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Long Arm Jurisdiction in North Dakota

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LONG ARM JURISDICTION IN NORTH DAKOTA

I. INTRODUCTION

Eight years ago, a student writer suggested that a "long-arm statute," which is also known as a "single act statute," be enacted in the state of North Dakota.[1] In 1969, such a statute, which extends the jurisdiction of the state's courts over nonresident individuals and foreign corporations, was adopted by the North Dakota Legislature,[2] and in June of 1971 the provisions of the statute were incorporated by the North Dakota Supreme Court into the North Dakota Rules of Civil Procedure.[3] By the time North Dakota enacted its long-arm statute, at least 35 other states already had approved similar statutes.[4] The neighboring states of Minnesota,[5] South Dakota,[6] and Montana[7] all extended the jurisdiction of their courts in this way.

Although long-arm jurisdiction has been vested in North Dakota courts for six years, the statute has been subjected to only a few tests, leaving unanswered a number of questions about its scope and the requirements of due process.

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1. Note, *A Single Act Statute for North Dakota*, 43 N.D.L. REV. 299 (1967).

2. N.D. SESS. LAWS OF 1969, *codified as* N.D. CENT. CODE § 28-06.1-02 (Superseded 1971). All citations to the N.D.R. Civ. P. in this article are to the rule prior to January 1, 1976 unless otherwise indicated.

3. N.D.R. CIV. P. 4(b)(2). It reads:

> (2) A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's
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> (A) transacting any business in this state;
>
> (B) contracting to supply or supplying services, goods, or other things in this state;
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> (C) committing a tort within or without this state causing injury to another person or property within this state;
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> (D) committing a tort within this state causing injury to another person or property within or without this state;
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> (E) owning, or having any interest in, using, or possessing property in this state;
>
> (F) contracting to insure another person, property, or other risk within this state; or
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> (G) acting as a director, manager, trustee, or officer of a corporation organized under the laws of, or having its principal place of business within, this state.

4. Annot., 20 A.L.R.3d 1201, 1204-05 (1968).

5. MINN. STAT. ANN. § 303.13(1)(8) (1969).

6. S.D. COMPILED LAWS ANN. § 15-7-2 (1967).

7. MONT. R. CIV. P. 4(B).

II. THE HISTORICAL DEVELOPMENT OF LONG-ARM STATUTES

A. EARLY PERSPECTIVES

Civil actions are generally classified as either in personam, in rem, or quasi in rem.[8] Actions in personam settle rights and duties between the parties; actions in rem declare the rights of all the world to specific property within the jurisdiction of the court; and actions quasi in rem settle the rights of the parties to the property in question.[9]

Actions in personam have raised the most serious problem as far as state court jurisdiction is concerned because they involve the effect to be given the personal service of process outside the limits of the state where the action is pending. Most of the challenges to extended jurisdiction are based on fourteenth amendment due process considerations.[10] Such challenges do not typically arise in the classic and usual method of obtaining jurisdiction over the defendant's person by serving process (the summons and complaint) upon him personally within the state in which the action is brought.[11]

The extent to which federal due process restricts state jurisdiction over nonresident individuals and foreign corporations is considered a question of federal law.[12] The issues are determined largely on the basis of United States Supreme Court opinions, which historically have limited long-arm jurisdiction, but which more recently have demonstrated a broad acceptance of long-arm statutes.

Illustrative of the early decisions is *Kendall v. United States*,[13] in which the Supreme Court declared that "No court can, in the ordinary administration of justice, in common-law proceedings, exercise jurisdiction over a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process." Later, in the famous case of *Pennoyer v. Neff*,[14] the Court held that a state court could not obtain in personam jurisdiction over a nonresident defendant simply by serving process upon him outside the forum state or by publication.

The states, which were at the time of *Pennoyer* considered comparable to nations for jurisdictional purposes,[15] conformed almost eagerly to the early proclamations of the Court. For example, the

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8. RESTATEMENT OF JUDGMENTS, Introductory Note (1942).
9. For a general analysis of in personam and in rem relief, see F. JAMES, JR., CIVIL PROCEDURE § 1.8 (1965).
10. U.S. CONST. amend. XIV, § 1, provides that, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."
11. G. STEVENS, CASES AND MATERIALS ON CIVIL PROCEDURE (College of Law, University of Iowa, Iowa City, Iowa).
12. *See, e.g.*, Pembleton v. Illinois Commercial Men's Ass'n., 289 Ill. 99, 124 N.E. 355 (1919), *cert. denied*, 253 U.S. 499 (1919).
13. 37 U.S. (12 Pet.) 526 (1838).
14. 95 U.S. 714, 727 (1877).
15. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

Louisiana Supreme Court declared as repugnant to the due process clause of the fourteenth amendment a statute that expressly authorized service of process to be made personally on either nonresidents or its own citizens temporarily absent from the state, and that allowed judgments in personam to be rendered.[16]

It quickly became clear, however, that the traditional bases of jurisdiction over individuals—presence,[17] actual consent,[18] and domicile[19]—were insufficient to deal with the expanding commercial complexity and population mobility found in the United States, and that a wider jurisdictional basis was needed to offer the desired degree of protection from alleged wrongs committed by nonresidents and foreign corporations.

B. Response to Modern Complexities

With the introduction and widespread use of the automobile in the United States, the problem of lack of personal jurisdiction became especially acute. An automobile operator could injure a person in another state and leave before service of process could be made upon him within that state. The apparent solution to this difficulty was nonresident motorist statutes, which declared that use of a state's highways by a nonresident motorist amounted to the granting of consent by him for a state official to act as his attorney upon whom process could be served in any action arising out of any accident in which he was involved.[20] The first such statute was upheld by the United States Supreme Court in 1916,[21] one year after the Court had considered and sustained the broad power of a state to control the use of motor vehicles upon its highways.[22] The leading nonresident motorist statute decision was *Hess v. Pawloski*,[23] in which the Court held that the Massachusetts statute did not conflict with the due process clause of the fourteenth amendement. The Court said that the statute "makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required."[24]

16. Altmann v. Sanderson & Porter, 122 La. 265, 47 So. 600 (1908).

17. *See, e.g.*, Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).

18. *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. 404 (1855).

19. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457 (1940).

20. In upholding the validity of nonresident motorist statutes, one court said that the forum state was pursuing the "public interest" in protecting its citizens from the operation, by nonresidents, of motor vehicles within the forum. *See* Hess v. Pawloski, 274 U.S. 352, 356 (1927).

21. Kane v. New Jersey, 242 U.S. 160 (1916).

22. Hendrick v. Maryland, 235 U.S. 610 (1915).

23. 274 U.S. 352 (1927).

24. *Id.* at 356.

C. CORPORATIONS

Peculiar problems involving in personam jurisdiction developed where foreign corporations were the defendants. While domestic corporations could be sued on any cause of action within the forum state, the traditional view held that corporations were artificial persons existing only within the territorial boundaries of the state in which they were chartered.[25] But over the years, several approaches were devised to make foreign corporations amenable to service of process.

1. *Consent Theory*

The most common jurisdictional approach was to make such a foreign corporation's consent to be sued a condition of its conducting business in the state. The justification for this approach was that a corporation lacked an inherent right to do business in the state because it was not a citizen within the privileges-and-immunities clause of Article IV of the Constitution.[26] The consent, of course, was fictional.[27]

2. *Doing Business Test*

Another jurisdictional approach that developed was the "doing business" test—*i.e.*, jurisdiction would stand if the foreign corporation was discovered to be "doing business" within the forum state to such an extent as would justify holding it liable in damages for any wrongs committed therein. The problem with this test was in determining just what activity was adequate to constitute "doing business" in the forum jurisdiction, thus making the foreign corporation amenable to process. It was generally recognized that single or isolated transactions did not constitute "doing business,"[28] nor was a foreign corporation "doing business" when an officer of the corporation happened to be present in the forum state.[29] In addition, a for-

25. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

26. *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall) 168 (1868).

27. The fictional consent theory was applied even when the foreign corporation did not appoint an agent to receive service of process, as required by statute. This was done to avoid giving a more favorable position to a corporation that did not comply with the statute.

28. *See* for a discussion of single or isolated transactions, Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018, 1028-29 (1925). *See also* Cooper Mfg. Co. v. Ferguson, 113 U.S. 727, 735 (1884), where the Court said that a foreign corporation could be considered "doing business" in Colorado only if its purpose was to pursue or carry on business therein; therefore, a single contract entered into by the corporation was not "doing business" within the meaning of the Colorado constitution and corporation statute.

29. *See, e.g.*, Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915). The Court declared:

> "[I]t is indubitably established that the courts of one State may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State where such corporation has not come into such State for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process may be served; and

eign corporation was initially not deemed "doing business" if its agent solicited offers in the forum state that were subject to later acceptance or rejection by the home office.[30]

3. *Fair Play and Substantial Justice Test*

In 1945, long-arm jurisdiction was substantially expanded by the decision in *International Shoe Co. v. Washington*,[31] where the state of Washington had sought to collect from International Shoe Company contributions to the state unemployment compensation fund. Salesmen from the corporation had exhibited samples of the company's merchandise within the state and had solicited orders from prospective buyers to be subsequently accepted or rejected at its home office outside the state. Although the activities were systematic and on-going,[32] and created a large volume of business, the corporation did not maintain an office in Washington and made no contracts either for the sale or purchase of merchandise therein.

The Supreme Court found that the activities carried on by the corporation established sufficient "minimum contacts"[33] to permit the exercise of jurisdiction by the Washington courts without violating the due process requirements of the fourteenth amendment. In so holding the Court laid down the "fair play and substantial justice" test,[34] to be applied when weighing long-arm jurisdiction against the requirements of the due process clause. The Court said:

> Whether due process is satisfied must depend . . . upon 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 a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts. . . .[35]

In adopting the "fair play and substantial justice" test, the Court rejected the idea that a foreign corporation must engage in a fixed

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> the mere fact that an officer of the corporation may temporarily be in the State or even permanently reside therein, if not there for the purpose of transacting business for the corporation or vested with authority by the corporation to transact business in such State, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against the corporation upon a service had upon such officer under such circumstances."

Id. at 194-95.

30. *See, e.g.*, Green v. Chicago B. & Q. Ry., 205 U.S. 530 (1907).

31. 326 U.S. 310 (1945).

32. In the years in question (1937-40), International Shoe employed 11-13 salesmen, who resided in Washington and confined their principal activities to that state. They were under direct supervision and control of the company's sales managers in St. Louis, and they were compensated by commissions. *Id.* at 313.

33. The Court said that 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. . . ." *Id.* at 316.

34. *Id.*

35. *Id.* at 319.

amount of, or certain types of, activity in order to be "doing business" within the forum state. In *Travelers Health Association v. Virginia,*[36] the new test was applied to prohibit a foreign corporation from selling certificates of insurance to Virginia residents without first obtaining the state's permission as required by statute. Under the statute, a precondition for obtaining a permit was that the corporation had to appoint the secretary of state as its agent for service of process in suits filed by state residents. The statute also provided for service by registered mail where service could not otherwise be obtained. The Court concluded:

> [I]f Virginia is without power to regulate this Association to accept service of process on the Secretary . . . the only forum for injured certificate holders might be Nebraska [where the association was incorporated and its office located]. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit. . . . And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated. The Due Process Clause does not forbid a state to protect its citizens from such injustice.[37]

a. Single Insurance Contracts

Seven years later, the Court, in *McGee v. International Life Insurance Co.,*[38] sustained jurisdiction over a foreign corporation on the basis of a single insurance contract entered into by the corporation and a California resident. The petitioner in *McGee* had sued the foreign insurance company on a claim and obtained a judgment, process having been served by registered mail sent to the company's principal place of business in Texas. The Court concluded that the due process clause did not preclude the imposition of a judgment on the company since the suit was based on a contract that had a substantial connection with California.[39] The Court also made note of the movement toward expanded jurisdiction over nonresidents and foreign corporations, and explained the trend in the following manner:

> In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party

36. 339 U.S. 643 (1950).
37. *Id.* at 648-49.
38. 355 U.S. 220 (1957).
39. *Id.* at 223.

sued to defend himself in a State where he engages in economic activity.[40]

b. Deliberate Acts

In 1958, just a year after *McGee*, the Court took what appeared to some observers to be a cautious step backward in its role in expanding in personam jurisdiction. *Hanson v. Deckla*,[41] presented the issue of whether the state of Florida had jurisdiction over a Delaware corporate trustee, thus enabling the Florida courts to decide the validity of a trust agreement made by a settlor who moved to Florida after executing the trust in Delaware. The Court held that the Florida courts could not determine the validity of the agreement because the corporate trustee did not solicit or transact any business in Florida, did not maintain an office therein, and did not administer any trust assets in the state. The Court declared that there must be some act by which the defendant has deliberately availed itself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[42] *Hanson* might thus be cited for the proposition that long-arm jurisdiction should be extended to those cases in which the defendant's association with the forum state is based on his voluntary activity. However, this might be reading too much into the decision, for it is equally as likely that the Court concluded that the contacts in the case were simply too insignificant to warrant jurisdiction. Indeed, the Court reaffirmed its position that the application of the "minimum contacts" rule depends upon the quality and nature of the defendant's activity.[43]

c. Testing Sufficiency of Contacts

The question of what amounts to a sufficient minimum contact or contacts was discussed by the Ninth Circuit in *L. D. Reeder Contractors v. Higgins Industries, Inc.*,[44] wherein the court applied a three-part test[45] based upon a combined reading of *International Shoe*, *McGee*, and *Hanson*. The court said that once a sufficient minimum contact is established, such contact will support jurisdiction if in accordance with the due process concepts of "fair play" and "substantial justice," even if the contact consists of a single act or transaction by the nonresident defendant.[46]

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40. *Id.* at 222-23.
41. 357 U.S. 235 (1958), *reh. denied*, 358 U.S. 858 (1958).
42. *Id.* at 253.
43. *Id.*
44. L. D. Reeder Contractors v. Higgins Industries, 265 F.2d 768 (9th Cir. 1969).
45. *Id.* at 774-76. The test is basically as follows: (1) the defendant must do some act or consummate some transaction within the forum; (2) the cause of action must arise out of or result from the defendant's activities within the forum; and (3) once the "minimum contacts" have been established by applying (1) and (2), the jurisdiction based thereon must be consistent with "fair play" and "substantial justice."
46. *Id.* at 773.

D. SUMMARY

A review of the leading cases involving in personam jurisdiction over nonresidents shows that such jurisdiction has indeed come a long way—from the rags of *Pennoyer* to the relative riches of *International shoe* and subsequent cases. An arm that was once very short has grown considerably, with the result that today certain "minimum contacts"—such as a single insurance contract or solicitation of orders in a state even though the defendant maintains no office therein—are deemed adequate to sustain jurisdiction over nonresident defendants.

One writer has suggested that the following elements are factors that should be considered in testing the validity of in personam jurisdiction over nonresidents for causes of action arising out of their contacts with the forum state:[47]

1. *Some governmental interest.* "The activities of the defendant which precipitated the suit must be of such a nature that the forum state has an interest either in regulating them or in some way exercising a slight degree of control over them."[48]

2. *Trial convenience.* The forum state must be in a favorable position with regard to the relative convenience of the parties and the court.[49]

3. *A purposeful act of the defendant.* "There must be some act by which the defendant purposefully avails himself of the benefits and protections afforded him by the laws of the forum state."[50]

III. NORTH DAKOTA JURISDICTION BEFORE THE LONG-ARM STATUTE

A. EARLY VIEWS ON "DOING BUSINESS"

North Dakota had no long-arm statute prior to 1969, but it did have the Business Corporation Act,[51] which provides for service of

47. Towe, *Personal Jurisdiction Over Non-Residents and Montana's New Rule* 4(B), 24 MONT. L. REV. 1, 13-16 (1962).

48. *Id.* at 13. *See also* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

49. Towe, *supra* note 47, at 15. *See also* Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (on the facts, no inconvenience to defendant); Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955) (place of residence of parties).

50. Hanson v. Denckla, 357 U.S. 235 (1958).

51. N.D. CENT. CODE § 10-22-10 (1974) provides in part:
Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this state, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be suspended or revoked, then the secretary of state shall be

process on foreign corporations "transacting business" in the state.[52] Although this statute has never been construed as a long-arm statute in the traditional sense, it is said to have "all the qualities of a Single Act statute."[53]

It has been suggested that the reason the Business Corporation Act was not viewed by the courts as a long-arm statute was because of the "conservative view that North Dakota has towards 'doing business' in the state."[54] However, another reason might be that a court would be stretching the act beyond legislative intent by construing it as a long-arm statute.[55]

Most of the early cases in North Dakota concerning in personam jurisdiction over nonresidents involved corporations and the issue of whether they were "doing business" in the state. While decisions prior to 1930 generally favored the corporate defendants, some of the decisions since that time have indicated support for expanded jurisdiction, while others have continued to adhere to the early, conservative views.

1. *Single Transaction*

A 1906 decision placed North Dakota in line with the traditional rule that a single or isolated transaction by a foreign corporation does not constitute "doing business."[56] The court criticized the respondents for asserting that "doing business" or "transacting business" must be construed to include every act done by a corporation of a business nature.[57] It said that more was required: continuity of transactions and a "purpose of engaging generally in the carrying on" of business in the state.[58] This decision was later reinforced by

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an agent of such corporation upon whom any such process, notice, or demand may be served. . . .

. . . .

Whenever a claim shall arise out of business transacted in this state by a foreign corporation transacting business without a certificate of authority, service of process may be made upon any person who shall be found within this state acting as an agent of, or doing business for, such corporation, or by mailing a copy thereof to the defendant corporation by registered or certified mail at its last known post office address.

52. "Transacting business" and "doing business" are apparently synonymous. Isaacs, *supra* note 28, at 1024-25, distinguished three degrees of "doing business": (1) the least degree is that permitting service of process in a suit against a foreign corporation if the business conducted is "of such a character as to warrant the inference that the corporation is present in the jurisdiction where service is attempted;" (2) a higher degree is necessary to subject such a corporation to a tax on its activity within the forum state; and (3) still a higher degree is needed for application of statutes requiring qualification in the state, as where the activities of the corporation indicate a purpose of regularly transacting business therein.

53. Note, *supra* note 1, at 329.

54. *Id.*

55. *See* Scranton Grain Co. v. Lubbock Machine & Supply Co., 167 N.W.2d 748, 753 (N.D. 1969), discussed *infra*, wherein the North Dakota Supreme Court said that the legislative assembly, in adopting the long-arm statute in 1969, had realized "that our present statutes providing for service upon foreign corporations are not so broad in their scope as are the statutes or rules of procedure in other jurisdictions."

56. State v. Robb-Lawrence Co., 15 N.D. 55, 106 N.W. 406 (1906).

57. *Id.* at 59, 106 N.W. at 408.

58. *Id.* at 60, 106 N.W. at 408.

Cooper v. E.L. Welch Co.,[59] a federal circuit court case, and *Briorschi-Minuti Co. v. Elson-Williams Const. Co.*[60]

2. *Solicitation*

The issue of solicitation arose in 1920 in *Dahl Implement & Lumber Co. v. Campbell.*[61] It was held that where a foreign corporation that had its main office in a South Dakota town near the North Dakota line was shown to have solicited business *generally* in tributary territory in North Dakota, any transaction consummated by it in advancement of its business was not an isolated transaction. According to the court:

> While it is true that . . . an isolated transaction does not amount to a doing of business, it is also true that, where an ordinary pursuit of business is shown, no exception is made in favor of what may be the first transaction consummated.[62]

Solicitation questions arose again in *Wheeler v. Boyer Fire Apparatus Co.*[63] and *Ellsworth v. Martindale-Hubbell Law Directory, Inc.*[64] In *Wheeler*, the appellant claimed that since the contracts or orders procured by its agent in North Dakota were subject to approval of the home office in Logansport, Indiana, service of process upon the agent was inadequate. The court, in sustaining jurisdiction, relied upon *International Harverster Co. v. Kentucky*,[65] in which jurisdiction was upheld where machine orders were solicited by International Harvester in Kentucky, but sent to another state for approval.

The court also upheld jurisdiction in *Ellsworth*, where service of process in a libel action was made upon a representative of Martindale-Hubbell Law Directory, Inc.[66] The court noted that the company had been sending copies of its law directory to North Dakota since 1890 and that its representative[67] not only took subscriptions for the law directory,[68] but also gathered information for the publication and

59. 218 F. 719 (8th Cir. 1914). It held that a Minnesota corporation that did no business in North Dakota except soliciting orders for grain to be shipped to its place of business in Minnesota could not be sued in North Dakota, even though the corporation had attempted to comply with the state corporation statute by filing with the secretary of state a power of attorney appointing the secretary as its attorney to receive service of process in all actions against it in the state. *Id.* at 720.

60. 41 N.D. 628, 172 N.W. 239 (1919).

61. 45 N.D. 239, 178 N.W. 197 (1920).

62. *Id.* at 243, 178 N.W. at 199.

63. 63 N.D. 403, 248 N.W. 521 (1933).

64. 65 N.D. 297, 258 N.W. 486 (1935).

65. 234 U.S. 579 (1914).

66. The libel action was brought by a long-time state resident engaged in the practice of law, but the court's opinion did not state the nature of the alleged libel. Ellsworth v. Martindale-Hubbel Law Directory, 65 N.D. 297, 258 N.W. 486 (1935).

67. The representative was served with process in North Dakota. He, like other company representatives, was allotted a specified territory. He called upon the members of the bar and solicited their business, but subscriptions and advertising obtained by him were not binding upon the company until accepted by it at its New York office. *Id.* at 299, 258 N.W. at 486-87.

68. The law directory included information relating to the rating of lawyers, the date of their admission to the bar, their estimated legal ability and character, their estimated financial worth and their promptness in paying their bills. *Id.* at 299, 258 N.W. at 486.

collected accounts. Said the court: "The case is not where there was merely an occasional and infrequent business transaction in North Dakota. So it seems to us that the defendant was doing business in this state. . . ."[69]

A federal court distinguished *Wheeler* and *Ellsworth* in the 1950 case of *Anderson v. Page & Hill Homes, Inc.*,[70] where the defendant Minnesota corporation employed a representative who resided in Minneapolis, but who traveled through the Dakotas for the purpose of establishing dealer-builders. He was without authority to approve orders or dealer-builder contracts, make contracts, or legally commit the corporation in any other way. The court declined to sustain jurisdiction, arguing that the mere solicitation of business in the state by the corporation was not "doing business" in such a way as to make it amenable to service of process.[71]

B. JURISDICTIONAL HESITANCY

Several decisions by the state supreme court shortly before the enactment of the long-arm statute demonstrated a clear reluctance to extend in personam jurisdiction because of the absence of a long-arm statute in the state.

In *Fisher v. Mon Dak Truck Lines, Inc.*,[72] the appellant, the widow of a man killed in a 1966 accident involving a truck manufactured by a nonresident corporation that subsequently merged with another nonresident corporation had sought to obtain jurisdiction over the corporations by service of process upon the manager of two North Dakota businesses that sold the corporations' trucks. The court held that such service was inadequate to warrant jurisdiction because the North Dakota firms' only connection with the foreign corporations was that they sold the corporations' products.[73] It also held that such service could not be obtained either by mail[74] or by the state's nonresident motorist statute.[75] In its decision, the court noted that neither

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69. *Id.* at 307, 258 N.W. at 490.
70. 88 F. Supp. 408 (D.N.D. 1950).
71. *Id.* at 413.
72. 166 N.W.2d 371 (N.D. 1969).
73. *Id.* at 374.
74. Such service apparently was attempted under the Business Corporation Act, but the court said such service could not be valid unless it was shown that the defendants had been transacting business in North Dakota, and the claim of the plaintiff arose out of such transaction. *Id.*
75. The court said that the nonresident motorist statute, N.D. CENT. CODE § 39-01-11 (1972), did not apply because neither of the foreign corporations used the state's highways or operated the motor vehicle in question upon the highways at the time of the accident. The statute provides in part:

> The use and operation by a resident of this state or his agent, or by a nonresident or his agent, of a motor vehicle upon or over the highways of this state shall be deemed an appointment by such resident when he has been absent from this state continuously for six months or more following an accident or by such nonresident at any time, of the highway commissioner of this state to be his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him growing out of the use

of the foreign corporations had at any time maintained a warehouse or had employees in the state.[76]

Although the appellant emphasized *International Shoe* in its argument, the court took what appears to be a narrow reading of that decision in light of the general consensus that it served to greatly expand the concept of long-arm jurisdiction.[77] Declared the court: "Whether the United States Supreme Court would have held that International Shoe was doing business within the State of Washington so that service of process could be made on it for any purpose other than imposition of the unemployment tax is not determined."[78] The court also distinguished two other cases[79] relied upon by the appellant, and concluded:

> The foreign corporations attempted to be served in this case conducted no activity in the State of North Dakota except to ship products into the State in response to orders sent to them by a local dealer. One of such corporations occasionally did send an employee into the State to call on the local dealer to encourage sales, but such foreign corporations had absolutely no control or authority over the local concern. This did not constitute "doing business" in the State of North Dakota so as to subject such foreign corporation to service of process in this State.[80]

There then followed a series of three cases involving the Scranton Grain Company of Scranton, North Dakota, which had brought an action against several defendants. At the center of the litigation was a defective fuel pump that allegedly was partly responsible for a 1961 explosion that damaged the Scranton Grain Company's elevators and their contents. The fuel pump had been manufactured by foreign corporate defendants Roper Hydraulics, Inc., and Roper Industries, Inc., and sold to the Fargo Foundry Company of Fargo, North Dakota. Fargo Foundry in turn sold the pump to Carl J. Austad & Son, which was unloading propane gas near the plaintiff's elevators when the explosion occurred.

> or operation of the motor vehicle resulting in damage or loss to person or property . . . and such use or operation shall constitute an agreement that such process in any action against him shall have the same legal force and effect as if served upon him personally. . . .

76. 166 N.W.2d at 374.

77. For a contrary view regarding the importance of *International Shoe*, *see* L. D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 772 (9th Cir. 1969), where the court said that *International Shoe* stands for the proposition that reasonableness is the test by which to measure whether the demands of due process are met in cases where a foreign corporation has contacts with the forum.

78. 166 N.W.2d at 376.

79. The cases were 501 DeMers, Inc. v. Fink, 148 N.W.2d 820 (N.D. 1967), and Szantay v. Beech Aircraft Corp., 237 F. Supp. 393 (E.D.S.C. 1965), *aff'd* 349 F.2d 60 (4th Cir. 1965). The court distinguished 501 *DeMers* on the ground that the defendants had been operating three parking lots in North Dakota, and *Szantay* was distinguished because in that the case the defendants exercised complete control over the operation that caused the harm to the plaintiff's decedent.

80. 166 N.W.2d at 376-77.

In the first case of *Scranton Grain Co. v. Lubbock Machine & Supply Co.*,[81] the court upheld dismissal of jurisdiction, using the same reasoning that it had employed in *Fisher*. Although the Roper defendants employed a sales manager to use his best efforts to promote the sale of Roper products in a four-state area, including North Dakota, and to appoint, train, and develop distributors in that area, the court held that there was no evidence to indicate that the defendants possessed any control or authority over the local distributors of their products.[82] Hence, they were deemed not to be "doing business" in the state and not amenable to service of process.[83]

The second *Scranton* case[84] involved certified jurisdictional questions,[85] which the court refused to answer pending further proceedings in the trial court.[86] The final *Scranton* decision,[87] which was handed down about two years after the long-arm statute had taken effect, declared that the long-arm statute was only to apply prospectively and had no retroactive application because the statute did not contain a "savings clause"[88] that would give it retroactive effect.

C. SUMMARY

North Dakota's experience with long-arm jurisdiction has been limited by the fact that the state supreme court has not decided a case interpreting the scope of the state's long-arm statute. But a review of the cases discussed above and other decisions leads to some general conclusions about the scope of pre-1969 jurisdiction over foreign corporations. They are:

1. The Business Corporation Act was not construed as a long-arm statute.[89]

2. Single transactions were not considered to fall within the meaning of "doing business."[90]

3. Service of process had to be made within the state upon the foreign corporation, or upon some person authorized to accept service in its behalf.[91]

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81. 167 N.W.2d 748 (N.D. 1969).
82. *Id.* at 751.
83. *Id.* at 753.
84. Scranton Grain Co. v. Lubbock Machine & Supply Co., 175 N.W.2d 656 (N.D. 1970).
85. The questions related to the issue of jurisdiction over defendants Lubbock Machine & Supply Company and Lubbock Manufacturing Company, whose motion contesting district court jurisdiction had been denied. The judge who denied their motion was not the same judge who granted a similar motion by the defendants in the first Scranton case.
86. The court said that the jurisdictional questions could not be answered until they had first been presented to and ruled upon by the trial court. 175 N.W.2d at 657-58.
87. Scranton Grain Co. v. Lubbock Machine & Supply, 186 N.W.2d 449 (N.D. 1971).
88. N.D. CENT. CODE § 1-02-10 (1975) reads: "No part of this code is retroactive unless expressly declared to be so."
89. Note, *supra* note 1, at 329.
90. *See, e.g.*, State v. Robb-Lawrence Co., 15 N.D. 55, 106 N.W. 406 (1906).
91. *See* in this respect Kluver v. Middlewest Grain Co., 44 N.D. 210, 173 N.W. 468 (1919), which involved the alleged conversion by the defendant, a Minnesota corporation,

4. Plaintiffs were denied a remedy where the foreign corporation did not own property in the state or the cause of action did not arise in the state.[92]

5. Solictation coupled with other activities such as collecting payments was sufficient to constitute "doing business," in which event jurisdiction was upheld.[93]

IV. APPLICATION OF THE LONG-ARM STATUTE IN NORTH DAKOTA

A. FEDERAL COURT INTERPRETATION

While the pre-1969 decisions of the North Dakota Supreme Court were generally conservative, the court noted in the first *Scranton* case that Senate Bill 412 was shortly to take effect as the state long-arm statute. Said the court: "This Act, when it becomes effective . . . will broaden the jurisdiction of our courts over nonresidents transacting business in this State and permit service of process upon nonresidents previously exempt under our law."[94]

After the three *Scranton* cases and *Fisher* were decided, there arose in United States District Court three notable tests of the long-arm statute. All of these decisions were rendered after the statute had been incorporated into the North Dakota Rules of Civil Procedure.

1. *Jurisdictional Contacts*

The first case was *Keller v. Clark Equipment Co.*[95] One of the defendants in the action, Clark Equipment A. G., a wholly owned foreign subsidiary of Clark Equipment Company, sought dismissal of the action against it or, in the alternative, the quashing of service on the ground that it was a corporation organized under the laws

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of more than 300 bushels of the plaintiff's wheat. The summons and complaint were served upon Jourgen Olson, a Minot resident. The plaintiff claimed that Olson was the president of the defendant company, but the court agreed with the conclusions of the trial court that the evidence did not show that Olson was an officer or agent of the defendant at the time of service of process. The court said that service "must be exercised so as not to encroach upon the elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction to render personal judgment except by actual service of process within its jurisdiction upon the defendant, or some one authorized to accept service in his behalf, or by his waiver of due service." *Id.* at 219, 173 N.W. at 471.

92. *See* Brevick v. Cunard S. S. Co., 63 N.D. 210, 247 N.W. 373 (1933). Brevick had brought an action to recover for damages allegedly sustained on a trip to Europe. He claimed that the defendant had made misrepresentations when he purchased his steamship ticket, and, as a result, he was unable to see those parts of Europe he had wanted to see. The court found no basis for jurisdiction because the alleged cause of action arose in Europe, not in North Dakota, and because Brevick made no claim that the steamship company had any property in the state. The controlling statute provided that service could not be made upon a foreign corporation unless it had property in the state or the cause of action arose therein.

93. *See, eg.*, Ellsworth v. Martindale-Hubbell Law Directory, Inc., 65 N.D. 297, 258 N.W. 486 (1935) ; Wheeler v. Boyer Fire Apparatus Co., 63 N.D. 403, 248 N.W. 521 (1933).

94. 167 N.W.2d at 753.

95. 367 F. Supp. 1350 (D.N.D. 1973).

of Switzerland and therefore not subject to service in North Dakota. The parent company, Clark Equipment, was a Delaware corporation. Service of process on Clark A. G. was effected pursuant to Rule 4(d) (7)[96] of the Federal Rules of Civil Procedure by serving the summons and complaint upon an officer of Clark Equipment at its Melroe Division in Gwinner, North Dakota. At the hub of the litigation was a patent licensing agreement.

In defense, Clark A. G. claimed that the plaintiff did not show facts that established court jurisdiction or proper service. The court, however, found no decisive merit in this claim, holding that the defendant had a sufficient connection with North Dakota to justify jurisdiction, even though only a single contract was at issue.[97] Contacts cited by the court as adequate for jurisdiction included the fact that Clark A. G. maintained a liaison engineering employee in the state and that the plaintiffs were likely contacted, in regard to the patents, by a person representing the defendant.[98] Therefore, even though Clark A. G. was not "doing business" in the state,[99] the court concluded that "Clark Equipment and Clark A. G. were inextricably involved with [the plaintiffs] in the negotiations and execution of the patenting licensing agreements, and that Clark A. G. comes within the minimum contacts rule."[100]

The court also refused to accept the allegation that service upon Melroe was invalid as against Clark A. G. It held that the evidence showed that Clark A. G. had received adequate notice by service upon a division of the parent company.[101] To not allow jurisdiction in this case, according to the court, "would force the [plaintiffs] to bring suit in Switzerland, since no other United States forum would have any greater nexus with the plaintiffs or the issues than North Dakota."[102]

Unlike the state supreme court, which had read *International Shoe* in a narrow light, the federal district court emphasized that decision's "fair play and substantial justice" test as a basis for departing from the traditional rules for obtaining jurisdiction over foreign corporations.[103] The court also emphasized the broad interpretation afforded Minnesota's long-arm statute permitting jurisdiction over any case in which the state has a reasonable interest in offering a remedy.[104]

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96. Service under the federal rule was upon reliance of the North Dakota long-arm statute.

97. 367 F. Supp. at 1354.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1355.

102. *Id.*

103. *Id.* at 1352-53.

104. *Id.* at 1354. Cited by the court as an example of a case broadly interpreting Minnesota's statute was United Barge Co. v. Logan Charter Service, Inc., 237 F. Supp. 624 (D. Minn. 1964).

In *Vasquez v. Falcon Coach Co., Inc.*,[105] decided a year after *Keller*, the same district court again sustained jurisdiction where a North Dakota mobile home purchaser sued a Kansas company for alleged negligence in the manufacture of the home and for breach of express and implied warranties. The contacts cited by the court as adequate for jurisdiction included the following: (1) the defendant admitted that it delivered its products to the state, apparently using its own trucks for delivery to dealers; (2) "trouble shooter" repairmen were available who sometimes performed repair work; (3) the defendant solicited business from dealers in the state through visiting sales representatives even though it did not deal directly with the ultimate purchaser; and (4) several products made by the defendant were utilized by North Dakotans as homes.[106] The defendant had alleged that there could be no jurisdiction because it merely delivered its goods to North Dakota and performed isolated repair work in the state; it also had claimed that it maintained no office in the state, did not directly solicit business, did no installation or construction work, entered into no contracts or finance transactions, and neither owned nor supported any stock or goods in North Dakota.[107]

As in *Keller*, the court emphasized the holding in *International Shoe*, saying that it "set broad guidelines not limited to the facts of the case."[108] The defendant's position that *Hanson v. Denckla* supported its motion to quash service was ignored by the court on the ground that *Hanson* was so decided only because the Supreme Court could find no activity on the part of the defendant to sustain jurisdiction.[109] In its discussion of North Dakota's long-arm statute, the federal court said:

> [T]he rule is couched in terms of "contacts" and not in terms of "doing business." It is also noteworthy that a contract with the aggrieved person is not necessary to base service upon a foreign corporation; rather the act authorizes "jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's . . . *supplying* services, goods, or other things in this state."[110]

a. Contracts with Insufficient Nexus to Forum

In the third case, *Shern v. Tractor Supply Company of Grand Forks*,[111] the same federal court refused to allow jurisdiction over the defendant on the basis of a contract that did not involve North

105. 376 F. Supp. 815 (D.N.D. 1974).
106. *Id.* at 819-20.
107. *Id.* at 816.
108. *Id.* at 818.
109. *Id.* at 819.
110. *Id.* at 822.
111. 381 F. Supp. 1331 (D.N.D. 1974).

Dakota residents and was to be wholly performed outside the state. The plaintiff, a resident of Minnesota, had entered into a contest that promised the winner a three-month cruise on the *S. S. President Wilson,* a vessel owned by the defendant, American President Line, of San Francisco, California. He alleged that in reliance upon the representations made by American and another defendant, Tractor Supply Company, he registered for the contest, and was subsequently notified in late November, 1972, that he had won the contest and was entitled to the cruise. The plaintiff told the defendants that he could not arrange his personal affairs in the short time remaining between the notification of his success in the contest and the time that the cruise was to begin. He alleged that the defendants failed to offer a fair, reasonable, or legitimate alternative to the cruise, substituting trips for much shorter periods aboard cargo ships that sailed not the world but only the Pacific.[112]

American alleged that it had no contacts with North Dakota sufficient to constitute "doing business" in the state. Although the court said that the defendant's reliance on a "doing business" concept was misplaced,[113] it agreed that the contracts were insufficient. Cited by the court in support of its position were the facts that the contract was between nonresidents, that there were no prior negotiations in the state regarding the terms of the contract, and that the obligations of the contract were not to be performed in North Dakota.[114] Said the court:

> To construe North Dakota's long-arm statute as allowing an assertion of jurisdiction in this action where no obligations of the contract were to be performed in the state, and no other consequences concerning the state exist, would set up Rule 4(b) of the North Dakota Rules of Civil Procedure for a constitutional attack as violating the standards of due process.[115]

B. LIBERAL VIEW

It seems quite clear from the discussion of the above federal cases that the federal district court, where it had opportunity to do so, has interpreted quite broadly North Dakota's long-arm statute as incorporated into the Rules of Civil Procedure. In *Keller,* it was held that a single contract is a basis for jurisdiction if the plaintiff can show something more than the mere making of a contract in North Dakota. In *Vasquez,* it was held that the sale of mobile homes to North Dakota dealers, the delivery of mobile homes to the state, and the usage of those homes by North Dakota residents were among contacts adequate to support jurisdiction since they extend-

112. *Id.* at 1333.
113. *Id.*
114. *Id.* at 1336-37.
115. *Id.* at 1338.

ed the benefits, protections, and obligations of North Dakota laws to the defendant.

While *Shern* was a victory for the defendant, it cannot be said to have imposed any oppressive restrictions on the breadth of the long-arm statute. Indeed, the decision is notable for what it says about Rule 4(b)(2) and modern thinking about extended in personam jurisdiction: "The rule is couched in terms of 'contacts' and not in terms of 'doing business' ";[116] "[A] single tortious act or a single contract *may* constitute a sufficient contact. . . . ";[117] "The facts of the specific case will often be determinative of whether the single act or contract will serve as a viable basis for jurisdiction."[118]

Certainly the federal court's holdings go considerably beyond the decisions of the state supreme court prior to the adoption of the statute, and some may question whether the federal court's view of the long-arm statute is perhaps too broad. However, its interpretations do not appear overly expansive when compared to interpretations given long-arm statutes in other states, including those states that neighbor North Dakota.

C. HOW NORTH DAKOTA'S DECISIONS COMPARE

In South Dakota, the supreme court has on several occasions construed that state's long-arm statute,[119] which is very similar to North Dakota's.

In *Ventling v. Kraft*,[120] the South Dakota Supreme Court upheld jurisdiction on the basis of a contract that a North Dakota resident had executed in South Dakota. The court said that the North Dakotan had availed himself of the protection and benefits of South Dakota law, adding that the long-arm statute was to be construed to gain "the fullest benefits from the United States Supreme Court cases. . .

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116. *Id.* at 1334, *citing* Vasquez v. Falcon Coach Co., Inc., 376 F. Supp. 815, 822 (D.N.D. 1974).

117. *Id.*

118. *Id.*

119. S.D. COMP. LAWS § 15-7-2 (1967) reads:

> Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, or through an agent, of any of the following acts:
>
> (1) The transaction of any business within the state;
>
> (2) The commission of any act which results in accrual within this state of a tort action;
>
> (3) The ownership, use, or possession of any property, or of any interest therein, situated within this state;
>
> (4) Contracting to insure any person, property, or risk located within this state at the time of contracting;
>
> (5) Entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
>
> (6) Acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as executor or administrator of any estate within this state.

120. 83 S.D. 465, 161 N.W.2d 29 (1968).

in which the due process requirements under the Federal Constitution have relaxed as they pertain to personal jurisdiction in civil actions."[121]

In *Kelley v. Duling Enterprises, Inc.*[122] the South Dakota Board of Optometry sought to enjoin allegedly illegal conduct by the defendant. Among the alleged illegal activities were unlawful advertising and the "capping and steering" of persons to certain optometrists under alleged arrangements and agreements. Said the court:

> Duling Enterprises, Inc., directly contracted for and controlled advertising signs which it caused to be erected in South Dakota under a contract with a sign company. It also contracted for and arranged for broadcasting of its advertisements over Radio station WNAX from the studios of Yankton, South Dakota. It had sufficient contacts with the State of South Dakota to subject it to the jurisdiction of this state.[123]

Liberal construction has also been given to Minnesota's long-arm statute.[124] In *Atkins v. Jones & Laughlin Steel Corp.*,[125] the Minnesota Supreme Court upheld jurisdiction over a foreign corporation in spite of allegations that there could be no jurisdiction because the tort had not occurred wholly in Minnesota. Nine years later, the Eighth Circuit court held that where there was a tortious injury arising out of a contract to be performed wholly or in part in Minnesota, the in personam jurisdiction of that state over a Texas corporation was valid.[126]

Decisions in states farther removed from North Dakota than Minnesota and South Dakota have produced similar, liberal interpretations of long-arm statutes. For example, in Ohio the failure of a father to provide child support payments under the Illinois Paternity Act[127] was deemed a tortious act within the meaning of the Il-

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121. *Id.* at 474, 161 N.W.2d at 33-34.
122. 84 S.D. 427, 172 N.W.2d 727 (1970).
123. *Id.* at 448, 172 N.W.2d at 738.
124. MINN. STAT. ANN. § 303.13(1)(3) (1969) covers corporations. It provides:

> If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, or if such foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of the state of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against the foreign corporation arising from or growing out of such contract or tort. . . . The making of the contract or the committing of the tort shall be deemed to be the agreement of the foreign corporation that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served personally within the state of Minnesota.

125. 258 Minn. 571, 104 N.W.2d 888 (1960).
126. Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (8th Cir. 1969).
127. ILL. ANN. STAT. ch. 106¾, § 52 (Smith-Hurd Supp. 1970) states: "The father of a child born out of wedlock whose paternity is established in a proceeding under this Act shall be liable for its support, maintenance, education and welfare, until the child's attainment of age 18. . . ."

linois long-arm statute,[128] thus permitting service on the father in Ohio.[129] In Illinois, that state's supreme court upheld jurisdiction over a Wisconsin defendant who sent one of his employees to Illinois to deliver some appliances when the plaintiff was injured by the negligence of the employee in unloading a stove.[130]

D. SUMMARY

It is clear that the federal court decisions applying North Dakota's long-arm statute produced much more liberal results than the state supreme court cases prior to 1969. But this does not mean that the supreme court, when it does hear arguments in a case involving the statute, will construe the statute narrowly. Indeed, there are several possible reasons why the court construed jurisdiction narrowly in decisions made before adoption of the long-arm statute.

First, some statutory authority must exist before a state can exercise jurisdiction over a nonresident defendant.[131] Therefore, it may be argued that *Fisher, Scranton* and earlier cases were adverse to extended jurisdiction because the state had no long-arm statute upon which such jurisdiction could be based. Second, the Business Corporation Act, even if it had been construed as a long-arm statute, would likely have proven inadequate for the task. Indeed, one of the provisions of the statute specifies acts of a foreign corporation that are not to be considered the "transacting of business" in the state.[132] Third, courts remain conscious of the bounds of their jurisdiction even if there is a long-arm statute. The Supreme Court has said that restrictions on state jurisdiction are "more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states."[133]

V. HOW EXPANSIVE SHOULD JURISDICTION BE?

A. CHANGING CONCEPT

The whole concept of statutory in personam jurisdiction over nonresidents and foreign corporations has undergone, and continues to experience, significant change. State court decisions that would not have withstood the scrutiny of the United States Supreme Court 40 to 50 years ago are not considered violative of due process today.

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129. Poindexter v. Willis, 51 Ohio Op. 2d 157 (Montgomery County C.P. 1970), *noted in* 40 U. CIN. L. REV. 183 (1971).

130. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

131. Cummins, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028, 1035 (1935).

132. N.D. CENT. CODE § 10-22-01 (1974).

133. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

> Jurisdiction can now be based not only upon the classical bases—presence, consent, appearance—but also upon conduct such as transacting business, contracting to supply goods, causing tortious consequences, owning property, and insuring persons and property within the state.[134]

An example of modern legal thinking regarding long-arm jurisdiction is *Gray v. American Radiator & Standard Sanitary Corp.*,[135] which had facts somewhat like those in the first and third *Scranton* cases. In *Gray*, the defendant was an Ohio manufacturer of water heater safety valves. A Pennsylvania company used the valves in assembling water heaters. One of the heaters sent to the forum, Illinois, caused the injury to the plaintiff. The Illinois court sustained jurisdiction over the valve manufacturer despite its rather remote nexus with the forum.[136]

B. INTERPRETING SCOPE IN NORTH DAKOTA

The North Dakota long-arm statute is, like long-arm statutes in other states, quite broad in terms of its language, which creates interpretational problems. For example, it provides for personal jurisdiction over any person (including a corporation) in a claim arising from "transacting business in this state."[137] What does "transacting business" mean? Although no precise definition has been given, apparently "transacting business" requires an intentional act of some significance in the forum state. In one case, it was said that there must be an act by the defendant that produces an effect in the forum state so as to make the exercise of jurisdiction reasonable.[138]

The North Dakota statute also provides for in personam jurisdiction over a nonresident defendant "contracting to supply or supplying services, goods, or other things in this state."[139] The decisions of the federal court in *Keller* and *Shern* indicate that such a provision will be interpreted liberally if there was an intentional act that produced an injury in the forum state that should be remedied. There is a provision in the long-arm statute that specifically places insurance contracts within the reach of in personam jurisdiction.[140]

Another provision allows jurisdiction over a nonresident or foreign corporation "owning, having any interest in, using, or possessing property in this state."[141] Provisions such as this have been sub-

134. Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105 (1963) (footnotes omitted).
135. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
136. *Id.* at 444, 176 N.E.2d at 767.
137. N.D.R. CIV. P. 4(b)(2)(A).
138. Belmont Industries, Inc. v. Superior Court of Stanislaus County, 31 Cal. App. 3d 281, 107 Cal. Rptr. 237, 240 (1973).
139. N.D.R. CIV. P. 4(b)(2)(B).
140. N.D.R. CIV. P. 4(b)(2)(F).
141. N.D.R. CIV. P. 4(b)(2)(E).

jected to criticism on the ground that the presence of property in a state does not give the state power over the nonresident owner. According to one critic, a state

> has power over the property and a proceeding *in rem* can be brought against the property. The owner is subject to the law of the state where he is physically located. . . . The attempt to apply [a long-arm statute] to the out-of-state owner is an extraterritorial application of the statute contrary to due process of law. Furthermore, it is unnecessary since an action for any injury arising from the property can be brought *in rem* against the property.[142]

Other language in the statute provides for jurisdiction over nonresidents and foreign corporations "committing a tort within or without this state causing injury to another person or property within this state"[143] or "committing a tort within this state causing injury to another person or property within or without this state."[144] The first of these provisions appears to be directed toward litigation involving such issues as product liability. It has been said that such provisions

> should be liberally construed to achieve their intended objective. Assuming the various state legislatures intended to confer the maximum jurisdictional powers on their courts that will comport with due process limitations, a suggested approach to interpretation of the statutes is to direct attention to the three causal elements which are essential to the manufacturer's liability: the defective manufacture, the distribution of the product to the purchaser, and the resulting injury. For example, viewed in this manner, it seems apparent that the shipment of a product to the forum is an *act* committed by the defendant. If there is an intermediate distributor who is also a nonresident, his activity is but a continuation of the defendant's act of shipment. Using similar reasoning, the negligent manufacture and the resultant injury are also acts which, if occurring in the forum state, would sustain jurisdiction. All three elements, *i.e.*, manufacture, distribution, and injury, are *parts* of the tort, for they represent phases of the continuum of events leading to the cause of action. While a court's interpretation of a statute should reflect legislative policy toward subjecting a nonresident to suit, unnecessarily restrictive results have occurred all too often that could have been avoided by this approach.[145]

VI. CONCLUSION

Jurisdiction of state courts over nonresidents and foreign corporations has expanded greatly in the latter part of the twentieth

142. Stimson, *Omnibus Statutes Designed to Secure Jurisdiction Over Out-of-State Defendants*, 48 A.B.A.J. 725, 727 (1962).
143. N.D.R. CIV. P. 4(b)(2)(C).
144. N.D.R. CIV. P. 4(b)(2)(D).
145. Cummins, *supra* note 131, at 1036.

century, and a number of grounds are now considered adequate for the exercise of such jurisdiction. It appears that new tests of jurisdiction will have to be developed as our society becomes increasingly complex and corporations become larger and more powerful. However, such a task will not be without difficulty and delay. As one writer has noted: "The shifting basis upon which jurisdictional power has been grounded in the transitive process have made the subject most prolific in litigation, particularly with respect to the foreign corporations, whose rapid and steady growth of operations have tended to work an effacement of state boundaries."[146]

The long-arm statute in North Dakota is similar to long-arm statutes in other states, but because it has been in effect for a relatively short time, it has been subjected to only a few tests, all in the same federal court. While the decisions of the federal court give the statute a broad construction, no decisions interpreting its applicability have yet been rendered by the North Dakota Supreme Court, which in cases decided before the adoption of the statute took a narrow jurisdictional view.

The North Dakota statute should be interpreted to the extent necessary to afford maximum protection to the state's residents, yet not violate the fourteenth amendment due process rights of the defendants. However, due process requirements have been in a state of continual flux, and what is considered a violation of due process today may in the future be held within the bounds of due process. Therefore, there should be a balancing test, weighing the desirability of a remedy for the plaintiff against possible unfairness to the defendant.[147]

ADDENDUM

Since the writing of this article, the North Dakota Supreme Court has issued an order[148] amending Rule 4 of the North Dakota Rules of Civil Procedure. The amended rule, promulgated in response to a petition signed by members of the State Bar Association from each of the state's six judicial districts, will take effect on January 1, 1976. The court order embodies rule changes that the court deemed appropriate after consideration of proposed changes.

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146. Wilson, *In Personam Jurisdiction Over Nonresidents, "An Invitation and a Proposal,"* 9 BAYLOR L. REV. 363, 364 (1957).

147. Mention should be made of the doctrine of *forum non conveniens*, which is the discretionary power of a court to refuse to exercise jurisdiction when it appears that the cause before it should be tried elsewhere. Factors to be considered in deciding whether to utilize it include availability of the witnesses, the dispositive law that will govern the case, ease of access to proof sources, and other factors that speed the disposition of a case and reduce its cost. Use of the doctrine could minimize some of the adverse effects of expanded in personam jurisdiction. For a discussion of this doctrine, see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

148. Order of the North Dakota Supreme Court, September 2, 1975.

One of the amendments is a new long-arm statute provision,[149] which must be read *in para materia* with the jurisdictional bases[150] that were not altered by the amendments. The new provision serves to broaden the long-arm statute by allowing a state court to exercise jurisdiction over a person acting directly, or through an agent,[151] who is "enjoying any. . . status or capacity [other than a status or capacity previously specified] within this state, including cohabitation, or engaging in any other activity having such contact with this state that the exercise of personal jurisdiction over him does not offend against traditional notions of justice or fair play or the due process of law."[152]

Rule 4(b)(2)(3),[153] which also remains unchanged, provides that if jurisdiction over a person is based solely upon the long-arm statute, "only a claim for relief arising from bases enumerated therein may be asserted against him."[154] Therefore, the language of the new provision is significant because it potentially expands the circumstances that may warrant the exercise of state court jurisdiction. Its language is considerably broader than the language used to describe the other rather specific contacts upon which personal jurisdiction may be based. As a test for sustaining jurisdiction, the provision apparently applies to "fair play and substantial justice" approach applied by the United States Supreme Court in *International Shoe Co. v. Washington.*[155]

Several other amendments to Rule 4 should be noted because of their relationship to the issue of long-arm jurisdiction. The definition of "person" was slightly modified in Rule 4(a),[156] and Rule 4(b)(5)[157] is a new provision recognizing the concept of the inconvenient forum. It provides: "If the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just."

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149. N.D.R. CIV. P. 4(b)(2)(H) (effective January 1, 1976).
150. N.D.R. CIV. P. 4(b)(2) (A-G) *supra* at note 3.
151. N.D.R. CIV. P. 4(b)(2)
152. N.D.R. CIV. P. 4(b)(2)(H) (effective January 1, 1976).
153. N.D.R. CIV. P. 4(b)(2)(3).
154. *Id.*
155. 326 U.S. 310, 316 (1945).
156. N.D.R. CIV. P. 4(a) (effective January 1, 1976). It reads: "As used in this rule, 'person,' whether or not a citizen of domiciliary of this state, and whether or not organized under the laws of this state, includes: an individual, his executor, administrator joint or common interest; a partnership, an association; a corporation; and any other legal or commercial entity."
157. N.D.R. CIV. P. 4(b)(5) (effective January 1, 1976). *See also* note 147, *supra.*