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CONFLICT OF LAWS—PHYSICAL PRESENCE AND APPEARANCE AS BASES OF JURISDICTION

Justice Holmes once said, "The foundation of jurisdiction is physical power . . . ." On another occasion he declared that jurisdiction over a person is based on the power of the sovereign to seize that person and imprison him to await the sovereign's pleasure. This was undoubtedly the original concept—and it may well be the fundamental concept still—yet it is clear that there are numerous modern cases in which actual physical power is lacking.

There are certain fairly well established ways by which jurisdiction may be obtained. Jurisdiction exists: (1) if the person, thing or status is actually present within the state; (2) if the person makes an appearance; (3) if, in certain circumstances, the party or parties have consented to jurisdiction; (4) if a sovereign state is bringing an action against one owing allegiance to that state; (5) if the person is a domiciliary of the state in which he is sued; (6) if certain acts have been done within the state. It is readily seen that actual physical power may be lacking in all except the first and second of these situations although some courts create physical power in all six by the use of fictions, apparently in an effort to harmonize the decisions with the statement of Justice Holmes. It is the purpose of this note to discuss only (1) and (2) of these methods of obtaining jurisdiction.

(1) Presence. If a person is within the state and has been properly served, the sovereign has physical power over him and there is apparently no exception to the rule that in such cases a judgment against him must be recognized by the other states. It is immaterial that the defendant is a non-resident or that he is in the state only temporarily or that he leaves the state immediately after service so that the judgment is by default. Likewise, it is well settled that if jurisdiction is once secured it continues until the matter is completely adjudicated, including appeal, whether the defendant remains in the state or not.

If the defendant is personally served, there is no question as to the validity of the judgment; in fact, statutes providing for something

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1 McDonald v. Mabee, 243 U. S. 90 at 91 (1916).
2 Michigan Trust Co. v. Ferry, 228 U. S. 346 (1913).
3 CHEATHAM, DOWLING, AND GOODRICH, CASES AND MATERIALS ON CONFLICT OF LAWS (1936) at pp. 69 and 97; RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 77.
5 Michigan Trust Co. v. Ferry, 228 U. S. 346 (1913).
less than personal service on one temporarily in the state have been held sufficient to bring him within the jurisdiction of the court. Thus, in *Durfee v. Durfee,* the defendant was a resident of Rhode Island but, while in Massachusetts, was served by registered letter mailed to his Massachusetts post office address. The defendant was held to be properly before the court.

If the action is one in rem or quasi-in-rem and the defendant has property within the state, that property, being within the physical power of the court, if properly attached, is subject to judgments rendered with regard to it even though the owner has never been in the state and has been served by publication. Likewise it is well established in divorce cases that the state has the power to make decrees effecting the matrimonial status if the status is within the state. If the rules in this category are reduced to their final analysis, it will be seen that physical power is the fundamental concept.

There is language in a number of cases which seems to contradict the statement that there are no exceptions to the rule that a person physically present in the state is subject to the jurisdiction of that state. It is submitted that what are referred to as exceptions are, rather, situations in which the states, as a matter of policy refuse to exercise jurisdiction. For example, one court has said that if a person is brought into the state through fraud he is not "found" there for the purpose of service in a civil action. But it is well established that he can be "found" for a criminal action under similar circumstances, so that it would appear that he is subject to the physical power of the sovereign if it is the policy of the sovereign to exercise that power. Thus, if a state should render a judgment against a person brought into the state by fraud, there is well considered opinion to the effect that other states should recognize the judgment. Again, it has been held that the fraud of one other than the plaintiff or one acting for him, will not prevent the court from exercising jurisdiction. There would seem to be little doubt, therefore, that if the defendant is actually within the state even though brought there through fraud, the court has jurisdiction because it has physical power but, as a matter of policy, the court refuses to exercise its power. The better view appears to be that the same rule is appli-

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See Restatement, Conflict of Laws (1934) Sec. 78, Comment C, Illustration 1.


See Pennoyer v. Neff, 95 U. S. 714 at 725, 726 (1877).


"Note (1930) 39 Yale L. J. 897.

cable to cases in which the defendant is brought into the state by force12 but the law on this point is not too clear.13

It is also true that persons in the state as parties or witnesses in a suit are exempt from service during such proceedings and for a reasonable time thereafter to permit them to leave the state.14 Since such persons are actually present within the state, the courts are granting protection from services as a matter of policy in order, it is said, to leave parties free to come into the state to testify. This privilege which is generally construed liberally, has been extended to persons appearing before notaries public to give depositions.15

(2) Appearance. At least one writer in the Conflict of Laws field treats appearance under the head of consent16 and it is true that when the defendant makes a general appearance he consents to the jurisdiction of the court and these cases present no difficulty. On the other hand, it is obvious that he does not consent when he makes a special appearance to question jurisdiction. A state by statute may provide that by appearing specially the defendant is before the court so that he is bound by a judgment on the merits.17

In York v. Texas18 the Supreme Court of the United States held that such a statute does not violate the due process of law clause of the Constitution for the reason that a judgment does not deprive a person of his property; it is only on execution that property is taken. Although this may be true technically, it is believed that a judgment in itself presupposes that property may be taken to satisfy it. Since the question is disposed of by saying that it was raised prematurely, the case does not settle the constitutionality of such statutes, for, apparently, it can be raised when there is an attempt to execute the judgment. The rule that a special appearance confers general jurisdiction can be rationalized as the exercise of physical power over a defendant who is actually present, but the majority view is that a special appearance does not confer general jurisdiction19 and as a matter of policy this is by far the better rule.

A plaintiff by selecting a certain court for his suit brings himself within its jurisdiction at least to the extent of that particular claim.20

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13 Restatement, Conflict of Laws (1934) Sec. 74, Caveat.
16 Stumberg, Conflict of Laws (1937) p. 79.
17 137 U. S. 15 (1890).
18 Ibid.
19 Davis, Agent, etc. v. O'Hara, 266 U. S. 314 (1924); Rorick v. Stilwell, 101 Fla. 4, 133 So. 609 (1931); Scott v. Wamsley, 215 Iowa 1409, 245 N. W. 214 (1931); Brumleve v. Cronan, 176 Ky. 818, 197 S. W. 498 (1917).
Likewise, he is subject to any counter-claim or set-off available to the defendant. 2

Undoubtedly the two methods of obtaining jurisdiction which have been discussed fall within the Holmes' concept. If the defendant is physically present within the state—for however short a time and for whatever reason and by whatever means—and is properly served, he is subject to the jurisdiction of the court in any situation in which it sees fit to exercise its power. The courts have, however, refused to impose jurisdiction in certain fairly well defined situations as a matter of policy rather than because of lack of power. Whether physical power exists in the other instances in which jurisdiction is exercised is beyond the scope of this note.

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WAYS OF NECESSITY: SECURED BY STATUTE

At Common Law, where the owner of land sells a part with no outlet to a public highway, it is implied that the vendor grants to his vendee a right of way over his remaining land to enable the latter to get to and from the part sold to him. 1 The Common Law does not, however, afford any remedy to one whose land is entirely surrounded by the lands of others giving him no access to a highway, where no vendor-vendee relationship exists. 2

In 1820 the Kentucky General Assembly began making provisions for persons in these circumstances to obtain passways by statutory proceedings. The first statute was very strict, allowing passways only when they were proved to be absolutely and indispensably necessary. 3 This original statute has been modified from time to time, so that our present statute allows passways when it appears to the county court, that it is necessary for a firm to have a private passway over the land of another to enable him to attend courts, elections, warehouses, etc. 4

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3 Tiffany, Real Property (abed. ed., 1940) sec. 543, p. 554.
4 KRS 381.580: "Whenever it appears to a County Court that it is necessary for a person to have a private passway over the land of one or more persons to enable him to attend courts, elections, a meeting house, a mill, warehouse, a ferry, a railroad depot, most convenient to his residence, or to have a private tramroad or haul road over the land of one or more persons to enable him to reach a warehouse, steamboat landing, ferry, railroad switch, or navigable stream, for the purpose of operating and marketing the products from a lead mine, iron works, salt works, coal mine, fire clay, and other minerals,