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A Reconsideration of "Long-Arm" Jurisdiction
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STUDENT SYMPOSIUM ON JURISDICTION AND VENUE:

The place of trial of an action has great significance at all stages of litigation, from service of process through execution of the judgment. In this symposium, the writers examine and criticize developments in the determinants of place of trial—jurisdiction and venue—in state and federal courts. The three notes are directed to differing aspects, pointing out differences in policy as regards the treatment of corporations and individuals and even differences in policy between federal and state courts in the treatment of corporations.

The first note criticizes the trend toward statutory and judicial expansion of jurisdiction in state courts, pointing out adverse effects which have not generally been recognized and offering a suggestion of a "best jurisdiction" theory. The second note analyses the dichotomy between the concept of federal diversity jurisdiction and the requirement that state law be applied by federal courts in diversity cases. The principal question is whether the test of "outcome determination" requires that state determinants of place of trial be applied in the federal courts, and, if so, whether that application frustrates the utility of federal diversity jurisdiction. In the last note the plight of the corporate plaintiff in federal diversity litigation is examined. The writer criticizes the position that venue may be laid only in the district corresponding to the plaintiff's state of incorporation, offering arguments for the more liberal "multi-venue option" permitting venue to be laid also in districts where the plaintiff is licensed to do business or is doing business.

A RECONSIDERATION OF "LONG-ARM" JURISDICTION

The expansion of state court jurisdiction in recent years has been discussed extensively in law review articles and comments. Most of the literature has been devoted to consideration of the probable and possible limits of expansion under the requirement of due process of law, but little attention has been given to the ultimate adverse results which may

1. The latest, most exhaustive treatment is Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909 (1960).
2. For example, fairness to the defendant is mentioned several times in Developments in the Law—State-Court Jurisdiction, supra note 1 at 934, 937, 955-65 and 1014 (1960). However, nowhere in this discussion is it pointed out that the weak plaintiff and strong defendant may be reversed in some future action so that the person for whom the laws were made might be unduly burdened by them.
follow from the trend toward increasing a state's jurisdiction over non-residents. On the other hand, many valid arguments have been made in support of jurisdictional expansion. Typical of these is the following:

As technological progress has increased the flow of commerce between states, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.

A state certainly has an interest in providing its citizens with an easily available forum in which to litigate claims at a minimum of expense. However, it should be remembered that the advantages gained by a state in enacting liberal statutes for acquiring in personam jurisdiction may be largely lost when other states follow suit. This is true because the state no longer assures a convenient forum for all its citizens but only for citizen plaintiffs, citizen defendants having become subject to the "long arm" reach of other states' liberal statutes. It would seem that a state's interest should extend to the protection of its citizens whether plaintiffs or defendants.

One of the general results of state court jurisdictional expansion is an increase in the number of forums available to plaintiffs in suits against non-residents. With the increase in number of available forums comes an encouragement of forum-shopping, which presents problems of overcrowded courts, harassment of defendants and a two-step litigation process. The two-step litigation process includes, first, a trial in the forum state and, second, execution of the judgment in a foreign state. If the defendant has property in the forum state, of course, the second step is usually unnecessary.

Although the disadvantages of the two-step litigation process may be outweighed in some cases by the location of witnesses and other means

3. The clearest recognition of the problem is in CHEATHAM, CONFLICT OF LAWS, CASES AND MATERIALS, 4th ed. at 7 (1961 Supp.):

The expansion of jurisdiction of courts since the International Shoe Company case has taken place principally in cases with relatively weak plaintiffs and strong and wealthy defendants. Will these expanded grounds of jurisdiction be sufficient when the nature of the parties is reversed with, say, a weak defendant and a powerful plaintiff, or a powerful and potential defendant that files in its own forum an action for a declaratory judgment against a weak and distant claimant?


5. For example, a non-resident individual or corporate defendant may be sued for a tort or on a contract in plaintiff's state if there has been a substantial connection with the state, i.e., one doing business act; in the defendant's home state; in any state where defendant may have property; in any state where defendant may be found; and in the federal courts if the requisite jurisdictional amount is present.

of proof in the forum state, it would seem that the process obviates one of the basic reasons for jurisdictional expansion—convenience of the parties. The plaintiff must travel to a distant forum for execution of his judgment. The defendant must either travel to a distant forum to defend or suffer a default judgment. In some cases a defendant having a valid defense on the merits may be required to default because he lacks the funds for a defense in a distant forum of the plaintiff’s choice. Public policy is certainly not served in this instance.

The balance of convenience is difficult to strike. The forum for trial should not be made more convenient for defendants than for plaintiffs. The question is thus raised as to whether the total relative convenience of the parties should determine the jurisdiction of the court.7

BACKGROUND OF STATE COURT JURISDICTION

Jurisdiction over non-resident individuals and foreign corporations has been an ever present problem in litigation. The present bases of jurisdiction are the result of expansion from the “power theory”8 expressed in Pennoyer v. Neff9 in 1877. For a court to have the power to render a judgment in rem10 it is necessary only for the property in contro-

7. It is interesting to note that in Hanson v. Denckla, 357 U.S. 235 (1958), where all the parties and witnesses were in Florida except a trustee, the Supreme Court felt that jurisdiction could not be determined by the “center of gravity.” Florida was the most convenient forum for the litigation. Compare Hanson v. Denckla, supra, with Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934).

8. The “power theory” of Pennoyer requires that there be property within the state which the court may attach in order for the court to obtain jurisdiction over a non-resident defendant. Otherwise any judgment which the court might render would be worthless. Pennoyer v. Neff, 95 U.S. 714 (1877). The “power theory,” as used in this note, is somewhat broader than the Pennoyer concept. The theory may be generally explained as a limitation of a court’s jurisdiction to cases where the court has the power to enforce any judgment it may render. This same idea is expressed by the English writer, A. V. Dicey in his General Principle No. 3 as “effective” jurisdiction. MORRIS, DICEY’S CONFLICT OF LAWS 17 (7th ed. 1958). “An effective judgment means a decree which the sovereign under whose authority it is delivered has in fact the power to enforce against the person bound by it, and which therefore his courts can, if he chooses to give them the necessary means, enforce against such person . . . .” DICEY AND KEITH, CONFLICT OF LAWS 42 (3d ed. 1922). Dicey used this “principle of effectiveness” as an attempt to explain when the English courts acquired jurisdiction over a cause. MORRIS, supra at 17.

9. 95 U.S. 714 (1877).

10. In rem actions are those which settle controversies over specific property within a court’s jurisdiction and are binding on all the world. RESTATEMENT, JUDGMENTS ch. 1, Introductory Note (1942). A major current problem involving in rem actions is the determination of the situs of intangibles. The same problem is present in regard to quasi-in-rem actions, as it is necessary to have the defendant’s property in the forum state for attachment purposes. This area of jurisdiction has retained the power concept. For a discussion of situs of intangible property see, e.g., Andrews, Situs of Intangibles in Suits Against Nonresident Claimants, 49 YALE L.J. 241 (1939); Developments in the Law—State-Court Jurisdiction, note 1 supra at 950. The expansion of quasi-in-rem actions in this note is used in the sense of methods available for a claimant to pursue a personal remedy in his home state where the defendant has property or interests.
versy to be within the geographical area served by the court. Similarly, a judgment quasi in rem\(^1\) requires only that some property of the defendant be within the geographical area served by the court. These concepts have remained relatively stable since *Pennoyer*.

The basic requirement for rendering an *in personam*\(^2\) judgment is that the individual be found and served with process within the geographical area served by the court. This is the aspect of jurisdiction that has been subject to expansion. It has been accomplished in part by statutes permitting courts to obtain *in personam* jurisdiction over individuals and corporations not present within the state under various nominal circumstances,\(^3\) as long as the basic requirement of adequate notice is met. Accompanying the statutes has been a judicial willingness to depart from the more rigid standard of the *Pennoyer* case.\(^4\)

Early in United States history, there was a distinct difference in a court's ability to obtain jurisdiction over corporations from that over individuals because of the idea that a corporation had existence only in its state of incorporation.\(^5\) There are presently few differences in the basic requirements for obtaining jurisdiction over individuals and corporations,\(^6\) except that provisions for service of process differ as a result of inherent differences between the two.\(^7\)

Indiana specifically provides several bases for obtaining jurisdiction over foreign corporations doing business within the state. Such corporations must register with the Secretary of State and name an agent within the state who is authorized to receive service of process before being authorized to do business within the state.\(^8\) If a foreign corporation does not register, it thereby consents to effective service of process on the Secretary of State for any cause of action which is connected directly or

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\(^1\) Quasi-in-rem actions are those which settle controversies as to the rights and duties of parties to particular property. *Restatement, Judgments* ch. 1, Introductory Note (1942).

\(^2\) In personam actions are those which settle controversies between parties arising out of contracts and torts and having no relationships with either real or personal property. *Restatement, Judgments* ch. 1, Introductory Note (1942).


\(^5\) See, e.g., *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), which held that a corporation's existence was limited to its state of incorporation; for a discussion of developments in corporate status in states other than the state of incorporation, see the accompanying note, *Federal Venue and the Corporate Plaintiff*.


\(^7\) For example, only individuals get divorces and only corporations are subject to the statutes requiring registration with the Secretary of State before being authorized to do business within the state. Many of the provisions for service of process and adequate notice, however, are the same or similar for foreign corporations and individuals doing business within the state.

indirectly with "any transaction" or the "doing of business" within the state by the corporation.\textsuperscript{19} It has been held that the state has the power to require that foreign corporations doing business in the state consent to the service of process on a person within the state.\textsuperscript{20}

Other sections of the Indiana statutes provide for venue in any county where the foreign corporation has assets of any kind, including credits,\textsuperscript{21} or in the case of injuries on railroads the action may be brought wherever the line runs.\textsuperscript{22} Service of process may be made effectively on the named agent, or, if none, the Secretary of State.\textsuperscript{23} If a foreign corporation has property within the state, or the cause of action arose within the state, notice by publication is sufficient when there is no agent within the state to receive service.\textsuperscript{24} Where notice by publication is permitted, personal service without the state is equivalent to publication if supported by proper affidavit.\textsuperscript{25}

A few states have enacted statutes which state additional grounds on which foreign corporations and non-resident individuals may be brought under the jurisdiction of the court. For example, Wisconsin enacted a statute in 1959 which provides for in personam jurisdiction on very liberal grounds.\textsuperscript{26} In addition the act provides for a liberal interpretation, stating, "[T]he rule that statutes in derogation of the common law must be strictly construed does not apply to this chapter."\textsuperscript{27} This act provides for what may be described as long arm jurisdiction. It is in effect "reaching" from Wisconsin into other states to obtain in personam jurisdiction over non-resident individuals and foreign corporations.

The expansion of jurisdiction which has taken place under the older statutes, such as Indiana's, has been accomplished by increasingly liberal interpretation of the "doing business" and "any transaction" provisions. The Attorney-General of Indiana wrote an opinion in which he stated that an isolated real estate transaction involving real estate in Indiana would make a foreign real estate brokerage corporation not admitted "to do business in Indiana amenable to process."\textsuperscript{28} This follows the reasoning

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27. Wis. Stat. § 262.01 (Supp. 1960). This Wisconsin statute is what this note calls a "long-arm" jurisdiction statute. The court may "reach" outside the state to obtain jurisdiction over individuals or corporations.
by the Supreme Court in *McGee v. International Life Insurance Co.*,\(^{29}\) which held that a single offer by a Texas corporation to reinsure a California resident, followed by an acceptance of the offer by the California resident was such a substantial connection with California as to give California courts jurisdiction under the applicable statute.\(^{30}\) The offer and acceptance were both by mail. *McGee* is the ultimate result of the minimum contacts standard established by the Supreme Court in *International Shoe Co. v. Washington*.\(^{31}\) Therefore the present law permits a single act within a state to be a sufficient connection to bring it under the requirement of “doing business.”

There are other cases involving insurance contracts in which the acts within the state obtaining jurisdiction over the foreign corporation were very limited.\(^{32}\) It is not certain whether jurisdiction could be similarly obtained over a foreign corporation for a tort committed by its agent. If the tort were in any way connected with the business of the corporation, or “any transaction,” it would seem to be no different from the contract cases.\(^{33}\) It is possible that a court might conclude that the tort itself was sufficient to be a “transaction” so as to give the state court jurisdiction.

In the corresponding expansion of jurisdiction over non-resident individuals more distinctions have been made as to the type of action involved. Generally an individual must be personally served within the state to be subject to the personal jurisdiction of the court.\(^{34}\) There are several exceptions to this requirement similar to those providing for jurisdiction over foreign corporations.\(^{35}\) Similar to the provisions for cor-

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31. 326 U.S. 310 (1945). This case is thoroughly discussed in Note, 29 ROCKY Mt. L. Rev. 433 (1957). The minimum contacts standard as established by Mr. Chief Justice Stone was that operations of the corporation within the state must establish “sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.” 326 U.S. 310 at 320 (1945).


33. Cf. Interstate Dispatch, Inc. v. Sears Roebuck & Co., 170 F. Supp. 170 (1958), where it was held that a non-resident plaintiff could bring an action arising out of an automobile accident in a county where one non-resident defendant had an office and successfully bring in the rest of the defendants under IND. ANN. STAT. § 47-1043 (Burns 1952).

34. E.g., IND. ANN. STAT. § 2-707 (Burns 1946); WIS. STAT. § 262.06 (Supp. 1960).

35. See IND. ANN. STAT. §§ 2-703, 2-707, 2-807, 2-813 (Burns 1946); WIS. STAT. § 262.05 (Supp. 1960). The language of the opinion of Mr. Chief Justice Stone in In-
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porations having property within the state, a non-resident who has property within the state or who has a debtor within the state is subject to attachment and garnishment for quasi in rem jurisdiction. In addition, domicile is recognized as a basis for in personam jurisdiction, regardless of the defendant's presence within the state. Domicile of one of the two spouses, whether plaintiff or defendant, is sufficient to support jurisdiction in divorce actions, but the jurisdiction is not regarded as in personam. The increased ease of becoming a domiciliary in some states has greatly increased the number of forums available for divorce actions. Non-resident motorist statutes are universal as a means of obtaining jurisdiction over individuals who have accidents while using the highways of the forum state. It can be argued that such statutes would apply to corporations whose agents have an accident in a state where the corporation has no other contacts. Other areas of jurisdictional expansion include actions involving trespass to land and tax cases of sister

ternational Shoe Co. v. Washington, 326 U.S. 310 (1945), indicated that the "minimum contacts" standard would also be applicable to individuals. For a discussion of the validity of this statement see Developments in the Law—State-Court Jurisdiction, note 1 supra at 935-37. This is supported in Ehrenweig, Pennoyer is Dead—Long Live Pennoyer, 30 Rocky Mt. L. Rev. 285, 287 (1958). However, Ehrenweig, supra at 292 states that the Pennoyer case retains validity as regards individuals not doing business in a foreign state while any action of a corporation in a foreign state would be a "doing business" act. As regards individuals doing business in a foreign state through agents, it was held as early as 1935 that constructive service of process was sufficient to obtain in personam jurisdiction. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

36. See Pennoyer v. Neff, 95 U.S. 714 (1877) (dictum) (attachment); Harris v. Balk, 198 U.S. 215 (1905). Altman v. Levine & Tany, Inc., 265 Minn. 48, 97 N.W.2d 460 (1959), held that an allegation of no funds due and owing from the garnishee to the non-resident defendant did not defeat jurisdiction. The case is noted in 44 Minn. L. Rev. 164 (1959).

37. See Milliken v. Meyer, 311 U.S. 457 (1940). This was first suggested in McDonald v. Mabee, 243 U.S. 90 (1917) (dictum).


39. The first non-resident motorist statute upheld by the Supreme Court required non-residents to file notice of consent to jurisdiction before being allowed to use the highways. Kane v. New Jersey, 242 U.S. 160 (1916). It was next held that consent to jurisdiction was implied when a non-resident used the highways, since the state could exclude the motorist altogether under its police power. Hess v. Pawloski, 274 U.S. 352 (1927). Query whether the police power of a state to regulate the public highways for the public safety would permit total prohibition of the use. Compare Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). Indiana's non-resident motorist statute at first had the defect of applying only to accidents which occurred on the highways. IND. ANN. STAT. § 47-1028 (Burns 1952). This would not cover the situations where a motorist left the highway and damaged property. A recent amendment has cured the defect in Indiana. IND. ANN. STAT. § 2-808A (Burns Supp. 1961).

40. Minnesota first broke away from the common law rule that actions involving trespass to land have to be tried where the land is located in Little v. Chicago, St. P.M. & O. Ry., 65 Minn. 48, 67 N.W. 846 (1896). Arkansas followed in Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952). Mr. Chief Justice Marshall followed the common law rule, but admitted that it was archaic and unreasonable because such an action involved merely getting a money judgment, unless title to land was involved, in Livingston v. Jefferson, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811). While many
where the cause of action itself, rather than the land or property involved, is now considered the subject matter of the action.

It is clear from the above that there has been a steady trend toward jurisdictional expansion by state courts. With this, the differences between individuals and corporations have been almost completely obliterated except in areas where there is an inherent difference.42

**ADVERSE EFFECTS OF JURISDICTIONAL EXPANSION**

*The McGee Situation Reversed.* It will be remembered that in each of the extreme cases upholding jurisdiction, the plaintiff was an individual43 or a state44 and the defendant was either an insurance company or other large corporation. Assuming that the *McGee*45 "substantial connection" test is applicable to individuals as well as corporations,46 it is possible that a large corporation or wealthy individual could obtain jurisdiction over a weak non-resident defendant. There are presently some safeguards which might prevent this, but such prevention is not assured. One's sense of justice may not be shocked by the result of the *McGee* case, but it very likely would be shocked if the situation were reversed.

Assume that the facts in *McGee* were changed in that the Texas insurance company had paid the beneficiary's claim; that it was subsequently suspected that the California beneficiary had perpetrated a fraud by failing to disclose that the insured had committed suicide; that the Texas insurance company then brought an action in a Texas court to recover the amount paid on the policy; and that Texas has a statute providing for jurisdiction over non-residents under these circumstances.47

At this point, the California beneficiary is at a definite disadvantage. The witnesses and means of proof are in California and it would be excessively expensive to defend the case in Texas. If he attempts to appear specially in Texas to litigate the question of jurisdiction, the Texas courts have held that any defects which might have been present in the court's

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41. Leflar, *Conflict of Laws*, 34 N.Y.U.L. Rev. 20, 25 (1959), states that there has always been a hesitancy of state courts to entertain tax collection cases of sister states. Although Delaware has followed this procedure as late as 1948 in Detroit v. Proctor, 5 Terry 193, 61 A.2d 412 (Sup. Ct. Del. 1948), there is an indication that this policy is becoming increasingly relaxed. See e.g., City of Detroit v. Gould, 12 Ill.2d 297, 146 N.E.2d 61 (1958); Leflar, *supra*; 7 DePaul L. Rev. 243 (1958).

42. See note 17 supra.

43. *Supra* note 29.

44. *Supra* note 31.

45. See text following note 29 supra.

46. See note 35 supra.

47. It could be argued that the insured had a substantial connection with Texas by his acts of accepting the offer of insurance from Texas and mailing premiums to Texas.
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If he suffers a default judgment in Texas, he takes the great chance that the judgment will be executed successfully in California. He may collaterally attack a Texas default judgment in California on the issue of jurisdiction, but if he loses he has thereby lost his chance of a successful defense on the merits. At the present time it would seem unwise for a defendant to take a chance of suffering a default judgment in a foreign forum if he has a good defense on the merits. Although this result seems to place an unreasonable burden on the defendant and defeats the purpose of jurisdictional expansion, there seems to be no adequate safeguard against it.

The result would not seem quite so harsh in states which provide for a special appearance. However, if the defendant should lose on the jurisdictional point, he is then faced with a similar dilemma. He has had his day in court and cannot thereafter attack the judgment collaterally on the jurisdictional issue. If he then proceeds on the merits, which is probably a hardship in the assumed case above, he may thereby waive any possible direct attack on jurisdiction. If he defaults on the merits so as to save his objection on jurisdiction, he has lost his chance to present any possible valid defenses.

**Relationship of Adverse Effects and the Reasonable Expectations of Defendants.** It is logical that when insurance companies solicit and issue policies in foreign states, they can reasonably expect that some disputes will develop which will require litigation. Knowing this, they should include such expected expenses in the premiums as a cost of doing business. Especially in light of the *McGee* case, it is reasonable for

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48. See *York v. Texas*, 137 U.S. 15 (1890), which held that the Revised Stat. of Texas, Art. 1242-45 (1897), in converting any special appearance into a general appearance, did not violate the due process clause of the fourteenth amendment to the Constitution. The present law is found in *Tex. R.P. Civ. 122, 123*. The rule is discussed in Note, *Non-Resident Defendants and the Special Appearance in Texas*, 32 *Tex. L. Rev.* 78 (1953).

49. *Ind. Ann. Stat.* § 2-1007 (Burns 1946), provides for demurrer if it appears on the face of the complaint that the court has no jurisdiction of the defendant or the subject matter. *Ind. Ann. Stat.* § 2-1011 (Burns 1946), provides for an answer if the defect is not on the face of the complaint. Failure to demur or answer waives the issue of jurisdiction over the defendant, but not over the subject matter.

50. See *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).


52. It is possible that, as long as the defendant makes it abundantly clear that he is preserving his objection as to jurisdiction, he may not lose or waive it by proceeding to the merits.

53. 355 U.S. 220 (1957). It should also be remembered that in the insurance cases, the "substantial connection" necessary to give a court jurisdiction has become very slight. See *Schutt v. Commercial Travelers Mut. Acc. Ass'n*, 229 F.2d 158 (2d Cir. 1956), *crt. denied*, 351 U.S. 940 (1956), where the only connection with the state was a policy holder who had moved into the state after receiving his policy in another state.
insurance companies to expect to be subjected to litigation in foreign
states.

On the other hand, when an individual receives a policy of insurance,
he may reasonably expect that either the insurance company will pay as
required by the contract or that the matter can be litigated in a local
forum. If the individual should win in such a case there probably would
be no problem of having to execute the judgment, and the two-step litiga-
tion process would not develop. This result is desirable and places no
undue hardships on either side.

The idea of reasonable expectations is compatible with the doing
business test, and it is possible that this idea has been an important factor
in the expansion of jurisdiction although no court has expressed the
idea.44 Any person doing business, entering into any transaction, or driv-
ing an automobile in a foreign state can reasonably expect that litigation
might arise in regard to any torts or contracts arising out of his conduct.
On this reasoning, it is not surprising that Vermont upheld jurisdiction
over a foreign defendant whose agents negligently damaged a plaintiff’s
roof while in Vermont performing a contract.55

As contacts with a foreign state become more remote, however, it
seems that the courts may go beyond the reasonable expectation idea in
granting jurisdiction over non-residents. For example, it was pointed
out above that in the case of insurance contracts, the insurance company
is amenable to suit wherever the policy holder may ultimately move, re-
gardless of the fact that the company has no other contacts with that
state.56 It could be argued that this is a reasonable expectation for in-
surance companies, but how much farther can this reasoning be sustained?

The idea of reasonable expectations can be more clearly developed
when applied to other businesses and causes of action. A large automo-
bile manufacturing corporation which advertises, sells and generally has
substantial connections with all states could reasonably expect that its
products will be found in all states. The corporation could further rea-
sonably expect and plan for litigation in all the states involving causes of
action arising from the use of its products. The same would be true if

Can the position that an insurance company should reasonably expect this movement be
sustained? In the view of the fairly transient public in the United States today, per-
haps it can be.

44. North Carolina has a statute based in part on reasonable expectations of foreign
corporations. N.C. GEN. STAT. § 55-145(a)(3) (1960). Its use has been limited. See
Erlanger Mills v. Cohoes Fibre Mills, 235 F.2d 502 (4th Cir. 1956); Putnam v. Tri-
angle Publications, 245 N.C. 432, 96 S.E.2d 445 (1957) (libel—unconstitutional on the
facts of this case only).

The court relied also on the convenience of the forum in upholding jurisdiction.

56. Schutt v. Commercial Travelers Mut. Acc. Ass’n, 229 F.2d 158 (2d Cir. 1956),
the manufacturer sold in only a large number of states but advertised in all states. However, a small local manufacturer of machine parts in Florida who advertises and sells within a limited area probably does not reasonably expect that one of his parts might reach Alaska. On the other hand, if the part were sold to an automobile manufacturer, it would be reasonable to expect that the part might ultimately reach Alaska. The question then arises as to whether on this basis, the local manufacturer should reasonably expect to be amenable to suit in such a distant forum for a warranty or negligence action.

It would seem that such a result would place an unreasonable burden on one who is an otherwise small local businessman with no direct or substantial connections with foreign states. Estimating the possibilities of a suit in a distant forum would be an almost impossible task. The task is admittedly lighter when the manufacturer knows that his products will be widely distributed. However, the burden is still great for the local manufacturer. This type of situation involving the possibility of subjecting a weak defendant to the jurisdiction of a distant foreign forum is another of the adverse effects which has apparently been overlooked in the process of jurisdictional expansion.57

It is questionable whether a manufacturer's reasonable expectation of the ultimate destination of products should imply a reasonable expectation of being amenable to suit in any such state for actions involving these products. Because of the transient nature of the public today it may be reasonable to expect any product to reach every state regardless of the size of the manufacturer of that product. Fairness to the defendant would seem to require some safeguard against "long arm" jurisdiction, which safeguard would take into consideration the type and size of the defendant and his actual expectations of a product's destination. The type of advertising, local or national, logically will vary with the size of the manufacturer and probably is a good indication of the actual expectations of the ultimate destination of his products. The actual expectations of a product's destination may be a valid basis from which a reasonable expectation of suit can be inferred. On the above reasoning, there should be a distinction between insurance companies and manufacturers when determining the ability of a court to obtain in personam

57. S. Howes Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954), appeal dismissed per stipulation, 348 U.S. 983 (1955), held a corporation amenable to suit in a foreign state where one of its alleged negligently constructed items was sold by an independent broker, the corporation itself having no direct sales system in the foreign state. The manufacturer here did deliver the machine directly and had sent agents to service it. The court evidently used this in determining that the doing business test was satisfied. There was also mentioned the fact of reasonableness in the convenience of the forum.
jurisdiction over a non-resident. It is doubtful if this distinction is presently being made.

A distinction also should be made between manufacturers of industrial products and manufacturers of consumer products. The former has some control over his area of distribution and his expectations are more easily determined. The latter has no control over where his products may be taken by any consumer regardless of where sold. For these reasons, it may not be fair for actual expectations of destination to be used as a basis for inferring reasonable expectation of suit in a foreign forum by a manufacturer who has no control over the ultimate destination, unless he intends for his products to reach every state and thus advertises nationally.

The reasons for distinguishing between a manufacturer of industrial products and a manufacturer of consumer products are even more applicable in distinguishing between a manufacturer and a retailer of consumer goods. For example, a local independent service station attendant in New York may sell tires which are guaranteed by a national manufacturer. Assuming that there is also an implied warranty for fitness for a particular purpose against the retailer, a purchaser may have two chances for recovering damages caused by a defective tire. This situation causes no great problems for the most part. Most of a dealer's tire business is with local residents, and under McGee there should be no difficulty obtaining jurisdiction over the manufacturer. However, if a California resident replaces a worn tire at a New York station while on a trip, and a defect in the tire causes an accident in Wisconsin, the California resident may be able successfully to bring an action against the New York service station operator in Wisconsin. One would clearly expect any such tire sale to result in the tire moving from state to state. Since everyone is presumed to know the law, it may be reasonable to expect that litigation might take place in any state in regard to the tire. However, one probably would not reasonably expect to be subjected to an action for damages in some foreign state, and it would not seem fair to permit such a result. Under present statutory and judicial standards for obtaining jurisdiction, this result is possible.

While jurisdictional expansion of state courts has been the result of

58. The California resident would also be able to obtain jurisdiction over the manufacturer under McGee at this point, especially if doing business in the state where the action is brought.

59. It may be argued under Schutt v. Commercial Travelers Mut. Acc. Ass'n, 229 F.2d 158 (2d Cir. 1955), cert. denied, 351 U.S. 940 (1956), that a sale to a non-resident, gives the defendant seller a substantial connection with that state. Admittedly this goes a step farther than the Schutt case as there were at least some mail contacts between the two states in that case. This hypothetical fact situation would seem to be expressly covered by Wis. Stat. § 262.05(4)(b) (Supp. 1960).
necessity to a large extent, it has developed to a point where the possible
detriment to defendants may outweigh the advantages to plaintiffs. If
the present safeguards are not sufficient to curb this in extreme cases,
some reform is necessary to insure justice in litigation in all cases. At
present, it seems that the plaintiff may have all the advantages including
the privilege of choosing from among several available forums, so that
his selection may be convenient to him regardless of the position in which
this places the defendant. Such a result would seem desirable only if it is
concluded before trial that all defendants are at fault and thus should be
penalized.

Present Safeguards Against Adverse Effects of "Long-Arm"
Jurisdiction

The constitutional limitation on jurisdictional expansion is due pro-
cess as required by the fourteenth amendment. The relevant factors are
that the choice of the forum and the type of notice given the defendant
be such that he is assured of a fair trial. Adequate notice is not a major
problem. Most state statutes are such that actual, not merely construc-
tive, notice is given to the defendant.60 However, when a court has a
statutory ground for jurisdiction over an individual or corporation, no-
tice by means other than personal service has been upheld as not violative
of due process. For example, notice by publication has been held suf-
ficient service on a resident who was absent from his residence state.61
Service by registered mail on a foreign corporation with personal service
on a resident salesman was upheld in International Shoe Co. v. Washing-
ton,62 and service by registered mail on a foreign corporation without any
accompanying personal service on an agent was deemed sufficient in
McGee v. International Life Insurance Co.63 In a trust administration
case, service by mail on an inactive trustee was similarly upheld.64

The above cases indicate that the due process requirements other
than notice necessary to uphold jurisdiction over an individual or cor-
poration are uncertain. Usually the courts use such terms as "reason-
ableness," "fairness to the defendant," "freedom from undue hardships,"

60. Such statutes usually provide for notice to be served: (1) Personally if the
defendant is in the state; (2) By registered mail if the defendant is outside the state
and his address is known; or (3) By publication only if the defendant's address is un-
known after reasonable inquiry by the plaintiff and this fact is presented to the court
by affidavit. E.g., Ind. Ann. Stat. §§ 2-801-821 (Burns 1946); Wis. Stat. § 262.06
(Supp. 1960). See notes 23-25 supra, in regard to corporations. In all cases, the above
statutes provide for some proof that process was actually served.
and "assurance that substantial justice will be done." An exact definition of what is unfair obviously cannot be given. Generally expenses of travel, litigation and loss of earnings have not been considered an undue hardship.

The Supreme Court analyzes the due process requirements in Mullane v. Central Hanover Bank & Trust Co., but this case points out only the basic idea of reasonableness.

Under the test of reasonableness, there might very likely be several courts which could obtain jurisdiction in most cases. Therefore, the test of reasonableness does not sufficiently limit the number of forums available to plaintiffs. While this test might prevent obtaining jurisdiction under many circumstances there is no assurance that this result will follow. It is uncertain whether a court will take into consideration such factors as wealth, business and reasonable expectations of suit in a foreign forum.

The doctrine of forum non conveniens can alleviate hardships to defendants to whom the Constitution does not give adequate protection. Basically the doctrine is "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." While this doctrine indicates a positive tendency toward limiting the number of forums available to plaintiffs, it is often ineffective in preventing hardships to defendants. The fact that application of the doctrine is completely discretionary with the court takes vitality from its effectiveness. However, when a court determines that the trial in some other forum will best serve the convenience of the parties and the ends of justice and thereby exercises its discretion under forum non conveniens, this exercise will probably be upheld.

Before a court will dismiss on forum non conveniens it will often consider the policy reasons for the expansion of jurisdiction which has taken place. Many courts may feel that the state's interest in providing

68. See Note, Jurisdiction Over Foreign Corporations—An Analysis of Due Process, 104 U. PA. L. Rev. 381 (1955), where it is concluded that while there is a tendency of expansion of due process requirements, the weighing of the relevant factors of reasonableness makes due process uncertain.
70. See Leflar, Conflict of Laws, 34 N.Y.U.L. Rev. 20, 24 (1959), where it is stated: "Most courts take the view that despite their power to dismiss cases because they can better be tried elsewhere, they will be very cautious in doing so, and will order dismissal only in very clear cases."
residents with an inexpensive convenient forum will outweigh most of the hardships of defendants.

It has been recently suggested that the commerce clause of the Constitution could be used to limit jurisdiction of courts where an undue burden on interstate commerce could be shown in subjecting a defendant to litigation in a distant forum.\(^2\) The commerce clause was used occasion-ally for this purpose several years ago.\(^3\) It has been used to a limited extent recently by state courts.\(^4\) The Supreme Court has not recently invoked it. It would seem that this would not be an effective method of protecting individual defendants from undue hardships. In denying jurisdiction because of an undue burden on interstate commerce, the relevant interest is that of the public, not the individual defendant.\(^5\)

It has also been suggested that the best way to make certain when jurisdiction will be obtained is to draft statutes in terms of different types of actions.\(^6\) This procedure is faced with obvious obstacles of extreme complexity and difficulty in adequately covering all circumstances. Also it is difficult for a statute to draw a definite line as to when obtaining jurisdiction would present a case of undue hardship on a particular defendant. It would seem that a statute listing in detail the situations in which the hardship is sufficient would be impractical because of the number of considerations necessary to determine hardships.

Wisconsin has approached the problem of personal jurisdiction by a detailed statute. After indicating the circumstances upon which a state court has jurisdiction over individuals,\(^7\) it has included sections providing for several safeguards.\(^8\) Where a defendant's motion to dismiss for lack of personal jurisdiction is granted, the plaintiff is required to pay defendant all reasonable costs thus far expended up to a maximum of $500.\(^9\) Another section provides that if a court "on motion of any party, finds that trial of an action . . . should as a matter of substantial justice be tried outside the state, the court may . . . stay further proceedings. . . ."\(^10\) This is completely discretionary on the part of the court and there are various protective devices for the plaintiff to prevent his

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72. *Developments in the Law—State-Court Jurisdiction, supra* note 1 at 983-87.
73. E.g., *Davis v. Farmer Co-op. Equity Co.*, 262 U.S. 312 (1923).
75. See generally Farrier, *Suits Against Foreign Corporations as a Burden on Interstate Commerce, 17 Minn. L. Rev. 381* (1933).
77. Wis. Stat. § 262.05 (Supp. 1960).
losing his cause of action when the court grants a stay.81 When a stay is granted, the defendant may recover all his costs to date without limit.82 Since granting a stay is in the discretion of the court, it incorporates the same weakness present in the doctrine of forum non conveniens. However, the penalties against plaintiffs would seem to prevent them from bringing actions which have reasonable probabilities of being stayed. The penalty for bringing an action where personal jurisdiction is not provided by the statute has a similar cautionary effect.

The safeguards in the Wisconsin statute may be superficial. In the first instance, the statute is sufficiently broad that there will be very few cases where a Wisconsin resident cannot obtain jurisdiction over non-residents. It can also be argued that the penalty against the plaintiff when a stay is granted will make the courts even more reluctant to exercise their discretion to order a stay. As was pointed out above, a reviewing court will seldom disturb a trial court's decision where such discretion is involved.

Possible Solution: A "Best" Jurisdiction

Assuming that on the basis of the above arguments the present safeguards against jurisdictional expansion are not sufficient to insure justice in many instances, it would be desirable for some reform in jurisdictional requirements.83 It would be presumptuous to advocate any immediate major reforms. The reasons advanced for the necessity of expansion of jurisdiction are well grounded if not allowed to blind the courts to the possible effects of going too far. However, a few minor reforms could be initiated which could help insure justice in most cases.

It would seem that the first step should be for courts and lawyers to think more in terms of one "best" jurisdiction out of the many available. It is clear that the problem of personal jurisdiction has changed from inconvenience on the part of plaintiffs because of limited available forums to inconvenience on the part of defendants because of too many available

81. Wis. Stat. § 262.19 (1) (4) (Supp. 1960). The defendant must give his consent to be sued in another forum; he waives the defense of the statute of limitations which may have run since the plaintiff instituted the suit and the court retains jurisdiction for 5 years in "the interests of justice."


83. It must be assumed that the present safeguards are insufficient for the purposes of this note. It is certain that many people will feel that the expansion of jurisdiction will stop short of allowing a strong plaintiff to subject a weak defendant to a distant forum, or of allowing an Alaskan motorist to subject a small Florida service station salesman to an Alaskan forum on a breach or warranty action on a tire bought in Florida. See New York Times v. Conner, 291 F.2d 492 (5th Cir. 1961). But if this is true in extreme cases, just where will the line be drawn? Is it fair to determine "fairness" of a forum on the basis of the relative wealth of the parties? What about the basis of "reasonable expectations" of suit without regard to wealth? It is submitted that these are all relevant factors.
forums. It is not difficult to see that a median is needed which would take into consideration the relative needs of litigants.

In choosing a "best" jurisdiction, the considerations relevant under the doctrine of forum non conveniens should be seriously considered. In this connection, Wisconsin has listed the following factors as relevant in a court's determination of granting a stay:84

(a) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;
(b) Convenience to the parties and witnesses of trial in this state and in any alternative forum;
(c) Differences in conflict of law rules applicable in this state and in any alternative forum; or
(d) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

"Other factors" could reasonably include the relative wealth of the parties and therefore their relative hardships; the defendant's actual expectations of possible suit in foreign forums; the location and type of real proof necessary to the action and the type of action involved. Where, after a consideration of the above factors, it is determined that there are two equally fair forums, it would seem that the sensible solution would be to revert to the "power theory."85 The "power theory" would prevent the two-step litigation process. It would also seem a relevant factor in weighing the relative merits of various available forums in the first instance for this reason.

The different types of actions would require different analysis in many cases. For example, the non-resident motorists' cases would usually warrant disregarding the "power theory." Since insurance companies defend in most cases, there is no problem of executing a judgment and no need to bring the action in a forum where the defendant has property. In the same case, more weight should be given to the location of the accident for the convenience of witnesses and proof. However, in a case where the non-resident motorist is not insured, the "power theory" would become a very practical consideration because of the need for execution of the judgment.

In the McGee case, a determination of the "best" jurisdiction probably would have resulted in allowing the plaintiff to bring the action in California as was done. The plaintiff was relatively weak and the de-

85. See note 8 supra; for further discussion of the power theory, see Ehrenwieg, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L.J. 289 (1956).
defendant strong. It would not be an unreasonable burden on the defendant to defend in California. The means of proof were in California. The countervailing factor of the necessity of a two-step litigation process for execution would be outweighed by the above factors. In the hypothetical set out above in which the parties in McGee were reversed, the same “best” jurisdiction would exist. By analyzing the relative burdens on the parties and considering the elimination of the two-step litigation process in the event the Texas Insurance Company won, California would seem to be the “best” (or rather the better) of the two available jurisdictions.

In the case of a local manufacturer or service station operator with a distant injury caused by a defective product, it would seem that the competing factors would be the location and proof and the problem of execution. The facts in each case would have to determine which should have the greater weight. In such a case, the other factors listed above could probably solve the dilemma, giving substantial weight to the reasonable expectations of suit by the seller.

It should be readily apparent that the idea of a “best” jurisdiction in limiting the number of forums available to a plaintiff could do more than limit jurisdictional expansion in protecting defendants. In some cases, it might expand jurisdiction more in a particular area of the law. One very important area which would seem to benefit from this is that of trust and probate administration. In 1953 Erdheim v. Mabee followed the prevalent idea of jurisdictional expansion. The case involved a will probated in the District of Columbia creating a trust with a New York bank as trustee and administrator and an inactive trustee in Wisconsin. The plaintiff brought garnishment proceedings in New York to execute an unsatisfied judgment for legal fees against the beneficiary. In holding for the plaintiff, the court reasoned that the appointment of a New York trust company as trustee and administrator showed a presumptive intent to remove the trust situs from the probate jurisdiction. Since the Wisconsin trustee was inactive, he was not an indispensable party and service by mail was considered sufficient for the court to obtain jurisdiction and try the case.

This case was followed by Hanson v. Denckla, which seems to indicate a trend away from expansion of jurisdiction. The Supreme

89. See Note, 31 Rocky Mt. L. Rev. 115 (1958), where it is pointed out that this case draws an effective line between the strict rule of Pennoyer v. Neff and nationwide service of process. But see Leflar, Conflict of Laws, 34 N.Y.U. L. Rev. 20, 27-35 (1959),
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Court held that a Florida court was without jurisdiction to decide the validity of a power of appointment of a beneficiary of a trust previously created in Delaware. The basic reason was the lack of jurisdiction over the trustee, who was considered an indispensable party. Service by mail was held insufficient to obtain jurisdiction of the absent trustee. As a result, the validity of the subsequent Delaware decision\(^9\) upholding the appointment made in Florida, and refusing to recognize as res judicata the former Florida decision\(^1\) denying validity, was upheld.

It seems unfortunate and impractical that an executor in state A should not be able to discharge his duties in one “best” forum when the testator dies in state B leaving a will in which he exercised a power of appointment over a trust in state C and in which he provided for distribution of property located in state D. A “best” jurisdiction could be chosen so as to be most convenient to the majority of the parties, witnesses and property involved.\(^2\) Another important factor would be a consideration of the conflict of law rules of the various jurisdictions. The major problem facing the chosen court would be in the correct choice of law for each part of the will. However, this would not be impossible and it would seem much simpler and less expensive to the estate than having the executor travel from state to state for separate judicial determinations of the validity of the will. Such a solution, while apparently desirable in cases such as Hanson, should be closely scrutinized on the facts of each case. There may be fact situations where undue hardships would be created by choosing only one forum. Also it must be admitted that choosing one “best” jurisdiction would not prevent individuals from ignoring or challenging the determinations in their home states on the issue of jurisdiction. However, these possible difficulties do not obviate the necessity and desirability of limiting the available forums to a “best” jurisdiction.

A “best” jurisdiction concept must provide for a time and place for determination to be effective. Ideally, the party bringing the action would consider all the relevant factors and institute his action in the right court. The Wisconsin statutory scheme of penalizing plaintiffs who chose the wrong forum seems a step in the right direction in encouraging this practice. Another possibility would be the increased use of the “spe-

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90. Lewis v. Hanson, 128 A.2d 819 (Del. 1957).
91. Hanson v. Denckla, 100 So.2d 378 (Fla. 1956).
92. The decision in Hanson v. Denckla, 357 U.S. 235 (1958), is surprising in this regard in the light of the general tendency to expand rather than restrict jurisdiction. The Court said that jurisdiction is not determined by the “center of gravity” of persons affected.
cial appearance” for the sole purpose of determining the “best” jurisdic-
tion. The special appearance has its greatest weakness in that the forum
chosen for determining a “best” jurisdiction may be unduly inconvenient
to one of the parties. However, it would necessitate only a trip by an
attorney—not all the witnesses and proof necessary for a full trial.

Another method which would tend toward the same result of obtaining
a “best” jurisdiction is wider use of forum non conveniens. This
necessitates the use of special appearances to litigate the question of jurisdic-
tion, which most states other than Texas allow. The courts could do
this on their own initiative, or general statutes could be drafted requiring
that a court exercise its discretion to use forum non conveniens when
the facts of the particular case would justify it. While it would still be
difficult to question a trial court’s discretion once exercised, a legislative
statement of policy such as this might encourage courts to give the matter
more consideration. The effects of increased use of forum non conveniens
would be two. Many hardships would be alleviated by its use and the threat of its use would cause many attorneys to consider their choice of forums more seriously in the first instance.

It could be argued that courts should return to the “power theory” as the best jurisdiction. The additional relevant factors of relative con-
venience of parties, means of proof and a transient public would seem to
outweigh the advantages present in a strict application of the “power theory.” The theory probably can best serve the public interest when
considered by the courts as a relevant factor in determining a “best” jur-
isdiction, rather than the sole determinant.

ERIE V. TOMPKINS AND FEDERAL DETERMINANTS OF
PLACE OF TRIAL

Since 1938, when Erie v. Tomkins required that “except in matters
governed by the Federal Constitution or by acts of Congress, the law to
be applied in any [diversity] case is the law of the state,”¹ the courts
have been attempting to determine the extent of that doctrine. The
question is, of course, how much law should be tied to the states? There
is, on the one hand, the consideration that if the federal court is made
absolutely identical to the state court nothing is gained by opening the
federal courts to what would otherwise be a state problem. On the other
hand, if there are significant differences in the federal courts, one may

¹. 302 U.S. 64, 78 (1938).