transient presence rule should be explored and, if this were done, it is entirely possible that the ancient rule would be eliminated completely.*

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[44] For example, see Ehrenweig, Conflict of Laws, § 30 (1962).

[45] 274 U.S. 352 (1927).

* Appreciation is expressed to Bennie J. Harrison, 1965 graduate of the College of Law, University of Kentucky, who has read the manuscript of this article and who has made a number of valuable suggestions.