Long Arm and Convenient Forum

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Seven years have passed since the enactment of the Kansas "Long arm" statute. During that period several significant decisions interpreting the law have been rendered by the Kansas Supreme Court and by the federal courts. The 1971 Legislature added two new and potentially important provisions to it. The time is ripe for stock taking.

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[Notes and references omitted for brevity]
The Kansas Supreme Court has said that the Kansas long arm statute, which was patterned after the Illinois statute, "reflects a conscious state policy to assert jurisdiction over non-resident defendants to the extent permitted by the due process clause of the Fourteenth Amendment . . . ." This phrase, was borrowed from an Illinois case, in which it was used to express an attitude of the utmost liberality in construing the terms of the statute. The thrust of the Illinois opinion was that jurisdiction would be upheld if the language of the statute could possibly be construed to permit it, so long as due process was not violated. The Kansas decisions, however, have taken a narrower view of what the due process clause will allow and as a result the provisions of the Kansas statute do not reach so far as comparable provisions of the Illinois law. This difference is understandable, for the United States Supreme Court's decisions relating to the content of "due process" in the matter of state court jurisdiction leave doubts concerning the very nature of judicial jurisdiction and the significance in that connection of the territorial boundaries of the states in our federal system.

I. Bases of Jurisdiction—Underlying Theory

Any discussion of the exercise of personal jurisdiction by courts of original jurisdiction must start with *Pennoyer v. Neff*, decided nearly a century ago. That case, as everyone who has ever attended law school knows, recognized, as "a principle of general, if not universal, law," the proposition that: "[W]here a defendant does not appear in court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property . . . ." *Pennoyer v. Neff* thus identified the three traditional bases of personal jurisdiction—physical presence, consent, and residence—and recognized the traditional distinction between jurisdiction over persons and jurisdiction over property, or, as the distinction is often expressed nowadays, between jurisdiction *in personam* and jurisdiction *in rem*. The case also indicated that jurisdiction according to one of these bases was essential to due process of law as contemplated in the fifth and fourteenth amendments, and that the same conceptions of jurisdiction were applicable in determining when the constitutional requirement of full faith and credit was owed to the judgment of a sister state. Although the Court's references to due process and full faith and credit were dictum in *Pennoyer v. Neff*, the case has been accepted as an authoritative constitutional interpretation.

*Pennoyer v. Neff* emphasized that judicial jurisdiction was an aspect of

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11 95 U.S. 714 (1877).
12 Id. at 720.
13 The judgment in question had been rendered before the effective date of the fourteenth amendment, and its validity was challenged not in the courts of a sister state but in the federal court in same state.
sovereign power. Sovereignty entails the power to issue directives or orders and to enforce compliance—by physical means if necessary. Its potency pervades the entire territory of the state, but it has no force whatever outside that territory. When the legislative body, in the exercise of the law-making aspect of that sovereign power, enacts a law, it too affects the entire territory. But judicial power has no such pervasive scope. It can be exerted only in particular cases and affects only particular identified interests. Before it can validly be exercised, the case must be “plugged in” to the sovereign power source by the exercise of certain prescribed formalities. Those formalities serve to identify the particular persons and interests sought to be touched by the case and to insure that the court will be able to enforce its judgment. In earlier times this process might have entailed the physical arrest and detention of the defendant, but by the time of *Pennoyer v. Neff* actual arrest was not necessary. Still, a case was not effectively connected to the judicial power without some sort of physical contact between the court and the defendant. In most cases the defendant had to be touched with the court’s process—a summons. Before a judgment could be enforced against a non-consenting non-resident, he had to be served with process within the territory of the state, or else his property within the state had to be seized by attachment or some comparable procedure.

This rationale, which tended to equate jurisdiction with power to enforce or effectuate a judgment, had (and still has) a beguiling appeal. But while providing a relatively simple analytical framework, this reasoning has some serious flaws. For one thing it does not square with the reality recognized even in the *Pennoyer* opinion,¹² that within America a state court’s judgment does not have to be enforced within the state to be effective. If the defendant, after service of process, refuses to participate in the action, a default judgment can be rendered which will be conclusive anywhere in the country. The full faith and credit clause of the United States Constitution insures its recognition and enforceability in other states. A judgment’s effectiveness, then, depends ultimately not on the de facto power of the state wherein it was rendered over the person or property of the defendant, but upon the federal constitution. Federal rather than state sovereignty ultimately determines whether judicial jurisdiction can be exercised over a non-resident.

Apart from that, however, the *Pennoyer* theory had practical deficiencies. It failed to consider in which forum the case could be most conveniently and fairly litigated. Even though all the elements of the case were centered in a particular state, jurisdiction could not be exercised there if the defendant was a non-consenting non-resident with no property there, unless he could be caught and served with process. Conversely, even though none of the elements of the case touched the state in which the action was brought, jurisdiction there was perfectly valid if the defendant was caught and served within the state. So long as lawyers and judges believed, however, that “the founda-

tion of jurisdiction is physical power," as Justice Holmes put it in *McDonald v. Mabee*, they saw nothing particularly wrong in insisting that a penniless plaintiff take his case and his witnesses to the defendant's home—perhaps clear across the country. Nor did it seem unjust to require a defendant who might be similarly impotent to defend his case in a state with which he had no connection except that he had been caught and served with process while transiently passing through. According to *Pennoyer v. Neff*, personal service was necessary for due process, and personal service was sufficient.

Now everyone who has attended law school also knows that while its philosophical foundation may retain some vitality, *Pennoyer v. Neff* does not reflect the state of the law today. The requirement that a non-consenting non-resident must be personally served within the state has undergone considerable erosion. First the corporation doing business on a multi-state scale and then the automobile led to a realization that in some situations non-consenting non-residents should be subjected to jurisdiction even though they were not personally served within the state. Common sense dictated that result, and courts and legislatures responded. The hold of the *Pennoyer* "power" rationale was so firm, however, that such extensions of jurisdiction as were recognized to accommodate these special situations had to be expressed in terms consistent with that analytical schema. Actually, the *Pennoyer* court had foreseen the problem of jurisdiction over foreign "associations" and suggested that it could be solved by laws requiring them to designate someone within the state to receive service, or by providing for service on some public officer as agent for the defendant. Through the exercise of legislative power, a process could be provided by which judicial power could be exercised in such cases without disrupting the *Pennoyer* analysis. Thus, corporations could legislatively be forced to "consent" to jurisdiction, or could be legislatively declared to be "present" wherever corporate agents were "doing business." Through resort to these patent fictions of "constructive presence" or "implied consent," state court jurisdiction was extended to foreign corporations and non-resident motorists not personally served within the state in a manner verbally consistent with *Pennoyer*.

The Supreme Court undertook a real break with the *Pennoyer* theory in 1945. In that year the Court in *International Shoe Co. v. State of Washington*, announced the "minimum contact" or "fundamental fairness" theory. Although *International Shoe* actually concerned the power of a state to impose and collect a tax upon foreign corporations, the opinion of Justice Stone indicated that the Court was not simply recognizing an exception to the *Pennoyer*

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13 243 U.S. 90, 91 (1917).
16 326 U.S. 310 (1945).
principle, but was attempting to state a comprehensive new approach to the whole question of state judicial jurisdiction:

Historically the jurisdiction of courts to render judgment in personam was grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff . . . But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." 17

This passage suggests that the theory of state court jurisdiction followed in the past should be replaced with one more consonant with modern realities. But what should be the new approach, and how would it differ from the old? Was Justice Stone thinking primarily of cases the Pennoyer tradition could not have contemplated, such as those involving multi-state corporations and non-resident motorists? Or did he mean that the territorial power theory should be abandoned completely? The case does not provide a final answer. The passage quoted above seems to comprehend jurisdiction over individuals as well as corporations, but it does not completely reject the power theory. Presence within the territory of the forum is still sufficient for due process even though it may no longer be necessary. Moreover, the Court did focus upon the fact that defendant was a corporation, and based its opinion mainly on prior cases that had provided standards applicable only to corporations. Due process was satisfied, the Court said, if a corporation had such contacts with the state as to "make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit that is brought there." 18 "An estimate of the inconveniences . . . which would result is relevant in this connection." 19 The Court went on to note that even single or occasional acts by corporate agents in a state might be sufficient to subject the corporation to jurisdiction there for claims arising from those acts. On the other hand, the activities of the corporation in the state might be so substantial, qualitatively and quantitatively, as to warrant the exercise of jurisdiction there even for causes of action unrelated to that activity. Decisions reaching this result under statutes requiring corporations "doing business" in the state to submit to jurisdiction have been upheld.

Whether due process is satisfied must depend . . . on the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that any state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . .

But to the extent that a corporation exercises the privilege of conducting

17 Id. at 316.
18 Id. at 317.
19 Id.
activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so 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 to enforce them can in most instances, hardly be said to be undue.\footnote{Id. at 319.}

Although \textit{International Shoe} did not expressly overrule \textit{Pennoyer v. Neff}, it did indicate that whether a state was able to exercise jurisdiction depended, not upon finding, either at the time the action is commenced or any other time, the defendant or his property physically present in the state, but upon the existence of conditions that make it “fundamentally fair” to require the defendant to defend the case in that forum. Among the factors identified by the court as relevant to the question of fairness were the relative inconvenience of litigation in that forum, the nature and quality of the defendant’s contacts with the state, the relation between those contacts and the plaintiff’s claim and considerations relating to the fair and orderly administration of the laws. Arguably, the Court only meant to supplement the territorial power theory, not to replace it. The Court did say that minimum contacts, fair play and substantial justice were all that was required “if the defendant be not present within the territory of the forum.” That seemed to suggest that jurisdiction may be exercised in cases where the territorial power theory would allow it and also in other cases where that would be fundamentally fair. But if fundamental fairness is the criterion of due process, it is difficult to justify the exercise of jurisdiction in some kinds of cases where \textit{Pennoyer} would allow it, e.g., where the case’s only contact with the state is the fact that the defendant was physically found within its borders. If states can continue to subject transients to jurisdiction in cases having no connection to that state, some vitality must remain in the territorial power theory.

One way of determining whether the “territorial power theory” has been replaced rather than merely supplemented is to analyze the effects of the \textit{International Shoe} decision in later cases dealing with differences between in rem and in personam actions. If the legitimacy of the exercise of jurisdiction is not dependent upon territorial power there is little if any relevance in the traditional distinction between in rem and in personam actions. Where the defendant has or claims property in the state he has, of course, some contact with the state, and if the purpose of the action is to determine conflicting claims to that property, all the indicia of “fundamental fairness” noted in \textit{International Shoe} will be satisfied and the court may entertain the case. The reason, however, may be not simply that the property is within the court’s territorial power, but that it is fair and convenient to try the case there. However, the typical quasi in rem action, where the claim to be adjudicated really does not relate to the defendant’s property ownership at all, does not seem consistent with the fundamental fairness approach. The claim asserted may have no connection whatever with the state of the forum and it may be seriously in-
convenient for the defendant to present his defense there. The quasi in rem proceeding is justifiable primarily as a device for ameliorating the rigidity of the territorial power theory’s limits on personal jurisdiction. If a court can exercise personal jurisdiction in any case in which it is fundamentally fair to require the defendant to defend in that state, the only occasion for resort to a quasi in rem proceeding for jurisdictional purposes would be when it will not be fundamentally fair to force the defendant to appear and defend.\textsuperscript{21} If *International Shoe* completely displaced the territorial power theory, and if all states had procedures permitting the exercise of personal jurisdiction in any case where the defendant’s contacts were sufficient to make it “fundamentally fair,” quasi in rem jurisdiction as contemplated in *Pennoyer* would be an anachronism.

The Court came close to declaring the distinction between in personam and in rem actions to be obsolete for jurisdictional due process purposes in *Mullane v. Central Hanover Bank and Trust Co.*\textsuperscript{22} Although the Court in that famous 1950 case directed its attention primarily to the manner of serving process, in holding that New York could exercise jurisdiction to adjudicate the rights of non-consenting non-residents as against a resident trustee of a common trust fund without the necessity of personal service in the state, the Court declared that it was unnecessary to classify the proceeding as in personam or in rem: “[W]e think that the requirements of the Fourteenth amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally…. [W]e do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.”\textsuperscript{23}

The *Mullane* case reinforced the view that “fundamental fairness” was now the standard of due process, but it was not a clear rejection of the *Pennoyer v. Neff* theory any more than the non-resident motorist cases were. The Court emphasized the practical necessity of conducting the litigation in New York, and the case could be viewed as simply another exception to the *Pennoyer* rule made necessary by the development of an institution—the common trust fund—that was unforeseen in 1877. The *International Shoe* case was not cited in *Mullane* and none of Justice Stone’s memorable phrases appear in Justice Jackson’s majority opinion. The Court’s preoccupation with the manner of service of process lends some credence to the argument that its analytical orientation in *Mullane* was still consistent with that of *Pennoyer v. Neff*.

In two other cases the Court had an opportunity to clarify the question of whether *International Shoe* replaced or merely supplemented the territorial power theory. Unfortunately, those decisions seem contradictory and do not resolve the matter.

\textsuperscript{22} 339 U.S. 306 (1950).
\textsuperscript{23} *Id.* at 312-13.
In *McGee v. International Life Insurance Co.* the Court upheld a California state court's jurisdiction over an insurance company whose only physical contact with the state was an undertaking by mail to insure a California resident and the acceptance of premium payments from him over a two year period. The defendant had no office nor agent in California, and (so far as the record showed) solicited no insurance business in California, except the policy in suit. The Court recognized that the defendant had literally no physical connection with California, but held that: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." The analysis in *McGee* seemed to carry out the logic of *International Shoe*, and in addition clearly exposed a relevant factor that was only implicit in the earlier case: the state's interest in providing protection and a forum for its residents. The Court noted that if claims were small or moderate, individual claimants might not be able to afford the cost of bringing action in a foreign forum, in effect making the insurance company judgment proof and encouraging the refusal to pay just claims. The "fundamental fairness" of requiring the Texas insurance company to defend the claim in California, in spite of the absence of any activity there on its part, seemed clear. No attempt whatever was made to cast the decision in terms reconcilable with the territorial power theory.

However, in *Hanson v. Denckla*, a 5 to 4 decision rendered the following year, the Court held that Florida could not subject a Delaware corporate trustee to jurisdiction in Florida courts. The proceeding was brought to determine the validity of a power of appointment created by the trust instrument and exercised inter vivos by the holder of the power, a Florida domiciliary who had created the trust and who was the life beneficiary. The trust had been established when the settlor resided in Pennsylvania, but for about five years before the appointment in question, she had resided in Florida. During that time and until her death three years later, the trust company regularly corresponded with the settlor-beneficiary concerning the trust, including the matter of the exercise of the power of appointment. The *Hanson* case was produced by a controversy between those who claimed an interest in the trust res by virtue of the power of appointment and those who claimed that the trust and power were invalid and that, accordingly, the assets held by the trustee passed to them as residuary legatees under the decedent’s will. Although the dispute concerned relative rights between parties who were admittedly subject to jurisdiction in Florida, Florida law regarded the trustee as an indispensable party. The trustee had no office nor agents acting in Florida. Like the insurance company in *McGee*, its only connection with the state, was the very trust that provided the subject of the suit. However, since most of the contesting

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* Id. at 223.
parties were Florida domiciliaries, there was no doubt that the state of Florida itself had a strong interest in the litigation.

After McGee, the Court would have been expected to decide the issue of jurisdiction over the non-resident trustee by reference to those indicia of "fundamental fairness" identified in International Shoe and McGee: relative inconvenience of litigation in Florida; the nature and quality of the trust company's contacts and their relation to the plaintiff's claim; consideration of fair and orderly administration of the laws; and the interests of the forum state. Instead of this approach, however, the majority opinion in Hanson was couched in language recalling the power analysis of Pennoyer v. Neff.

Justice Warren's majority opinion revived the distinction between jurisdiction in rem and in personam that had apparently been rejected as irrelevant to due process by Mullane. "Founded on physical power . . . the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State."27

Finding that Florida was not the "situs" of the intangible assets that made up the trust res, the Court concluded that Florida had no in rem jurisdiction. The Court then looked to see if Florida could exercise in personam jurisdiction over the Delaware trustee and found that it could not.

[T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff . . . to the flexible standard of International Shoe Co. v. Washington. . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are the consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.28

To find that such contacts exist, the Court said, it was essential "That there be some act by which the defendant purposefully avails of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."29 The insurance company in McGee had performed such an act when it offered, by mail sent into California, to insure the California resident. But "the record [in Hanson] discloses no instances in which the trustee performed any acts in Florida that bear the same relationship to the [trust] agreement as the solicitation in McGee."30 The trustee's only contact with Florida was the conduct of correspondence with the decedent and mailing trust income to her there. If the suit had arisen out of some problem in connection with that contact, the Hanson majority might have upheld personal
jurisdiction over the trustee in Florida. The suit, however, concerned the validity of the trust; it arose from the trust agreement, not the correspondence with the decedent. The trust was formed when the settlor lived in Pennsylvania. The trust’s connection with Florida resulted from “unilateral activity” of the settlor in moving to Florida, and according to the Hanson majority, that cannot satisfy the requirement of “contact” between defendant and the forum state for purposes of adjudicating the validity of the trust.

If Justice Warren’s statements can be taken literally, jurisdiction still turns on territorial power and some sort of physical contact. If jurisdictional limitations are the consequence of “territorial limitations” on a state’s power, the basic determinant is physical—territory—and so the “contacts” that justify exertion of jurisdiction must have some identifiable physical content, i.e. location within the territory. Bodily physical presence at the time the action is commenced is not required, but the defendant must have voluntarily caused something to happen in the forum state at some time, and the case must arise from that. All International Shoe meant, Justice Warren’s view suggests, is that besides physical presence at the time and place of the service of process, a court may also base jurisdiction on some prior physical connection. When International Shoe spoke of “minimal contacts” it meant some sort of physical event precipitated in the forum state by defendant’s voluntary activity. It did not refer to the non-physical sort of relation McGee seemed to consider sufficient, i.e. merely being a party to a contract or other arrangement having a “substantial connection” with the state. While the Court surely did not mean that the defendant or its agent must have been physically present in the state, the majority opinion does use such terms as “conducting activities” and “performing acts” in the state, and some courts have understood this to require actual physical presence.

The dissenting group in Hanson, followed the “fundamental fairness” approach. Justice Black’s opinion employed the same kind of language he used in McGee.

It seems to me that where a transaction has as much relationship to a state as Mrs. Donner’s appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a non-resident defendant that it would offend what this Court has referred to as “traditional notions of fair play and substantial justice.” . . . [S]o far as the non-resident defendants here are concerned I can see nothing which approaches that degree of unfairness. Florida, the home of the principal contenders for Mrs. Donner’s largess, was a reasonably convenient forum for all. Certainly there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts.81

The real significance of Hanson v. Denckla is difficult to assess. It seems to be out of step with the trend of cases following International Shoe, and it

81 Id. at 258-59.
was a very close decision. None of the five member majority remains on the Court, while two of the four dissenters remain: Justices Douglas and Brennan. Some commentators have sought to explain *Hanson* as an aberrant decision in which the majority was straining to find some way of upsetting the Florida judgment which seemed substantively unsound and unfair. Others, on the other hand, have felt that *Mullane* and *McGee* were the exceptional cases, and explain them as instances of "jurisdiction by necessity"—i.e. cases where there was no other appropriate forum so that a denial of jurisdiction would in effect prevent adjudication of the matter.

Probably the best explanation of the *Hanson* decision is that the majority of the Court was concerned about whether the defendant could reasonably have anticipated, at the time the act or relation connecting it to the state was done or formed, that it might become involved in litigation arising from that act or relation at some later date. This foreseeability factor does seem to bear on the overall question of fairness, and the earlier Supreme Court decisions had not specifically mentioned it as one of the relevant factors. If exposure to litigation in distant tribunals is one of the consequences of doing an act or forming a juridical relationship, a party should be able to take that into account before he proceeds. If he has no way of knowing that his act might have interstate consequences, it seems unfair to predicate jurisdiction in a foreign state on that conduct. If an automobile owner lends his car, which he realizes has faulty brakes, to a friend, knowing that the friend will drive it to another state, an accident is foreseeable, and it does not seem unfair to hold the owner subject to jurisdiction in that state in a suit by a pedestrian there injured by reason of the defective brakes. But if the owner lent the car to the friend on the understanding that it would not be driven to another locale, and with no reason to believe it would be driven there, the balance of fairness tips toward the defendant's side. The *Hanson* case indicates that jurisdiction in the latter case would be improper, but the reason, it is submitted, is not that defendant personally did no act within the forum state, but rather that he could not have foreseen exposure to suit there.

Later state and federal cases reflect the division in basic approach illustrated by the *Hanson* opinions. Some cases follow the physical contact ideas sug-

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82 *See, e.g.*, Foster, *Expanding Jurisdiction Over Nonresidents*, 32 Wis. Bar Bull. 20 (Supp. Oct. 1959) where the author predicts that *Hanson* "will be confined to its precise facts." *Cf.*, Hazard, *A General Theory of State Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 244: "Justice Warren reached the fair result . . . by a line of analysis that in all charity and after mature reflection is impossible to follow . . . ." The Florida Supreme Court upheld a judgment that had been based upon very questionable application of substantive principles. It upset Mrs. Donner's plan for the distribution of her estate, prevented the realization of a gift of $400,000 to some of her grandchildren, and gave that amount to two of her daughters who were going to receive one million from the Donner estate anyway.

83 *Cf.*, *e.g.*, F. James, *Civil Procedure* 644 (1965): "[T]he actual holdings [in the Supreme Court's post-*International Shoe* decisions] could all be narrowly construed so that each of them (with the possible exception of *McGee*) fits within an old familiar mold." The *Mullane* case is described as the prototype of "jurisdiction by necessity" in Von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analyis*, 79 Harv. L. Rev. 1121, 1174 (1966).

84 Extensive case compilations may be found in Annot., 19 A.L.R.3d 13 (1968) (products liability cases); 23 A.L.R.3d 550 (1969) (contract cases); and 24 A.L.R.3d 352 (1969) (tort cases).
gested by the *Hanson* majority opinion, others regard the absence of physical contact inconclusive and follow the "fundamental fairness" approach of *McGee*. Since *Hanson*, the Supreme Court has declined to review any cases explicitly treating the constitutional bases of state court jurisdiction although there have been some decisions that bear upon the subject indirectly.

If the Court's relative silence on this problem for more than a decade means anything, it must support the view that the territorial power theory has seen its day. It does suggest that the Court apparently is not seriously troubled by the continued expansion of the "fundamental fairness" view predating jurisdiction on relational as well as physical contacts. Insofar as the limitations imposed by the due process clause on the exercise of jurisdiction are concerned, physical contact or "activity" in the state surely is not an invariable requirement, although such factors are relevant to the basic question of "fairness."

Eventually the Court will have to provide further clarification. The trend reflected in recently adopted state long arm statutes is to expand over ever wider the permissible range of state court jurisdiction. The most recent statutes expressly incorporate the due process limits as the statutory standards. Until the Court indicates otherwise, state courts interpreting long arm statutes can appropriately assume that the "territorial power theory" is no longer a part of due process and proceed to develop and refine the implications of "fundamental fairness." The *Hanson* decision should not be viewed as prescribing any sort of physical contact requirement. The "fairness" implications of *Hanson* should be understood as relating primarily to whether the defendant's association with the forum state was purposely or knowingly caused by the defendant rather than by someone else.

II. Forum Non Conveniens

Before examining the Kansas law and cases it is necessary to consider the doctrine of forum non conveniens, which can be viewed as part of the modern law of judicial jurisdiction. Under this doctrine a court that has jurisdiction of the parties and subject matter may nevertheless decline to exercise that jurisdiction if it would be a seriously inconvenient forum for trial of the issues presented.

When the strict territorial power theory of jurisdiction held largely un-
challenged sway, little use was made of the doctrine. But the expanding range of permissible state court jurisdiction and the adoption of long arm statutes, necessitated some device to prevent abuses. *Forum non conveniens* is such a device. Two years after the *International Shoe* decision the Supreme Court decided *Gulf Oil Corp. v. Gilbert*, 40 the leading modern case. The plaintiff, a resident of Virginia, had sued the defendant oil company, a Pennsylvania corporation, in the federal district court in New York for damages arising from a fire in Virginia. Defendant was subject to jurisdiction in Virginia, but plaintiff sued in the New York federal court, candidly admitting that he expected a better award from the New York jury. The trial court dismissed the case for *forum non conveniens*, and the Supreme Court held that dismissal was proper. While treating the doctrine as essentially a matter of judicial discretion, the Court summarized, in a manner reminiscent of *International Shoe*, the kinds of considerations that would be relevant.

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. 41

Thus, the same kinds of considerations are relevant to the question of whether a court can constitutionally exercise jurisdiction as to whether a court can properly decline to exercise it, since "fairness" is an element of both conceptions. It has been suggested by some commentators that it is pointless to separate the question of personal jurisdiction and the question of whether the exercise of jurisdiction should be declined for *forum non conveniens*. Ehrenzweig has argued forcefully that the two conceptions "seem about to coalesce in a new—and old—American rule governing the interstate venue of the 'forum

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41 *Id.* at 508-09.
conveniens." Most American jurisdictions have not yet gone this far, although some recently adopted statutes approach it. In most of the state decisions that have been rendered following the Gulf Oil case the use of forum non conveniens has been restricted to situations where the plaintiff's choice of forum is seriously inconvenient from the defendant's point of view. The objective is not to locate the forum conveniens but to avoid the forum non conveniens, and this is probably what the Gulf Oil decision contemplated. Except where some specific statute covers the matter, the courts have almost uniformly held that a case cannot be dismissed for forum non conveniens when a defendant is sued in his or its home state.

The Kansas Supreme Court, however, has not felt so limited in applying the doctrine. In Gonzales v. Atchison, T. & S.F. Ry., the Kansas Supreme Court approved dismissal for forum non conveniens of an F.E.L.A. case brought by a Colorado resident against a Kansas corporation to recover for injuries sustained in an accident in Colorado. The Gonzales decision comes close to authorizing a doctrine of forum conveniens—beyond forum non conveniens—for Kansas. It is not clear how far the Kansas court will be willing to go, however, in the absence of legislative confirmation of this broad principle.

The potential availability of a broad forum non conveniens doctrine means that the Kansas courts do not have to rely solely on jurisdictional rules to prevent abuses of long arm jurisdiction in Kansas. This point should be borne in mind when considering the question of how our long arm statute should be construed.

III. The Statute

Several years passed after the International Shoe decision before state legislatures began exploiting its implications. Illinois, in 1955, was the first state to produce a comprehensive statute designed to expand the scope of personal jurisdiction in its courts to the full extent permitted by the due process clause. That Illinois law is virtually identical to what now appears as Kan. Stat. Ann. § 60-308(b) except for subsections 5 through 8, which were added by the Kansas Legislature to the basic Illinois law. The Kansas Supreme Court has recognized the Illinois origin of these provisions and has said that the legisla-
ture must be presumed to have intended the Kansas statute to have the meaning reflected in previously decided Illinois cases. 49

The statute applies to "any person," not just to corporations, and declares that a person "submits" to jurisdiction for causes of action arising from the doing of any of the enumerated "acts." The language seems to have been chosen carefully to provide courts not yet ready to depart from the Pennoyer rationale with a basis for upholding the statute. "Submits" is tantamount to "consents." The reference to "acts" does seem to follow the rationale of the Hanson majority in contemplating that jurisdiction may be exercised over a non-consenting non-resident only if he is implicated in an event that has some palpable impact within the borders of the state. The Illinois statute, in which this phraseology originated, was enacted before Hanson, however, and indeed even before McGee. If the statute had come after McGee, perhaps different language might have been used. The law might have paralleled recent long arm statutes, such as those of California and Rhode Island, 50 which do not attempt to identify any particular kinds of cases or "acts" to which the statute applies, but rather simply declare that jurisdiction can be exercised in any situation where such exercise would not violate the due process clause. These newer laws are consciously based upon a "fundamental fairness" conception of jurisdiction and reject the territorial power rationale. The earlier Illinois-type statutes, with their emphasis on "acts," might invite courts to take the latter approach. Decisions of the Illinois courts, however, indicate that this is not a necessary interpretation. 51

A. Some analytical problems

Statutes of the Illinois-type authorize long arm jurisdiction only over individuals or corporations who do certain "acts," and the jurisdiction is said to extend only to causes of action "arising from the doing of any of said acts." Phrasing the jurisdictional basis in these terms gives rise to certain analytical difficulties that plague the courts who have to interpret the statutes in particular cases. Whenever a long arm statute describes the basis for jurisdiction in terms of "entering into a contract," or "ownership of property," the fact upon which the defendant's susceptibility to jurisdiction depends may also be the ultimate substantive issue. Suppose a non-resident defendant has communicated to a resident of Kansas that he will do something in Kansas. When he fails to act the Kansas resident initiates an action in Kansas for breach of contract serving defendant out of state under Kan. Stat. Ann. § 60-308(b)(5). The defendant moves to dismiss for want of jurisdiction. He admits the statement, but claims it was unsupported by consideration and did not constitute a contract. The plaintiff, of course, insists that there was consideration. If the

51 The best known illustration of this is Gray v. American Radiation & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). For a thorough examination of the Illinois cases decided by the time Kansas adopted the statute, see Currie, supra note 48.
statute's reference to "contract" means that defendant must have incurred a binding legal obligation, the same inquiry that will be required to resolve the jurisdiction question will also determine the substantive question. But can the defendant be forced to appear and litigate that question? This gets us into a circle. A court cannot decide whether a contract exists without jurisdiction, but it cannot determine whether jurisdiction exists without deciding whether there was a contract.

Of course, the terms "contract" and "tort" do not necessarily have the same meanings in the statute as they do in the general substantive law. Even if they did have, a different quantum of proof may be appropriate when the question of contract vel non is raised in a challenge to jurisdiction than that necessary to establish a substantive claim. Should there be a separate trial of the question before the trial on the merits? If so, should it be to the court or to a jury? To what extent, if at all, should discovery be permitted? If the jurisdiction issue is tried to the court and jurisdiction is upheld, but the jury in the later trial on the merits finds that no contract existed, should the judgment be dismissal for want of jurisdiction or a judgment on the merits for the defendant?

Most long arm statutes contain no direct guidance on these points, and as might be imagined, courts have resorted to differing solutions to this problem. Some cases have indicated that plaintiff must establish by solid proof the existence of the requisite jurisdictional facts or else face dismissal. Others have said that in order to avoid dismissal, plaintiff need only raise a "non trivial possibility" that the defendant will be found to have done one of the acts on which jurisdiction rests. Under either view, the courts have generally held that conclusions of law and fact reached in ruling on jurisdictional challenges have no preclusive effect on issues going to the substantive merits.

The Kansas Court has not yet clearly passed upon this issue. Clarification, either by statute or by court rule, of the question of what degree of proof is necessary to permit the exercise of jurisdiction, and how it should be presented—by specific pleading or affidavit, or both, before or after discovery—would be desirable. In addition, provision should be made to toll the statute of limitations during the proceedings to determine jurisdiction.

Another problem stemming from the fact that the statute authorizes juris-

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63 This point is well analyzed in Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957), and Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).
64 An exception is the Wisconsin statute. See Wis. Stat., § 262.16 (1960).
65 See, e.g., Dahlberg Co. v. American Sound Prods., Inc., 179 F. Supp. 928 (D. Minn. 1959). A suit to enjoin the use of confidential information allegedly wrongfully obtained by defendant was dismissed for want of jurisdiction because plaintiff was able to produce only "hearsay" evidence that the agent allegedly using the information in Minnesota was acting for defendant.
67 Some courts have required that facts warranting long arm jurisdiction be pleaded. See, e.g., Keckler v. Brookwood Country Club, 248 F. Supp. 645 (N.D. Ill. 1965); Lake Erie Chemical Co. v. Stinson, 162 So. 2d 545 (Fla. App. 1964).
diiction over a defendant only for "causes of action arising" from the jurisdictional "acts" is presented when the plaintiff has two closely related claims, one of which does and another which does not "arise" from one of the specified "acts." Modern procedure encourages the joinder of such claims in one lawsuit in the interests of efficiency and economy, but the language of the long arm statute has led many courts to deny jurisdiction over the related cause of action.\(^6\) To give the statute any other construction is difficult when it specifically declares, as the Illinois and Kansas statutes do, that "only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this paragraph." The Kansas Court takes this provision seriously. In one case it denied long arm jurisdiction over a foreign corporation on the ground that the cause of action did not "arise from" the corporation's acts in Kansas, even though jurisdiction apparently would have been upheld if service had been made under Kan. Stat. Ann. § 60-304(f) or Kan. Stat. Ann. § 17-504.\(^\)\(^6\)

It would surely not be unconstitutional per se if a court that had jurisdiction over a defendant by virtue of the long arm statute for a "cause of action arising from" one of the "enumerated acts" were also to exercise jurisdiction in a closely related claim on a cause of action not so arising. *International Shoe* itself indicated that the purpose of the due process clause was to insure the fair and orderly administration of the laws. That purpose is not served by a rule that requires two lawsuits on closely related claims—with the consequent waste of time, energy and resources and the potentiality of inconsistent decisions on common questions—when one suit would be fair in all respects. If the defendant will be required to defend one claim in a particular state court, and if substantially similar issues are presented in another claim, it seems fair to adjudicate both claims in that court.

An analogy from the field of "federal question" subject matter jurisdiction may be apropos. When a plaintiff has a claim arising under federal law and a closely related state-created claim and joins both in a federal suit, the federal court may exercise jurisdiction over the state claim as well as the federal question claim, even if there is no diversity of citizenship. The federal courts have created the doctrine of "pendent jurisdiction" to accommodate such a case.\(^6\)\(^1\) Common sense indicates that both claims in such a case should be tried together. The analogy, however, is not perfect. The provisions of the federal constitution\(^6\)\(^2\) and judicial code\(^6\)\(^3\) defining the federal question jurisdiction refer to "cases" and "matter in controversy" "arising under" federal law, while the long arm statute refers to "causes of action arising" from enumerated acts. But the arguments that support pendent federal question jurisdiction would

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\(^6\) See *Kechler v. Brookwood Country Club*, 248 F. Supp. 645 (N.D. Ill. 1965). In *Tice v. Wilmington Chemical Corp.*, 259 Iowa 27, 143 N.W.2d 86 (1966), however, the court held that jurisdiction as to one cause of action carried with it jurisdiction for related causes of action.


\(^6\) U.S. Const. art. III, § 2.

also seem to support the constitutionality of state court long arm jurisdiction over the person of a non-consenting non-resident defendant both for a cause of action arising from one of the enumerated acts and a closely related cause of action not so arising. Due process, in other words, does not turn upon the technical definition of "cause of action." If the statute used the term "cases arising from the enumerated acts" it would surely be constitutional, even as applied to permit the exercise of jurisdiction for a claim that did not itself technically "arise from" one of the "acts." While the statute does refer to "causes of action" instead of to "cases," if a court were to construe the term "cause of action" broadly enough to include the related claim, surely that alone would not constitute a denial of due process.

This is not to say that jurisdiction would be constitutional in every case where a plaintiff joins a claim involving some common issue with one arising from one of the enumerated acts. In some cases the connection between the two claims would be too remote to produce any considerable saving of time and effort by trying both claims in the same suit. In others, the claim "arising from the enumerated acts" may be relatively insubstantial in comparison to the related claim sought to be joined. The fact that a related claim does not technically arise from acts enumerated in the statute, poses no constitutional inhibition to a court's entertaining it. The statute should be amended or broadly construed to permit jurisdiction over a claim that is so closely connected to one over which jurisdiction can admittedly be exercised that the interests of overall fairness and "orderly administration" would be furthered by trying the two claims together. If a court cannot give the statute a construction broad enough to permit jurisdiction for both claims, then it might well decline to exercise jurisdiction at all by invoking the doctrine of forum non conveniens. Both claims could then be presented to the same court in a different state.

Comparable in some respects to the problem of jurisdiction to adjudicate closely related claims is the problem of jurisdiction over co-defendants who may share liability for the cause of action arising out of the "enumerated act." Unless the defendants themselves did an "enumerated act" out of which the cause of action arose, or unless the one who did such an act was their "agent or instrumentality," the long arm statute does not, in terms, reach them. But if our interpretation of Hanson v. Denckla is correct,64 there would be no constitutional barrier to the exercise of jurisdiction if the defendant who did not act in the state was aware that he was voluntarily participating in an arrangement likely to produce consequences in the state. A defendant who has somehow become concurrently liable with one who did perform the "enumerated act" surely has sufficient "minimum contact" to satisfy due process, even if the relationship is not technically one of agency, at least if the contact with the state was foreseeable. The language of the Kansas long arm statute is not

64 See the text at note 33 supra.
so restricting here, as it is in the matter of the related claims. It does contemplate reaching a defendant who has employed an "instrumentality" to perform the "enumerated act," but the courts have not been eager to give that term an expansive interpretation. The consideration of avoiding an unnecessary trial is as relevant here as in the case of the closely related claim, but there are other considerations that perhaps explain the reluctance to extend long arm jurisdiction over defendants who did not personally perform the requisite act within the state.

The reason appearing most commonly in the cases that deny jurisdiction over such a defendant is the famous passage from Hanson v. Denckla.65 A good illustration of this is the case of Wilshire Oil Co. v. Riffe,66 discussed below.67 The courts that take this approach insist that the defendant must have initiated some sort of physical event within the state before jurisdiction can be upheld. This means that it may not be possible to obtain long arm jurisdiction of one who allegedly conspired with a defendant who acted to commit a business tort in the state unless the conspirator himself did some act in the state to advance the conspiracy. This result has been reached, even when it appeared that there was no one state in which both defendants could be sued if long arm jurisdiction over the non-acting conspirator was denied.68 Duplicate trials thus become inevitable.

But even if the Hanson physical impact notion is rejected, there may be some justification for the reluctance to extend long arm jurisdiction over these non-acting defendants. Apart from "foreseeability" as a legal requirement, there is the problem of establishing that the requisite contact exists where that contact itself is a complex mixture of facts and law. The mere claim by a plaintiff that a defendant has the requisite contact for long arm jurisdiction does not, ipso facto, establish it. A hearing is necessary to determine the correctness of that contention if the defendant challenges it. In complicated cases, it may be unfair even to require the defendant to appear and contest jurisdiction if it seems unlikely that the plaintiff will be able to make the requisite showing. Where the defendant's alleged contact is some form of physical conduct, the problem is not acute. Physical conduct is susceptible of solid proof, and the plaintiff will either have it or he will not. Establishing a relationship between defendants on the other hand may have to rest on inference from circumstantial evidence. Even an agency relation may be very difficult to establish without a document or some other direct evidence.69 Where jurisdiction depends on the existence of such a relationship, a hearing on a motion to dismiss may turn out to be a complex and burdensome proceeding. Many of the cases refusing to uphold jurisdiction over defendants who did

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65 "It 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." 337 U.S. at 253.
66 409 F.2d 1277 (10th Cir. 1969).
67 See text at note 94 infra.
69 In the Dahlberg case, 179 F. Supp. 928 (D. Minn. 1959), "hearsay" was inadequate for this purpose.
not personally perform the "enumerated act" may perhaps be rationalized as cases where the plaintiff could not establish the jurisdictional contact without a full scale trial (which the defendant should not have to participate in unless jurisdiction were previously established). In those cases, there was little or no solid evidence to support the plaintiff's contention that the defendants were related together in a way that would justify jurisdiction over the nonactor.\footnote{The Riene case, 409 F.2d 1277 (10th Cir. 1969), is a good illustration of this point.} The problem is more a matter of proof than of constitutional limitation, and the courts should regard it as such. By basing these decisions on Constitutional grounds, courts form precedents that may require dismissal even when plaintiffs are able to prove that the defendant's connection with the cause of action warrants long arm jurisdiction. Hopefully the Kansas Court will adopt the "proof analysis," if an appropriate case is presented. However, the court's past reliance on the Hanson physical impact theory may deter it from doing so in the absence of new legislation.

B. "The transaction of any business within this state."

Subsection (1) of the Kansas long arm statute, the least specific of the "acts" enumerated in the statute, has produced the most reported cases. Woodring v. Hall\footnote{200 Kan. 597, 438 P.2d 135 (1968).} was the first of these. The plaintiff, a Kansas resident, sued her former son-in-law, a former Kansas resident but since 1962 domiciled in Texas, to obtain repayment of money lent by the plaintiff to defendant over a number of years. Service was made on the defendant in Texas pursuant to KAN. STAT. ANN. § 60-308(b)(1). The defendant challenged jurisdiction on the grounds that he transacted no business in Kansas and that the statute could not be invoked to give jurisdiction over him since the plaintiff's cause of action arose before the effective date of the statute. In dismissing the action, the trial court sustained the defendant's contention that the suit did not arise from the transaction of any business by the defendant. The Kansas Supreme Court reversed.

The court first referred to the Illinois source of the law and then declared that "a statute adopted from another state carries with it the construction placed upon it by the courts of that state."\footnote{Id. at 601, 438 P.2d at 140.} The court referred to the leading Illinois case, Nelson v. Miller,\footnote{11 Ill. 2d 378, 143 N.E.2d 673 (1957).} which involved the "tortious act" provision rather than the "transaction of business" provision. The court quoted at length from the Illinois case. One passage indicates the fundamental approach to jurisdiction that the Kansas Supreme Court might follow in construing the long arm law generally: "The limits on the exercise of jurisdiction are not mechanical or quantitative [citing International Shoe], but are to be found only in the requirement that the provisions made for this purpose must be fair and reasonable in the circumstances . . . ."\footnote{200 Kan. at 601, 438 P.2d at 140.}

The court also uttered the often quoted statement that the long arm statute
"reflects a conscientious state policy to assert jurisdiction over non-resident defendants to the extent permitted by the due process clause . . . "75

The Court found no lack of due process or contravention of Kansas law in applying the long arm statute to transactions that occurred before the statute was enacted. The statute declares that persons who do the enumerated "acts" "thereby submit" to jurisdiction. If the Court had been inclined to take a narrow, territorial power approach to the statute, it might have found that it could not apply retroactively. When defendant did the "act" upon which the claim of jurisdiction rests, Kansas law attributed no such consequences to it, and the defendant himself had not been in Kansas so as to be touched by Kansas sovereign power since then. The Court viewed the statute, however, as merely providing a new "procedure" for the exercise of jurisdiction. The decision suggests that the statute does not create new "bases" for the exercise of personal jurisdiction. It merely provides a method of service of process to effectuate in the enumerated cases an independently existing "basis," namely "fundamental fairness." The court seemed to be saying that there is a basis for jurisdiction in any case where it is "fair and reasonable in the circumstances," the standard for due process, but that the statute provides a means of service only for the enumerated cases. The court made it clear that the defendant, although presently a non-resident, had no "vested right" not to be sued in Kansas courts.76

The view that the statute deals only with service of process instead of with bases for jurisdiction probably does not reflect the legislative intention. It may account for the court's tendency in other cases, described below, to ignore the terms of the statute or to confuse issues of statutory construction and constitutional due process. In the Woodring case, however, the court did give careful attention to the terms of the statute. In construing "transaction of any business," the court rejected the argument that "business" in the statute referred to commercial-type transactions not to a personal, intra-family loan such as was involved in the Woodring case. The court said that "business" in this statute does not have the same meaning as it does in the statutes that had long ago extended jurisdiction over foreign corporations "doing business" in the state. "[T]he phrase 'transaction of any business' itself is all encompassing and was used by the Legislature in its broadest logical sense and as intending to authorize the personal service of summons [out of state] upon a corporate or individual defendant to the full extent of the due process clause."77

The court found that the defendant had conducted activities of such nature and quality as to make the exercise of jurisdiction fair. Since the defendant lived in Kansas, received a medical degree from the state university, and obtained a divorce in Kansas courts, he had "invoked the benefits and protections" of Kansas law during the period covered by the loan transactions. In addition,
Kansas had interests in providing the forum. Not only would Kansas want to help its own citizens collect their debts, but the substantive law of Kansas was applicable to the case. While the defendant’s relation to the state was such that the court could have found jurisdiction even with a relatively narrow approach, the overall tenor of Woodring indicates that the court was following a broad “fundamental fairness” approach. The same may not be said, however, of the Tilley case, which was decided the same day as Woodring, nor of White v. Goldthwaite, a “transaction of business” case decided the following year.

In Goldthwaite, a Kansas resident sued an Oklahoma resident to recover money allegedly owed by the defendant under two transactions that were related to a larger complex arrangement between the parties. One transaction was repayment of a loan of $1,560. The other was an agreement by the defendant to buy back from the plaintiff an option to purchase stock owned by the defendant. The purchase option had been given as part of the consideration for an agreement whereby the plaintiff was to obtain some $120,000 and loan it to the defendant. When the value of the stock subject to the option went up dramatically, the parties agreed that the defendant could buy back the option for $25,000. The larger transaction was the result of negotiations in Oklahoma and by telephone communication between Kansas and Oklahoma by the plaintiff and the defendant’s agent. In performance of his part of the deal the plaintiff borrowed $60,000 from a Kansas bank and received from the defendant, as collateral, stock certificates, which he in turn pledged at a Kansas bank. The plaintiff claimed that the agreement to buy back the stock option called for payment of the $25,000 in Kansas, but the defendant disputed this. The plaintiff sued in Kansas, serving the defendant in Oklahoma under Kan. Stat. Ann. § 60-308(b)(1).

Defendant’s challenge to jurisdiction was overruled, and the case went to trial to the court. A judgment for the plaintiff for the full amount claimed was returned. On appeal the Kansas Supreme Court reversed on the ground that in personam jurisdiction was lacking.

The court’s analysis of the jurisdictional issues in the Goldthwaite opinion is vague. Some language in the opinion suggests that the decision may rest on the ground that our statute does not cover this particular case, either because the arrangement did not constitute “transaction of business” or because the cause of action did not “arise from” the “transaction of business” in Kansas. There is also language suggesting that the court thought it was basing its decision on due process considerations. The meaning of “transaction of business” was not discussed. The court drew from Woodring the proposition that our legislature intended the statute to extend as far as permitted by the due process clause. The court then made reference to five United States Supreme Court cases,

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80 “[T]he entire transaction was essentially an Oklahoma enterprise and the claim for relief arose out of defendant’s activities in Oklahoma, rather than Kansas. Her acts in Kansas, through her agent, appear to be incidental rather than essential . . . .” Id. at 89, 460 P.2d at 583.
extracting a one-line “guideline” from each. Upon these the court attempted to base a formula:

From the foregoing cases it appears there are three basic factors which must coincide if jurisdiction is to be entertained over a nonresident on the basis of transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of the laws of the forum state afforded the respective parties, and the basic equities of the situation.81

This formula contains elements that are relevant to the due process question and others that are meaningful only in terms of our statute. It purportedly derives from the United States Supreme Court decisions, but it deals with jurisdiction “on the basis of transaction of business,” a statutory conception. The third “factor” is the International Shoe doctrine. The first factor, is taken from the narrow Hanson impact notion, which the Hanson majority thought was merely a clarification of the International Shoe standards. The second factor, of course, is not a constitutional requirement, but a provision stemming from our statute, which extends to “causes of action arising from” the enumerated acts.82

The Kansas Supreme Court’s reduction of the fourteenth amendment’s due process requirements to a formula in Goldthwaite is inappropriate. The court may do that, if it deems it desirable in construing our statutes, but the test for due process should be: “If we uphold jurisdiction here would our decision be reversed by the United States Supreme Court?” Although the question is not free from doubt, the Supreme Court probably would not have found a violation of due process if the Kansas court had approved jurisdiction in the Goldthwaite case. Defendant initiated the larger transaction and the two particular debts under suit. She knew she was dealing with a Kansas resident. The parties understood that the transaction would have impact in Kansas as well as in Oklahoma, even though the actual physical acts involved in the Kansas element of the arrangement were acts that the plaintiff would perform. Under the McGee standard, defendant was a party to a transaction having a substantial Kansas connection, and it would not be fundamentally unfair to require her to litigate that transaction in Kansas. Even the view expressed in the majority opinion in Hanson v. Denckla would probably uphold jurisdiction in such a case, for the Kansas connections were clearly present at the outset of the arrangement.

81 Id. at 88, 460 P.2d at 582. The language of the formula is taken from Tyee Construction Co. v. Dulien Steel, 62 Wash. 2d 106, 381 P.2d 245 (1963) (citations omitted).
82 One of the “foregoing cases” was Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), in which the Supreme Court held that a state could constitutionally exercise jurisdiction over a foreign corporation for a cause of action unrelated to its activities within the state if its contracts were “substantial.”
The Kansas court, however, interpreted Hanson as requiring physical contact by the defendant with the territory of the forum state. After reciting the points of contact the transaction had with Kansas, the court said: "The difficulty is these were all activities of plaintiff, not defendant." The court then quoted a phrase from the Hanson majority opinion: "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state." The Goldthwaite court interprets that statement to mean that even if a "transaction" contemplates substantial activity in the state, unless it is the defendant who is to perform the activity, long arm jurisdiction over the defendant violates due process.

Here the failure to separate the question of due process from the question of statutory construction leads to difficulty. It is one thing to say that the legislature did not intend to extend jurisdiction over defendants such as Mrs. Goldthwaite; it is quite another to hold that it could not constitutionally do so. The interpretation the Kansas court drew from the Hanson passage was surely not what the Supreme Court had in mind. In Hanson, the Court was concerned about exposing a defendant to jurisdiction in a forum that was unforeseeable when the relations between the parties were formed. If Mrs. Donner had been a resident of Florida when the trust agreement was entered into, even the Hanson majority indicated it would uphold jurisdiction over the Delaware trustee for purposes of determining the validity of the trust and the power of appointment, even though the only activity in Florida was that of Mrs. Donner. In such a case the trustee would have "purposefully availed itself of the privilege of conducting activities" in Florida by entering into such an arrangement. The "unilateral activity" reference related, not to the absence of physical activity in the forum state by the trustee, but to the fact that the relation between the transaction and Florida did not exist at the time the transaction was formed. The Florida connection in Hanson resulted from the later "unilateral" act of Mrs. Donner in moving to Florida.

Unless the Kansas court somehow indicates that the problem in Goldthwaite was not a lack of due process, but rather that the statute did not reach the defendant in that case, the court will face interpretative difficulties in construing one of the new sections added to the statute by the 1971 legislature, as Kan. Stat. Ann. § 60-308(b)(5). That provision was undoubtedly added to the statute to counteract Goldthwaite and certain federal court decisions similarly

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48 204 Kan. at 89, 460 P.2d at 583.
49 357 U.S. at 253.
50 The Court might have found support for this view in some Illinois cases, e.g., Grobark v. Addo Match Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959), where the Illinois court had held that a New York corporation who had entered an exclusive distributorship arrangement with Illinois residents whereby the latter sold defendants products in Illinois, had not "transacted business" in Illinois. Although some negotiations took place in Illinois, the contract was concluded by mail. The regular sale of defendant's products in Illinois was not transaction of business by defendant, since plaintiff were the ones doing it. This line of reasoning was undercut, however, by the later Gray case, note 51 supra. As noted by Currie, "if a tort can be committed in Illinois although the defendant is not here, business can be transacted here the same way." Currie, Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U.Ill. L. Forum 533, 569. The Kansas court in Goldthwaite gave no reason for turning to Washington for its authority and ignoring Illinois cases.
giving a narrow reach to the long arm statute in “transaction of business” cases. If the due process clause forbids the exercise of jurisdiction over an Oklahoman who enters into a contract with a Kansas resident where no part of the contract is to be performed in Kansas by the defendant, the new provision will be essentially nugatory. If the contract does call for part performance in Kansas by the defendant, jurisdiction would be permissible under the “transaction of business” clause, and the new provision would be unnecessary. If the contract does not contemplate part performance by the defendant in Kansas, but does call for some conduct on the plaintiff’s part, the new provision avails nothing, for “due process” will not permit suit against defendant in Kansas unless there is some other sufficient basis.

In spite of the analytical deficiencies in Goldthwaite, one point seems persuasive—Oklahoma would have been a more convenient forum for the trial of the case. The plaintiff, although a Kansas resident, was principally engaged in the oil business in Oklahoma. He had an office and an apartment there. The court indicated that Oklahoma law governed the substantive issues of the case. The Kansas banks, who at one time had been involved in the transaction, had been paid off. The court made a valid point when it said that the facts of the case failed to “establish any legitimate interest of the state in providing a forum for trial.” But a better means of making that point would be by invoking the doctrine of forum non conveniens. The case may not fall within the classical standards for forum non conveniens as announced by the United States Supreme Court in Gulf Oil Corp. v. Gilbert, but as noted previously, Kansas has gone beyond other states in permitting the use of the doctrine even when a defendant is sued in its home state. Goldthwaite surely could have been dismissed for forum non conveniens under our broad doctrine.

If it arguably could have been properly dismissed on forum non conveniens grounds, why quibble with the decision? What difference does it make if a case is dismissed for want of jurisdiction or for forum non conveniens? The difference is that forum non conveniens, unlike jurisdiction, is a discretionary matter. The decision to apply it ought to be made at the trial level, subject to review only for abuse of discretion by the trial judge. If the case has been tried and decided (as it was in Goldthwaite) and the trial was regular in all respects and fair, it would serve no purpose for an appellate court to reverse the decision on the ground that the trial court should have dismissed for forum non conveniens, unless there was a clear abuse of discretion. Lack of jurisdiction, on the other hand, is a more serious matter. The standards for determining when a court has jurisdiction may be flexible, but they are not discretionary. The appellate court must set aside a decision, even one rendered after a full-

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86 “Here defendant violated no Kansas statute, she breached no Kansas contract—about all she really did on her single entry in Kansas was to attempt to compromise or settle a disputed claim which had arisen elsewhere. This type of contact hardly suffices to establish any legitimate interest of the state in providing a forum for trial.” 204 Kan. at 90, 460 P.2d at 584.

87 See notes 40-44 supra.

88 See notes 45, 46 supra.
scale trial, if the court below lacked jurisdiction. A judgment rendered without jurisdiction may even be attacked collaterally. In the interests of effective judicial administration, however, the appellate court ought to be very slow to reverse a decision after a full trial. It ought to exhaust all avenues of analysis to see if there is any way to uphold the lower court's jurisdiction. Trial courts should have considerable latitude to dismiss a case before trial—even on the court's own motion and even though the court does have jurisdiction—in the interest of encouraging plaintiffs to seek the most convenient forum. But if the trial judge decides not to dismiss, and the case proceeds through trial to judgment, as it did in Goldthwaite, the appellate court should not reverse unless an error was committed in the trial itself, or unless there is no reasonable way to affirm the trial court's jurisdiction.

Since the court in Goldthwaite viewed the matter as involving the court's jurisdiction rather than one involving the discretion to decline to exercise jurisdiction, the result is a decision of dubious value and uncertain meaning narrowing the scope of Kansas long arm jurisdiction and a totally wasted trial. Although the connection of the case to Kansas might not have been strong enough to warrant burdening Kansas courts with it, the trial court did in fact accept the burden. The defendant's connection to Kansas was not so remote as to warrant declaring a completed trial a nullity and to require that another court be burdened with the same case. There is no suggestion in Goldthwaite that another court could render a better or different judgment on the facts.

In some cases "transaction of any business within this state" could logically include transactions of business by mail or telephone with Kansas residents or involving other significant Kansas connections. Federal decisions construing the Kansas statute, however, have indicated that transactions effected through mail may not constitute the "transaction of business in this state." In National Bank of America v. Calhoun,\(^9\) the United States District Court for Kansas upheld jurisdiction over a Nebraska resident in a suit to recover on a check executed by the defendant while he was physically present in Kansas. The court indicated in dictum, however, that the critical fact was that the check had been executed and delivered by defendant to plaintiff while defendant was physically present in Kansas. If the check had been executed and delivered in Nebraska, even if delivered to a Kansas resident to purchase Kansas property, the court said it might not have met the requirements of "transaction of business" in Kansas. In Oswalt Industries, Inc. v. Gilmore,\(^9\) the Kansas plaintiff sued a Georgia defendant for breach of a contract under which the latter agreed to purchase farm machinery and equipment from plaintiff. The contract was negotiated by mail, telephone, and by personal contact between defendant and plaintiff's salesman in Georgia. The district court held that this did not constitute "transaction of business" as contemplated

by the Kansas long arm statute, and suggested that if the Kansas statute did cover this, it would be contrary to due process. The court sought to distinguish several cases construing comparable provisions in other states’ statutes upholding jurisdiction over non-residents who contracted by mail with residents, and suggested a distinction between cases where the non-resident was a seller and where he was a purchaser. A distinction between seller and buyer as such is hard to rationalize. The court merely held that in order to reach a non-resident buyer, something more than agreeing to purchase goods from a Kansan was necessary. The court said:

To rule otherwise in our opinion, would extend the in personam jurisdiction of the state of Kansas towards the four corners of the United States, and indeed the world, subjecting mail order buyers of every type to the risks inherent in such a broad exercise of powers. The jurisdiction which Oswalt would have this court assume would be applicable in principle to every customer who deals at a distance with a Kansas vendor. Such a principle is not consistent with the traditional notions of “fair play and substantial justice.”

However, according to National Equipment Rental v. Szukhent, if the vendor had included in the purchase contract a clause whereby the purchaser agreed to jurisdiction in Kansas and appointed some Kansan to receive service of process as “agent” for the purchaser, jurisdiction would have been proper—even if the purchaser did not know the “agent,” and even if the “agent” was the wife of one of the officers of the plaintiff corporation.

It is probably significant that both the state and federal decisions construing our statute seem to recognize that a single contract may be enough to constitute “transaction of business.” Both indicate, however, that some sort of physical conduct in the state by or on behalf of the defendant is necessary. The legislature has indicated dissatisfaction with the latter requirement in the recently adopted provision of Kan. Stat. Ann. § 60-308(b)(5). That provision would permit jurisdiction in a case like Oswalt, in spite of the fears expressed by the court in that case concerning the risks to which mail order purchasers are exposed. Further reference to this new provision will be made later.

One other federal decision dealing with Kan. Stat. Ann. § 60-308(b)(1) must be considered. In Wilshire Oil Co. v. Riffe, a Delaware corporation that had been indicted and convicted of antitrust violations, sued three of its agents in the United States District Court for Kansas to recoup the fines, penalties and other expenditures incurred by it as a result of that prosecution and succeeding civil suits. The antitrust violations allegedly resulted from a conspiracy by the three defendants, one of whom was an officer of the corporation, to fix the prices at which asphalt was sold to the States of Kansas and Missouri. The plaintiff charged that the defendants’ conduct

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91 Id. at 313.
93 See text at note 117 infra.
94 409 F.2d 1277 (10th Cir. 1969).
was in violation of their fiduciary duty, and that they were accordingly liable for the expenses to the corporation caused by their faithless conduct. The officer defendant, L. E. Riffe, was a citizen of Oklahoma. One of the agents was a citizen of Oklahoma and the other a citizen of Kansas. All three allegedly participated in the Missouri conspiracy, but only L. E. Riffe and the Kansas agent were charged with the Kansas conspiracy. The Oklahoma defendants moved to dismiss for want of personal jurisdiction, and the Kansas resident sought dismissal for failure to state a claim. The trial court granted both motions and dismissed. On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal for want of jurisdiction but reversed the dismissal for failure to state a claim against the Kansas resident.

The case was a very difficult one, for it was not clear that the plaintiff corporation had a substantive right of action at all. The trial court, indeed, had held that the facts alleged did not state a claim for relief. The Tenth Circuit, on the other hand, refused to hold as a matter of law that the corporation could not recover for antitrust penalties and expenses against employees and officers who caused the corporation those losses through breach of their fiduciary duties. The court recognized that facts might be developed in later stages of the litigation that would support a recovery, but was concerned about the fairness of requiring a non-consenting non-resident to participate in such litigation in view of all the uncertainties. The case could have provided an excellent vehicle for deciding the degree of certainty with which plaintiff must show the defendant's contact with the transaction to avoid a dismissal on jurisdictional grounds. Instead of taking that approach however, the court based its decision dismissing the Oklahoma defendants mainly on the ground that the plaintiff was unable to identify any one "act" in Kansas by a defendant in his individual capacity (as opposed to his representative or fiduciary capacity as agent for some corporation) out of which the claim could be said to have arisen. The court did not clarify whether such an act was required by the statute or by the due process clause, or by both. As in Goldthwaite, the court was led into the search for physical contacts between the defendants and Kansas by the unfortunate but memorable language of Hanson v. Denckla.

The only such contacts in the Wilshire case were acts done by the defendant as representative of the corporation, and the court held that these contacts served only to submit the corporation, not the defendant as an individual, to jurisdiction in Kansas for claims arising from the business transacted. The defendant himself was protected, the court said, by a "fiduciary shield."

This "fiduciary shield" idea was taken from four cases cited by the court

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96 See text at notes 52-56 and notes 69-71 supra.
97 See note 65 supra.
98 409 F.2d at 1281.
in \textit{Riffe}.\footnote{Id.} In all four, that principle was treated as part of the concept of "transaction of business," as the term was used in the New York statute.\footnote{Willner v. Thompson, 285 F. Supp. 394 (E.D.N.Y. 1968); Schenim v. Micro Copper Corp., 272 F. Supp. 523 (S.D.N.Y. 1967); Union Management Corp. v. Koppers Co., 250 F. Supp. 850 (S.D.N.Y. 1966); Rene Boas and Associates v. Vernier, 22 App. Div. 2d 561, 257 N.Y.S.2d 487 (1965).} New York has taken a more restricted approach to the interpretation of its statute\footnote{See text at notes 75-78 supra.} than that expressed by the Kansas Supreme Court in \textit{Woodring v. Hall},\footnote{United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir. 1966); Krause v. Hauser, 272 F. Supp. 549 (E.D.N.Y. 1967).} and so the same terms may have different significance in the New York law than in Kansas. In none of the cases cited by the court is there any suggestion that due process forbids subjecting an agent or fiduciary to jurisdiction for claims connected with acts done or activity engaged in by him in his representative capacity. The Tenth Circuit apparently ignored the fact that these cases concerned statutory construction, not due process, and treated as irrelevant two other cases construing the New York statute in such a way as to permit the assertion of personal jurisdiction over agents for claims arising from activities conducted in their representative capacity when, as in the \textit{Riffe} case, it was claimed that they were guilty of violating their fiduciary duty in connection with that activity.\footnote{Eisman v. Martin, 174 Kan. 726, 258 P.2d 296 (1953).} In the only case cited by the court in connection with this point (other than a Kansas non-resident motorist case,\footnote{Maternity Trousseau, Inc. v. Maternity Mart of Baltimore, 196 F. Supp. 456 (D. Md. 1961).} which the court said was inapposite) that did not rest upon construction of the New York statute, a corporate officer was held personally subject to long arm jurisdiction in Maryland in a claim arising from antitrust violations by the corporation despite the argument that the only activity of that officer connected to the cause of action in Maryland was conducted in her representative rather than individual capacity.\footnote{Maternity Trousseau, Inc. v. Maternity Mart of Baltimore, 196 F. Supp. 456 (D. Md. 1961).} Thus the court had very little justification for importing the "fiduciary shield" concept into \textit{Riffe}. While there is little justification for the use of the "fiduciary shield" to narrow the scope of the long arm statute, there is none whatever for reading it into the "due process" question. The capacity in which the defendant acted is one of many considerations to be weighed in looking at the "nature and quality of the activity," but the fact that a defendant was acting in a representative rather than an individual capacity cannot, as a matter of constitutional law, immunize him as an individual from personal jurisdiction in a cause of action related to that activity in Kansas. It seems clear that due process would not prohibit jurisdiction over an Oklahoma defendant who, in breach of his fiduciary duty, conspired with a Kansas defendant to restrain trade in Kansas. It would not have required a strained construction of the Kansas long arm statute to reach the Oklahoma defendant in such a case—either under the "transaction
of business” or the “tortious act” provision. Even though the “cause of action” is breach of fiduciary duty, it arises from business transacted or tortious conduct in the state by an “instrumentality” of the defendant. He and his co-conspirator caused the corporation to “act” in Kansas as the means of carrying out their scheme, and the corporation’s cause of action arose from that. Or, the Kansas conspirator could have been viewed as the “agent” of the Oklahoma conspirator, insofar as acts done in furtherance of their mutual venture were concerned. Partners may be subjected to jurisdiction because of acts of their partners; conspirators are comparable.

The most serious problem concerned whether there was sufficient probability that the plaintiff would be able to prove the facts alleged in its complaint. This was a case like those described above, wherein the existence of jurisdiction turned upon issues that were also relevant to the substantive merits. The mere allegation that the defendant breached his fiduciary duty in transacting business in Kansas should not make the defendant subject to jurisdiction in Kansas. But if the plaintiff could have adduced facts clearly showing that the transactions were violations of fiduciary duty, both due process and the long arm statute would be satisfied. The plaintiff should not have to prove its whole case in order to withstand a jurisdictional challenge, but it ought to produce some evidence in support of its allegations. The question is how much. The “fiduciary shield” concept was apparently seized upon by the court as a means of avoiding that difficult question. The court seemed to realize the “fiduciary shield” was not really an adequate solution to the jurisdictional question. It said:

[W]e do not deem it necessary to decide the case solely on that basis. The interaction of the inherent weakness of the contacts and the strained causal connection with the underlying cause of action, operates in conjunction with the fact of the agency relationship to require, in conformity with notions of fair play and substantial justice, that this court refrain from compelling a corporate officer to answer in courts located in a state foreign to both the agent and his corporation.108

If it were not for the fact that a Kansas defendant, over whom the court clearly had jurisdiction and against whom the litigation was going to proceed, was sued in the same case, the quoted statement would have perhaps been a sufficient ground for the decision. When, however, the result of holding the Oklahoma defendant to be beyond the reach of the long arm statute is that two trials involving substantially the same issues will be necessary, it is not so clear that “fair play and substantial justice” require that the suit against the Oklahoma defendant be dismissed. If the Kansas defendant were subject to jurisdiction in Oklahoma, the best solution to the problem posed in Riffe would have been to order a change of venue to Oklahoma under 28 U.S.C. § 1404(a) (1964). If the Kansas defendant was not subject to jurisdiction there, however, this alternative would not have been available. That failing, “fair

106 See notes 52-56 supra.
107 409 F.2d at 1282-83.
play and substantial justice" would seem to call for liberality in construing the terms of the statute and in viewing the contacts between defendant and the state so that the case against all the defendants could proceed in the same court if possible. *International Shoe* held that an "estimate of inconveniences" is relevant and that "fair play and substantial justice" call for consideration of the fairness to plaintiff as well as to defendant. A comparison of the relative inconvenience to the Oklahoma defendant in being required to defend in Kansas and the inconvenience to plaintiff in having to bring multiple suits should have been made before concluding that "fair play and substantial justice" required dismissal. "Fair and orderly administration of the laws" should be taken into account as well as the bare contacts between the defendant and the forum state.

The overall effect of *Riffe* is to construe narrowly the "transaction of business" provision in the Kansas long arm statute, and presumably to read into it the "fiduciary shield" qualification. Concern over this case may have led to the inclusion of the new provision, KAN. STAT. ANN. § 60-308(b)(6), by the last legislature. That section pointedly repudiates the "fiduciary shield" concept insofar as executives of Kansas corporations or corporations "having a place of business" in Kansas are concerned. It also rejects the "fiduciary shield" for executors or administrators of Kansas estates.

C. "The commission of a tortious act within this state."

Only one Kansas case construing subsection (2) of the Kansas long arm statute has been reported. In *Barr v. McHarg*, the Kansas Supreme Court held that jurisdiction could be exercised over a Michigan administrator of the estate of a Michigan resident in an action for wrongful death arising out of a collision in Kansas. The court noted that jurisdiction could have been acquired by virtue of the non-resident motorist statute, KAN. STAT. ANN. § 8-401 (1964), but since the plaintiff initiated the suit by out-of-state service under KAN. STAT. ANN. § 60-308(b)(2), the court had to determine whether that provision applied. Since the statute specifically covers a suit against a personal representative of one who does one of the enumerated acts, the court had no difficulty concluding that it was applicable. Moreover, an Illinois case had already decided the point, and the court said that decision was part of the Illinois law Kansas acquired when the legislature copied the provision from the Illinois statute.

Illinois decisions construing "commission of a tortious act" may not always be accepted as authoritative in Kansas, however. The Illinois court had found that term broad enough to include a manufacturer who manufactured a valve in Ohio and sold it to a Pennsylvania manufacturer who incorporated the valve into a water heater that was sold to a consumer in Illinois. The water heater exploded in Illinois and injured the plaintiff. In *Gray v. American*
Radiator and Standard Sanitary Corp.,\textsuperscript{110} the court said that the Illinois statute was intended to extend as far as due process would permit, and so that if there was any way the statute could be construed so as to reach the defendant, it should do so. "Tortious act" was found to be the equivalent of "tort." A tort takes place where the last event constituting the cause of action occurs. The explosion, the last event in this case, occurred in Illinois. Therefore the defendant had committed a tortious act in Illinois, even though none of the defendant's employees or agents, so far as the record showed, had ever set foot in Illinois.

The Kansas court may not be willing to go so far in interpreting subsection (2). The legislature did not intend to rely on the "tortious act" provision to provide jurisdiction in "product liability" cases such as Gray. It adopted a specific provision, Kan. Stat. Ann. § 60-308(b)(7),\textsuperscript{111} to cover such cases. In Tilley v. Keller Truck and Implement Co.\textsuperscript{112} the Kansas Supreme Court ruled that jurisdiction could not be exerted over a Colorado truck dealer who negligently inspected and serviced a truck, the wheel of which broke while the truck was passing through Kansas. The court did not discuss whether this could constitute a "tortious act." It discussed only the applicability of Kan. Stat. Ann. § 60-308(b)(7). The court felt it would be unconstitutional to subject the Colorado defendant to jurisdiction in Kansas on such tenuous connections, and so it probably would not have found the case to be within the "tortious act" concept of Kan. Stat. Ann. § 60-308(b)(2). This case will be discussed at length later.\textsuperscript{113}

The Kansas court may follow the lead of New York and hold that "tortious act" does not mean the same as "tort" and that the tortious act takes place where the defendant does the wrongful act or omission, not where the "last event" occurs.\textsuperscript{114} The reasoning of Riffe and other federal "transaction of business" cases certainly points in this direction.\textsuperscript{115}

D. "The ownership, use or possession of any real estate situated in this state."

No cases have been reported construing subsection (3) of the Kansas long arm statute, and its scope is far from clear. What sort of in personam causes of action "arise" from the defendant's ownership, use or possession of land? Suits for injuries attributable to defects in the premises, perhaps, but they are probably covered already by the "tortious act" provision. Actions for waste would also probably fall under "tortious acts." Suits to force a non-resident to convey, need not rest upon personal jurisdiction. Suits to compel a purchaser to pay the price do require personal jurisdiction, however. Such a claim might be said to arise from a defendant's "ownership, use or possession" of any real estate located in Kansas. Considering the narrow interpretation the Kansas Court

\textsuperscript{110} 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
\textsuperscript{111} See note 135 infra.
\textsuperscript{112} 200 Kan. 641, 438 P.2d 128 (1968).
\textsuperscript{113} See note 137 infra.
has given to "transaction of business," that provision might not cover a non-
resident purchaser who signed and delivered the contract of purchase outside
the state.

Damage actions for breach of title warranties would surely be covered,
as well as claims for unpaid rent, although both types of action may also arise
from "transaction of business." Actions for reformation, for rescission and
cancellation, and to enforce constructive trusts or equitable liens on the pro-
ceeds of real property illegally obtained, also are probably covered by this
category, if not by others.

E. "Contracting to insure any person, property, or risk located within this state
at the time of contracting."

Subsection (4) of the long arm statute has not been tested in Kansas, but
a similar statute was involved in the McGee\(^{110}\) case and its constitutionality
was upheld insofar as jurisdiction over a company contracting to insure a
state resident was concerned. However, the provision is not, in terms, limited
to contracts to insure Kansas residents. If the court should construe "located"
to mean simple physical presence, the statute would reach an insurance com-
pany which contracted to insure the life of someone who happened to be
passing through Kansas at the time of contracting. Application of the statute
in such a case would be constitutionally doubtful, unless the insurance company
had "substantial contacts" with Kansas.

The provision does not require the contract to be entered into in Kansas.
A contract to insure property located in Kansas would be covered regardless
of where the contracting party resided or was physically present when the
contract was formed.

F. "Entering into an express or implied contract, by mail or otherwise, with a
resident of this state to be performed in whole or in part by either party in
this state."

Subsection (5) of the long arm statute may have been adopted by the legis-
lature to counteract some of the decisions narrowing the scope of the "transac-
tion of business" provision. The language of the provision is very much like
that of the Texas statute,\(^{117}\) and some of the provision's significant language
also appears in the statutes of Minnesota,\(^{118}\) Iowa\(^{119}\) and formerly Vermont.\(^{120}\)
These statutes only apply to corporations, however. The provision in the
Kansas statute seemingly subjects anyone who contracts with a Kansas resident
to jurisdiction in Kansas if any of the performance called for in the contract
is to be performed in Kansas—even if it is the plaintiff-resident's performance

\(^{110}\) 355 U.S. 220 (1957).
\(^{117}\) TEX. REV. CIV. STAT. art. 2031b(4) (1964).
\(^{119}\) IOWA CODE ANN. § 617.3 (1950).
\(^{120}\) VT. STAT. ANN. T.12, § 855 (1957), before it was amended in 1967 to provide even broader
coverage of foreign corporations.
that touches Kansas. The *Goldthwaite* case, however, casts doubt on the constitutionality of such an application.\(^{121}\)

This provision would also seem to permit the exercise of jurisdiction in Kansas for a suit by a Kansas purchaser against a mail order seller, even if the seller had no other contact with Kansas. This result does not seem unfair. If the plaintiff is an individual who made a relatively small purchase, requiring him to go to the defendant’s home state to sue for damages if the goods were defective might leave the plaintiff with no effective remedy. The Supreme Court specifically pointed this out in *McGee*. But the new provision in our statute is also broad enough to cover a suit by a Kansas mail order seller to recover from a non-resident purchaser. If “resident” includes corporations as well as individuals, the Kansas seller in *Oswalt Industries v. Gilmore*\(^{122}\) could reach the Georgia purchaser through this provision, and the fears expressed by the United States District Judge in that case would be realized. The court there thought that the exercise of jurisdiction in Kansas would exceed the limits of due process.

Moreover, a Kansas insurance company could perhaps invoke this provision to obtain jurisdiction over a non-resident policy holder. Such a case could be the reverse of *McGee*; *i.e.* instead of the insured’s suing the company in the insured’s home state, the Kansas insurer might sue for a declaratory judgment of non-liability in Kansas. This does not seem fair, although it is difficult to articulate the reason why what is due process in a case where the insured sues should not also be due process in a case where the insurer does so. The contract has a “substantial connection” to both the insured’s and the insurer’s home state. Each state has a significant interest in the litigation.

Perhaps the distinction made in the *Oswalt* case will be followed permitting the use of long arm jurisdiction over a seller but not a buyer in a case where a single contract is the defendant’s only connection to the state. The Minnesota Supreme Court raised this distinction in a suit brought under its statute, which subjects foreign corporations to suit in Minnesota for causes of action arising from a “contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota.” In *Fourth Northwestern National Bank v. Hilson Industries*,\(^{123}\) notes, payable in Minnesota, were given by an Ohio corporation to purchase machinery from a Minnesota corporation. The Minnesota court held its statute could not be applied without violating “traditional notions of fair play and substantial justice,” since the defendant had no contact with Minnesota other than the contract for which the notes were given. In reaching this conclusion, the court sought to distinguish other cases where foreign corporations were held subject to long arm jurisdiction. Among the distinguishing factors the court noted were that the plaintiff was not an individual—“a relatively defenseless holder of a small claim”—but a

\(^{121}\) See text at note 85 supra.

\(^{122}\) See text at notes 90-91 supra.

\(^{123}\) 264 Minn. 110, 117 N.W.2d 732 (1962).
corporation that had "taken the initiative" in the transaction. "There is a sharp distinction," the court said, "between suing a non-resident seller and invoking [the long-arm statute] against a non-resident buyer."\(^{124}\)

The "initiative" factor had come from a Utah case, *Conn v. Whitmore*,\(^{125}\) in which the Utah court denied full faith and credit to an Illinois judgment. The Illinois seller had offered by mail to sell horses to the Utah buyer, and a contract was completed by mail. When a dispute arose, the plaintiff sued in Illinois for the purchase price, serving defendant in Utah under the Illinois long arm statute. Default judgment was rendered in Illinois, but recognition and enforcement of the judgment in Utah was denied. The Utah court, raising the "mail order" specter, held that jurisdiction could not be exercised over one who had not taken the initiative in the formation of the interstate contract. A distinction between buyer and seller or a distinction based on the identification of the party having the initiative would not be satisfactory for all cases. The courts are still wrestling with this problem, and the Kansas court surely will have an opportunity to express its view soon.

In framing its approach, the court should keep two points in mind. One is that the legislature, by enacting this new provision, has expressed its view that the interpretation of "transaction of any business" reflected in such cases as *White v. Goldthwaite*\(^{126}\) and *Oswalt Industries v. Gilmore*,\(^{127}\) is too narrow to include all of the situations the legislature wants to reach with the long arm statute. The other point is that the critical question concerning the constitutionality of long arm jurisdiction is whether it is fundamentally fair to require the defendant to appear in Kansas and move to dismiss the case, not whether it is fair to require him to try the substantive merits here. "Relative inconvenience" is a factor to be taken into account. If the amount involved is small, and the relative economic strength of the parties is greatly disparate, fundamental fairness may require that the stronger of the two or the one best able to pass on the costs (which may well be the seller in most cases) be the one who must litigate in the foreign forum. If the amount in controversy is great, however, so that the cost of preliminary litigation seeking dismissal for want of jurisdiction or for *forum non conveniens* is relatively insignificant in comparison to the total amount at stake, or if the economic strength of the parties is roughly equivalent, it does not seem fundamentally unfair to require a defendant who has contracted with a Kansas resident, with knowledge that some of the performance will take place in Kansas, to present to the Kansas court his objections to trying the case there on the merits.

Another possible construction of the provision which might avoid some of the potential abuse that troubled the Minnesota court in the *Hilson* case,

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\(^{124}\) *Id.* at ...., 117 N.W.2d at 735.

\(^{125}\) *9 Utah 2d 250, 342 P.2d 871 (1959).*

\(^{126}\) *204 Kan. 83, 460 P.2d 578 (1969).*

\(^{127}\) *297 F. Supp. 307 (D. Kan. 1969).*
would be to interpret the word "resident" in Kan. Stat. Ann. § 60-308(b)(5) to mean only individuals, not corporations. Some long arm statutes expressly distinguish between the jurisdictional bases for suits against individuals and suits against corporations\textsuperscript{128} although the Kansas statute does not. Such a construction would avoid the "mail order" problem in most cases. It would also mean that the Oswalt Industries decision could be reconciled with the new provision, since the Kansas party there was a corporation. This interpretation, however, does not make the answer turn on the fairness issue. A Kansas individual could use the long arm statute oppressively in some instances, a Kansas corporation might on the other hand deserve its assistance. Accordingly, the approach described earlier seems preferable.

G. "Acting within this state as director, manager, trustee or other officer of any corporation organized under the laws of or having a place of business within this state, or as executor or administrator of any estate within this state."

Subsection (6) of the Kansas long arm statute may have been added by the 1971 legislature to repudiate the "fiduciary shield" concept that the federal district court had read into the "transaction of business" provision of the statute in Wilshire Oil Co. v. Riffe.\textsuperscript{129} A similar provision (useful primarily in connection with shareholders' derivative suits),\textsuperscript{130} appears in the Michigan long arm statute.\textsuperscript{131}

The reference to executors and administrators in this section is somewhat ambiguous. Only a Kansas resident may serve as executor or administrator of the estate of a Kansas decedent,\textsuperscript{132} so long arm jurisdiction is not necessary. A non-resident may serve only in cases where administration in the Kansas probate court is undertaken with respect to Kansas properties of a non-resident decedent; but, such a non-resident must appoint a resident agent to receive service of process before he can enter upon the duties of administration.\textsuperscript{133} Accordingly, long arm jurisdiction is not really necessary to reach him. A non-resident fiduciary may sue and be sued in Kansas in his representative capacity without the necessity of Kansas probate;\textsuperscript{134} perhaps this clause was added to provide a right of action in tort or for contract obligations personally incurred by the executor while in Kansas suing or being sued as representative of the estate. In view of the Wilshire Oil Co. case, the legislature probably felt a specific provision was necessary.

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\textsuperscript{129} 409 F.2d 1277 (10th Cir. 1969).
\textsuperscript{130} The Commissioners on Uniform State Laws did not recommend the inclusion of such a provision in the Uniform Interstate and International Procedure Act, suggesting that this was more appropriately included in corporation statutes.
H. "Causes injury to persons or property within this state arising out of an act or omission outside this state . . . ."

Subsection (7) of the Kansas long arm statute was borrowed from Wisconsin rather than Illinois law, and is clearly intended to provide jurisdiction over foreign manufacturers or suppliers in product liability cases. Although Illinois had already construed the "tortious act" provision broadly enough to cover such cases, the framers of the 1964 code did not want to leave any doubt that they intended product liability cases to be covered.

When Wisconsin enacted its law in 1959 the only authority construing the constitutionality of such a provision was to be found in cases construing the concept of "doing business," employed in statutes dealing with service on foreign corporations. Those cases seemed to require that something more than a single isolated injury had to occur before jurisdiction could be exercised. Provisoes i and ii supply the additional factor. Proviso i looks to purposeful activity in the state by the defendant itself. The other proviso does not require any activity in the state by the defendant, but it does require that the defendant's products, or those things affected by the defendant be present in the state "in the ordinary course of trade." It should be noted that the "solicitation of service activities" referred to, need not be related to the cause of action sued on. That is, provisoes i and ii relate to other contacts between the defendant and the state.

The Kansas legislature made one potentially significant addition to the language of the Wisconsin law. To proviso ii's phrase "in the ordinary course of trade" it added "or use." However, the Kansas Supreme Court has construed this provision in such a way as to render the "or use" phrase redundant. In that case, Tilley v. Keller Truck and Implement Co., four plaintiffs, one of them from Colorado and the other three Kansans (although the opinion in the case is silent as to the residence of the other three plaintiffs), sued International Harvester Co. and Keller Truck and Implement Co., for injuries to person and property sustained when a wheel on a truck manufactured by International broke while the truck was passing through Kansas. The truck had been sold to plaintiff Tilley by Keller, who had also serviced the vehicle. Keller was a Colorado corporation doing what the court called a "strictly local retail business" in Lafayette, Colorado, 150 miles from the Kansas border. It never solicited business or engaged in any other activity in Kansas, so long arm juris-

Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided in addition, that at the time of the injury either (i) the defendant was engaged in solicitation or service activities within this state; or (ii) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use;

189 The record and briefs submitted in the case are likewise silent on this point, but the plaintiff's attorney has informed me that they were Kansans.
190 200 Kan. at 643, 438 P.2d at 130.
ution over Keller had to depend on whether things serviced, or processed by the defendant in Colorado were used or consumed in Kansas in the ordinary course of trade or use. The trial court had granted Keller’s motion to dismiss, and the Kansas Supreme Court affirmed.

The Kansas Supreme Court recognized the Wisconsin origin of this part of the Kansas statute, but found no Wisconsin cases construing it. It did find federal court decisions holding manufacturers who shipped defective merchandise into the two states subject to long arm jurisdiction under both the Wisconsin\textsuperscript{140} and Kansas\textsuperscript{141} statutes, but these cases were not authoritative. To find Keller subject to long arm service the court had to determine whether “products . . . or things . . . processed, [or] serviced” by it were “used or consumed” in Kansas “in the ordinary course of trade or use.” The court, however, did not really address itself to this question, and, as a result, its decision leaves much uncertainty.

In its preliminary recitation of the facts, the court made the bald statement that “The company has never solicited business or performed services within the State of Kansas and products sold or serviced by it are not consumed or used in Kansas in the ordinary course of trade or use.” If that were intended as a statement of fact, then the provision in question could not have applied. There would have been no need for further discussion about the provision or its constitutionality. It would have been appropriate then to see whether the facts could have come within the concept of “commission of a tortious act within this state,” as contemplated by Kan. Stat. Ann. § 60-308(b)(2). But once it was settled that the defendant did not solicit or engage in service activity in Kansas, and that no products serviced by the defendant were consumed or used in the ordinary course of trade or use in Kansas, there was no point in discussing further the provisions of Kan. Stat. Ann. § 60-308(b)(7). Accordingly, it is hard to determine what the point of that preliminary statement may have been.

The plaintiff’s contention was that things serviced by Keller were used in Kansas in the ordinary course of trade or use because Keller sold and serviced vehicles that had a range of more than 150 miles. It would stretch credulity to assume that none of the vehicles were used in Kansas. Moreover, the record showed without dispute that Tilley was in the livestock business and that he had used and planned to use again the very truck Keller sold him to haul cattle across Kansas to Missouri; and further, that the manager of Keller knew this. Surprisingly, the court neglected to discuss whether these facts constituted use in the ordinary course of trade or use but instead jumped right to the question that obviously troubled it most, namely, whether exercise of personal jurisdiction over Keller in Kansas would be consistent with due process. This is particularly difficult to understand, since the court apparently held that the

\textsuperscript{140} Becher Corp. v. Anderson-Tully Co. 252 F. Supp. 631 (D. Wis. 1966).

\textsuperscript{141} Myers v. Fox River Tractor Co., No. T-3796 (D. Kan. 1965).
statute did not reach Keller, and yet felt it necessary to discuss whether it would have conformed with due process if the statute had been applied. Normally a court would not undertake to decide the constitutional question unless it had first determined that the statute did apply. The confusion stems from the Kansas court’s approach that ties the questions of statutory construction and constitutionality of application together. By holding that the statute extends as far as but no farther than due process permits, the court avoids the problem of statutory construction altogether. This approach is proper where the statute is like those of Rhode Island or California, where the legislature provided the courts no guidelines other than “due process.” It is not proper for the Kansas statute. Since the exercise of jurisdiction will turn not on the meaning of the statute but upon the constitutionality of its application in the given case, parties are encouraged to litigate the question of jurisdiction in every close case to the hilt. Moreover, this approach accords too little respect to the legislature’s intention: it assumes that the legislature had no purpose in enumerating the various “acts” that purport to supply the basis for jurisdiction. It is quite appropriate to construe the terms of the statute expansively, using the due process clause to limit the extent to which the statutory language may be stretched. But until the legislature declares that the range of Kansas long arm jurisdiction is exactly coextensive with due process, the terms of the statute should not be ignored.

Apart from the court’s approach to the case, the conclusion reached on the due process question is debatable. The court apparently pinned its decision on the Hanson v. Denckla declaration, i.e. it found no way that the defendant had purposely availed itself of the privilege of conducting activities in Kansas thereby invoking the benefits and protections of its laws. The Illinois court had struggled with the same problem in Gray v. American Radiator and Standard Sanitary Corp. That case concerned a manufacturer whose product reached Illinois through middlemen; the defendant itself conducted no activity whatever in Illinois. The court there found that Hanson was satisfied if the defendant could reasonably contemplate substantial use and consumption of its products in Illinois, even though someone other than the defendant actually brought them into the state. To that extent a manufacturer derives sufficient benefit from the laws of a state to justify requiring it to defend in that state suits arising from product defects. The defendant had purposefully put its products into the stream of commerce with awareness that some would find their way to Illinois, and so the court found no impediment to fundamental fairness in requiring submission to jurisdiction.

The Keller situation was different, of course. Keller was not a manufacturer.

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142 “The defendant Keller Truck has not submitted itself to in personam jurisdiction in Kansas. . .” 200 Kan. at 650, 438 P.2d at 134.
143 See note 76 supra.
144 See note 38 supra.
145 See note 65 supra.
146 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
Nevertheless, the plaintiff argued, products sold and serviced by Keller were regularly used in Kansas, and Keller knew this. Moreover, Keller also knew that the particular truck involved would be used in Kansas. Plaintiff argued that the important consideration was whether or not Keller could reasonably have foreseen the potential consequences in Kansas from negligent servicing or inspection of the truck. 147 The court held, however, that foreseeability was not enough to satisfy due process. To reinforce its conclusion, the court hypothesized an Alaska filling station operator who sold a defective tire to a motorist whose car bore Kansas license plates, thus making it clearly foreseeable that consequences in Kansas might result from a defect in the product. It would offend traditional notions of fair play and substantial justice to hold the Alaska operator subject to jurisdiction in Kansas for a suit arising from a defect in the tire, the court said, and such a result was not intended by the legislature. 148 The implication was that if an Alaska filling station operator could not be reached by the Kansas long arm statute, neither could a Colorado operator.

It is not clear that the Alaska operator could not constitutionally be sued in Kansas. If "relative inconvenience" is to be disregarded, and if no weight is given to considerations relating to "fair and orderly administration of the laws," then that conclusion might follow. But in a case between a Kansan and an Alaskan, one party or the other is going to be exposed to the inconvenience of trial in a distant forum. The "physical power" theory held that it was always the plaintiff who must travel, but the "fundamental fairness" theory says that such need not always be the case. If the main fact issues in the case turn upon events to which Kansas witnesses will have to testify, and if the substantive law governing the main questions is Kansas law, the Kansas contacts of the transaction may be strong enough to make up for the remoteness of the defendant's personal contact with the state. This is not a case where the defendant has no contact, and according to the International Shoe criteria it would not necessarily violate due process to hold the defendant subject to jurisdiction in Kansas for negligence in Alaska if that negligence produced injury in Kansas. The fact that the negligent act took place in Alaska and the injury in Kansas might make it difficult to establish as a fact matter the connection between the two. That problem would be the more serious the greater the distance between the alleged cause and the effect. Thus it might be that in a given case the plaintiff would not be able to adduce sufficient preliminary proof to withstand a motion to dismiss by an Alaska defendant, but evidence of the same quality might be enough against a Colorado defendant, because of the different probabilities that intervening causes may have produced the injury. Even if the court were correct in concluding that an Alaska filling sta-

147 This argument was perhaps bolstered by Currie's analysis. He used the question of whether "defendant acted with knowledge of such facts that he could reasonably anticipate that his acts would have consequences within the state," as one of his tests for constitutionality of long arm jurisdiction. See Currie, supra note 85, at 579.
148 200 Kan. at 649, 438 P.2d at 134.
tion owner could not constitutionally be subjected to jurisdiction in Kansas, it would not necessarily follow that a Coloradoan could not under comparable facts.

The "tire hypothetical" was used as long as fifteen years ago in a case involving the North Carolina statute which covered suppliers who shipped goods into the state with the "reasonable expectation that they would be used or consumed there." The Fourth Circuit Court of Appeals held in *Erlanger Mills v. Cohoes Fiber Mills* that a New York manufacturer could not constitutionally be sued in North Carolina under this statute for breach of warranty for defective goods shipped into North Carolina. The buyer's agent had ordered the goods while he was present in New York, and the court felt that if the defendant seller was subject to long arm jurisdiction in North Carolina for breach of warranty, then a California retailer who sold tires in California to a North Carolina resident could be subjected to jurisdiction there under the same principle. The tire hypothetical has been discussed by two noted commentators who concluded that due process would not necessarily be violated if the California retailer were subject to suit in the state of injury—even if that be clear across the country from the place of sale—at least if the plaintiff was a resident of the state of injury, and the retailer knew it.

One practical argument in favor of the exercise of jurisdiction in cases such as the tire case is that this procedure can facilitate the objective of getting the case tried in the most convenient forum. For example, if the parties are citizens of different states and more than $10,000 is in controversy, a non-resident defendant sued in the plaintiff's state can remove the case to the federal court and seek a transfer of the venue to his home state. The federal court may allow this if it appears that it would be in the interests of justice and serve the convenience of parties and witnesses to do so. If the more convenient forum is in the plaintiff's state, the case will remain there. But if it is held that jurisdiction over the defendant cannot be exercised in the plaintiff's state, then even if the plaintiff sued the defendant in a federal court in the defendant's state, transfer to the plaintiff's state would not be possible, even if that were the more convenient forum. Since one party or the other must travel, the rules for determining who should do so ought to result in a trial in the more convenient forum. Access to the federal venue transfer procedure promotes this, but this method may be used only if the defendant is subject to jurisdiction in both states. If the case is outside federal subject matter jurisdiction, *i.e.* if there is not complete diversity or if there is an insufficient amount in controversy, a similar result may be reached through invocation of the doctrine of *forum non conveniens* if the state in which the action is commenced will

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239 F.2d 502 (4th Cir. 1956).


243 Since that would not be a district in which the action "might have been brought." See Hoffman v. Blaski, 363 U.S. 335 (1960).
apply that doctrine as liberally as the Kansas court did in Gonzales v. Atchison, T. & S.F. Ry.154 Once again, however, this doctrine will be useful only if the defendant is subject to jurisdiction in both states.

Even if the defendant is a small retailer whose business is essentially “local” rather than “interstate,” it does not seem fundamentally unfair to require him to defend an action arising from his defective product or service in the state where injury resulted—if he knew the product or thing serviced would be removed to the other state. Liability for defective merchandise or service is one of the costs of doing business. The only burden added if defense is required in the foreign state is whatever difference there may be in the cost of conducting the litigation in that forum. If the plaintiff is the one who must travel, he would be exposed to that burden. It may not be improper to consider, in determining on whom that burden must fall, which party is in the better position to absorb the cost. The “estimate of inconveniences” mentioned by Justice Stone in International Shoe surely contemplates this. Where the defendant is a business enterprise and the plaintiff a private individual, more often than not, it will be the defendant who is in the better position to absorb the cost of travel.

Professor Currie has expressed the view that jurisdiction over the retailer in the tire hypothetical would surely be constitutionally exercised by the state where injury occurred if the plaintiff were an innocent third party—say a pedestrian injured when a tire blew out and the car went out of control—if the defendant knew the tire would be used in that state. He felt that the same would be true if the plaintiff were the buyer of the tire, and resided in the state of injury, or at least was not domiciled in the same state as the defendant. If the defendant could be sued in the state of injury by a pedestrian, Currie saw no compelling reason why the purchaser of the tire could not also sue the defendant there. But if the plaintiff and the defendant were domiciled in the same state Currie could see no reason for allowing suit in any state other than the state of common domicile.155

The Tilley156 case was a combination of two of Currie’s categories. One plaintiff—Tilley—was domiciled in the same state as the defendant. The other plaintiffs, however, were “innocent third parties” and were Kansas residents. Currie’s view would hold Keller subject to suit in Kansas for the Kansas plaintiff’s claims but not for Tilley’s—at least not if Tilley had sued separately. Whether the fact that Tilley joined his claim with those of the Kansas plaintiffs is enough to make Kansas jurisdiction over his claim against Keller fundamentally fair, would probably turn on what state’s law should be applied to the substantive merits. If Kansas law should apply then Kansas jurisdiction would be proper. But if Colorado law governed the substantive claim, the possibility of confusion in the application of Kansas law to one set

154 See note 45 supra.
155 Currie, supra note 85, at 559.
of plaintiffs and Colorado law to another, where the same facts were involved might render it unfair to try both claims together. If separate trials would be required anyway, the balance of fairness might well indicate that the Colorado claimants should litigate in Colorado.

The Kansas court, however, dismissed the claims of both parties against Keller, and both had to pursue their claims in Colorado. This may have been a proper disposition of the case, but to justify it, more facts than were reflected in the Tilley opinion would have to be considered.

This discussion has been directed at the court's conclusion in Tilley, that it would have been contrary to due process of law had jurisdiction been upheld. That conclusion is doubtful. The court would have been on safer ground if it had predicated its decision on the statute instead. The language of the statute, by referring to "ordinary course of trade or use," may not have reached one such as Keller even though things serviced by Keller were used in Kansas. The question is whether there was use "in the ordinary course of trade or use," as contemplated in Kansas law. My own view is that the Tilley situation should be covered, since as previously stated, I feel the best approach is to find the case covered if by any reasonable construction it could be said to fall within the long arm statute. It is, however, certainly arguable that the legislature meant "ordinary course of trade or use" to include only things brought into Kansas and left—not transient items like trucks. Still, the law may clearly reach transient motorists, and, as Professor Cardozo put it, defective California tires (or Colorado wheels) are as dangerous in North Carolina (or Kansas) as are California drivers.\footnote{Cardozo, supra note 150, at 214-15.} The Kansas Supreme Court may err in its view of what the fourteenth amendment requires, but it is the authoritative interpreter of Kansas legislation. Accordingly, if the court concluded that our legislature did not intend to reach Keller with the Kansas long arm statute, it would have been better to have found that intention in the legislative message itself, rather than through ruling that the legislature could not have intended to contravene the Kansas court's view of the limits of the fourteenth amendment. It is to be hoped that when another opportunity presents itself, the court will give more attention to exposing what the legislature actually meant by Kan. Stat. Ann. § 60-308 (b)(7), than it did in the Tilley case.

I. "Living in the marital relationship within the state . . . ."

Subsection (8) of the long arm statute is unique to Kansas; it was added to solve the problem that arises from the fact that a court can decree a divorce without personal jurisdiction of one of the parties, but it cannot render an enforceable judgment for alimony, property settlement or child support without personal or quasi in rem jurisdiction over the party to be bound or his assets. The code subsection provides that anyone who has lived in Kansas with a spouse and has then left the state, the spouse continuing to reside here, is
subject to personal jurisdiction so that a court may not only decree a divorce but also give a binding judgment for alimony, etc. The Kansas Supreme Court upheld the constitutionality of this provision in Scott v. Hall,168 and applied it to a defendant who had been divorced and had then moved from the state before the long arm statute was adopted. The plaintiff in Scott was a lawyer who sued to recover attorneys fees awarded him in the divorce decree. Thus, subsection 8 applies not only to claims of the other spouse or the children, but, also to third parties’ claims as well (at least if the claims are derived from the settlement agreement or decree).

VI. Conclusions

Through this “stock-taking” exercise, we have tried to identify certain problems that need to be resolved if the benefits of long arm jurisdiction in Kansas are to be fully realized and potential abuses checked. First, all vestiges of the de facto power theory of jurisdiction should be eliminated. “Fundamental Fairness” should be recognized as the ultimate test of judicial jurisdiction; this means not only that the legitimacy of jurisdiction should be recognized in many kinds of cases where that would not have been possible under the power theory, but also that jurisdiction should no longer be recognized in some kinds of cases where the power theory would have allowed it. For example, personal service on a transient “caught” within our borders should not itself be a sufficient basis for personal jurisdiction, nor should the fact that a non-resident has property located within our borders be a sufficient basis for adjudicating claims that have no Kansas connections. Distinctions between in personam jurisdiction and in rem jurisdiction merely serve to keep alive concepts that have meaning only within the analytical framework of the power theory, and accordingly they should be abandoned. To fully implement these recommendations, legislation may be necessary.

Second, even in cases where jurisdiction would be clearly proper both under Kansas statutes and under the requirements of due process, our courts should be empowered and encouraged to invoke the doctrine of forum non conveniens whenever it appears that trial in another state would be more conducive to the overall purposes of fair and orderly adjudication. Dismissal for forum non conveniens should be ordered in appropriate cases, subject to conditions sufficient to guarantee that the plaintiff will be able to obtain a fair day in court on the merits of his claim. If dismissal of the action would be inappropriate, the court should be empowered to hold the case in abeyance. The plaintiff should be protected against the running of the statute of limitations during the interim, before his case is lodged in the other court. If the other court will not entertain his case on the merits, the Kansas court should reopen the case. In addition, the defendant should be protected against unreasonable delay by the plaintiff in initiating the suit in the other court. Through this means an

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"interstate change of venue" may be effected, comparable to the procedure available in federal courts. Legislation may be appropriate to clarify the full range of the court's *forum non conveniens* powers.

Third, a plaintiff who seeks to invoke jurisdiction over a non-resident defendant through the long arm statute should expressly plead the "act" or "acts" enumerated in Kan. Stat. Ann. § 60-308(b) that he will rely on as authorizing jurisdiction. If the defendant then moves to quash service or to dismiss, denying the allegations, the plaintiff should be prepared to establish his contention. If the facts upon which jurisdiction depends are not integrally related to the substantive merits of the case, the plaintiff should have the burden of convincing the court by a preponderance of the evidence of their existence. This situation would arise if jurisdiction depended upon establishing that the defendant had engaged in solicitation or service activities in the state, or that products, materials or things processed or manufactured anywhere, were used or consumed in the ordinary course of trade or use in Kansas. The situation would also present itself if the question were whether the cause of action arose from the "transaction of business." If jurisdiction turns on whether the defendant committed a "tortious act" or "entered into a contract with a resident," on the other hand, the questions involved in jurisdiction determination will also go to the merits of the case and should be tried to a jury, if requested. To withstand a jurisdictional challenge, the plaintiff should establish a reasonable possibility that he will be able to prove the tort or contract at trial. The amount of proof necessary to raise a "reasonable possibility" may vary inversely with the extent of the defendant's other contacts with the state.

Fourth, in determining whether the statutory conditions for the exercise of jurisdiction are present, the court should interpret the statutory language broadly. A case should not be dismissed for want of jurisdiction as being outside the scope of the statute, unless by no reasonable construction of the language could it be said to fall within the statute's terms.

Fifth, only after it has concluded that the case is covered by the statute should the court undertake an inquiry into whether the exercise of jurisdiction would be constitutional. The question of fairness should be directed to whether the defendant's contacts with Kansas are sufficient to require him to make his jurisdictional challenge in Kansas courts, rather than collaterally, after judgment, in the courts of his own state. If an integral part of Kansas procedure is the broadened *forum non conveniens* advocated earlier in this conclusion, the defendant should be required to challenge the Kansas court's jurisdiction directly—in Kansas—unless his contact with the state is too remote even to require him to respond to the plaintiff's jurisdictional allegations. In a given case, if the Kansas court decides it has jurisdiction, *i.e.* that the statute applies and that it is not fundamentally unfair to subject the defendant to Kansas jurisdiction, the defendant may then move to dismiss for *forum non conveniens*. If the *forum non conveniens* motion is denied, a procedure for
interlocutory appeal of the jurisdictional ruling should be available. The procedure prescribed by Kan. Stat. Ann. § 60-2102(b) should be adequate for this purpose. If the Kansas Supreme Court upholds the trial court's jurisdictional ruling, the defendant may then defend on the merits or let judgment be taken by default. The default judgment may be appealed to the Supreme Court of Kansas, where the court may reconsider its prior decision or may invoke the doctrine of the law of the case. Defendant then may seek review in the United States Supreme Court to obtain an ultimate decision on his contentions.

If the defendant fails to respond in any way to the long arm summons, he may make his jurisdictional challenge by collateral attack on the Kansas default judgment; but the court in the other state should uphold the Kansas judgment if it would have been regarded as valid in Kansas.