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THE GROWTH OF THE LONG ARM: EIGHT YEARS OF EXTENDED JURISDICTION IN ILLINOIS

BY DAVID P. CURRIE*

"Wheresoever a man soweth, there shall he also reap."
—The Illinois General Assembly

FOR MANY YEARS, the judicial power of Illinois, like that of the other states, suffered partial paralysis from the baneful influence of the territorialist theory expressed in Pennoyer v. Neff: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them." 1 In 1955, however, encouraged by a series of United States Supreme Court decisions permitting the States wide latitude in effectuating their legitimate interests through the assertion of jurisdiction in personam, the Illinois legislature enacted the present section 17 of the Civil Practice Act, 2 based upon the bold principle that one should be amenable to suit in Illinois on any cause of action arising out of certain activities within this State. The time is ripe for an evaluation of this provision in the light of eight years' experience.

DUE PROCESS AND PERSONAL JURISDICTION

The notion that a State deprives a person of property without due process of law by entering a judgment against him in the absence of personal jurisdiction is an interesting one. I put to one side the obvious and entirely distinct principle, so often confused with the problem of personal jurisdiction, that a fair hearing requires timely notice reasonably calculated to inform the defendant of the proceedings against him. 3 In addition to this requirement the Supreme Court has consistently held, ever since the adoption of the fourteenth amendment, that the due process clause limits the power of a State to enter a judgment against a defendant not found within, or in some other relation to, the forum State. This restriction, the Court has

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1 95 U.S. 714, 727 (1878).

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recently reaffirmed, is "a consequence of territorial limitations on the power of the respective States."\(^4\) It has never been doubted, however, that this limitation can be waived by the defendant.\(^5\) It is a limitation obviously designed, or at least conceived in the present day, for the protection of the defendant against another sort of unfairness in the procedure for reducing his obligation to judgment: the unfairness, as it is conceived, of being compelled to defend himself in a court of a State with which he has no relevant connection.

It does seem unfair to summon a New York resident to Hawaii to be sued on an obligation unrelated to that State, although it is rather difficult to formulate exactly why. Trial in a distant court may be inconvenient and expensive, and may come as an unpleasant surprise; but trial in a federal court in Hawaii would be as much so as trial in a state court there, and yet the Supreme Court has declared that the due process clause of the fifth amendment, worded identically with that of the fourteenth, does not prevent Congress from providing for federal service of process anywhere in the United States.\(^6\) Moreover, it is likely to be much more inconvenient and expensive for a resident of Texarkana, Texas, to defend a suit in El Paso, 900 miles way, than just across town in Texarkana, Arkansas. But the Court has never suggested either that due process forbids trial in an inconvenient part of the proper State or that the convenience of a court in a nearby sister State justifies trial there.\(^7\) In part, this may indicate that state boundaries serve as rough indicia of hardship in preference to an unwieldy \textit{ad hoc} determination. But it also, especially in conjunction with the notion that federal process may run nationwide, seems to mean that there is something to the idea that restrictions on state sovereignty are involved.\(^8\)

A related restriction of state power, often enforced under the due process clause in the past but more recently treated largely as an issue of full faith and credit, is the constitutional limitation on choice of the governing law. As presently construed, both these clauses forbid determination of a controversy on the basis of the law of a State with no interest in the case.\(^9\) It is as arbitrary to determine the rights of New Yorkers acting in New


\(^7\) Compare the provision in § 4(f) of the amended Federal Rules of Civil Procedure for service of process on certain additional parties outside the forum State but within 100 miles of the court.

\(^8\) See Development 924-25.

York by Hawaiian law as it would be to determine their rights by a law repealed before they acted; neither is consistent with due process of law. In something of the same way, perhaps, a State lacks judicial as well as legislative power over transactions and persons with which it has no relevant connection. This parallel must not be carried too far, however. Not only may there be situations, as the Court has pointed out, in which a State has sufficient interest to justify application of its law but insufficient contacts to permit it to exercise personal jurisdiction, but under earlier views of the requirements of due process in the fields of jurisdiction and choice of law there must have been a great many cases in which jurisdiction could only be obtained in a state with no power to apply its own law. Probably the most that can be said in a general way is that due process embodies a test of fundamental fairness in all steps of the proceedings; that our sense of fairness is outraged by certain assertions of jurisdiction on the part of States unconnected with the parties or with the controversy; and that this sense of unfairness stems partly from the inconvenience and expense involved, partly from the idea of unfair surprise, partly from anticipation of an improper choice of law, and partly from more general notions of the limits of a state's rightful sovereignty.

Pennoyer v. Neff laid down the rule that, while a State had power to assert jurisdiction over property within its borders, whether to determine claims respecting the property or to apply it in satisfaction of an unrelated obligation, it could render a judgment binding a defendant personally only if he was physically present and served with process while in the forum State. In the case of a foreign corporation, later decisions made clear that it was not sufficient that process be served upon an agent of the company within the State; the corporation must also have impliedly "consented" to the exercise of jurisdiction, or have been constructively "present" in the State, and the agent must be engaged in doing the corporation's business when served. The test of corporate presence or consent was whether the company was "doing business" within the forum State.

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10 Hanson v. Denckla, supra note 4, at 253, 78 Sup. Ct. at 1239-40.
11 Jurisdiction required personal service on the defendant in the forum State, Pennoyer v. Neff, 95 U.S. 714, 727 (1878), while for a time the due process clause was thought to compel application of the law of the place where a contract had been made. This in turn was held to be the place where it had been accepted, and it was quite possible that one party to a contract concluded by mail had never been there. New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 Sup. Ct. 337 (1918).
12 95 U.S. 714 (1878).
It was not long before this structure began to crumble. Milliken v. Meyer 14 held that an absent defendant could be sued in the courts of the state of his domicile. Hess v. Pawloski 15 held that a nonresident motorist might be required to defend an action in the State in which his use of an automobile had given rise to a cause of action. Henry L. Doherty & Co. v. Goodman 16 held that service could be made on the agent of a nonresident securities dealer respecting obligations arising from transactions in the forum State. In International Shoe Co. v. Washington,17 the Supreme Court discarded the theories of constructive presence and implied consent and enunciated a new test for determining whether a State might obtain personal jurisdiction consistently with due process: whether the defendant corporation had certain “minimum contacts” with the forum State “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

Two decisions of the Court since International Shoe have given content to these principles. The first was McGee v. International Life Ins. Co.,18 in which the permissive policy of International Shoe was invoked to sustain jurisdiction of a suit against a foreign insurance company which, without ever sending agents into the forum State, had insured one of its residents. The second, Hanson v. Denckla,19 denied jurisdiction over a nonresident trustee whose sole contact with the forum State was by correspondence with the settlor, who had moved there subsequent to establishment of the trust: “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . .” This principle is borne out by cases such as Estin v. Estin,20 holding that a State to which one spouse has moved after separation has no power to enter a judgment terminating support payments to a nonresident spouse who has never entered the State. But Hanson and Estin leave much latitude to the States beyond service of process on defendants found within their borders.

Illinois, in order to protect its interests within the latitude afforded by International Shoe and other decisions, enacted the following statute:21

21 Note 2 supra.
(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State;
(b) The commission of a tortious act within this State;
(c) The ownership, use, or possession of any real estate situated in this State;
(d) Contracting to insure any person, property or risk located within this State at the time of contracting."

Provision is made for personal service outside the State; causes of action not arising from the enumerated acts are prohibited in actions under the section; and existing means of obtaining jurisdiction are preserved.

Illinois was not the first State to assert jurisdiction over such matters. As early as 1937, Maryland had provided for suits arising from contracts made or acts done within the State, and Vermont for suits arising from contracts to be performed or torts committed "in whole or in part" there. Jurisdiction in suits arising from the ownership or use of real property within the State originated in a 1937 Pennsylvania statute. The Uniform Unauthorized Insurers Act, which provided for jurisdiction over those insuring residents of the forum State, had been promulgated in 1938 and adopted in several States. But Illinois was the first State to enact a statute comprehensively dealing with personal jurisdiction and frankly attempting to occupy the entire field of its constitutional power under the recent liberalization of the due process clause. Other States have followed suit. Wisconsin's 1959 statute, based on the same general principle as Illinois', is more detailed and somewhat different; six states—Idaho, Maine, Montana, New Mexico, New York, and Washington—have adopted statutes based upon that of Illinois.


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At one time, the only means of acquiring jurisdiction in Illinois over an individual defendant was to find him in the State. But in 1927 the Supreme Court of the United States, invoking the fiction of implied consent and the State's strong interest in promoting safety on its highways, upheld a Massachusetts statute recalling the nonresident motorist who had left the State before he could be served. Two years later Illinois, following this example, enacted a statute constituting the Secretary of State as "agent" for service of process on nonresident motorists in actions arising out of the "use or operation" of vehicles on Illinois highways.

This statute was held to permit actions in contract as well as in tort; to permit suits by nonresident plaintiffs as well as by residents; and, by a construction more liberal than some courts were willing to adopt, to permit suits against nonresidents who had "used" vehicles in the State by permitting their agents to drive in Illinois. It was amended to extend, retroactively, to suits against residents of the State who had moved away after the cause of action had arisen. But the limitations of the statute were evident. In Brauer Mach. & Supply Co. v. Parkhill Truck Co., plaintiff's employee had been injured by the alleged negligence of defendant's driver in unloading defendant's truck. The employer paid workmen's compensation and sued as subrogee. Because the unloading took place on private property, the Illinois Supreme Court held that the cause of action did not arise out of the operation or use of the truck on Illinois highways and thus that there was no jurisdiction.

This has been changed by the enactment of section 17 to the Illinois

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32 Ibid. Accord, State ex rel. Rush v. Circuit Court, 209 Wis. 246, 244 N.W. 766 (1932).


35 383 Ill. 569, 50 N.E.2d 836 (1943).
Civil Practice Act. *Nelson v. Miller*,\(^8\) the first case to reach the Illinois Supreme Court under this section, concerned almost identical facts. Defendant, in Wisconsin, sent his servant into Illinois to deliver a stove to plaintiff, who was injured by the servant's alleged negligence in unloading the stove. The court wisely rejected the suggestion that the merits of the action must be determined in order to ascertain jurisdiction; the commission of a "tortious act" was construed to mean the commission of an act tortious if proved as alleged, not one proved to be tortious.\(^9\) There is flexibility enough in the language to permit this result, which simplifies the jurisdictional issue and avoids a double trial of the merits—a double trial which certainly could not have been intended.\(^9\) The court also upheld application of section 17 to an action arising out of an incident that had occurred before its enactment, on the obviously correct ground that it simply established a means of securing existing rights and could therefore be retroactively applied without destroying any vested interests.\(^9\) In this holding the court followed its own earlier decision regarding an amendment to the nonresident-motorist statute\(^4\) and was squarely supported by the United States Supreme Court decision in *McGee v. International Life Ins. Co.*\(^4\)

The court in *Nelson* declared that the aim of section 17 was to assert jurisdiction to the fullest constitutional extent. Reviewing the cases, it applied the minimum-contacts and fundamental-fairness test of *International Shoe* to uphold the statute against due-process objections. Illinois had an interest in affording a forum to redress wrongs against persons such as the plaintiff, entitled to the State's protection; it was not unfair to summon the defendant to return to a State into which he had sent his servant and where the servant had caused an accident; the Illinois forum was a convenient one for witnesses; and Illinois law would be applicable.\(^4\)

Thus Illinois joined Vermont\(^4\) in upholding the jurisdiction of its

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\(^{11}\)Ill. 2d 378, 143 N.E.2d 673 (1957).

\(^{8}\)"An act or omission within the State, in person or by an agent, is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort." *Id.* at 393-94, 143 N.E.2d at 681.

\(^{9}\)Worse still, the opposite holding would have required the plaintiff suing elsewhere on a default judgment to relitigate the merits, thus defeating the whole purpose of the section. See Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657, 659 (1959).

\(^{39}\)Ill. 2d at 382-83, 143 N.E.2d at 675-76.


\(^{42}\)U.S. 220, 224, 78 Sup. Ct. 199, 201-02 (1957).

\(^{43}\)Ill. 2d at 383-91, 143 N.E.2d at 676-80.

\(^{44}\)Smyth v. Twin State Improvement Corp. 116 Vt. 569, 80 A.2d 664 (1951).
courts over nonresident defendants entering the State, in person or by an agent, and committing there acts alleged to be tortious. No showing of continuous activity in the State is required; a single tort is sufficient. Statutes in Connecticut, Iowa, Maryland, Minnesota, North Carolina, Texas, and West Virginia, as well as those of Wisconsin and the States which have adopted the Illinois statute, now provide for jurisdiction on the basis of a single tort. Many of these are limited to suits against foreign corporations, but this is not constitutionally required. In cases such as Nelson, these laws have been uniformly upheld. Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on "consent," but on the interest of the forum State and the fairness of trial there to the defendant. In Hanson v. Denckla, the United States Supreme Court lent some credence to the suggestion that these statutes depended for their validity upon some special regulatory interest of the State over its highways, and that both Henry L. Doherty v. Goodman, upholding jurisdiction over a nonresident individual doing business in the state, and McGee v. International Life Ins. Co. sustaining power over a corporation with isolated rather than continuous contacts with the forum State, likewise rested upon the fact that they concerned activities (the sale of securities and insurance) in which the State had an unusual regulatory interest. But Hanson is


45 See notes 26-27 supra and accompanying text.

46 Connecticut, Iowa, Maryland, Minnesota, North Carolina, Vermont, and West Virginia.


51 "This case is also different from McGee in that the State 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. Cf. Travelers Health Ass'n v. Com. of Virginia [also an insurance case] ...; Doherty &
amply distinguishable from *McGee* on grounds other than a special interest in insurance, the significant fact in *Hanson* was the absence of any act by which the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," a condition obviously met when the defendant has ordered his servant to enter the State to deliver a stove. I can perceive no plausible basis for holding it fair to ask the defendant to return and defend a suit when he strikes a pedestrian with his truck, but unfair to do so when he causes injury while unloading the truck. The convenience or inconvenience and the expense of trial are identical in the two cases; and, whatever may be said about a special interest in highway safety or insurance or securities, the Supreme Court has made it clear that no automobile is required to justify a State's interest in applying its laws to secure compensation for residents or even nonresidents injured within its limits. This interest, coupled with a fair basis for calling on the defendant to defend there, suffices to sustain jurisdiction under the modern test of fairness, state interests, and minimum contacts. *Hess v. Pawloski* is no longer such a close case that a State interest of more than ordinary vitality can be thought required.
Following Nelson v. Miller, jurisdiction under the tort provision of section 17 has been upheld in all cases in which the defendant or his agent has physically entered the State and committed an act alleged to be tortious. This has been so in the obvious cases of a nonresident motorist,\textsuperscript{58} of an airplane crash in Illinois,\textsuperscript{60} and of a ship collision in waters subject to Illinois jurisdiction.\textsuperscript{60} It has also been true in a suit for unfair competition in the solicitation of plaintiff's customers by defendant in Illinois,\textsuperscript{61} and in an action for fraud in connection with an oil transaction negotiated in Illinois.\textsuperscript{62} There can be no question of the correctness of these decisions. When an Illinois resident is injured by tortious acts in Illinois, compensating him is within the purpose of the Illinois law whether the injury is to person or to pocketbook, and the nature of the wrong does not affect the issue of fairness to the defendant.\textsuperscript{63} Nor should it matter, in terms of the relevant policies, whether the defendant in such a case is a natural person, a corporation, a partnership, or some other entity, or whether, if an individual, he is acting for profit or for pleasure.

The defendant in Nelson v. Miller was not himself in Illinois when the alleged tort was committed; but his servant was. The Illinois Supreme Court had already held that service could be made on an absent principal under the nonresident-motorist law,\textsuperscript{64} and the United States Supreme Court long ago upheld the application of New York law to hold an automobile owner, who had loaned his car in New Jersey with express or implied permission to take it elsewhere, liable for an injury caused by the bailee's negligence in New York.\textsuperscript{65} The defendant can claim no unfairness when he has knowingly sent his servant into the State.

In most of the cases of this type adjudicated to date under section 17, the plaintiff has been an Illinois resident. Some of the single-tort statutes are

\begin{itemize}
\item \textsuperscript{58} Star v. Rogalny, 162 F. Supp. 181 (E.D. Ill. 1957).
\item \textsuperscript{59} Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958).
\item \textsuperscript{60} Runci, Inc. v. Peddie, 195 F. Supp. 124 (E.D. Ill. 1961).
\item \textsuperscript{62} Bluff Creek Oil Co. v. Green, 257 F.2d 83 (5th Cir. 1958); 287 F.2d 66 (5th Cir. 1961).
\item \textsuperscript{63} The Maine statute, patterned after the Illinois, limits itself to suits arising from tortious acts "resulting in physical injury to person or property," rather pointedly excluding cases such as fraud, unfair competition, and defamation. Me. Rev. Stat. Ann. c. 112, § 21 (Supp. 1961). New York expressly excludes defamation cases, N.Y. Civ. Prac. Law & Rules § 302(2) (1963), but the accompanying comment makes clear that defamation from acts done in New York will often arise from the transaction of business there.
\item \textsuperscript{64} Jones v. Pebler, \textit{supra} note 33.
\item \textsuperscript{65} Young v. Masci, 289 U.S. 253, 53 Sup. Ct. 599 (1933).
\end{itemize}
expressly limited to suits by resident plaintiffs, but the Illinois statute is not, and the Illinois appellate court has held that nonresidents may sue under the motorist statute. Doubtless the same will be held, generally, with respect to section 17; in at least one case under the new statute, the foreign residence of the plaintiff was been ignored. In a personal-injury case, this is clearly correct; as the appellate court said in dealing with an automobile collision between two nonresidents, the State's interest in compensation as a means of furthering highway safety may extend to nonresidents as well as to residents. The Supreme Court of the United States has also recognized the interest of the state of injury in securing a fund for the payment of local doctors and other creditors. And certainly the convenience of witnesses is as great, and the hardship on the defendant no greater, than if the plaintiff resided in Illinois. But the nature of the cause of action may be important when the plaintiff is a nonresident. It has been suggested, for example, that the state of the accident, as such, has no interest in applying its wrongful-death law as between nonresidents. Illinois' unfair-competition law may well express a policy of protecting nonresidents doing business here, but it is not so certain, despite the common adherence to the rule that a tort action is governed by the law of the place of wrong, that Illinois has any policy of protecting transients from frauds committed by other transients and affecting property located elsewhere. Fraud cases arising from contractual dealings give rise to interests in some respects more akin to those of contract than to those of tort, and, as I shall discuss below, the place where a contract is made may not always have an interest in the outcome of litigation. That this may also be true in some tort cases does not necessarily prove that the assertion of jurisdiction, with the application of foreign law, would offend due process. It does, however, remove the principal support for the exercise of jurisdiction. It would not be unfair to the defendant to bring him back to Illinois to defend if there were a good reason for doing so;

66 Connecticut (resident plaintiff or one with a "usual place of business" in the State); Iowa; Maryland (same as Connecticut); Minnesota (but see note 73 infra); North Carolina (same as Connecticut); Texas; and Vermont. See notes 23 and 44 supra.


68 Rensing v. Turner Aviation Corp., supra note 59. In Riinc, Inc. v. Peddie, supra note 60, the plaintiff's residence was not mentioned.

69 Carroll v. Lanza, supra note 55, at 413, 75 Sup. Ct. at 807 (even though the injured man had been removed from the State without incurring any bills).


71 RESTATEMENT, CONFLICT OF LAWS § 378 (1934). The new RESTATEMENT § 379 (Tent. Draft No. 8, 1963), gets away from this rule, but not very far. See id. comment b.

72 See text accompanying notes 225-33 infra.
but there may be no such reason if the State has no interest in applying its law, and especially in a fraud case where the only witnesses may be the non-resident parties themselves. It is therefore unfortunate that the statute is phrased in terms simply of the commission of a tortious act in the State, without reference to an Illinois interest in the outcome. The matter can be handled, if necessary, by judicious use of forum non conveniens. But I am aware of no decision of the United States Supreme Court permitting suit in a state other than that in which the defendant is resident or present, in the absence of an interest in the application of the forum State's law.\(^7\)

Activities Outside the State Causing Injury Within

There has been a series of cases concerning the applicability of section 17 to a type of situation with Illinois connections perhaps less substantial than *Nelson v. Miller*—cases in which injury has been caused in Illinois by acts of the defendants outside the State. The first such decision was *Hellriegel v. Sears Roebuck & Co.*\(^4\) Power Products Corporation manufactured an engine in Wisconsin and sent it by independent carrier to Newark Stove Co. in Ohio, where it was incorporated into a lawnmower and delivered to Sears Roebuck, which later sold the lawnmower in Illinois. An Illinois child was injured because of the allegedly negligent manufacture of the engine in Wisconsin. The federal district court, while doubting that the assertion of jurisdiction would be unconstitutional, construed the statutory reference to the commission of a "tortious act" as expressing an intentional deviation from the familiar choice-of-law rule that a tort is committed where the last act necessary for liability—*i.e.*, the injury—occurs,\(^5\) and followed a British decision that the commission of a tort "within the jurisdiction" for purposes of service of process required the presence of the defendant within the forum State at the time of the alleged tort.\(^6\) The Seventh Circuit Court

\(^3\) In Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216 (D. Minn. 1962), suit was against a foreign manufacturer in Minnesota for the death of a South Dakota resident in an Indiana plane crash, although the suit was based on Indiana law. The explicit limitation of the statute to suits for torts committed against Minnesota residents and on contracts with Minnesota residents, MINN. STAT. ANN. § 303.13, was avoided by holding that the cause of action arose from a contract between the manufacturer and the airline, a Minnesota resident, and that the decedent stood in the shoes of the airline since the maker's warranties were for his benefit. Minnesota law could probably have been applied to the case, since the airline's principal office and much of its business was in Minnesota and the safety of all its passengers was at stake. Cf. Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928). Moreover, the fact that a Minnesota defendant—the airline—was joined might suffice to justify holding the entire suit there, since the manufacturer's activities within the State would sustain suit there if good reason were shown.


But in *Gray v. American Radiator & Standard Sanitary Corp.* [81] decided after Hellriegel, Trippe, and Insull, the Illinois Supreme Court authoritatively construed section 17 to apply to a situation remarkably like that of Hellriegel. Defendant manufactured a safety valve in Ohio and sold it to an independent company outside Illinois; the valve was attached to a water heater in Pennsylvania and sold later to an Illinois consumer. An Illinois woman was injured in an explosion allegedly caused by the negligence of the manufacturer in Ohio. Process was served in Cleveland. The supreme court held that, in accordance with the traditional choice-of-law test, a "tortious act" had been committed "in this State" because the injury occurred here. [82] The test of the statute's scope, the court reaffirmed, was "the extent permitted by the due-process clause," [83] and due process was not violated by Illinois jurisdiction in this case. "As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable here for any damage caused by defects in those products." "Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State." [84] Apparently agreeing with this assessment of the validity of the

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77 270 F.2d 821, 823 (7th Cir. 1959).
78 16 Ill. 2d 426, 158 N.E.2d 73 (1959) (discussed in text accompanying notes 194-219 infra).
79 273 F.2d 166 (7th Cir. 1959).
81 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
82 Id. at 435-36, 176 N.E.2d at 762-63. The court also noted that a tort is committed for purposes of the statute of limitations when injury is suffered. *Ibid.*
83 Id. at 436, 176 N.E.2d at 763.
84 Id. at 442, 176 N.E.2d at 766.
The issue of the amenability of foreign manufacturers to suit for injuries arising from defective manufacture has been much considered. Connecticut, Nevada, North Carolina, and Wisconsin have explicitly provided for jurisdiction in specified cases. There have been a number of decisions on the subject under statutes such as that of Illinois respecting the commission of a tort within the State, and also under older provisions for jurisdiction over corporations doing business in the State of injury. The cases with which I am concerned all deal with injuries arising out of defects created by acts outside the forum State; but several factual variations are presented.

When the harmful product is sold by the defendant to a purchaser in the State of injury as a result of continuous business activities, even continuous solicitation of orders, within that State, there is ample basis for jurisdiction under the general doing-business statutes without regard to where the alleged negligence took place. It has also been held, in cases where there has been continuous solicitation, that a tort was committed in the State, and the North Carolina Supreme Court has said that such a case was just what the legislature had in mind in enacting its product-liability provision. Similar sales resulting from isolated solicitation by an agent of the defendant in the forum State may give more difficulty under the doing-business statutes, but should be no problem under statutes providing jurisdiction over isolated torts committed in the State. So long as an agent of the defendant has physically entered the State to promote the sale of the offending goods, there is no serious constitutional problem; as *Hanson v. Denckla* demanded, the defendant has conducted activities in the State, although the cause of action did not arise solely from acts of the agent in the State but required in addition other acts committed elsewhere.

92 In Mueller v. Steelcase, Inc., 172 F. Supp. 416 (D. Minn. 1959), jurisdiction was denied although there had been "some" solicitation of orders within the State. It was not clear whether the goods in issue had been sold through such solicitation.
There is a deep split of authority, however, on the question of jurisdiction in product-liability cases in the absence of solicitation, sale, or delivery by the defendant's agents within the State of injury. In such cases, jurisdiction has usually been denied under the old doing-business statutes. In considering jurisdiction under single-act or product-liability statutes, several factual variants should again be distinguished. The strongest case for jurisdiction is one in which the defendant itself shipped the product into the forum State, and the plaintiff was an outsider to the transaction. The equities seem clearly to favor permitting the plaintiff to sue in his own State; he has done nothing to connect himself with the seller's State, while the seller has voluntarily introduced something into the buyer's State, knowing that a risk of injury was created. But some courts have refused jurisdiction even here under broad jurisdictional statutes. In Mann v. Equitable Gas Co., a Texas company had sold pipe to the plaintiff's employer for use in West Virginia. The court refused jurisdiction over an action brought against the seller for personal injuries when the pipe exploded in West Virginia, holding as in Hellriegel that the West Virginia single-tort statute required "that the alleged tortfeasor, or his agents . . . [be] in West Virginia at the time of his act, which is alleged to have resulted in the tort." The North Carolina Supreme Court has held that State's explicit product-liability statute unconstitutional in a comparable defamation case. The Connecticut, Nevada, and Wisconsin statutes, which also expressly permit suit though the defendant never sent agents into the State, have not been tested. But Illinois is not alone in upholding jurisdiction in such cases. Oklahoma has gone perhaps even further, and the Minnesota Supreme Court, rejecting an earlier federal decision, has held its single-tort provision to apply, and to be constitutional as applied, to cases of injury to third parties resulting from direct shipments to the forum State, without the aid of agents there.

83 E.g., Ex parte Emerson, 270 Ala. 697, 121 So. 2d 914 (1960).
84 209 F. Supp. 571, 574 (N.D. W.Va. 1962). The court did not say whether the sale had been solicited in the State, or where delivery had been made.
86 See note 86 supra. The New York legislature, by excepting defamation cases from its single-tort statute because of the likelihood that offending material would enter the State despite its remote origin, implied that other New York injuries resulting from acts outside the State were intended to be included. See notes accompanying N.Y. Civ. Prac. Law & Rules § 302 (1963).
88 Mueller v. Steelcase, Inc, supra note 92. This decision went even further than most, for it held it irrelevant that there had been solicitation by defendant's agents in Minnesota.
No Supreme Court authority is directly in point. Tort jurisdiction has been upheld in single-act cases such as *Hess v. Pawloski*, but only when the defendant or his agent has entered the State in person. The nearest favorable decision was *McGee v. International Life Ins. Co.*, where the Supreme Court, with an inconclusive but generally approving citation of an Oklahoma product-liability case, upheld California's jurisdiction over an action by the beneficiary of a California insured against an out-of-State insurance company whose only contact with the State had been the mailing of the policy in suit into the State and the receipt elsewhere of premiums mailed in California by the California insured: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." But here *Hanson v. Denckla* poses a serious obstacle. The Court there stressed that *McGee* concerned "an activity that the State treats as exceptional and subjects to special regulation" and announced the requirement that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State." It is certainly a permissible reading of *Hanson* that the defendant or its agent must be physically present in order to "conduct activities" in the State; and the Seventh Circuit Court of Appeals has declared that *Hanson* limited *McGee* to insurance cases.

*Hanson v. Denckla*, however, is not a statute and should not be read as such. The holding of the case was that the Delaware trustee of a trust established by a Pennsylvania settlor was not subject to the jurisdiction of a Florida court. The trustee's only connections with Florida had been by correspondence after the settlor moved there subsequent to the establishment of the trust. I am inclined to agree with the dissent of Mr. Justice Douglas that jurisdiction could have been sustained by considering the trustee in privity with the settlor, since under the terms of the trust it was "purely and simply a stakeholder or an agent holding assets of the settlor to dispose of as she designated." However, on the Court's view

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100 274 U.S. 352, 47 Sup. Ct. 632 (1927).
102 Id. at 223, 78 Sup. Ct. at 201.
104 The Supreme Court of Washington has so read *Hanson*. Tyee Constr. Co. v. Dulien Steel Prods., Inc., ——Wash.2d ———, 381 P.2d 245, 251 (1963) (dictum).
106 357 U.S. at 263, 78 Sup. Ct. at 1245. Professor Leflar says this description overlooks the fact that the trustee had already paid out the disputed funds, Leflar, *Conflict of Laws*, 1958 Survey of American Law, 34 N.Y.U.L. Rev. 20, 32 n.75 (1959). But since apparently there was no suggestion of a breach of trust, it seems the trustee had no interest in the outcome. Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 257-58 (1959).
that the trustee should be treated as independent, it was easy to find that it had insufficient contacts with Florida. Not only had it never been there; it had not, as had the defendant in *McGee*, voluntarily entered into a business relationship with a resident of the forum State. Once the settlor, who retained substantial control over the trust res, moved to Florida, the trustee had no choice but to deal with her there or to resign. It is arguable that its refusal to resign was a voluntary acceptance of a business connection with Florida; but, in view of the alternative, the case is certainly not on all fours with *McGee* even apart from the insurance aspect.

The suggestion that *McGee* should be limited to matters (such as insurance, securities, and highways) in which the State has some "special" regulatory interest is no more persuasive when the defendant acts outside the State than when he acts inside. I cannot see why a State is any less strongly concerned to ensure that its injured residents recover compensation from those who injure them than from those who promise to pay for injuries caused by others. The decisions determining the liability of a tort defendant for acts in one State according to the law of another State in which injury occurred are legion. When the State's interest justifies choice of its substantive law, the question of jurisdiction is half solved. The essence of the second requirement, imposed by *Hanson*, is that the defendant must have taken voluntary action calculated to have an effect in the forum State. This was satisfied in *McGee* by the voluntary acceptance of an obligation to insure a California resident; it is met in the product-liability cases by shipping a product into the State for use or consumption there. When a manufacturer—or any other seller—knowingly sends something into a state for his own economic gain, it does not seem unjust to expect him to answer there for the consequences. It would be odd if in a federal system Illinois could not enter a judgment against a man who stands in Indiana firing his gun at people in Illinois; the man who ships in unwholesome food is in no different situation. Nor does his position differ materially from that of the defendant, as in *Nelson v. Miller*, whose servant is sent into the State and causes injury there. In either case, having set into motion a force which he intends to send into the State, he may fairly be required to defend an action there. One of the best arguments I have seen for upholding jurisdiction in this kind of case was


108 See notes 48-57 supra and accompanying text.


made by a federal judge in Minnesota in holding against jurisdiction. The
defendant, a Michigan firm, had sold a defective chair to a Minnesota re-
tailer, who had sold it to the plaintiff. The court declared that Minnesota
law would be applicable; that most of the witnesses were in Minnesota;
that trial in Minnesota would be less burdensome to the defendant than
trial in Michigan would be to the plaintiff; and yet, said the court with
apparently no tongue in cheek, to hold trial in Minnesota would be so unfair
as to deprive the defendant of property without due process of law! 111

In Gray itself, the defendant’s connection with Illinois was somewhat
more tenuous. The defendant manufacturer had not itself shipped the
defective valve into Illinois, but had sold it to another company outside
the State, and it had later been shipped into Illinois. The difficulties pre-
pared in such a case can be illustrated by a familiar choice-of-law decision.
In Scheer v. Rockne Motors Corp., 112 plaintiff sought to impose liability
under an Ontario law upon a New York automobile owner whose em-
ployee had driven the car negligently in Ontario, causing injury. Judge
Learned Hand, despite his attachment to the rules of the Restatement of
Conflicts, 113 did not simply uphold application of the law of Ontario as
the locus of the tort. The case was remanded for a determination whether
the defendant had authorized his agent to drive into Ontario; only if he
had, could the law of that Province be applied. This is not to read the
technicalities of frolic and detour into the choice of law; it is to recognize
the injustice of imposing unforeseeable liabilities. 114 This principle has
been recently restated by the Supreme Court of California in a suit
brought to forfeit the interest of a Texas mortgagee in an automobile used
to transport narcotics in California. A California statute providing for
forfeiture unless the mortgagee made a character investigation was held
inapplicable because, despite the California policy of soliciting the aid
of moneylenders in curtailing the narcotics traffic, it would be unfair
to subject the Texas company to a liability it had no reason to anticipate. 115
A similar philosophy should limit the applicability of section 17 to suits
involving injuries within the State due to conduct elsewhere. The Oregon
automobile owner who lends his car to a friend to drive around the block
can hardly anticipate that the car will make its way to Illinois; the owner
can scarcely be said to have “purposefully availed [him]self of the privi-

112 68 F.2d 942 (2d Cir. 1934).
113 See Louis-Dreyfus v. Paterson S.S., Ltd., 43 F.2d 824, 826 (2d Cir. 1930).
114 Since New York law was the same as Ontario’s, Professor Cavers is quite right
that the result was absurd, Comment, The Two “Local Law” Theories, 63 HARV. L.
Rev. 822, 828 (1950). Liability for the bailee’s acts was certainly no unfair surprise on
the facts.
lege of conducting activities" in Illinois, and it would seem as improper, and as unconstitutional, for Illinois to assert personal jurisdiction as for Illinois law to be applied against the absent owner.

Product-liability cases too can perhaps be imagined in which the entry of products into the State would be such a surprise that the assertion of jurisdiction would be unfair. A European manufacturer who sells all his products at retail in Europe might be in such a position if one of his customers later moved to Illinois and was injured there because of negligent manufacture. But it cannot be said that a manufacturer places himself in this innocent position whenever the distribution of his product is handled by independent middlemen. The Texas brewer of bunion potions whose "independent" distributors resell his wares to Alabama druggists may not have "agents" in Alabama to subject him to jurisdiction under the doing-business statute, but he cannot plead he is not knowingly responsible for the introduction of the product there. The explicit product-liability statutes make provision for protecting the hypothetical innocent manufacturer from unforeseeable liability. Nevada asserts jurisdiction over any foreign concern which "manufactures, produces, makes, markets or otherwise supplies directly or indirectly any product for distribution, sale or use in this state;" Wisconsin requires that "products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade;" Connecticut and North Carolina require that the defendant produced or distributed the goods "with the reasonable expectation that those goods are to be used or consumed in this State." The unsuspecting manufacturer whose product strays into Nevada or Wisconsin may be held not to have supplied it for distribution or use in Nevada and his product not to have been used in the ordinary course of trade in Wisconsin. The best and most explicit of these provisions, that of North Carolina, has been held unconstitutional by that State's supreme court in a case quite like Gray. But the North Carolina court did not base this decision on the fact that the sale by the defendant had been to an independent middleman outside the State, for it had earlier denied jurisdiction even when the defendant shipped its product directly into North Carolina.

118 Ex parte Emerson, supra note 93; cf. Dooly v. Payne, 326 F.2d 941 (5th Cir. 1964).


119 Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961). The Iowa court has declared its doubts that such a case would present a tort committed in the State, Hill v. Electronics Corp. of America, 253 Ia. 581, 113 N.W.2d 313 (1962) (dictum).

118 Putnam v. Triangle Publications, Inc., supra note 95. See note 95 supra and accompanying text.
In *Gray*, the Illinois Supreme Court held it immaterial that the defendant had not itself introduced the defective valve into Illinois, because the valve had been "presumably sold in contemplation of use here." 120 I do not think the court, in its use of the word "presumably," was sliding carelessly over the failure of the plaintiff to prove the critical fact that use here should have been contemplated. Rather the court seems to have meant that a company which manufactures in this country parts which are to become components of water heaters later to be marketed in the United States should be presumed, as a matter of law, to have contemplated their eventual sale and use in Illinois, and that consequently a suit here cannot be said to come as an unfair surprise. I quite agree with the court.

The two decisions of the Seventh Circuit denying jurisdiction in cases of tort injury in Illinois from activities outside the State—*Trippe* 121 and *Insull* 122—did not involve liability for injury due to defective goods. *Trippe* was a suit for unfair competition in catalogs mailed into Illinois; *Insull* for libel in newspapers mailed here. Reliance on the rule of the *Restatement of Conflict of Laws*, as suggested by the supreme court in *Gray*, would prescribe an overruling of both these decisions. The injury to plaintiff's business in the former occurred in Illinois, where his business was located; the injury to plaintiff's reputation in the latter occurred, according to the *Restatement*, wherever he had a reputation and the statements were read 125—including Illinois. There seems little doubt that *Trippe* is doomed, based as it was on the principle, rejected in *Gray*, that the defendant or his agent must be physically present within the State. But Illinois, as pointed out in *Insull*, follows the rule that the tort of libel is committed (for purposes of the statute of limitations) not whenever and wherever the material is read, but when and where it is first published.126 Thus, if the Illinois courts adhere strictly to the principle that a "tortious act" is committed in this State only when the last act necessary to establish liability occurs here, *Insull* may very well still be the law.

This would be unfortunate. The supreme court's discussion in *Gray* of the place of the last necessary event should be read simply as demonstrating that injuries resulting from acts in other States can be embraced within the permissible meaning of the statutory phrase "tortious act within this State." Legislative intention, the court said, "should be de-

122 *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959).
123 *Restatement, Conflict of Laws* § 377, example 7 (1934).
termined less from technicalities of definition than from considerations of general purpose and effect. A rigid rule requiring the last event necessary for liability to occur in Illinois, no less than the rule rejected in Gray, "would tend to promote litigation over extraneous issues concerning the elements of a tort . . . , whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature." The aim of the statute, as the court stated, was to establish jurisdiction wherever constitutionally possible; if it is possible in some cases where the last necessary event does not occur in Illinois, the purpose of the statute should not be frustrated by tying its interpretation to an irrelevant standard. For the words no more require that the last necessary event occur here than that the defendant be present; the commission of a "tortious act" in Illinois ought to be construed, in the light of the statutory purpose and the requirements of due process, to embrace all tort actions in the outcome of which this State can assert a constitutional interest and in which it would not be unfair to subject the defendant to Illinois jurisdiction. This, I submit, is the essence of the opinion in Gray.

Judged by this standard, Insull must go. An Illinois resident claimed to have been harmed by articles mailed into Illinois by defendants. The Illinois libel laws are clearly designed to protect Illinois residents against defamation; Illinois has an interest in applying those laws in such a case. It is no more unfair to subject a newspaper publisher than a valve maker to suit here when both have deliberately caused their wares to be consumed in Illinois. It is no answer that only a relatively few copies of the papers in Insull were sent into this State; one copy is enough to damage a reputation and to constitute a tort. Consideration of libel cases tends to become befogged by thoughts of press freedom and by the common feeling that the recent $500,000 verdict rendered in Alabama against the New York Times was the result of an unfair or biased trial. But a defendant who has received an unfair trial is entitled to a reversal on grounds of due process, and perhaps


1948 was too soon to repeal a statute allowing a defendant to remove a case to a federal court when it appears that "from prejudice or local influence, he will not be able to obtain justice" in a state court.\textsuperscript{128} Assuming, as the Supreme Court has held, that there are libel laws which do not infringe the freedom of the press,\textsuperscript{129} it is difficult to understand why a State in which libels are circulated should lack power to enforce those laws for the protection of its residents.\textsuperscript{130} A quite different problem would be presented by the publication of matter defaming an Illinois resident, or invading his privacy, but with no distribution, or with only accidental and unforeseen distribution, in Illinois. This State's interest in protecting the plaintiff would still exist, and there is authority in the field of invasion of privacy that the tort occurs where the plaintiff resides.\textsuperscript{181} But I doubt that the assertion of power in such a case could pass the test of a voluntary conduct of activities in the forum State, or that in general it would be fair to the defendant.\textsuperscript{132}

With regard to the propriety of a test based on the place of the last necessary event, consider also this example. An Illinois housewife buys in Chicago a can of tuna fish packed by a California defendant and shipped to Illinois for sale. She takes the fish to the Indiana Dunes for a picnic, consumes it there, and is stricken there with botulism due to the defendant's negligence. The \textit{Restatement} test in such cases points to the State in which the offending material took harmful effect, in this case


\textsuperscript{130} Mississippi has recently provided, and I think validly, for civil and criminal jurisdiction over "persons who are responsible for the importation" of obscene matter into the State from outside. Miss. \textit{Code Ann.} § 2674.16 (Supp. 1962). Putnam v. Triangle Publications, Inc., \textit{supra} note 95, where jurisdiction in a case similar to \textit{Insull} was denied, was not limited to libel cases; the court there cited Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), with apparent approval. But see Leflar, \textit{Conflict of Laws}, 1960 Survey of American Law, 36 N.Y.U.L. Rev. 36, 42 (1961), suggesting that freedom of the press may make jurisdiction harder to sustain in defamation cases. Both Maine and New York except defamation from their single-tort statutes, Maine requiring physical injury, ME. \textit{Rev. Stat. Ann.} c. 112, § 21 (Supp. 1961). New York made the exception because of the likelihood that offending matter would enter the State despite its remote origin. See notes accompanying N.Y. \textit{Civ. Prac. Law \& Rules} § 302 (1963).

\textsuperscript{131} Donahue v. Warner Bros. Pictures, Inc., \textit{supra} note 125.

\textsuperscript{132} See Cleary & Seder, \textit{supra} note 126, at 609-10.
Indiana. But why should the Illinois court decline jurisdiction? Illinois policy requires the compensation of its resident, injured through the sale of contaminated food in Illinois, no less because she became ill 30 miles beyond the State line. It would not be seriously suggested that application of Illinois law would be unconstitutional.\textsuperscript{133} And in no sense can the fact that the fish was eaten in Indiana make it more or less inconvenient or unfair to the defendant to be sued in Illinois, a State into which he knowingly sent his wares for purposes of profit.\textsuperscript{134} Conversely, Indiana—the place of the wrong according to the Restatement—would not be a singularly appropriate forum in the same situation. Its only interest in the outcome would appear to be the accumulation of a fund for payment of possible medical creditors, and there is good authority for a restrained construction of tort laws to avoid frustrating a possibly greater interest in such a case.\textsuperscript{135} On the other side of the scale, the defendant may control the distribution of his product, and may never have shipped goods into Indiana; we have once again a case in which his only connection with the suggested forum is the rather remote possibility that a can sold in another State may find its way there—not too far a cry, perhaps, from the case of the car owner whose bailee unexpectedly drives too far.

In interstate product-liability cases either the plaintiff or the defendant must litigate in a foreign court. In the cases I have so far discussed, the balance of convenience—more properly, perhaps, the balance of equities—clearly has favored permitting the plaintiff to sue in his home State: Either the plaintiff has been an innocent stay-at-home injured because the defendant shipped his product into the State, or he has been a stay-at-home buying goods from a seller who sent his agent into the buyer's State to negotiate the sale or to make delivery. When the plaintiff is a purchaser, and when the sale is negotiated entirely by correspondence or telephone with both buyer and seller remaining in their own States, the equities seem more evenly balanced; perhaps it is relevant to

\textsuperscript{133} Cf. Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 564 (2d Cir. 1962), where even the dissenters conceded the power of New York to apply its wrongful-death statute in the case of a New Yorker who had boarded a plane in New York and died in a crash in Massachusetts.

\textsuperscript{134} A court in Minnesota has upheld jurisdiction in a quite comparable case. Lockheed sold an airplane to Northwest Airlines for use in flights to and from Northwest's Minnesota home. On a flight from Minneapolis, a man was killed when the plane crashed in Indiana. The case was made somewhat stronger by the presence of a Lockheed service representative in Minneapolis, while in two respects the case was weaker than the hypothetical one I have posed: The plaintiff was a nonresident, and the suit was based on foreign law. Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216 (D. Minn. 1962).

ask who initiated or solicited the transaction. The Oklahoma Supreme Court, however, has upheld jurisdiction—and under an archaic doing-business statute at that—over an action for damages when defective goods were shipped into the State pursuant to an order placed by the purchaser with an independent broker in Oklahoma and forwarded to the defendant. When the seller has remained at home, and the buyer has gone to his place of business to negotiate the sale or to accept delivery, the equities are again altered: It is difficult to suppress the feeling that the buyer can be fairly expected to return to the State where he did business if he wishes to bring suit.

This analysis would support the decision of the Fourth Circuit Court of Appeals in the leading case of Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc. Suit was brought to recover damages for the shipment of defective goods into North Carolina pursuant to an order placed after a visit by the buyer's agent to the seller's place of business in New York, and the court held the North Carolina product-liability statute unconstitutional as applied. Judge Sobeloff did not base his decision on the buyer's New York adventure; his opinion was broad enough to preclude jurisdiction in any case of an isolated shipment into the State, at least so long as the seller accepted the offer at home and had not sent agents into the forum State. In Erlanger Mills the buyer's contact with the seller's State seems sufficient to require the buyer to return there as defendant if sued for the price; it is arguable that it so affects the equities as to require the buyer to return also when he is plaintiff.

More extreme cases can easily be imagined. Judge Sobeloff based his opinion in Erlanger Mills partly on his apprehension that a contrary decision would support jurisdiction in Pennsylvania over a California retailer who has sold defective tires in California to a Pennsylvania tourist, who suffers injury in Pennsylvania. This is an interesting and difficult case. The State of injury certainly has an interest in the application of its law to permit recovery. The defendant acted with knowledge—from one look at the license plates—that his tires would be taken to that State and create a risk of injury. He therefore cannot claim surprise or deny that he had voluntary contact with the State of injury; and yet the assertion of juris-

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137 239 F.2d 502 (4th Cir. 1956).
diction is likely to seem unfair. An even more extreme case has recently arisen in North Carolina. A South Carolina garageman was allegedly negligent in repairing a South Carolina automobile in South Carolina, and the plaintiffs were injured in North Carolina as a result. A federal court held the assertion of jurisdiction in the State of injury unconstitutional.\(^{140}\) Because the defendant dealt with a resident of his own State, jurisdiction seems still more doubtful than in Judge Sobeloff’s case, although because of the mobility of automobile owners the garageman could reasonably have anticipated that injury might occur outside of South Carolina. A similar problem would be presented by a New Jersey suit arising out of an over-the-counter sale by Macy’s in New York to a customer who did not reveal that he lived in New Jersey.

Judge Sobeloff was right on one point: It is not easy to rationalize a distinction between these cases and Erlanger Mills. The distinction is not between manufacturers and retailers; I would have no trouble upholding jurisdiction over Macy’s for defective goods shipped into the forum State. Perhaps one factor is that the tire dealer or repairman “is set up to do business locally whereas the other depends upon foreign consumption.”\(^{141}\) But does the fact that Macy’s also does a large mail-order business distinguish between suits against Macy’s and against merchants with only local business, if both suits arise out of over-the-counter sales? The fact which seems of most significance is that in the tire, auto-repair, and over-the-counter cases, the customer was in the defendant’s State both to make the purchase and to accept performance, while in cases such as Erlanger Mills the product was shipped into the forum State, by the defendant or by some distributor, before it reached the plaintiff. Again, the equities are shifted more heavily in favor of the defendant; perhaps, still more strongly, it is not inequitable to require the plaintiff to return to the seller’s place of business to present his claim.

But this is to state the wrong conclusion. The question is not whether the seller's State is a more appropriate forum than the buyer's; the question is whether suit in the buyer’s State is so unfair to the defendant as to amount to a denial of due process. It is not a complete answer to say that the seller’s State would be a fair forum for the plaintiff, because perhaps both are fair. Due process does not always single out the most appropriate State as the only one in which suit can be maintained. Moreover, while the relative equities as between the parties are of importance in determining the question of jurisdiction, they are not the sole consideration. State interests are also important. Whether the seller came to North Carolina or the buyer went to New York, the


\(^{141}\) Developments 929.
seller voluntarily, and for purposes of profit, sold goods which he well knew might create a risk of harm in North Carolina. Defective California tires, Professor Cardozo has pointed out, are as dangerous in North Carolina as California drivers;\textsuperscript{142} the interest of North Carolina in applying its laws to protect people within that State from such risks, or to compensate them for damages suffered, is indisputable. This is no less true if the buyer traveled to the seller's State to pick up the goods, to negotiate the purchase, or to do both. I am therefore convinced that the application of North Carolina law to any of these cases would be constitutional, so long at least as the defendant knew with whom he was dealing. Does it not follow that North Carolina is entitled to provide a forum in which to assure the enforcement of its laws? It is strange that a defendant can claim a constitutional right to be free from the application of a law that can be constitutionally applied. In this day of modern transportation and communication, as the Illinois court stressed in \textit{Gray},\textsuperscript{143} the inconvenience and expense of trial in a distant State, while by no means negligible, may not be so overwhelming as to make it fundamentally unfair to subject a businessman to suit as a cost of doing business with a known resident of the forum State.

I have overstated the case somewhat. \textit{Hanson v. Denckla} makes it clear that there may be occasions when a State cannot supply a forum to ensure the enforcement of admittedly constitutional laws,\textsuperscript{144} and this is probably correct. I am not convinced that it would be unconstitutional to apply Illinois law to an action for assault brought by an Illinois resident attacked by an Ohioan in Ohio, if the defendant knew where the plaintiff lived, but I would be disturbed at the prospect of an action brought in Illinois. Arguably, if a seller has sufficiently confined his activities to his own State—I make no effort to define "sufficiently"—he should be entitled to have his own court decide whether to apply the buyer's State law rather than the seller's, which is equally constitutional. Otherwise there may be no way in which the seller's State can enforce its laws for the protection of its businessmen, and arguably, as emphasized in \textit{Erlanger Mills}, interstate business may be discouraged.\textsuperscript{145}

There is one relevant fact in the case of the South Carolina garage-man which I have not yet mentioned: The suit was brought not by the South Carolina owner but by two North Carolina residents, one a bailee and the other a guest.\textsuperscript{146} This puts a different cast on the equities of the


\textsuperscript{143} 22 Ill. 2d at 442-43, 176 N.E.2d at 766 (1961).

\textsuperscript{144} 357 U.S. at 253, 78 Sup. Ct. at 1240.

\textsuperscript{145} 239 F.2d 502, 507 (1956).

\textsuperscript{146} Easterling \textit{v. Cooper Motors, Inc.}, supra note 140.
situation, as I have already discussed. More pointed than the case of these plaintiffs, who at least had gone to South Carolina to borrow the car, would be the case of an injured North Carolina pedestrian. As between the innocent plaintiff, who may have had nothing to do with the business arrangement in South Carolina, and the garageman, who knew that if he were negligent someone in North Carolina might get hurt, who should have to travel to litigate? As far as the plaintiff who is not a party to the business transaction is concerned, it is irrelevant whether a product is taken into the State by the defendant himself or by someone else. Such a plaintiff could sue in Illinois under the Gray case if defective tires had been brought into the State by an independent contractor or distributor; he should also be able to sue in Illinois if the tires are brought in by an individual who bought them from a California retailer. I think this is true even in Easterling, where the services were rendered to a resident of the garageman's State. And if this is so, what is the reason for denying jurisdiction when the injured plaintiff is the man who bought the tires in California? Not that the interest of the State of injury is insufficient; the interest is the same. Not that the defendant's acts are insufficient to justify bringing him to the State of injury in all cases, for he could be brought there by a third party. But only that the plaintiff's activities in the seller's State are sufficient to subject him to suit there. And this, I submit, does not make it unfair to entertain suit in the State of injury as well. I agree with Professor Cardozo that jurisdiction in that State would be no violation of due process even in Judge Sobeloff's extreme example of the California retailer and the Pennsylvania tourist. On the other hand, had the suit in Easterling been brought by the owner of the repaired car, I would find no compelling justification for allowing suit outside the State of common domicile.147

I should add that I by no means feel that my conclusion with respect to the tire problem is necessary in order for me to disagree with the decision in Erlanger Mills. The hypothetical tire case clearly comes within the meaning of the North Carolina statute, for it arises from the "distribution of goods...with the reasonable expectation that those goods are to be used or consumed in this State." It would also, under the test of the last event necessary for liability, constitute a "tortious act" committed in the State where the injury occurred, if fault on the part of the seller were alleged. But we need not throw the baby out with the bath. In Erlanger Mills, the defendant shipped the defective product into the forum State; it would not have been inappropriate to uphold the eminently fair assertion of power there even if one were convinced the tire case would be unfair. Since the test is fairness in the particular case, it is scarcely necessary to decline jurisdiction in one case because jurisdiction would be unfair in another.

147 Cardozo, supra note 142, at 214-15.
While the distinction may be hard to express, it should suffice that jurisdiction in the one case offends the sense of justice, and in the other it does not. Similarly, the proper decision in such cases is not determinative of the correct result in *Gray*; the upholding of jurisdiction in *Gray* itself was a bold and commendable decision fully in the spirit of this bold statute and fully consistent with the due-process requirement of fundamental fairness.

"The Transaction of Any Business Within This State"

"Doing business" in the State was the constitutional test for service of process on foreign corporations before *International Shoe*; a corporation "doing business" in the State was held to have impliedly consented to suits against it and to be constructively present in the State. The new section 17 speaks in language altogether too reminiscent of this outmoded theory: It provides for jurisdiction over any person in suits arising from "the transaction of any business within this State." Fortunately, the courts in construing this section have not been led astray by this linguistic resemblance; in general, Judge Campbell's view has prevailed that pre-section 17 decisions concerning what constitutes "doing business" do not govern interpretation of the new statute. In one important type of case, however, the state courts as well as the federal have been unduly restrictive in their construction of the transaction-of-business provision.

*Applicability to Individuals*

Section 17 provides for service on "any person" transacting business in this State, in person or by an agent. This is an innovation. In 1915 the Illinois Supreme Court, in *Flexner v. Farson*, refused full faith and credit to a Kentucky judgment rendered after service on the agent of a nonresident partner doing business in that State. A State's power to subject foreign corporations doing business there to suit, the court reasoned, was based upon its power to exclude them from doing business; as it had no such power with respect to individuals, it could not impose implied consent to suit as a condition of their doing business. The United States Supreme Court affirmed on the same ground. When the Court upheld service upon absent nonresident motorists in *Hess v. Pawloski*, it noted the State's power to exclude individuals from use of its highways. And when, in *Henry L. Doherty Co. v. Goodman*, the Court upheld service on the agent of a

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148 See cases and authorities cited note 13 supra.
149 IL. REV. STAT. c. 110, § 17(1) (a) (1963).
151 268 Ill. 435, 109 N.E. 327 (1915).
nonresident individual doing business in the forum State, its evident disapproval of Flexner was modified by reference to the fact that the sale of securities, in which the defendant was engaged, was also a subject of "special regulation" in which "neither her citizens nor non-residents could freely engage." Indeed, no decision of the United States Supreme Court has yet upheld state-court jurisdiction by service of process on an absent non-resident individual doing business within the State, absent a "special" regulatory interest.

Rather plainly, however, the new Illinois statute provides for such jurisdiction by the pointed reference to "any person," a phrase which, while it obviously includes corporations, still more obviously includes people. In Sunday v. Donovan, the Illinois appellate court applied the statute to an individual defendant who had become a nonresident after the cause of action arose, without adverting to the existence of an issue. Not much more attention was deserved. The State's power over a foreign corporation doing business here is not based on its power to exclude it; the State has jurisdiction over corporations engaged in nothing but interstate commerce within the State, although it has no power to exclude them. International Shoe made abundantly clear that the test of personal jurisdiction is fundamental fairness to the defendant in the light of state interests and trial convenience as indicated by the existence of contacts with the State. There is no earthly reason for limiting this test to corporations. If it is fair to subject corporations with certain business contacts with the State to suit there, it is no less so to do the same with individuals similarly situated.

Continuous Business Activities by Agents in the State

Cases such as Sunday v. Donovan and People ex rel. Hoagland v. Streeper, in which the defendant was engaged in running a cigar jobbing business or a toll bridge in Illinois, would have presented no difficulty before section 17 was passed. But prior to International Shoe not every foreign corporation with agents engaged in continuous activity in the State was amenable to suit there. The most conspicuous exception was that expressed

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159 See Sobeloff, supra note 138, at 207.
161 12 Ill. 2d 204, 145 N.E.2d 625 (1957).
162 See Italian-Swiss Agricultural Colony v. Pease, 194 Ill. 98, 62 N.E. 317 (1901).
by the United States Supreme Court in Green v. Chicago, B. & Q. Ry.\textsuperscript{163} and followed by the Illinois courts as a rule of due process: \textsuperscript{164} "mere solicitation" of orders to be accepted and filled from outside the State did not constitute the requisite "doing business." Rather minimal additional activities were found sufficient in later cases,\textsuperscript{165} and International Shoe itself, in which the doing-business test was repudiated as a constitutional requirement, can hardly be said to have involved anything more than continuous solicitation of orders and shipment into the State.\textsuperscript{166} There was also some authority that purchases within the State, even when made in person by the defendant's agents and "at regular intervals," could not alone constitute "doing business."\textsuperscript{167}

Cases of repeated solicitation or purchases seem to be among those to which International Shoe was particularly directed.\textsuperscript{168} "[S]o far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." \textsuperscript{169} In Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n,\textsuperscript{170} the only Virginia activities of a Nebraska insurance company held subject to suit in Virginia for failure to comply with the Virginia blue sky law respecting insurance of Virginia risks were that its policyholders within the State had recommended new members and that it had "caused claims for losses to be investigated" there. This case is practically on all fours with Pemberton v. Illinois Commercial Men's Ass'n,\textsuperscript{171} in which the Illinois Supreme Court had refused to enforce a Nebraska judgment for lack of jurisdiction. The only limitation I find of weight in Hanson v. Denckla is that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State,"\textsuperscript{172} a qualification that is fully satisfied whenever there are agents working for the corporation within the State, whether or not they have power to contract and whether or not they make sales as well as purchases.

\textsuperscript{163} 205 U.S. 530, 533-34, 27 Sup. Ct. 595, 596 (1907).
\textsuperscript{165} E.g., International Harvester Co. of America v. Kentucky, supra note 157.
\textsuperscript{166} 326 U.S. 310, 313-15, 66 Sup. Ct. at 157.
\textsuperscript{168} See Cleary & Seder, supra note 126, at 608 (solicitation).
\textsuperscript{169} 326 U.S. at 319, 66 Sup. Ct. at 160.
\textsuperscript{171} 289 Ill. 99, 124 N.E. 355 (1919). Suit in Pemberton was by a beneficiary, not by the State; and no entry had been made to adjust claims.
\textsuperscript{172} 357 U.S. at 253, 78 Sup. Ct. at 1240.
A number of courts, since International Shoe, have construed statutes in the old language of "doing business" to extend beyond the old limits, and there is no indication that the Illinois courts will do otherwise with the somewhat different language of section 17. One federal district court has upheld service on a corporation for a suit arising out of the operation of an office in Chicago for the solicitation of orders, rejecting arguments based on old cases and suggesting no factors to place the case within the old rule of "solicitation plus." And the Illinois appellate court has upheld jurisdiction of a suit based solely on a contract to purchase goods made in connection with a visit by the buyer's agent to Illinois. These sensible decisions will doubtless be followed; the new statute has freed Illinois from the technicalities of the "doing business" rule with respect to suits arising from transactions within this State.

**Isolated Business Transactions in the State**

Although I have found no Illinois authority squarely so holding, it was quite frequently asserted that isolated transactions by a foreign corporation did not constitute "doing business" within the State. Even in International Shoe the Court declared that "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it" and emphasized that the company's Washington activities "were neither irregular nor casual. They were

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174 Haas v. Fancher Furniture Co., supra note 150.


176 In Darling & Co. v. E. Rauh & Sons' Fertilizer Co., 242 Ill. App. 375 (1st Dist. 1926), the court denied jurisdiction over a foreign corporation which had "occasionally" solicited purchases or sales of goods to be sent into or out of the State. This is not solid authority for a rule requiring more than "isolated acts" in the State, for solicitation would not have constituted "business" even if continuous. See notes and text 162-67 supra. In Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 244 Ill. 354, 91 N.E. 480 (1910), it was held that a foreign corporation did not "transact any business" in Illinois by making an isolated sale of five carloads of cement to an Illinois buyer. The question there, however, was not whether the foreign corporation could be sued, but whether it had forfeited the right to sue in Illinois by transacting business in the State without qualifying to do so. Some courts, quite properly, required less activity to subject a corporation to suit than to require it to qualify, even before International Shoe. E.g., Colorado Iron-Works v. Sierra Grande Mining Co., 15 Colo. 499, 25 Pac. 325 (1890).

systematic and continuous . . .” In *Travelers Health* the Court pointed out that “the Association did not engage in mere isolated or short-lived transactions.” In upholding a product-liability suit based on the tort provision of section 17, the Illinois Supreme Court, in the *Gray* case, covered itself by the assertion that “defendant does not claim that the present use of its product in Illinois is an isolated instance . . . [I]t is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State.” Moreover, in the four States which have added to their doing-business statutes provisions for jurisdiction over persons who “perform any character of work or service in this State,” no court seems to have suggested that these words broadened the jurisdictional standard, and there have been decisions under the Mississippi statute holding an isolated business transaction insufficient, without mention of the new language. But *McGee v. International Life Ins. Co.* did concern an isolated transaction; and the Court held it sufficient that “the suit was based on a contract which had substantial connection with that State.” Moreover, there is authority that an isolated sale in the forum State can constitute “doing business” under an unamended statute, and several States have enacted statutes explicitly providing for jurisdiction, often only in suits against corporations, arising out of contracts made.

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178 326 U.S. at 318, 320, 66 Sup. Ct. at 159, 160. For the former proposition the Court cited Rosenberg Bros. & Co. v. Curtis Brown Co., *supra* note 167, which seemed to rely as much on the fact that the activities were purchases as that they were infrequent; for the Court said that “visits on such business” would not suffice “even if occurring at regular intervals.” 260 U.S. at 518, 43 Sup. Ct. at 171. The Court in *International Shoe* cited this rule as a matter of history and did not imply its approval.

179 339 U.S. at 648, 70 Sup. Ct. at 930.


182 *Chapman Chem. Co.* v. *Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949), is no exception, despite the hint to the contrary in *Developments* at 1002.


185 E.g., *S. Howes Co.* v. *W. P. Milling Co.*, 277 P.2d 655 (Okla. 1954). It was even probable that the defendant had no agent in the State at all.

or to be performed within the State. A Maryland statute to this effect
was upheld in *Compania de Astral v. Boston Metals Co.*, a case concern-
ing a single transaction.

The Illinois statute is not explicit on this, and the “transaction of any
business” could have been held by an unsympathetic court to be a
synonym for the earlier restrictive term “doing business.” Again in the
spirit of the statute’s purpose to expand jurisdiction to the modern con-
stitutional limit, however, the courts have consistently upheld jurisdiction
under section 17 over an isolated business transaction with the requisite
connection to this State. In *Berlemann v. Superior Distrib. Co.*, an action
for breach of warranty was sustained upon service made on a foreign cor-
poration in Colorado. The defendant had sent its agent into the State to
solicit the order for vending machines which had then been shipped to
plaintiff here. The company had also agreed to “obtain the ‘initial locating
contracts’” and to send a mechanic to Illinois to train plaintiff’s employees
in maintenance of the machines. The appellate court held that these con-
tacts were more than the minimum required by due process and did not con-
sider whether or not the defendant had engaged in other activities beyond
the single transaction in suit. Decisions by the appellate court in *Kropp
Forge Co. v. Jawitz* and by the Seventh Circuit in *National Gas Appliance
Corp. v. AB Electrolux* are to the same effect.

These decisions are plainly correct. A single transaction resulting in
injury or loss to a person within the reach of the policy of an Illinois law
is sufficient to give the State an interest in providing a forum for his compen-
sation, whether the suit be called “tort” or “contract.” When a foreign
corporation contracts to sell goods to an Illinois businessman, as in *Berle-
mann* and *National Gas Appliance*, or to purchase machines from him as in
*Kropp Forge*, the Illinois policy of holding people to their bargains is called
into play. It does not seem unfair to the defendant, in the light of this inter-
est to require him to defend in Illinois a suit arising out of such a contract,
when he has sent his agents into the State to solicit or to conclude the agree-
ment. That the defendant has also conducted other and unrelated activities in
the State may or may not make it more convenient for him to defend here,

1963).


190 37 Ill. App. 2d 475, 186 N.E.2d 76 (1st Dist. 1962).

191 270 F.2d 472 (7th Cir. 1959).
but the basic requirement that he make voluntary contact with the State is satisfied without such additional contacts. The nonresident motorist and the insurer of a risk within the State may be compelled to defend suits arising from isolated transactions; 192 I have elsewhere expressed my conviction that these cases cannot be limited to matters in which the State has an allegedly "special" regulatory interest. 193

Business "Within This State"—Physical Presence of Agents

In Grobark v. Addo Mach. Co.,194 two Chicago businessmen sued defendant, a New York corporation, for breach of their contract as exclusive distributors of defendant's products in Greater Chicago. The contract had been concluded by mail between New York and Chicago, after negotiations with defendant's president in Chicago. The appellate court, ignoring this contact, held that the defendant was not transacting business in Illinois simply because the plaintiffs were selling its wares here, since plaintiffs were not agents but independent distributors. 195 Over the dissent of Justices Davis and Schaefer, the Illinois Supreme Court affirmed, largely on the same ground: Plaintiffs "were not transacting business for the defendant in Illinois; they were transacting business for themselves." 196 International Shoe was distinguished because in that case "defendant's salesmen were employed in the State of Washington." 197 No reference was made to the possible significance of the negotiations held in Illinois, and the court seems not to have considered whether the making of the contract between plaintiff and defendant constituted the transaction of business. Later, in Saletko v. Willys Motors, Inc., 198 the appellate court denied jurisdiction over an action for breach of a contract of sale, negotiated and concluded by correspondence and telephone between the plaintiff in Illinois and the defendant in Ohio. The meaning of Grobark, said the court in Saletko, was that "the performance of jurisdictional acts, by defendant or its agents while physically present in Illinois, is essential" under the transaction-of-business clause of section 17.

Grobark itself, it is clear, went somewhat beyond that, for although it

193 See notes 48-57, 102-11 supra and accompanying text.
194 16 Ill.2d 426, 158 N.E.2d 73 (1959).
195 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958). The court also held that the alleged contract was void for want of consideration. The supreme court found it unnecessary to decide this. It is irrelevant to whether business was transacted in Illinois.
196 16 Ill.2d at 437, 158 N.E.2d at 79.
197 Ibid.
did not discuss the point, the court's opinion reveals that there had been negotiations in Illinois. It is quite unfortunate that the court did not discuss the nature of these negotiations or why it deemed them insufficient for jurisdiction. The obscurity of the opinion makes it difficult to assess the impact of the decision on other situations involving less than continuous activities within the State. Certainly the court did not intend to repudiate the principle that jurisdiction may be based upon a single act, for its cast no recognizable aspersions on that aspect of its own earlier decision in Nelson v. Miller; indeed, the court acknowledged the Nelson holding that the legislature intended to exhaust its constitutional power. But must the entire transaction be consummated in the State? What is the effect of Grobark on Berleman, where an order was solicited in Illinois, a servant was sent here to train maintenance men, and the defendant promised, apparently, to install the machines he sold? On Kropp Forge, where an agent came to Illinois to inspect turbines and generators and either concluded the sale here or acted "in furtherance of it"? This decision came after Grobark, and the court was not persuaded that the cases were similar. In National Gas Appliance Corp. v. AB Electrolux, the Seventh Circuit, which has not been noted for any conspicuous tendency toward an expansive reading of the statute, upheld jurisdiction in a contract action based upon "negotiations, conferences, contacts and meetings between the agents of plaintiff and defendant. A substantial part thereof occurred in the State of Illinois." An agent had come to Illinois to discuss engineering details and also, the court was convinced, to persuade the plaintiff to contract. The court cited Grobark with no apparent apprehension that it cast doubt on this result.

Were the Illinois activities of the defendants in these cases more substantial than those in Grobark? In Tyee Constr. Co. v. Dulien Steel Prods., Inc., the Supreme Court of Washington held that jurisdiction may be unfair even when the defendant's agent has entered the State, if his presence there was "incidental, rather than essential, to the transaction." The defendant in Tyee was a broker hired to sell generators owned by a Washington company; it had sent agents into the State to inspect the generators and to observe dismantling and loading operations after the sale. Suit was by the loading contractor, whose agreement was with the seller, to recover

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196 11 Ill.2d 378, 143 N.E.2d 673 (1957). See text accompanying notes 36-65 supra.
200 16 Ill.2d at 431, 158 N.E.2d at 76.
202 Kropp Forge Co. v. Jawitz, supra note 175.
203 270 F.2d 472, 475 (7th Cir. 1959).
for additional labor costs; the seller filed a cross-claim seeking to hold the broker responsible. Without necessarily approving the result in Tyee, I agree that the casual presence of an agent in the State should not be the determinative factor. Cases can be imagined in which negotiations in the State prove fruitless and a contract results much later as a result of correspondence alone; in such a case the negotiations in the State are perhaps too remote or preliminary to be relevant. But this does not appear to have been the case in Grobark, for the plaintiff alleged that "all negotiations leading up to the contract" occurred in Chicago, \(^{205}\) and apparently this was not denied. The defendant argued that the transaction must "be completed entirely within this state by an agent or employee of the defendant physically located within the state," \(^{206}\) and perhaps this is what the court held.

But I do not think so; I think the courts were quite right in Kropp Forge and in National Gas Appliance in brushing Grobark aside although it could not be said that the entire transaction took place in Illinois. The court in Grobark never addressed itself to the relevant question. The plaintiff did point out that the defendant's agent had come to Chicago to negotiate, \(^{207}\) but he did not stress it; his principal argument seems to have been that the defendant was transacting business in Illinois because the plaintiff was marketing its product here. \(^{208}\) The court contented itself with refuting this proposition. It is difficult to believe that the court would have reached the same result had the controversy been focused on the proper question. The making of the contract itself was the transaction of business, whether or not the subsequent activities of the buyer could be imputed to the seller. When a defendant has sent an agent into the State to solicit or negotiate a contract concerning the purchase or sale of goods to an Illinois resident, it is difficult to deny that it has transacted business here or that it has "avail[ed] itself of the privilege of conducting activities within the forum State." In sum, I do not believe Grobark casts serious doubt on jurisdiction in cases in which an agent of the defendant has entered the State for purposes significantly and proximately related to an agreement, purchase, or sale; but after Grobark it cannot be safely said that jurisdiction will be held proper whenever an agent of the defendant has entered the forum State in relation to the matter in suit.

But Grobark probably means at least what the appellate court says it means: There can be no "transaction of business" in Illinois unless the defendant or his agent performs some act while physically within the State. \(^{209}\)

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\(^{206}\) Id., Supplemental Answering Brief, p. 14.

\(^{207}\) Id., Petition for Leave to Appeal, pp. 25, 27; Brief, p. 3.

\(^{208}\) Id., Petition for Leave to Appeal, pp. 25-27, 30; Brief, pp. 10, 13-14, 17.

The Growth of the Long Arm

The Supreme Court of Washington, relying on Hanson v. Denckla, has made this a rigid requirement, and it is the same test once proposed by the federal courts in Illinois for product-liability and other tort cases. But the Illinois Supreme Court's decision in Gray v. American Radiator & Standard Sanitary Corp., discussed above, cut the ground from under Grobark. There, it will be recalled, jurisdiction was upheld in a product-liability case over a foreign manufacturer which had sold its goods outside Illinois, "presumably" in contemplation of resale and use in this State. Gray was in two respects a weaker case for jurisdiction than was Grobark: No agent of the defendant had entered the State, and the product had been shipped into the State by someone else. Yet jurisdiction was upheld, for reasons which I have described as sufficient; Grobark was not dignified by so much as a citation.

In Gray, it is true, jurisdiction was claimed because of the "commission of a tortious act" in Illinois rather than because of the "transaction of any business." But Grobark was not based on the language of the statute; it held the assertion of jurisdiction would be unconstitutional. Moreover, the language of the two provisions does not require different results; if a tort can be committed in Illinois although the defendant is not here, business can be transacted here in the same way. Ample justification of a more expansive reading of the business provision can be found again in the Restatement of the Conflict of Laws, relied on by the court in Gray. Just as a tort has often been deemed committed where the injury occurs, so a contract has often been deemed made where the offer is accepted; this could be whenever an offer is mailed into the State and an acceptance mailed back, although the defendant has never left Ohio.

Nor is there any basis in constitutional policy for a distinction in this regard between tort and contract actions. This is most clearly illustrated by


212 16 Ill. 2d at 438, 158 N.E.2d at 79.

213 RESTATEMENT, CONFLICT OF LAWS § 326 (1934). I find no negative implication as to jurisdiction over other kinds of business transacted by correspondence from the explicit statutory provision for jurisdiction in insurance cases concerning all risks within the State. The statute was enacted after McGee; insurance was one field in which it was certain that physical entry into the State by an agent of the defendant was not required. With respect to other business, the question was (and is) an open one, and a statute intending to open the full breadth of state power ought not be read to have closed the door to a judicial determination of unresolved situations.
cases such as *Morgan v. Heckle*,\(^{215}\) in which a federal district court denied jurisdiction in a suit for damages when a delivery of seed did not comply with a contract negotiated by telephone between the plaintiff in Illinois and the defendant in Tennessee. Had it been alleged that the seed had been negligently manufactured, *Gray* would permit jurisdiction for a tort committed by shipping the seed into Illinois and causing a loss here.\(^{216}\) Can it be seriously contended that the interest of Illinois is less, or the burden on the defendant greater, because the allegation was a breach of warranty? If it is not unfair to call in a defendant in tort when he has shipped something defective into the State, it is no more so on the same facts because the suit is based on a breach of promise.

*Morgan*, therefore, is doomed by *Gray*. *Grobark* and *Saletko*, moreover, are not substantially different in terms of policy. Both were suits against foreign corporations for the refusal (among other things, in *Grobark*) of the defendant to deliver goods which the defendant had promised to sell the plaintiff for distribution in Illinois. The defendants in those cases did not send goods into the State as in *Gray* and *Morgan*—indeed, that was the reason for complaint. But it would be passing strange to hold that a defendant is better off if he refuses altogether to perform his obligation than if he performs it unsatisfactorily—that he can immunize himself from service of process by breaking his contract. Illinois has a policy of securing to her businessmen the benefit of their bargains, as well as one of compensating them for injuries; the former is no less vital to the health of the Illinois economy than the latter. The significant contact rendering it fair to the defendant that he be sued here is not the shipping of goods into the State so much as the promise to do so; by making this promise, he has purposefully availed himself of the benefits of doing business with Illinois people who are in Illinois.\(^{217}\) The Wisconsin statute expressly allows jurisdiction in cases arising from shipments into the State by the defendant and from promises by the defendant to ship goods in, regardless of where the promise was


\(^{216}\) *Gray* was a stronger case in that the plaintiff was a stranger to the transaction, while the plaintiff in *Morgan* had negotiated by mail with the out-of-State seller. But this should not change the result. See text accompanying notes 134-47 supra.

\(^{217}\) In *Saletko*, supra note 209, the Illinois buyer was to pick up the goods in Ohio. The defendant did not promise to ship them into Illinois, and the case is therefore one step removed from *Grobark*. On the other hand, it is one step short of a case such as *Easterling v. Cooper Motors*, Inc., 26 F.R.D. 1 (M.D.N.C. 1960), where the buyer was at the defendant's place of business not only to receive the services but to negotiate and complete the contract; for in *Saletko* the contract was concluded by mail and telephone while the plaintiff was in Illinois. Whatever the correct disposition in *Easterling*, I think either contracting long distance or delivery into the plaintiff's state should suffice; who hired the trucker is not important. See text and notes 134-47 supra, and 224-52 infra.
made;\textsuperscript{218} and a Minnesota federal court has refused to dismiss a suit very similar to Grobark, saying the contacts with the forum State seemed sufficient.\textsuperscript{219}

Gray also sheds considerable doubt, if there was no doubt before, on the correctness of the Seventh Circuit's decision in Orton v. Woods Oil & Gas Co. \textsuperscript{220} There the court disallowed service under section 17 in an action brought by an Illinois lawyer and an Illinois business engineer for fees earned in performing work in Illinois for the defendant corporation respecting its incorporation and the registration of its securities. The corporation had no other contacts with Illinois. The decision was partly based on the fact that the original arrangement for the work done was necessarily entered into by defendant's predecessor, since the corporation was not yet in existence, and that the work done was a prerequisite to, rather than a transaction of, the defendant's business. The first suggestion is quite lacking in merit, and the second savor of the mildewed subtleties sought to be abolished by the new statute.\textsuperscript{221} If the corporation is liable at all on its promoters' contracts, it must be because of a subsequent ratification or adoption of the bargain; this surely constitutes a voluntary association of itself with the State of Illinois and makes the corporation equally subject to suit here as the original employer. By the phrase "transaction of business" the legislature meant to exhaust its constitutional power; surely it cannot be relevant to the interest of the State or to the justice of summoning the defendant whether a contract which it makes for the performance of services here concerns dealings prior or subsequent to incorporation. If it is suggested that "business" does not include the relations between an employer and its employees, that is rejected by two better decisions under section 17,\textsuperscript{222} and it cannot withstand analysis in terms of policy. This leaves only the fact that the contracts of employment were apparently negotiated

\textsuperscript{218} Wis. Stat. Ann. §§ 262.05(5) (c), and (e) (Supp. 1963).

\textsuperscript{219} McMenomy v. Wonder Bldg. Corp., 188 F. Supp. 213 (D. Minn. 1960). Some negotiations had taken place in Minnesota; the contract seems to have been concluded elsewhere; and defendant had sent an agent to Minnesota to adjust a claim. The Minnesota court has also upheld jurisdiction over a nonresident who sold stock to a Minnesota plaintiff by telephone and mail without ever entering the State. Paulos v. Best Securities, Inc., 260 Minn. 283, 109 N.W.2d 576 (1961). Since securities were involved, those seeking to limit the value of this case as precedent could point out that, as in McGee, which Paulos closely resembles, a "special" regulatory interest was affected.

\textsuperscript{220} 249 F.2d 198 (7th Cir. 1957).

\textsuperscript{221} Cf. Automotive Material Co. v. American Standard Metal Prods. Corp., 327 Ill. 367, 158 N.E. 698 (1927). Since this decision concerned the requirement of a license to do business, it was probably right, but too likely the same would have been held with respect to jurisdiction over the foreign company.

without the presence of any agent of defendant in Illinois, the fact deemed immaterial by Gray. Even without Gray, it would seem odd that a defendant could be sued in Illinois by third parties who had dealt with these employees without the presence of any agent of defendant in Illinois, the fact deemed immaterial by Gray. Even without Gray, it would seem odd that a defendant could be sued in Illinois by third parties who had dealt with these employees but not by the employees themselves for their own compensation. And after Gray, it seems plain that the presence of an agent in the State should not be required when the defendant has contracted with a resident of this State for work to be performed here. Wisconsin has made express provision for jurisdiction in such cases.

I have referred to the "rule" for determining the place of contracting in order to illustrate the flexibility of the language of section 17. I think it altogether praiseworthy, however, that no court construing this provision has suggested that business is transacted in Illinois for purposes of jurisdiction whenever, or only when, a contract or sale is completed in Illinois according to this rule. The Maryland legislature, for example, in generalizing from the nonresident-motorist situation to the assertion of jurisdiction over "every cause of action arising out of a contract made within this State or liability incurred for acts done within this State" was on the right track, but it chose a connecting factor which has involved it, as the Illinois court warned against in Gray, in "litigation over extraneous issues," with unfortunate results. Park Beverage Co. v. Goebel Brewing Co., for example, was an easy case in which to sustain jurisdiction. Not only had the defendant shipped bad beer to the plaintiff in Maryland, but the defendant's agent had gone to Maryland to solicit the contract. Yet, although this would have satisfied even the Seventh Circuit jurisdiction was denied by a court not unsympathetic to expanded personal jurisdiction because the

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224 This distinction was drawn with apparent approval in Rosenberg v. Andrew Weir Ins. Co., 154 F. Supp. 6, 10 (D. Md. 1957), a case similar to Orton and reaching the same result.

225 Wis. Stat. Ann. § 262.05(5) (Supp. 1963): "In any action which:

"(a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

"(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; . . . ."

226 79 A.2d 157 (Md. 1951).

227 National Gas Appliance Corp. v. AB Electrolux, 270 F.2d 472 (7th Cir. 1959).

228 See Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 108 A.2d 372 (1954) (dissenting opinion), upholding jurisdiction over a Panama company which had concluded a contract for the purchase of ships from a Maryland plaintiff. Defendant's agents had come to Baltimore for negotiations and to inspect the ships; the court held the contract made when the plaintiff signed in Maryland.
contract was made when the plaintiff's offer was accepted in Michigan.\textsuperscript{229} Conversely, due process is not always assured by the fact that the contract was "made" within the State. \textit{Kaye-Martin v. Brooks},\textsuperscript{230} decided by the Seventh Circuit, was an action for damages for nonperformance of an agreement to sell stock. The plaintiffs were residents of New York, the defendant of Arkansas. Negotiations had begun in New York; the parties met in Chicago during a convention and concluded a tentative agreement; the final contract was signed in Texas, and service was made there. The Seventh Circuit quite correctly held there was no jurisdiction under the transaction-of-business provision: It was "fortuitous" that "some of the events leading up to the execution of the final contracts in Dallas" occurred in Illinois. The court did not bother deciding whether the contract was made when tentative agreement was reached in Illinois or only when the final papers were signed in Texas, and for this it should be commended. Assuming the contract to have been made in Illinois, the case falls within the language of the Connecticut, Maryland, and North Carolina statutes. Yet, even on this assumption, Illinois had no legitimate interest in the outcome of the case. Neither party was an Illinois resident or engaged in normal business activities in Illinois; performance was not to take place here; the property involved was not in Illinois. It would have been simply meddlesome—and unconstitutional\textsuperscript{231}—for Illinois law to be applied to frustrate the interests of the States whose policies were affected. In the absence of any such interest, it is difficult to justify requiring the defendants to return to Illinois and defend,\textsuperscript{232} as they would have had to do if the plaintiff had done regular business in Illinois. In some cases of this sort, Illinois might be a convenient forum for witnesses, but this would be no less true if the offer had been made here and accepted in Texas. In any case, the technical location of the last act necessary to create a binding obligation is in no sense relevant to the interest of Illinois or to the justice of bringing in the defendant.

The plaintiff's residence (or his place of business), a factor often found


\textsuperscript{230} 267 F.2d 394, 398 (7th Cir. 1959). In \textit{Baughmar Mfg. Co. v. Hein}, 44 Ill. App. 2d 373, 194 N.E.2d 664 (3d Dist. 1963), the court also refused jurisdiction although the contract in suit had been signed in Illinois. But if, as seems likely, the plaintiff manufacturer was operating in Illinois, the decision seems doubtful. \textit{Kropp Forge Co. v. Jawitz}, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962).


in single-contract statutes,\textsuperscript{238} is more important than the place of contract-
ing, for in a great many cases the State of plaintiff's residence will have an
interest in protecting him from injury and in securing him the benefit of his
bargain. But residence of the plaintiff is not always necessary in tort\textsuperscript{234} and
may not be in contract; for example, it might not be inappropriate to sub-
ject to suit in Illinois a nonresident who has contracted to build a summer
home for another nonresident in Illinois. Nor by any means would I grant a
State jurisdiction over every defendant who enters into a transaction with
one of its residents, and none of the statutes does so. It seems clear that it
would be unfair to subject an Ohio driver to suit in Illinois because the man
he ran down in Cleveland lived in Chicago. Such a suit would not seem
appreciably more fair if the accident occurred during a Shriners' convention
which the defendant knew had brought numerous nonresidents into Ohio,
or even if the defendant knew before the accident that the plaintiff lived in
Illinois. In contract cases as well as in tort, the defendant's knowledge that
he is dealing with an Illinois resident does not seem sufficient in all cases.
It certainly would seem unfair to subject a defaulting purchaser of the
\textit{Encyclopedia Britannica} to suit in Illinois if the purchase had been consum-
ated by a salesman who visited the buyer in his home in New York, even
if the purchaser had known the \textit{Britannica} had its principal offices in Chi-
cago. Here, even more clearly than in Judge Sobeloff's case of the Cali-
ifornia tire dealer and the Pennsylvania tourist,\textsuperscript{239} there is something to the
notion that a party who has gone into a foreign State to do business with
one of its residents can be expected to go back to bring suit.

But unfairness is not always lacking when plaintiff and defendant, each
in his own State, negotiate by correspondence. In the very interesting case
of \textit{Conn v. Whitmore},\textsuperscript{239} a Illinois horse fancier wrote to the defendant in
Utah, offering to sell him several horses. The defendant had a friend inspect
the horses in Illinois, accepted the offer by mail from Utah, and sent a
servant to Illinois to pick up his purchases. Said the Utah Supreme Court in
refusing to enforce an Illinois judgment against the buyer for the price:
"[I]t was not the defendant Utah resident who took the initiative by going
into Illinois to transact business, nor did he engage in any activity resulting
in injury or damage there. Quite the contrary, it was the plaintiff resident
of Illinois who proselyted for business in Utah . . . ." In \textit{Fourth North-}


\textsuperscript{239} See notes 66-73 \textit{supra} and accompanying text.

\textsuperscript{239} Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir.
1956). See notes 135-47 \textit{supra} and accompanying text.

\textsuperscript{236} 9 Utah 2d 250, 255, 342 P.2d 871 (1959).
western Nat'l Bank v. Hilson Industries, Inc.,\textsuperscript{237} the plaintiff, a Minnesota company, had shipped goods to defendant in Ohio after correspondence initiated by mailed inquiries from the defendant's predecessor and a visit by the seller's agent to the buyer's offices in Kentucky. Suit was brought by the seller to recover on promissory notes later executed by the defendant during a meeting in Ohio with agents of the seller; the Minnesota court refused to sustain jurisdiction. These are hard cases. To simplify the picture, consider the situation in McGee v. International Life Ins. Co.\textsuperscript{238} A Texas company was held subject to jurisdiction in California in an action arising out of a policy issued after correspondence to a California resident. I have no hesitation in applauding this result, but I would find it unfair to subject the policyholder to suit in the company's home State,\textsuperscript{239} although that State has an interest in safeguarding its companies that cannot be said to be less than California's in protecting its risks, and although the insured's mailing of documents and premiums was as much a knowing association with that state as was the company's mailing matter to him.

The reasons for this difference are quite elusive; I have great sympathy for the efforts of the Utah and Minnesota courts to translate a subjective sense of unfairness into concrete distinguishing factors. The matter of the initiative was mentioned in both Conn and Hilson; the Minnesota court distinguished its product-liability decisions upholding jurisdiction because in those cases the nonresident defendant had been the "aggressor."\textsuperscript{240} This alone is not entirely satisfactory. In Hilson the negotiations had been begun by a feeler mailed to the plaintiff by the defendant; and in any event I would not be convinced that McGee could be sued in Texas if it were shown that the insured rather than the company had initiated the transaction. The Minnesota court also stressed that the plaintiff in Hilson was no defenseless individual but a corporation.\textsuperscript{241} But I do not think this can be carried very far. The corporation which buys a defective machine should be able to sue just as if it were an individual; and I would feel no differently in the McGee situation if the insurer had been a partnership or an individual. A more promising distinction is the fact that the company entered into this transaction for profit and the insured did not; defending in California can be said to be a cost of doing business for profit. Indeed something of the sort may be implicit in the concept of transacting "business," and the Idaho

\textsuperscript{237} 264 Minn. 110, 117 N.W.2d 732 (1962).
\textsuperscript{238} 355 U.S. 220, 78 Sup. Ct. 199 (1957).
\textsuperscript{241} \textit{Id.} at 117, 117 N.W.2d at 736.
statute seems to incorporate this distinction expressly.\textsuperscript{242} But this implies a possibly different result if the insurance covered premises used for business, and I am not certain that I would allow jurisdiction even there. This distinction too would require dismissals in product cases in which I think suit could be upheld. Finally, \textit{Hilson} suggested that a distinction should be drawn between nonresident sellers and nonresident buyers.\textsuperscript{243} At first glance this appears to make little sense, but it has precedent in the reluctance of courts before \textit{International Shoe} to hold that purchases within the State constituted "doing business."\textsuperscript{244} In addition, the Minnesota court argued, the nonresident buyer does not enjoy the benefits and protections of local law to the same extent as the foreign seller. This is rather tenuous. There may be some merit to the distinction in that the seller by sending something into the State creates a risk of injury here, but I would not follow this so far as to deny jurisdiction over sellers for nonperformance.\textsuperscript{245} The distinction has utility in that it serves to separate the mail-order house from its customers and the insurance company from its policyholders. But it is difficult to explain in policy terms, and again it should not be carried so far as to result in a denial of jurisdiction in cases such as \textit{Kropp Forge Co. v. Jawitz},\textsuperscript{248} in which the buyer's agent came into the state to persuade the resident seller to sell. 

\textit{Conn} is not far from \textit{Kropp Forge}, since the buyer in \textit{Conn} sent agents to Illinois to inspect and to pick up the horse. These contacts are perhaps too incidental, to adopt the test of the Washington court in \textit{Tyee},\textsuperscript{247} to overbalance the fact of the seller's initiative. In the case of a nonresident seller I would not deny jurisdiction because the buyer, after correspondence, received delivery in the seller's State.\textsuperscript{248} But the Wisconsin statute would have upheld jurisdiction in \textit{Conn} because the buyer promised the plaintiff to "receive within this state . . . goods . . . or other things of value."\textsuperscript{249} \textit{Conn} could easily have gone either way. \textit{Hilson} may be a harder case for jurisdiction; although the buyer was a business corporation and had taken the

\textsuperscript{242} "The transaction of any business within this state" in a statute copied from Illinois is defined as "the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation." \textit{Idaho Code Ann.} § 5-514(a) (Supp. 1963).

\textsuperscript{243} 264 Minn. at 117, 117 N.W.2d at 736.

\textsuperscript{244} See text accompanying notes 166-67 supra.

\textsuperscript{245} See notes 216-19 supra and accompanying text.

\textsuperscript{246} 37 Ill. App.2d 475, 186 N.E.2d 76 (1st Dist. 1962). See text accompanying notes 189-93, and 208-09 supra.

\textsuperscript{247} See text accompanying notes 204-05 supra.

\textsuperscript{248} But see Salerko v. Willys Motors, Inc., \textit{supra} note 209. See note 217 supra.

initiative by mail, its agents had never gone to the seller's State. The decision was probably right, although the facts were still not so extreme as the case of the everyday mail-order consumer, posed by the court in Conn.

No magic formula leaps to mind to solve all these cases. In each case all the factors must be considered—among them whether the defendant is buyer or seller; whether he or the plaintiff is in business; who took the initiative; whether the defendant sent agents into the plaintiff's State, and if so under what circumstances. The relative abilities of the plaintiff and the defendant to litigate in a foreign forum may also be relevant; as the court said in Conn, to permit the mail-order house to bring suit on small claims in its home state may effectively deny the customer the right to defend. Finally, care should perhaps be taken at the outer limits of fairness not to uphold jurisdiction where the court feels that to do so might discourage people from engaging in interstate transactions.

I do not think the difficulty of formulating objective justifications for felt distinctions signifies either that the fairness test is a poor one or that an artificial but simple line should be drawn short of the limits imposed by relevant policies. The essence of due process is that proceedings shall be fair; whether they are fair must be a subjective judgment based on the common sense of the judge. Such judgments must be made in other areas of constitutional law, such as in determining whether a search or seizure was "unreasonable." I have placed some emphasis on the place of performance of a contract as perhaps of more significance than the place of contracting. In a product-liability case, for example, it seems important that the defendant has shipped goods into the State. But cases can arise in which the place of performance is fully as fortuitous and as irrelevant as the place of making; the statutes providing for jurisdiction of contracts to be performed in the State, therefore, both leave gaps where jurisdiction should be asserted and assert it where it is unreasonable. Suppose, for example, that two New Yorkers agree that a loan shall be repaid when they meet in Miami on their next vacation. In the Hilson case, presenting a similar problem, the Minnesota Supreme Court refused to sustain jurisdiction over a case which it deemed otherwise inappropriate merely because the notes

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250 9 Utah 2d at 255, 342 P.2d at 875.


252 Compare the conclusion of Professor Harper with respect to the distinction between servant and independent contractor for vicarious-liability purposes, Harper, The Basis of the Immunity of an Employer of an Independent Contractor, 10 Ind. L.J. 494, 499 (1935).

253 See note 187 supra.
in suit provided for payment in Minnesota. The admirable Texas statute providing for jurisdiction over any nonresident individual or corporation "entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State." on its face would permit Sears Roebuck to sue its customer in the State where it delivered goods to a carrier for shipment, or the insurance company to sue McGee in its home State; but it would exclude an action on a debt contracted in Texas between Texans if one party were strong enough to insert a provision for payment and return just across a nearby State line, and it would not allow the nonresident to sue in Texas for default in the construction of his summer house there, unless he could allege the commission of a tort.

The more flexible language of the Illinois statute, allowing suit concerning "the transaction of any business within this State," is preferable, although it is too susceptible of construction as in Grobark requiring physical entry into the State. Where the relevant factors are so many and so elusive, ideally a statute should be phrased in terms of general policy considerations, leaving the courts a good degree of latitude in determining its applicability to new cases. Of course, it is not necessary, or necessarily desirable, for a State to exercise its full constitutional power; I would not advocate taking jurisdiction on the basis of unrestricted nationwide service even if the Supreme Court should declare that due process imposed no limitations. If there are specific cases or classes of cases in which the assertion of jurisdiction would be constitutional but appears undesirable, the legislature should make this clear. In the absence of such cases, I would approve a statute providing for jurisdiction whenever the following conditions are satisfied: (1) the forum State has a sufficient interest in the controversy to authorize the application of its substantive law; (2) the
defendant acted with knowledge of such facts that he could reasonably anticipate that his acts would have consequences within this State; and (3) the assertion of jurisdiction does not offend the concept of fair play and substantial justice in all the relevant circumstances.

"THE OWNERSHIP, USE, OR POSSESSION OF ANY REAL ESTATE SITUATED IN THIS STATE"

The first statute of this type was that of Pennsylvania, adopted in 1937, which subjected the "owner, tenant, or user, of real estate" in Pennsylvania to suit "arising out of or by reason of any accident or injury occurring within the Commonwealth in which such real estate, footways, and curbs are involved." 258 This was upheld by a trial court in a suit for damages suffered in a fall on a broken sidewalk: "It is just as important that non-resident owners of Philadelphia real estate should keep their property in such shape as not to injure our citizens as it is that nonresident owners of cars should drive about our streets with equal care." 259 The Pennsylvania statute is limited to "accident or injury" cases; it seems no more than a specialized provision for the commission of certain torts in the State. Since a landowner may commit a tort without ever entering the State, simply by permitting his sidewalks to fall into disrepair, even the Pennsylvania law requires something beyond Hess v. Pawloski to sustain it. But a person who knowingly acquires title to land has certainly no ground for complaint when asked to defend a tort suit there arising from his ownership; and I have already expressed my lack of concern in such cases for whether the defendant is within the State. 260

The Illinois property statute is not so limited; it applies to suits of any nature arising from real estate in Illinois. This may well include actions on contracts to buy or to sell land in the State, 261 on contracts to build or repair houses on Illinois land, 262 or on brokerage contracts respecting the

the acts were done, but most emphatically also on the content and policy of its laws. The State should not apply its law simply because the plaintiff is a resident, if the case is not within the law's purpose. But I would not require a determination that the forum's law in fact applies before upholding jurisdiction, any more than I would require under the Illinois statute that a tort was actually committed. Nelson v. Miller, 11 Ill. 2d 378, 393-94, 143 N.E.2d 673, 681 (1957). See text and notes 36-38 supra. It should suffice that the complaint alleges Illinois contacts adequate to support an argument that Illinois law applies.

258 PA. STAT. ANN. tit. 12, § 331 (1953).
260 Text and accompanying notes 100-11 supra.
262 Oklahoma provides for jurisdiction over owners of any interest in oil and gas leaseholds on land within the State in suits for "labor performed or materials furnished" which constitute liens. A personal judgment may be entered. OKLA. STAT. ANN. tit. 52, § 501(a) (Supp. 1963).
sale of Illinois land, as well as personal injuries and encroachments. Note-worthy is the absence of any requirement that the defendant himself, or his agent, ever have been in Illinois; a contract made in New York between two New Yorkers for the sale of Illinois land would fall within the statute's language. The interest of the State where land lies in questions affecting its title is well established, although many courts apply the law of the place of making to determine the validity of a contract to sell land; the contact of buyer and seller with the State of situs is voluntary and probably sufficient.

The Illinois statute, unlike those of Montana and Nevada, applies only to real and not to personal property. This is just as well. The New Yorkers' contract for sale of Illinois property would be a good deal more doubtful if it concerned personal property; whatever the case as to real estate, laws respecting transfers of personal property are probably designed more for the protection of the rights of the individuals involved than for the integrity of the title. A provision such as this that included personal property would also raise problems in the tort area; it might be construed to apply, for example, to the California owner of an automobile whose bailee unexpectedly drives to Illinois. In all probability most personal-property cases in which Illinois jurisdiction would be appropriate will fall within the provisions concerning torts or the transaction of business.

The Illinois real-property section has been the subject of only one reported decision. *Porter v. Nahas* was an action by a landlord against defendants, now in New York, for damage done to premises leased to the defendants in Illinois but since vacated. Probably jurisdiction could also have been sustained for the commission of a tort in the State; but the court quite correctly rejected the claim that a tenant for less than five years was not an owner, possessor, or user of real estate. Apparently the claim was based on the ancient notion that an interest in land for a term of years is

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283 See Cleary, supra note 261, at 368. Cf. Tyee Constr. Co. v. Dulien Steel Prods., Inc., ——Wash.2d——, 381 P.2d 245 (1963), in which jurisdiction over a broker who had sold personal property located in Washington was denied.

284 E.g., RESTATEMENT, CONFLICT OF LAWS § 215 (1934).


286 MONT. REV. CODES ANN. 93-2702-2B(1)(c) (Supp. 1961); NEV. REV. STAT. § 14.020 and § 14.030 (1961). The Nevada provision is not expressly limited, as are the others of this sort, to actions arising from the use of the property, but for constitutional reasons it should be so construed.


288 Wisconsin has certain specific provisions applicable to personal property within the State, but they are carefully limited. WIS. STAT. ANN. §§ 262.05(6)(b),(c) (Supp. 1963).

person property. This is a ridiculous contention in the context of the purposes of section 17; the duration of the estate has nothing to do with the justice of making the defendant return, or with the State’s interest in redressing injuries. Indeed one of the types of cases which make the provision particularly appropriate is an action against a former tenant, now departed, to recover unpaid rent. A comparable situation respecting personal property, in which jurisdiction would also be proper, is an action by the Illinois lessor of an automobile for nonpayment of charges. Probably this could be considered the transaction of business in Illinois, even if the defendant had rented the car for pleasure rather than profit.270

“Contracting To Insure Any Person, Property or Risk Located Within This State at the Time of Contracting”

The Commissioners on Uniform State Laws in 1938 promulgated an Unauthorized Insurers Act, which among other things provided for jurisdiction over foreign insurance companies in actions concerning policies issued to citizens or residents of, or companies doing business in, the forum State.271 A number of States have adopted this or similar provisions; it was a similar California provision which was upheld in McGee v. International Life Ins. Co.272 The Illinois statute is somewhat different; it authorizes suit when the policy covers property in Illinois owned by a nonresident not doing business here. Wisconsin has taken a still different tack, permitting insurance suits either if the insured was a Wisconsin resident “when the event out of which the cause of action is claimed to arise occurred” or if “the event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person insured resided.”273

Since there have been no Illinois or Wisconsin cases dealing with these provisions, a detailed comparative analysis seems premature. All three statutes, in accord with McGee, make it irrelevant where the contract was made or whether the company sent agents into the State. Suffice it to say that the Wisconsin provision, patterned in part upon comparable tort and contract provisions in the Illinois and other statutes, is on more shaky ground in insurance cases. Difficult choice-of-law problems arise when in-

\[270\] Clearly enough the nonresident lessor of Illinois property, real or personal, is engaging in “business” within the State. See Armi v. Huckabee, 266 Ala. 91, 94 So. 2d 380 (1957). The lessee, unless he rents for business purposes, is less certain. Cf. Idaho Code Ann. § 5-514(a) (Supp. 1963), and notes 241-43 supra and accompanying text.


sured property is taken into another State by a nonresident, or by one who has become a resident after taking out the policy. Florida has applied her own law to an insurance policy issued to a nonresident who later brought his insured boat into Florida and suffered a loss there; but it is questionable whether Florida laws are really designed, or can fairly be designed, to apply to obligations between nonresidents concerning personal property transiently within the State. Moreover, the problem of personal jurisdiction in such a case closely resembles Hanson v. Denckla, especially if the insured has moved into the forum State after the contract was made. Like the trustee in that case, the insurer's voluntary contact was with the State where the settlor or the insured lived at the time; and, even more clearly than in Hanson, where the trustee could resign presumably without any breach of obligation, the company could not avoid its contract without liability. It is arguable that an insurer of personal property, like the manufacturer of goods in Gray v. American Radiator & Standard Sanitary Corp., should anticipate in this mobile society that the property may be moved into another State, especially when the property is an automobile or a boat. Watson v. Employers Liab. Assur. Corp. is close authority for this; but there is still a requirement of forum-State interest which may not be satisfied when the injury is not to one of its residents by the foreign property, but to the property itself. And even if the movement of personal property can fairly be anticipated, there is a more serious question whether the same is true of a change of residence; Hanson v. Denckla seems rather formidable authority that it is not, at least for jurisdictional as contrasted with choice-of-law purposes. Accordingly, I think the Wisconsin provision goes too far in extending to cases in which neither the risk nor the insured was located or resident in the State when the contract was made. I am inclined to favor the Uniform Law's requirement of residence in the State, properly in-

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275 The Fifth Circuit held the application of Florida law unconstitutional where not only did the loss occur in that State but the insured had moved there after taking out the policy. Sun Ins. Office Ltd. v. Clay, 265 F.2d 522 (5th Cir. 1959). The Supreme Court sent the case to the Florida courts for a determination of state law, stating that the constitutional question was a difficult one. 363 U.S. 207, 80 Sup. Ct. 1222 (1960). The Florida court held its law applied, 133 So.2d 735 (1961), and the Fifth Circuit has reasserted its view that as so applied the law violates due process. 319 F.2d 505 (1963). A petition for certiorari has been filed. 32 U.S.L. Week 3103 (1963). See B. Currie, The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws, 28 U. Chi. L. Rev. 258, 290-94 (1961).
279 See Reese & Galston, supra note 232, at 257.
terpreted to require residence at the time of contract, for that seems to assure in most cases both a State interest (but query, when the insured has since moved away) and fair notice to the defendant. The Illinois provision for a risk in the State at the time of insurance commendably avoids unfair surprise to the defendant, but I am not certain the State has an interest in applying its laws for the protection of all personal property in the State, although quite frequently the choice will be appropriate.

**OTHER MEANS OF ACQUIRING JURISDICTION**

Section 17 is explicit that it in no way "limits or affects the right to serve any process in any other manner now or hereafter provided by law." This is understandable, since the legislature's purpose was to expand rather than to limit jurisdiction, and since section 17 does not exhaust the appropriate bases of jurisdiction. Now that the task of expanding the State's jurisdiction has been accomplished, however, it is appropriate to suggest that some attention be given to limiting other heads of jurisdiction which do not comport with modern conceptions of fair procedure.

The prevailing theory after *Pennoyer v. Neff* was not only that personal service within the state was necessary for jurisdiction over the person, but that it was sufficient as well. It is sufficient today in Illinois and elsewhere. Cases do not often arise in which this results in unfairness. Law professors, however, like to hypothesize a case in which a nonresident is served with summons while above the forum State in an airplane traveling between points in other States. An enterprising marshal recently accomplished this feat in Arkansas, and jurisdiction was upheld without discussion of whether the cause of action had any relation to the forum State. Since then, a nonresident temporarily in Minnesota was served a summons to defend an action arising out of an Iowa collision, and the state supreme court described his objection to jurisdiction as "frivolous." There is nothing frivolous about this objection. The assertion of jurisdiction in such cases lingers from the days when defendants were arrested and brought to court; it has no place in a system where jurisdiction is based upon fairness to the


281 Ill. Rev. Stat. c. 110, § 13.1(2) (1963), provides for service on defendants “wherever they may be found in the State,” and I have seen no indication that there may be cases in which such service will not be held to confer personal jurisdiction.

282 E.g., Wis. Stat. Ann. § 262.05(1) (Supp. 1963), makes explicit provision for this.

283 Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959). In fact the Arkansas contacts may have been sufficient.

defendant in the context of his acts and the interests of the forum State. 285

A related type of case capable of producing unfairness is the action quasi in rem, sanctioned by Pennoyer v. Neff. This differs from the perfectly reasonable assertion of power by a State in which property is located either to determine its ownership or to adjudicate an action arising out of its use or possession in the State; the property is seized and applied to a totally unrelated obligation of a nonresident defendant, even when the cause of action has nothing to do with the State. This is no more justifiable than jurisdiction based on presence of the defendant alone; the fortuitous presence of property in the State neither gives the State an interest in the outcome of an unrelated transaction nor makes jurisdiction fair to the defendant. Quasi in rem jurisdiction at its worst has been upheld by the United States Supreme Court in Harris v. Balk, 286 where the "property" of the defendant "located" in the forum State was a debt owed to the defendant by another nonresident passing through the State. In other words, one can be sued wherever his debtors happen to travel, as well as wherever he himself goes. This is not made appreciably more fair by the fact that recovery is limited to the value of the property in the forum State, 287 especially in view of the common unconstitutional practice that the defendant may enter to assert his constitutional right to contest the merits and protect his property only on condition that he surrender his constitutional immunity from a judgment binding him personally. 288 The entire notion that attachment or garnishment can give a State jurisdiction over a cause of action unrelated to the property seized, where no jurisdiction would otherwise exist, should be rapidly abolished.

There remain for consideration the provision of section 16 for service outside the State upon "a citizen or resident of this State" and that of section 13.3 for service upon "any officer or agent of . . . . . corporation found anywhere in the State." Neither of these provisions is limited to causes of action arising from activities in or connected with this State. In regard to individuals, it is not likely to be unfair to require a resident to defend an action in his home State. But residence and citizenship are different matters. Although service was upheld in Milliken v. Meyer 289 on the basis of the defendant's domicile within the forum State, there may be some question as to the fairness of this procedure in some cases. For a domiciliary or

287 Freeman v. Alderson, 119 U.S. 185, 190, 7 Sup. Ct. 165, 168 (1886).
288 See Developments at 953-55.
"citizen," in the words of the Illinois statute, need not be a resident; one who has not been in Illinois for fifty years is still a domiciliary of the State unless he has formed the requisite intention of remaining elsewhere. As for corporations, the United States Supreme Court made clear in Perkins v. Benguet Consol. Mining Co. that the scope of activities of a corporation required to subject it to suit on an unrelated cause of action is greater than that required in the case of a claim arising from activities within the State. Suit against a corporation where it does business, based upon an unrelated cause of action, is analogous to a suit against a resident of the forum State on an unrelated cause. But because many corporations do business in a great many States, this practice is subject to abuse; it would be better if fewer suits for accidents occurring in rural States were filed against railroads in distant urban centers where there is a tendency toward large jury verdicts. I doubt this rises to the level of a violation of due process, and forum non conveniens is available to check such abuses. Still it might be preferable to make statutory provision excluding such suits when another more suitable forum is available, at least unless the forum is the principal place of the defendant's business.

CONCLUSION

I find section 17 to be a commendable and well-conceived measure. In general it has been handled by the courts carefully and thoughtfully in the spirit of its purposes. I do not seriously suggest that it be altered by the legislature, but only that the courts, in interpreting it, avoid the temptation to import technical distinctions as to the place where an act has taken place and focus instead upon the relevant considerations of state interests and hardship to the defendant. The decisions of the Illinois Supreme Court in Nelson v. Miller and Gray v. American Radiator & Standard Sanitary Corp. lit the way toward a salutary broad construction of the statute; and that court's only retrogressive decision, Grobark v. Addo Mach. Co., seems in substance to have been overruled.

Finally, while I recognize that it is more difficult to induce a legislature to curtail the State's power than to increase it, some limitations of the existing statutory framework are now in order.

290 342 U.S. 437, 72 Sup. Ct. 413 (1952).