1949

An Evaluation of the Techniques of Acquiring Personal Jurisdiction Over Non-Residents Not Engaged in Business When a Single Commercial Transaction Has Been Breached

Robert E. Childs
Wayne University

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Commercial Law Commons, and the Jurisdiction Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol38/iss2/2

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
AN EVALUATION OF THE TECHNIQUES OF ACQUIRING PERSONAL JURISDICTION OVER NON-RESIDENTS NOT ENGAGED IN BUSINESS WHEN A SINGLE COMMERCIAL TRANSACTION HAS BEEN BREACHED

By Robert E. Childs

Lawyers have long wrestled with the problem of getting adequate service of process on non-residents who have defaulted in their obligations. With the object in view of protecting residents "against the financial hardship and inconvenience of seeking out the defendant in the state of his residence", and enforcing its jurisdiction over the subject-matter of the transaction within its territorial limits, several different approaches have been adopted in many jurisdictions. For example, as a condition of being permitted to do business within a state, a corporation chartered by a sister state must appoint a resident agent for the service of process. Many of these statutes apply only to cases based on business transactions having contact points within the forum state; others simply confer a general authority to accept service in all litigation, irrespective of a lack of internal factual elements. Most state assemblies have expanded this type of legislation...
to include unincorporated associations, partnerships and individuals. 4

The courts have expanded the statutory agency requirement by the use of the doctrine of estoppel in the event the non-resident actor within the forum has not complied with the licensing requirement by having failed to appoint a resident agent. 5

But all of these methods apply to entities or individuals who conduct a series of transactions at least partially within the confines of the forum state. There exists a tremendous number of cases in which an individual natural person, not engaged in business on a regular commercial scale, engages in only one transaction within a state. It is to this non-resident individual 6 not in business to whom we direct our attention, which problem can be presented by the following hypothets:

1. G, domiciled in State X, conveys real estate located in State Y by warranty deed to A, domiciled in State Y. G and A are natural persons; G is not engaged in business on a commercial scale in State Y, G has no assets in State Y. A discovers a breach in one of the covenants; he notifies G who refuses to make an amicable settlement, so A must litigate.

2. The same as the first example, except G has tangible assets in State Y at the time A must litigate.


4 Code of Iowa, 1946, sec. 617. 1, being Rule of Civil Procedure No. 56 (f): "Personal service may be made as follows: Upon a partnership, or an association suable under a common name, or a domestic or foreign corporation, by serving any present or acting or last known officer thereof, or any general or managing agent, or by any agent or person now authorized by appointment or by law to receive service of original notice, or on the general partner of a partnership." Sugg v. Thornton, 182 U. S. 524, 10 S. Ct. 163, 33 L. ed. 447 (1889); Doherty & Co. v. Goodman, 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935).


6 This discussion is limited to that of a natural person. Many of the methods analysed are also applicable to business associations who engage only in an isolated transaction, not the first in a series, and thus are not within the purview of the "doing business" part of the licensing statutes. The issues arise when a resident engages in a transaction within the forum state and thereafter acquires a domicile in a sister state. The solution advanced by this paper takes these possibilities into consideration. The situation of the domiciliary of the forum state who is absent for long periods of time can be solved by leaving a "summons at his last and usual place of abode" as suggested by Mr. Justice Holmes in McDonald v. Mabee, 243 U. S. 90, 37 S. Ct. 345, 61 L. ed. 608 (1917), or by service by publication in the forum state, which is the domicile of the defendant, with actual personal service in a sister state, as approved in Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. ed. 278 (1940).
These three examples present the familiar in personam, quasi-in-rem and in rem classifications of actions. But in each case the resident creditor’s initial problem (A in Hypothets 1 and 2; G in Hypothet 3) is to get the type of service of process on the non-resident defaulter which will result in an in personam judgment.

The creditor’s attorney advises him that process issuing from the United States courts sitting in State Y and also from the state courts of State Y cannot be effective if served upon the debtor across the state line, but can be served upon the defaulter only in the event he wanders across the line into the forum state—a fortuitous circumstance, which the debtor will certainly avoid, if he knows a process-server is lurking on the boundary line with a “Greetings” attested by a court clerk. But the subject matter of the litigation is located in State Y, and probably most of the witnesses, including the creditor, are of State Y. The person wronged prefers to use counsel of State Y with whom he has personal contact rather than counsel of State X with whom he has no acquaintance except by post or deposition. Out-of-town counsel increases the bill for professional services rendered. The lack of familiarity with the courts of State X is an additional deterrent. But in our first example, it seems that A’s only alternative is to litigate in State X. Why not devise some plan in advance so that, if there is a breach of a contract, the person in default is given a fair notice that he must come to State Y rather than that the person who keeps his obligation must go to a strange forum in State X?

At the present time, two types of statutes have been enacted by some states which permit an in personam judgment against non-resident tort-feasors. The first is the familiar non-resident motorists type of statute. For the privilege of using the highways of the state,

---

7 The Restatement of Judgments, secs. 2 and 3, would classify the third example as quasi-in-rem also, unless there would be an indication that the rights of all persons in the world are determined in this foreclosure action.

8 Substitute for these three hypothets other financial transactions involving a land contract, a sale of personal property, a chattel mortgage, or a conditional sales contract in those states which permit repossessions as well as deficiencies, and the technique of acquiring service of process in the home forum against the non-resident debtor still must be faced.

9 Ky.R.S. (1946) sec. 188.030: “The clerk of the court in which the action is brought shall issue a summons against the defendant named in the petition and direct it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State at least 20 days before the return day of the summons, and shall also deliver with the summons an attested copy of plaintiff’s petition. The Secretary of State shall then write a letter to the defendant, at the address given in the petition, notifying him of the nature and pendency of the action, and enclosing in the letter the summons and the copy of the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary. The Secretary shall file a report of his action, which shall include a copy of the letter, any answer thereto, and the return registry receipt, with the clerk who issued the summons.”
the non-resident driver\textsuperscript{10} (usually unknowingly) consents that the secretary of state or some other public official accepts service of process on his behalf, which summons must be sent via registered mail by the official agent to the named non-resident defendant.

A second type of statute is illustrated by that of Pennsylvania, which makes foreign property owners of Pennsylvania realty amenable to the jurisdiction of Pennsylvania courts in cases arising out of any accident or injury occurring within the state involving real estate, footways and curbs. The act specifically appoints the Secretary of the State as the officer upon whom process shall be served, which officer must send to the defendant, by registered mail, a like true and attested copy of such process.\textsuperscript{11}

But our problem is directed to procuring a personal judgment against a natural non-resident person who is not a tort-feasor but a defaulter in an isolated commercial transaction.

A partial answer which has proved extremely workable is the familiar cognovit or judgment by confession clause frequently inserted in documents:

"To secure the payment of said amount, I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court in term time or vacation, at any time hereafter and confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and attorneys twenty-five dollars fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that the said attorney may do by virtue hereof."

The effectiveness of this device has been whittled down by public policy as declared by state legislatures because of possible abuses.\textsuperscript{13}

\textsuperscript{10} It is interesting to note that these acts have been expanded to include non-resident owners who were not physically present in the forum state at the time the driver had the accident. Culp, Maurice S. \textit{Process In Actions Against Non-Resident Motorists}. 32 Mich. L. Rev. 325, 344-6 (1933).

An important limitation upon this statute which is relevant to our problem is that of the death of the tortfeasor, which has been held to revoke the agency created by the statute. See footnote 28, \textit{ff}.

\textsuperscript{11} Purdon's Penn. Stat. Ann., Tit. 12, \textit{secs}. 331-335: Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (Court of Common Pleas No. 6 of Pennsylvania, Philadelphia County, 1938). The type of service as provided by this statute has now been changed under the Pennsylvania Rules of Civil Procedure, Rule 2079, requiring service by registered mail on the Secretary of the Commonwealth who forwards by registered mail a copy of the notice to the non-resident defendant.

\textsuperscript{12} Jones v. Turner, 249 Mich. 403, 405-6, 228 N.W 796 (1930).

\textsuperscript{13} An example is Mich. C. L. 1948 sec. 622.3, M. S. A. sec. 27.1434: "Judgments may be entered in any circuit court at any time, upon a plea of confession, signed by an attorney of such court, although there be no suit then pending between the parties, if the following provisions be complied with, and not otherwise: 1. The authority for confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract or other evidence of the demand for which such judgment was confessed; "
The United States Supreme Court has been very literal in enforcing the terms of the agency conferred.\footnote{Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271 (1875).} In Indiana, a warrant of attorney to confess judgment is not enforceable.\footnote{Burns Ind. Stats. Ann. (1933), secs. 2-2904 and 2-2906.} Considerable litigation has resulted in a refusal to enforce judgments obtained when service of process had been dispensed with pursuant to the cognovit clause.\footnote{Burns Ind. Stats. Ann. (1933), sec. 2-2905. No execution may be issued on a judgment obtained by using the cognovit features of a contract or a note which judgment was entered in the courts of another state or foreign country.” Without a doubt this statute is contra to full faith and credit. Michigan refused to enforce a judgment so obtained in Illinois in Jones v. Turner, supra, note 12.} Essentially it is lacking in fairness in that actual notice is completely waived while the debtor is placed on notice only at the time he executed the document and not at the time of the commencement of an action against him.

Our second example presents another technique of acquiring at least partial jurisdiction over the debtor: while the cause of action is \textit{in personam}, the remedy can be shifted into the category of \textit{quasi-in-rem} on the basis of the use of the writ of attachment, the ground therefor being the non-residence of the defaulter. But the creditor usually finds that the property attached in the forum state is inadequate to satisfy the obligation; in fact, so negligible commensurate with the balance due that it may not coerce the debtor into appearing and making a defense. In the third example, the remedy of the grantor-mortgagee, G, against the non-resident grantee-mortgagor, A, is to foreclose his mortgage, an \textit{in rem} proceeding, and collect as much as possible out of the security. But frequently foreclosure is not the serious problem as is that of acquiring a deficiency judgment against A, the mortgagor, which can be rendered only after personal service on A. The net result is that in the second and third examples, a deficiency can be collected only by resorting to the courts sitting within another state: precisely the same problem of our first hypothesis, plus the fact that the creditor now has two law suits instead of only one, both of which must be tried on the merits.

Other obstacles present themselves. In both actions, the balance due over and above the property attached or foreclosed upon as security for the judgment or debt, respectively, can be procured only after relitigating the merits of the original cause of action. The attachment or foreclosure proceedings did not result in a merger of the cause of action, based on breach of covenant or default in paying the mortgage promissory note, into the final judgment. Therefore it is possible for plaintiff's subsequent litigation, for the purpose of collecting the deficiency on the original cause of action, in the defendant's
home forum to result in a judgment on the merits for the defendant. This anomalous conflict is incomprehensible to the layman.

Assuming a judgment on the merits for the defendant, he naturally asks to reclaim his assets taken from him in the other state. He is advised that while the plaintiff's claim is now extinguished, this judgment in favor of the defendant will not affect the validity of the prior proceedings; that a judgment rendered in the attachment proceedings, though not on the merits, is effective solely against interests in tangible things which are within the territorial limits of the state which was the initial forum.

"The court will not direct the plaintiff to restore to the defendant the sum which he received in the prior proceeding. Since the court in the prior proceeding has jurisdiction over the property attached and its proceeds, its judgment cannot be collaterally attacked."7

But when the defendant prepares his balance sheet he notes a decrease in his assets equal to the value of the assets attached in the other state, which after a judgment in his favor on the merits, seems lacking in common sense.

This rule that the assets attached are bound by the judgment is the basis upon which some titles to real and personal property rest. Bearing in mind the hesitancy of the courts to disturb well-settled rules which, if changed, would create havoc in the status of some of our property, yet it seems fitting that this axiom or generalization be questioned.

The aim of the law has been not only to satisfy the creditor's demand, but also to inform the debtor that he may at a certain time and place present any defense that he may have. The adequacy of the notice:

"so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied."8

The Restatement of the Conflict of Laws reads in a similar vein:

"Sec. 100. Notice and Opportunity to be Heard.
A state cannot exercise through its courts judicial jurisdiction over a thing, although its is within the territory of the state, unless a method of notification is employed which is reasonably calculated to give knowledge of the attempted exercise of jurisdiction and an opportunity to be heard to persons whose interests in the thing are affected thereby.

7 Restatement, Judgments, sec. 34, comment h.
8 Mr. Justice Douglas in Milliken v. Meyer, supra, note 6.
Comment c. Necessity of actual knowledge. It is sufficient that steps were taken which under all the circumstances had a reasonable tendency to give to persons whose interests are affected, knowledge of the proceedings and an opportunity to be heard.”

Likewise the Restatement of Judgments:

“Sec. 6. Notice and Opportunity to be Heard.
A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected.”

Notices emanating from the courts of State Y to inform the non-resident of an action *quasi-in-rem* or *in rem* pending against him are embraced by the phrase “substituted” or “constructive” service. Thus A in Hypothet 2 or G in Hypothet 3 may be “served” by posting a notice on the property attached or foreclosed upon, by personally serving the debtor a notice beyond the state boundary lines of the forum, or by printing a succession of advertisements in “a newspaper of general circulation” within the county in which the complaint has been filed. In addition the property situated within the forum is seized pursuant to the levy under the writ of attachment.

If the asset of the debtor seized within the forum state is personal property and particularly if it is in the hands of a third person, the latter ordinarily informs the owner of the proceedings. While “actual” notice from a court of competent jurisdiction is therefore not received by the defendant-owner, yet the “garnishee-defendant” has conveyed the fact that a lawsuit has been instituted against the principal defendant. But the property seized within the forum state may not be in the hands of a third person or actually taken into the custody of the sheriff, a good example being vacant real estate. The method of levy pursuant to the writ of attachment, since practically all attachment statutes provide that the real property of the debtor, including reversions and remainders may be seized, consists of the sheriff filing a copy of the writ with the registrar of deeds of the county which is the situs of the real estate. There would then be no method by which the debtor could be informed of the levy unless he would search the registrar of deeds’ records every thirty days or so to ascertain whether or not his realty had been attached—an impossible duty. The same problems of notice would inhere in the mortgage foreclosure, as given in the third example.

Statutory requirements for attachment proceedings usually include:

1. A bond which the creditor must file;
2. An affidavit must be filed, setting forth the ground praying
for the issuance of the writ, one of the most common grounds being
that the debtor is a non-resident of the forum.

3. An order for “constructive” or “substituted” service of process
must be entered by the court, which can be any one of the methods
above suggested.

There is no quarrel with the adequacy of the service on the de-
fendant personally beyond the state boundary lines of the forum.
Considerable doubt may be entertained whether a notice posted on
the seized property located in State Y is reasonably fair to inform the
debtor in State X. But it is to the bona-fide non-resident defendant
whose property has been levied upon pursuant to a writ of attachment
and a simultaneous “service by publication” to whom we direct our
attention, bearing in mind that the different methods of constructive
service are mutually exclusive of the other; each one results in a final
judgment, not on the merits, binding the property attached.

Of the statutory materials and court rules available, the various
jurisdictions can be divided into these categories, pertaining to the
printing of legal notices concerning non-resident defendants:

1. There are 23 states which by statute require that, in addition
to notices printed in newspapers, that a copy thereof must be mailed
to the non-resident defendant.20

2. Four states by statute do not require forwarding the notice by
mail, but have imposed the mailing requirement by court rules.20

3. The United States District Courts follow the law of the state
in which the court is held subject to federal statutes applicable to
specific situations.21

20 Code of Alabama, 1949, Tit. 7 secs. 713-726; Arizona Code Annotated, 1939,
Code sec. 5-509; Smith-Hurd Ill. Ann. Stat. Ch. 110, sec. 158; Michigan C. L. 1917,
sec. 613.46-613.49; M.S.A. 27.776-779; Minnesota Stat. Ann. sec. 543.11; Mississippi
York Rules of Civil Practice, Rule 50; Nevada Compiled Laws, 1931-41 Supplement,
sec. 8583; North Dakota Rev. Code of 1943, secs. 28-0620-28-0623; Page's Ohio General Code Ann. secs. 11292-11294; Oklahoma Statutes, 1911, Tit. 12, secs.
170-174; Oregon Compiled Laws Ann. secs. 1-605 to 1-607; South Carolina Code of
Laws, 1942, sec. 436; South Dakota Code of 1939, sec. 33.0813; Utah Code Ann. 1943
sec. 105-5-13; Virginia Code of 1912, Ann. sec. 6070; Remington's Rev. Statutes of
Washington, sec. 228 (requires mailing before publication in a paper); Wisconsin
Statutes, 1947 sec. 262.13; Wyoming Compiled Statutes, 1945, Ann. sec. 3-1101.

21 Rule 4h of the 1941 Colorado Supreme Court Rules of Civil Procedure; New
York Rules of Civil Procedure, Rule 50; Pennsylvania Rules of Civil Procedure,
Rule 2079; Texas Rules of Civil Procedure, Rule 109 requires that the “party
applying for citation [by publication on the non-resident defendant] has attempted
to obtain personal service of nonresident notice as provided for in Rule 108 [which
requires that the notice be personally served on the defendant outside the state],
but has been unable to do so, the clerk shall issue citation for such defendant for
service by publication.”

21 Rules of Civil Procedure for the District Courts of the United States,
Rule 64.
4. Twelve states require publication in a newspaper of the pendency of the action, but impose no requirement whatsoever for mailing a notice to the non-resident.\footnote{Arkansas Stat. 1917 Ann. secs. 15-101 to 15-115 Burns Indiana Stat. Ann. 1933 sec. 2-807. Rule of Civil Procedure No. 62, following sec. 617.6 of Code of Iowa, 1916: Ky.R.S. (1916) sec. 424.030. Flack's Ann. Code of Maryland, Art. 10, sec. 149; Ann. Laws of Mass. Ch. 223, sec. 90; Missouri Rev. Stats. Ann. secs. 891 and 899; Revised Laws of New Hampshire, 1942, Ch. 7, sec. 32, p. 47; Ch. 387, secs. 4, 5 and 9; New Mexico Statutes Ann. 1941, sec. 12-213; General Statutes of North Carolina, 1913, sec. 1-99, requires that a notice be published giving the title and purpose of the action and requiring the defendant to appear and answer at a time and place theretome mentioned; and no publication of the summons, or mailing of the summons and complaint is necessary; Vermont Statutes, Revision of 1947, Ch. 62 sec. 1294; West Virginia Code of 1943, Ann., sec. 5520.} Is service by publication on a non-resident issuing from the federal and state courts, held in those twelve jurisdictions as a method of obtaining a judgment which binds his assets within the forum state, reasonably calculated to give a non-resident debtor notice in accordance with the fair play and substantial justice implicit in due process?

It is interesting to read the comments and illustrations given by the Restatements of Conflict of Laws and Judgments, respectively:

Conflict of Laws, Section 100, entitled Notice and Opportunity to be Heard, comment c, Illustration 1.

"A statute of state X provides that in a suit to foreclose a mortgage, if the mortgagor cannot be personally served with process within the state, he may be served by handing him a summons outside the state or by mail or by publication in a newspaper. In an action brought in X by A against B to foreclose a mortgage upon land in X, service by publication in a newspaper in accordance with the statute is sufficient, although B does not see the newspaper."

Conflict of Laws, Section 106, entitled Application of Things to Payment of Claims, comment a, Illustration 1.

"A brings an action against B for debt in a court of state X. B is not subject to the jurisdiction of X, but a horse in X belonging to B is attached. B fails to appears. The court has jurisdiction to render a judgment under which the horse may be sold on execution; but no other property of B can be sold and the judgment does not impose a personal liability upon B."

Judgments, Section 34, entitled Attachment, comment d:

"d. Notice to defendant. In a proceeding begun by attachment the defendant is entitled to notice of the proceedings and an opportunity to be heard. Whether the mere seizure of the defendant's property under the attachment is sufficient notice depends upon the circumstances. If the property is so situated that there is no reason to suppose that the defendant would learn of its seizure, it is necessary that some form of notification be employed, either notification by mail, by service of process outside the state, or publication or otherwise."

These quotations illustrate that again the assumption is made that service by publication is equally calculated to give the same notification...
tion as does other types of constructive process. This is thoroughly embedded in our jurisprudence, but like so many other "fundamentals" it requires reexamination on policy bases to conclude that this type of service on non-residents is inconsistent with due process if the result is to bind his assets having a situs within the initial forum. By examining the realities of present-day service by publication as made in certain states, common sense indicates that the non-resident debtor is not treated fairly and that it is not reasonably calculated to give knowledge of the attempted exercise of jurisdiction.

Admittedly the courts have been very severe in requiring that each and every technical requirement of service by publication be met: while the case was pending in the lower federal court, the chief issue in the famous case of Pennoyer v Neff was the defects in the affidavit upon which the order of publication was found: Since publication is solely based upon statutory authority and is in derogation of the common law, the statute must be substantially complied with and strictly pursued. The controversy in most publication cases can be simmered down to whether or not "the single defect in the (foreclosure of a mortgage against a non-resident mortgagor) proceedings, which consisted in the publication of the summons in the Brooklyn Daily Eagle, through inadvertence, instead of in the Brooklyn Daily Times, one of the two newspapers designated in the order of publication" constituted "a technical and curable defect as contradistinguished from a fatal jurisdictional error."

However it seems that policy considerations which question the fundamental bases of notice by publication, rather than the niceties of the technical requirements, are very much more important:

---

20 Supra, footnotes 21 and 22.
21 95 U. S. 714, 24 L. ed. 565 (1878).
22 Note, Service of Summons By Publications: Sufficiency of Affidavit, 3 CALIF. L. REV. 344 (1914).
23 Valz v. Sheepshead Bay Bungalow Corp., 249 N. Y. 122, 163 N.E. 121 (1928), noted in 14 CORNELL L. Q. 228 (1929). Cf. Restatement, Judgments, sec. 34, Attachment, comment c, entitled Procedural Irregularities. "If property of the defendant it attached and thereafter judgment is rendered in favor of the plaintiff by default directing that the property be applied to the payment of the plaintiff's claim, the judgment is not void and is not subject to collateral attack merely because of irregularities in the procuring of the attachment. It is a question of construction of the statutes as to the requirements in an attachment proceeding whether the requirements are jurisdictional. Ordinarily a failure to comply with the statutory requirements does not prevent the court from acquiring jurisdiction over the property if the defendant is given sufficient notice of the proceedings. Although the failure to comply with the statutory requirements may be a ground for preventing the rendition of a judgment or for setting aside the judgment on a direct attack, it is not a ground for collateral attack upon the judgment, if the requirements are not construed to be necessary for the exercise of jurisdiction by the court."

Query: How will the defendant be able to make a direct attack unless he has had adequate notice of the attachment?
1. It is illogical to publish a notice in a newspaper printed and circulated chiefly in State Y concerning pending litigation affecting a domiciliary of State X. The defendant's likelihood of reading the notice would be enhanced if the legal advertisement were inserted in a newspaper printed and circulated in the community within which he lives in State X.

2. Very few laymen read the legal advertisements in any newspaper.

3. The cost of legal advertisements is greatly in excess of that of other methods of serving notice.

4. The possibilities of misuse have arisen. If the plaintiff happens to know (which will be seldom in commercial transactions, but which she frequently does in divorce cases) which newspaper the defendant habitually reads, it is doubtful whether the plaintiff would necessarily select that newspaper. Rather will he select that newspaper for publication of the notice which he knows defendant does not read.

5. Why impose such a drastic penalty upon the debtor, as losing his assets located in the forum state without a hearing on the merits, because he is a non-resident? There is nothing malum in se in living south of the border of the forum state.

6. In metropolitan counties, besides the large city dailies, there exist many community newspapers which meet the statutory requirements of being newspapers of general circulation. If the debtor lives in the northwest part of Lake county of State X, whose chief newspaper is the "Inquirer", the legal notice could be inserted in the "Tribune", a community newspaper printed and having limited circulation only in the southeast part of Lake County, State X. Nevertheless, both papers satisfy the requirements of the statute, though the probabilities of the defendant getting notice are practically nil.

7. By far the greatest abuse is that of inserting legal advertisements in newspapers which satisfy the statutory definition of "newspapers of general circulation" but whose circulation is restricted to that of the legal profession, with a few other subscribers being business houses, credit organizations, insurance companies and merchants. These papers usually are not "home-delivery papers", nor are they sold by the newsboys on the streets or on many of the newstands. Admittedly these legal papers are of extreme benefit to the courts and the legal profession, in furnishing court calendars, jury lists and credit information, but unfortunately so far as being a vehicle of purveying notice to the laymen, they satisfy the formalities of the statutes without meeting the realities of notice or the strict requirements of due process. There are approximately 89 legal newspapers in operation in
the United States during 1949. The circulation ranges from less than 100 copies per issue to a maximum of 7144. In metropolitan areas, apparently the legal papers and not the general newspapers are the chief vehicles of legal advertisements. Relative to the population served the mathematical probabilities of the person even knowing of the existence of the legal paper is relatively slight.

The foregoing resume indicates that there is a large gap in the jurisdictional concept applicable to non-residents who indulge in only one business transaction and thus are outside the pale of the licensing statutes. The confession of judgment clause, if inserted in the document, will remedy many of the situations, but not all. Waiving service of process is essentially unfair. Quasi-in-rem and in rem procedures are inadequate and in some jurisdictions are questionable on a due process basis.

The Restatement of Judgments does hint at a possible solution:

"Sec. 23. Jurisdiction Over One Who Does Acts Or Owns Things In A State.

A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who does acts or owns things in a State which are of a sort dangerous to life or property, as to causes of action arising out of such acts or such ownership, if a statute of the State so provides at the time when the cause of action arises.

Caveat: The Institute expresses no opinion on the ques-
JURISDICTION OVER NON-RESIDENTS

Whether the rule stated in this Section should be extended to include tortious acts which are not of a sort dangerous to life or property or to include the making of a contract within the State, is a question on which no opinion is expressed by the Institute; no opinion is expressed as to the constitutionality of a statute of a State which provides that if a nonresident is sued for a breach of contract made within the State, although he is not doing business in the State, service of process may be made upon him by mail or by personal service outside the State.”

It seems that no statute should be necessary to validate the following clause which could be inserted in a contract, deed, mortgage, or other types of commercial transactions:

“The parties hereto mutually appoint JOHN DOE, 123 Broad Street, City of Canton, State Y, as their respective agent, upon whom notice of default, notice of submission to commercial arbitration, or upon whom service of process may be had in any matter filed or presented before any individual, notary public, body provided for in this agreement, or any court within this state arising out of this transaction or the subject matter hereof;

Said agent is hereby notified that the home addresses of the parties hereto involved are as follows:

PARTIES OF THE FIRST PART

........................................................................................................................................
Name

........................................................................................................................................
Address

PARTIES OF THE SECOND PART

........................................................................................................................................
Name

........................................................................................................................................
Address

To which address, unless notified of a change, in event either or both parties are or become nonresidents of State Y, said agent is to forward a copy of any notices or process received by him, by registered mail with return receipt attached with directions thereon to “DELIVER TO NAMED ADDRESSEE ONLY.”
It is the duty of each party to inform the agent in event of a change of address.

This agency is to continue during the life of this contract and thereafter for any additional period of any statute of limitations applicable to this transaction.

IN CONSIDERATION OF THE SUM OF $..........................DOLLARS, I, named as said agent, hereby accept the appointment, upon the terms and conditions imposed therem.

..........................................................................................................................
Name of agent

..........................................................................................................................
Address of agent.

The most obvious defect in this clause is how to prevent the revocation of the agency. It might be offered that the "mutuality" of the appointment would prevent a revocation unless both parties agreed to rescind. Likewise, the agency is automatically revoked upon the death of one of the parties under the general rule that an appointment or agency, unless it be a power coupled with an interest, is terminated by the death of the principal. This might be prevented by the addition of the words "The parties, their assigns, successors in interest, heirs and personal representatives." In any event a failure to observe this clause should create a breach of contract for which damages will be awarded, equal to the cost of having to litigate in an unfavorable forum and in more than one forum.

The non-motorists statutes have been interpreted to exclude personal representatives of the estates of deceased tortfeasors. The cases have not decided that if the statute did include such personal representatives, that it would be unconstitutional. Dowling v. Winters, 208 N. C. 521, 181 S.E. 751 (1935) noted 56 Col. L. Rev. 681 (1936); Young v. Potter Title & Trust Co., 114 N. J. L. 561, 178 Atl. 177 (1935).

Thus free play is given to the application of the doctrine forum non conveniens. This discussion touches upon the broader problem as yet not explored of the power of the parties to confer by mutual consent in a contract the submission of a controversy to a court other than that at the domicile of the defendant, which has been thoroughly developed in civil law countries, and is called "Prorogation," which renders the rules relevant to venue and jurisdiction of the defendant more elastic and serves the individual needs of the parties better than the strict general rules of jurisdiction, venue and process. The Code of Austria, sec. 104, entitled Jurisdictions Norm reads: "Agreement concerning the jurisdiction of courts. The parties may by express agreement submit to one or several trial courts situated expressly named localities. Documentary evidence of this agreement must be submitted with the declaration. This agreement has legal force only if it covers a specific cause of litigation or of controversies arising out of a specific relation between the parties. Causes over which the ordinary courts do not have jurisdiction cannot be brought before the court by prorogation." Other examples of similar provisions are found in: Louisiana, Code of Practice, Arts. 92 & 93; Dupey v. Greffin, 1 Mart. (N.S.) 198; Encyl. of the Laws of Scotland (1929) Vol. 8, pp. 516-517, Paragraphs 1211-1215; Buenos Aires (Province), Codigo de Procedimientos Civil y Comercial, Art. 1; Chile, Codigo de Procedimiento Civil, Art. 104; Colombia, Codigo Judicial, Art. 150; France, Code de Procedure Civil, Art. 7; Germany, Zivilprozessordnung, secs. 38-40; Italy, Code de Procedura Civile, Arts. 28 & 29.
The purpose of this clause is to insure adequate notice upon the litigants. It appoints an agent in advance, only in the event a party is at the time the transaction is consummated or if he thereafter becomes a non-resident. Consent is given for the acceptance of service of process, the duty is imposed upon each one of the parties to keep the agent informed of the party's whereabouts. A corporation could act as the agent in order to insure continuity of the agency. On a policy basis it is fairer than the cognovit provision which waives service of process and thus dispenses entirely with notice. This clause specifically requires service of process. It seems consistent with the decisions of the United States Supreme Court in that it meets the procedural due process requirements of the Fifth and Fourteenth Amendments. It eliminates the expense of duplicity of litigation of an in rem proceeding in one state followed by an in personam proceeding in another state with the possible inconsistency in result as above suggested. If the initial forum is a state court, the judgment rendered must be enforced in a sister state, but since the original cause of action has been concluded as to its merits, only an authenticated transcript of the judgment need be presented to the second forum which in many jurisdictions could be the basis of a summary judgment. If the original forum is a federal court, no subsequent litigation to procure a judgment on the judgment in another federal district court is necessary because of the Federal Registration of Judgments Act. Of particular interest to the lawyer is the elimination of many vexatious conflict of laws problems. But above all, the non-resident is treated fairly in that this procedure informs him of the pending litigation vitally affecting his interests.

---

1 In event of failure to do so, thus necessitating litigation in another forum for a second time, it seems that the damages therefor should again be equivalent to the additional costs placed upon the plaintiff which is never covered by the "costs" as taxed by the clerk in favor of the prevailing party.

28 U. S. C. sec. 1963. Registration in other districts. "A judgment in an action for the recovery of money or property entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."