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A Single Act Statute for North Dakota

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NOTES

A SINGLE ACT STATUTE FOR NORTH DAKOTA

North Dakota is without a Single Act statute per se. This analysis of the Single Act statutes of Illinois, Wisconsin, and Minnesota will relate those statutes to what North Dakota has and needs. The aspects of the Single Act statutes that will be presented are the tort and contract provisions, which generally call for the transaction of business or the commission of a tort within the state.

Originally no personal judgment action could be maintained against a foreign corporation without its consent because a corporation could have no legal existence outside the boundaries of the state of incorporation.[1] This early concept was rejected as inconsistent with modern needs and was replaced with the consent doctrine. Consent to be sued in the courts of the forum state was required of a foreign corporation if it was to do business in that state. Consent was none the less effective because coerced.[2] But the foreign corporation might refuse to give its consent in this matter, and in the face of such difficulties that arose with the consent theory the idea of corporate presence was formulated.[3]

The problem of subjecting foreign corporations, which were doing business in a state, and had not agreed by some explicit consent to personal actions not connected with the business done in the state, was not clearly answered by the old cases. Some early cases held it was unconstitutional,[4] but it is not clear if these decisions were decided on the basis of statutory interpretation or constitutional power This power over foreign corporations was upheld in at least one case, however, where service of process was made on a corporate official or agent.[5]

The Commerce Clause further restricts the right of a state to

1. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).
2. Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917).
3. Philadelphia and Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).
4. Simon v. Southern Ry. Co., 236 U.S. 115 (1915). Old Wayne Mutual Life Ass'n v. McDonough, 204 U.S. 8 (1907).
5. 220 N.Y. 259, 115 N.E. 915 (1917).

exercise judicial power over a foreign corporation. In *Davis v Farmers' Co-op Equity Co.*,[6] a Kansas plaintiff sued a railroad corporation in a Minnesota court for a cause of action arising in Kansas. The railroad had an agent in Minnesota only for the purpose of soliciting business. The Supreme Court held that the exercise of jurisdiction over the defendant would be unconstitutional because it imposed a burden on interstate commerce.[7]

In *International Shoe Co. v State of Washington*,[8] the Supreme Court allowed a state court to maintain personal jurisdiction over a foreign corporation when the only contacts the corporation had with the state were salesmen, who resided in the state, exhibiting samples and soliciting orders that were to be accepted or rejected by the corporation at a point outside the state. The court held 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 which is such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[9]

In *International Shoe* the Supreme Court rejected the consent and presence theories and instituted a test that looked to the degree or extent of doing business.[10] The Court intimated that regular solicitation was enough to hold a foreign corporation amenable to service, but rested its opinion on a solicitation-plus theory, in that the Court looked to systematic and continuous business operation by the appellant in Washington.

After *International Shoe* the Supreme Court decided three other cases explaining *International Shoe* and the due process concept involved in acquiring jurisdiction over foreign corporations, on the basis of their acts in the forum state.

In *Perkins v Benquet Consolidated Mining Co.*,[11] the Supreme Court expanded the decision of *International Shoe* to encompass a situation in which the cause of action arose from activities entirely distant from the corporation's activities in Ohio, the forum state. In *Perkins*, the foreign corporation owned no mining property in Ohio. Its mines were located in the Philippine Islands, which at the time of trial were occupied by the Japanese. During this period Benquet carried on in Ohio a continuous and systematic, but limited part of its buisness, which consisted of directors' meetings and

6. 262 U.S. 312 (1923).
7. Farrier, *Suits Against Foreign Corporations as a Burden on Interstate Commerce*, 17 MINN. L. REV. 381 (1933).
8. 326 U.S. 310 (1945).
9. *Id.* at 316.
10. *Id.* at 319-320.
11. 342 U.S. 437 (1952).

business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc. While so engaged, its president was served with summons in an action in personam against the corporation filed in an Ohio State Court, by a nonresident of Ohio. The cause of action did not arise in Ohio and did not relate to the corporation's activity there. The Supreme Court said, "The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of the state are to be determined in each case."[12] The court then referred to *International Shoe,* and said, "Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company . under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding."[13]

Even though this case is somewhat weakened by the fact that it is a "war" case, in that the other situs of trial would have been the Philippine Islands, which at the time of trial were under Japanese control, in the cases studied not one has refused to apply *Benquet* for this reason, when states, other than the forum state, could have taken jurisdiction over the cause of action.

McGee v International Life Insurance Co. ,[14] involved a true single act situation. An Arizona insurance company, whose obligations were later taken over by defendant, sold a policy to a California resident. The defendant contacted the insured, offering to reinsure him with their company Neither insurance company had any other contact with California. Under a California statute subjecting foreign corporations to suit in California on insurance contacts with residents of California, even though the corporation could not be served with process within the state, the plaintiff (beneficiary) sued defendant and obtained judgment in a California court. The Supreme Court after citing *International Shoe,* formulated the "national common market" theory,[15] and said:

> It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state. . It cannot be denied that California has a manifest interest in providing effective means of redress for

12. *Id.* at 437.
13. *Id.* at 448.
14. 355 U.S. 220 (1957).
15. *Id.* at 222-224. The "national common market" theory is basically that modern transportation is so efficient and modern business is conducted on a nation-wide scale, so there is no reason why a company that operates with such conveniences should not defend where its goods are sold or do damage.

> There have been cases that restrict the holding in *McGee* to its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable.[16]

There have been cases that restrict the holding in *McGee* to insurance cases,[17] but most of the cases have refused to distinguish between insurance and other types of contracts.[18]

The broad decisions in the past cases were qualified in *Hanson v Denckla*.[19] Here the Supreme Court of Florida sustained a ruling that gave Florida personal jurisdiction over a Delaware trust company on the following facts. While domiciled in Pennsylvania, a woman executed in Delaware a revocable deed of trust making a Delaware trust company trustee of certain securities, reserving an income for life and providing that the remainder should be paid to such parties as she should appoint by inter vivos or testamentary power. Later the woman moved to Florida, where she exercised the powers of appointment. The Florida state courts ruled on the substantive question of the trust and appointment, and also claimed that Florida had jurisdiction over the trust company

In denying the Florida courts' jurisdiction, The Supreme Court affirmed the minimal contact theory put forth in *International Shoe*, but qualified the general language of *McGee* relating to the "national common market" theory It based the qualification on the fact that the trust company had not physically gone into Florida to do business. The Court felt that as far as personal jurisdiction is concerned, state borders have not totally dissolved.[20] The test in *Hanson*, which required that there be some contractual contact that directly connects the defendant with the forum state, has been broadened to include a situation in which a manufacturer was held amenable to suit in a foreign jurisdiction, when the product manufactured had been sold three times and integrated into a larger piece of machinery before reaching the forum state.[21]

These four cases are used as the interpretive guides in construing Single Act statutes. These statutes allow a state to take personal jurisdiction over foreign corporations for acts done or contracts made that touch or concern the state.

The constitutionality of these acts has been approved by the

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16. *Ibid.*
17. *E.g.* Mueller v. Steelcase, Inc., 172 F. Supp. 416 (D. Minn. 1959).
18. Belcher v. Anderson Tully, 252 F Supp. 631 (E.D. Wis. 1966).
19. 357 U.S. 235 (1958).
20. *Id.* at 251.
21. Ehlers v. U.S. Heating & Cooling Manufacturing Corp., 267 Minn. 56, 124 N.W.2d 824 (1963).

Supreme Court, as shown by the previous cases. The true problem concerning these acts is the application of the statutes to the fact situations that arise, and the construction of these statutes by the various courts in which they are intrepreted.

ILLINOIS

The constitutionality of the Illinois statute[22] was upheld by the Illinois court, not on the basis of the defendants implied consent, but because of "the legitimate interest of the State in providing redress in its courts against persons who, having substantial contacts with the State, incur obligations to those entitled to the States protection."[23] The court said that this statute "reflects a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause."[24]

Since the Illinois "Single Act" statute was enacted, the Illinois courts are not limited by the theory that mere solicitation is not doing business,[25] because the statute cannot be given a restrictive interpretation based on the old Illinois "doing business" cases.[26] Moreover, the statute has been applied to causes of action that arose prior to its effective date.[27]

In *Grobark v Addo Machine Co.*,[28] the court held that a nonresident's acceptance of orders outside the state and shipping the ordered goods into Illinois, did not confer jurisdiction over a claim by the buyer for breach of a distribution contract under which the goods were sold. *Grobark* was explained in *Saletka v Willys Motors, Inc.*,[29] where the court said, "the performance of jurisdictional acts by the defendant or its agents while physically present in Illinois is essential under the transaction of business clause of section 17."[30] *Grobark* actually met the test put forth in *Saletko*

22. ILL. REV. STAT. ch. 110 § 17 (1956). The pertinent provisions are

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

(a) The transaction of any business within this State.
(b) The commission of a tortious act within this State.

(3) 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 Section."

23. Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957).
24. *Id.* at 389, 143 N.E.2d at 679.
25. Booz v. T. & P R.R. Co., 250 Ill. 376, 95 N.E. 460 (1911).
26. Haas v. Francher, 156 F Supp. 564, (N.D. Ill. 1957).
27. Sunday v. Donovan, 16 Ill. App.2d 116, 147 N.E.2d 401 (1st Dist. 1958).
28. 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958).
29. 36 Ill. App.2d 7, 183 N.E.2d (1962).
30. *Ibid.*

because there had been negotiation in Illinois between the parties involved that were related to the contract sued upon.

Grobark was also considered in *Kropp Forge v Jawitz.*[31] There the defendant, a New York citizen, negotiated by mail with the Illinois plaintiff for the purchase of machinery Defendant then visited the plaintiff in Illinois to inspect the machinery he was to purchase. The court held that Illinois had jurisdiction under section 17 (1) (a) by reason of "either the making of the alleged contract itself, or the activity in furtherance of it, while defendant was physically present in Illinois."[32] The *Grobark*[33] case was treated as holding "that the performance of jurisdictional acts by a nonresident or his agent, while physically present in Illinois, is essential for submission to the courts of this state under section 17 (1) (a) "[34]

In *National Gas Appliance Corp. v A B Electrolux,*[35] the defendant, a Swedish corporation, contracted to sell cooling units to the plaintiff, who was using the units as components in a finished product. The contract consisted of a letter mailed by the defendant from Sweden and a telegram of acceptance sent by the plaintiff from Chicago. Prior to the making of the contract, representatives of the defendant made two visits to Illinois that were related to and led to the making of the contract. The court held that "these acts of defendant's representatives, which occurred in Illinois constitute at least such minimal contacts with the state that the maintenance of this suit does not offend traditional notions of fair play and substantial justice,"[36] and that the disrict court had jurisdiction under section 17 (1) (a)

The result of Kropp Forge[37] and *National Gas Appliance,*[38] is that *Grobark*[39] is in effect overruled as a precedent for denying jurisdiction and can only be safely cited for the construction given to it in *Kropp Forge.*[40]

In *Lurie v Rupe*[41] the court held, that where a corporation maintained an agent in Illlinois for many years and the agent also worked as an agent for a voting trust, both the corporation and the trustee were amenable to suit under section 17 (1) (a). The fact

31. 37 Ill. App.2d 475, 186 N.E.2d 76 (1st Dist. 1962).
32. *Id.* at 481, 186 N.E.2d at 79.
33. *Supra* note 28.
34. *Supra* note 32.
35. 270 F.2d 472 (7th Cir. 1959).
36. *Id.* at 475.
37. *Supra* note 31.
38. *Supra* note 35.
39. 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958).
40. *Supra* note 32.
41. 51 Ill. App.2d 164, 201 N.E.2d 158 (1964).

that the nonresident trustee of the trust had done no acts in Illinois was held to be immaterial.

In *Koplin v Saul Lerner Co., Inc.*[42] the court held that advertising did not constitute doing business for the purposes of section 17 The court said, "the advertisements indicate the desire and hope for doing business, but none of these denote that business was done. A willingness to do business and solicitation of business do not constitute the doing of business."[43]

In *Orton v Woods Oil and Gas Co.*,[44] there is an excellent discussion of section 17 Jurisdiction was denied under 17 (1) (a) when the defendant had hired the plaintiffs, a lawyer and an engineer who were both Illinois residents, to incorporate a Delaware corporation and list the stock with the Security Exchange Commission. The court said the defendant did not have sufficient minimal contacts with Illinois as required by the due process clause, and refused the plaintiffs' argument that they were hired as agents of the defendant, even when they were listed as such, and said they were working for themselves.[45]

In *Kaye-Martin v Brooks*[46] the court took a very questionable view of section 17 (3) It took the view that subsection (3) limited section 17 to apply only to cases arising solely from acts performed within Illinois.[47] Subsection (3) relates to counterclaims, and it was not the purpose of subsection (3) to limit the assertion of jurisdiction to cases in which every element of the transaction occurs in Illinois. Jurisdiction exists under section 17 even though only some of the events occurred in Illinois, if those events meet the minimum contact-due process tests.[48]

Magnaflux v Foerster[49] and *Nortown Steel Supply Co. v Northern Indiana Steel Supply Co.*,[50] are two cases where jurisdiction was maintained, but they involved cases of very substantial contacts by the defendants in Illinois, including their having entered into contracts with Illinois residents in Illinois, and having agents in the state.

In *Trippe Manufacturing v Spencer Gifts*,[51] the court held that the defendant's sending catalogs into Illinois was not transacting

42. 52 Ill. App.2d 97, 201 N.E.2d 763 (1964).
43. *Id.* at 97, 201 N.E.2d at 767.
44. 249 F.2d 198 (7th Cir. 1957).
45. *Accord*, E Film Corp. v. United Features Syndicate, 172 F Supp. 277 (N.D.Ill. 1959), Morgan v. Heckle, 171 F Supp. 482 (E.D.Ill. 1958), Bonan v. Leach, 22 F.R.D. 117 (E.D.Ill. 1957).
46. 267 F.2d 394 (7th Cir. 1959).
47. *Id.* at 397.
48. Nelson v. Miller, 11 Ill.2d at 389, 143 N.E.2d at 679.
49. 223 F Supp. 552 (N.D.Ill. 1963).
50. 340 F.2d 934 (7th Cir. 1965).
51. 270 F.2d 821 (7th Cir. 1959).

business and this contact was insufficient to confer jurisdiction under section 17 The court relied heavily on *Grobark*[52] and also refused to accept jurisdiction on a tort ground.[53]

The court in *Trippe*[54] said that the decision in *Hanson*[55] limited *McGee*[56] to the insurance field. This is a misreading of *Hanson*. The court in *Hanson* applied the theory of minimum contacts[57] to the facts before them. In *Hanson* the Supreme Court mentioned the insurance aspect of *McGee* only after mentioning the substantial connection the defendant had with the forum state. It is the general opinion that the reasoning in *McGee* will and should be considered in the construction of section 17 and similar statutes, in its jurisdictional meaning and not as a decision limited to insurance law[58]

It would seem the federal courts in Illinois would prefer *Kropp Forge*[59] to *Grobark*,[60] because it is the way in which the State prefers its statute to be construed, and the federal courts would be construing state law Also, the courts realize the modern trend towards the relaxation of due process in this area.

In *Hellriegel v Sears Roebuck and Co.*,[61] a case in which an out-of-state manufacturer sold his product outside of Illinois to another who then brought the product into Illinois and sold it to an Illinois resident who was injured by the product. The court held that since all of the defendants' acts concerning the product occurred outside of Illinois, the defendant had not committed any tortious act in Illinois. The court here relied on an English case[62] which reached a similar result construing an English statute[63] that provided for foreign service "whenever the action is founded on a tort committed within the jurisdiction." *Hellreigel* was followed in *Trippe*[64] and *Insull*[65], and the same result was brought about in *Wing v Challenge Machine Co.*,[66] which relied heavily on *Grobark*.[67]

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52. 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958).
53. In *Trippe*, the plaintiff tried to get jurisdiction under both subsection (1) (a) and (b). The tort claim being based on false advertising. Other cases involving both the tort and contract subsections of section 17 are. Insull v. New York World Telegram, 273 F.2d 166 (7th Cir. 1959), and National Gas Appliance Corp. v. A B Electrolux, 270 F.2d 472 (7th Cir. 1959).
54. *Supra* note 51.
55. 357 U.S. 235 (1958).
56. 355 U.S. 220 (1957).
57. *Supra* note 55, at 251.
58. ILL. REV. STAT. ch. 110 § 17 (Supp. 1965).
59. 37 Ill. App.2d 475, 186 N.E.2d 76 (1st Dist. 1962).
60 *Supra* note 52.
61. 157 F Supp. 718 (N.D.Ill. 1957).
62. George Monroe, Ltd. v. American Cyanamid [1944] 1 K.B. 432.
63. Order XI, Rule 1 (ee) of The Rules of the Supreme Court (Annual Practice 1957).
64. 270 F.2d 821 (7th Cir. 1959).
65. 273 F.2d 166 (7th Cir. 1959).
66. 23 F.R.D. 669 (S.D.Ill. 1959).
67. 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958). *Compare*, N. C. GEN. STAT. 355-145 (a) (3) (1965).
(a) Every foreign corporation shall be subject to suit in this state,

The Illinois Supreme Court considered the same problem as considered in *Hellriegel*[68] in *Gray v American Radiator and Standard Sanitary Corp.*[69] The court held that assuming the valve to be defective, as alleged, the valve manufacturer had committed a tortious act in Illinois, within the meaning of section 17 (1) (b) The court reasoned that since the last event, the failure of the valve and the resulting injury to the plaintiff, that was necessary to render the manufacturer liable happened in Illinois, a tortious act was committed in Illinois. The argument that the term "tortious act" referred to the acts or conduct of the defendant, rather than the consequences of the defendant's acts that result in injury in Illinois was rejected.[70]

The court then discussed *International Shoe*[71] and due process, and concluded "the requirements for jurisdiction have been further relaxed so that at the present time it is sufficient if the act or transaction itself has a substantial connection with the state of the forum."[72] The court also recognized that there could be some circumstances in which it would be unfair to require a defendant to defend in a distant state even though he had some contact with that state.[73] The court then noted that the defendant manufacturer did not claim the use of its product, giving rise to this cause of action, was an isolated incident, and commented that it was reasonable to infer that the defendant's sales resulted in substantial use and consumption of its product in Illinois, and that it had undoubtedly benefited from the protection that Illinois law has given to the marketing of hot water heaters containing its valves.[74] The court went on to say·

> [W]here the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into the state.
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> With the increasing specialization of commercial activity

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whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

(3) Out of the prodution, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this state and are so used and consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers;"

68. *Supra* note 61.
69. 22 Ill.2d 432, 176 N.E.2d 761 (1961).
70. *Id.* at 434-435, 176 N.E.2d at 762.
71. 326 U.S. 310 (1945).
72. *Supra* note 69, at 438, 176 N.E.2d at 764.
73. *Id.* at 441, 176 N.E.2d at 766.
74. *Ibid.*

> and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other states. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this state as to justify a requirement that he defend here.[75]
>
> As a general proposition, if a corporation elects to sell its products for ultimate use in another state, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of state lines. By the same token, today's facilities for transporation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other states.[76]

The two decisions in federal courts denying jurisdiction in cases of tort injury in Illinois from activities outside the state, *Trippe*[77] and *Insull*[78] did not involve injury due to defective manufacture. *Trippe* involved a suit for unfair competition, in which catalogs containing false information were mailed into the state; *Insull* was a case concerning libel in newspapers that were mailed into Illinois. *Gray*[79] seems to doom *Trippe*, but *Insull* is probably good law because of the Illlinois view of what constitutes libel.

In *Keckler v Brookwood Country Club*,[80] the defendant moved to quash service of process under section 17 (1) (b) The defendant manufactured a golf cart in Indiana and sold it to another company that delivered the cart to Illinois, where the cart tipped and injured the plaintiff. The court quoted from *Hanson v Denckla*,[81] "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, and invoking the benefits and protection of its law "[82] Here as in *Gray*[83] the defendant had never

75. Test of whether activities of a non-resident are sufficient to subject him to jurisdiction of Illinois courts is the substance of the acts rather than the quantity of acts done. Kropp Forge v. Jawitz, 37 Ill. App.2d 475, 186 N.E.2d 76 (1st Dist. 1962).
76. *Supra* note 73.
77. 270 F.2d 821 (7th Cir. 1959).
78. 273 F.2d 166 (7th Cir. 1959).
79. *Supra* note 69.
80. 248 F Supp. 645 (N.D.Ill. 1965).
81. 357 U.S. 235 (1958).
82. *Id.* at 253.
83. 22 Ill.2d 432, 176 N.E.2d 761 (1961).

physically entered Illinois. The court compared the two situations and expressed approval of the *Gray* holding[84] and said, "When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes."[85] It would seem that after taking this liberal position the court would allow jurisdiction to stand, but it did not. It went on to say that entering the manufacturing business is not enough to subject a person to personal jurisdiction under a Single Act statute. The court required that the plaintiff prove that the defendant's distribution pattern is of a kind from which a reasonable inference may be drawn that the national channels of commerce have been chosen by the manufacturer.[86] This requirement seems to be an excuse rather than a reason for denying jurisdiction, especially when the manufacturer sells to a wholesaler, and when Indiana and Illinois border on each other and have interlocking economies. It seems to be putting an unreasonable burden on the plaintiff, especially if the manufacturer chose to sell to wholesalers in his own state.

The language of section 17 (1) (a) and (b) is flexible enough to cover a single act in its jurisdictional context, although it is susceptible to the construction given to it in *Grobark*[87] and *Hellriegel*.[88] There is no doubt that an Illinois state court would sustain jurisdiction over a single act,[89] but a federal court sitting in Illinois would probably not do so,[90] since they take the due process clause more seriously than they do a citizen's right to sue in his own state.

But this does not pose that many problems. The states having Single Act statutes go through a period of adjustment where the statute is at first narrowly construed, then as the courts get used to "handling" the statute, they give it a more liberal construction. This will also appear when the Wisconsin and Minnesota statutes are considered.

The concept of forum non conveniens is considered in Illinois under both the tort[91] and contract[92] subsections of section 17. Forum non conveniens will be discussed with the Wisconsin ma-

84. *Id.* at 441, 176 N.E.2d at 766.
85. *Supra* note 80, at 649.
86. *Id.* at 650.
87. 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958).
88. 157 F.Supp. 718 (N.D.Ill. 1957).
89. Nelson v. Miller, 11 Ill.2d at 389, 143 N.E.2d at 679, Kropp Forge v. Jawitz, 37 Ill. App.2d 475, 186 N.E.2d 76 (1st Dist. 1962).
90. Morgan v. Heckle, 171 F.Supp. 482 (E.D.Ill. 1959).
91. Gray v. American Radiator and Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961).
92. Nelson v. Miller, 11 Ill.2d at 393, 143 N.E.2d at 681.

terial, as Wisconsin has a statute relating to it and discusses the cases from several jurisdictions.

WISCONSIN

The Wisconsin Single Act statute[93] was construed in *Huck v Chicago St. P., M. and O. Ry Co.*[94] which involved a tort action to recover for an injury that occurred in Wisconsin, resulting from a defective hand brake on a railroad box car. Rock Island was interpleaded as a defendant because it was the carrier that selected the defective car in Illinois for use in shipping the cargo into Wisconsin. The Rock Island, which operated over no track in Wisconsin, continuously solicited freight and passenger business to be routed over its lines outside Wisconsin from an office in Wisconsin. The court said it had no hesitancy in holding that the objective of the statute was to give citizens of Wisconsin the right to make use

93. WIS. STAT. 262.05 (Supp. 1966). The pertinent sections of this statute are. "A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to section 262.05 under any of the following circumstances:

(1) Local presence or status. In any action whether arising within or without this state, against a defendant who when the action is commenced.

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

(3) Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

(4) Local injury · foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant provided in additon that at the time of the injury either·

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant, or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

(5) Local services, goods or contracts. In any action which.

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

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

(c) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant, to deliver or receive within this state or to ship from this state goods documents of title or other things of value, or

(d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction, or

(e) Relates to goods, documents or title or other things of value received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred."

The above statute had a forerunner in Wisconsin, Wis. Stat. 262.09 (4), which read.

"(4) Foreign corporations, generally. If the defendant is a foreign corporation (including one created by or under any act of congress) and

(a) is doing business in Wisconsin at the time of service, or

(b) the cause of action against it arose out of the doing business in Wisconsin, service may be made in accordance with the provisions of 180.825 or by delivery within or without the state a copy of the summons to any officer director or managing agent of the corporation."

Both of the above statutes are considered Single Act statutes, and will be treated together.

94. 3 Wis.2d 132, 90 N.W.2d 154 (1958).

of the courts of Wisconsin in instituting causes of action against foreign corporations which were carrying on business activities within the state, subject only to such limitations as are imposed by the Constitution.[95] The court also said that the old cases defining doing business are not applicable when this Single Act statute is being construed.[96] In *Huck* it is obvious that the Wisconsin Supreme Court meant to give the statute the widest, most liberal construction that is permissible under due process.[97]

In *Hornstein v Atchinson, Topeka and Santa Fe Ry.*,[98] the plaintiff brought suit in Wisconsin for injuries received while a passenger on the defendant's line in Kansas. The defendant had no tracks and carried no freight or passengers in Wisconsin, but did maintain an office in Milwaukee for the solicitation of freight and passenger business. The plaintiffs had purchased their tickets in Wisconsin. The court cited *Huck*[99] and *Lau*[100] in holding that the objective of the statute was to give Wisconsin residents the right to make use of Wisconsin courts in bringing a cause of action against a foreign corporation, which is actually carrying on business in Wisconsin. The court distinguished an earlier case[101] where the court held that the casual presence of a corporate agent or even his conducting of single or isolated items of activities in a state, on the corporation's behalf, is not sufficient minimal contacts to subject the corporation to suit on causes of action arising from activities unconnected with the activities of the corporation in Wisconsin. In that case the corporation was not doing business in Wisconsin, and the agent's purpose for being in Wisconsin was unrelated to the cause of action. In the case at bar, the agent was not in Wisconsin for isolated purposes, he was there to solicit business for the railway and this activity was directly related to the plaintiff's injury, as the plaintiffs bought their tickets in Wisconsin.

The application of the statute to tort actions has been well within the purpose for which the statute was enacted. It has neither been too restrictive nor have the courts exceeded the bounds of due process.

American Type Founders Co., Inc. v Mueller Collor Plate Co.[102] involved a third party defendant, Elmora Corporation, that moved to dismiss on the ground that the court did not have jurisdiction,

95. *Id.* at 137, 90 N.W.2d 154 (1958).
96. *Ibid.*
97. Lau v. Chicago & N.W Ry. Co., 14 Wis.2d 329, 111 N.W.2d 158 (1961).
98. 229 F.Supp. 1009 (W.D.Wis. 1964).
99. *Supra* note 94.
100. *Supra* note 97.
101. Mitchell v. Airline Reservations, Inc., 265 Wis. 313, 61 N.W.2d 496 (1953).
102. 171 F.Supp. 249 (E.D.Wis. 1959).

because the plaintiff's cause of action did not arise out of its doing business in Wisconsin. The court held that where Elmora had solicited the contract in Wisconsin, shipped the goods into Wisconsin, furnished help for the installation of the goods in Wisconsin, and filed a conditional sales contract pertaining to the goods in Wisconsin, it had sufficient minimal contacts to be amenable to suit in Wisconsin. In doing so, the court reiterated what the purpose of the statute was, and went on to mention *International Shoe* in holding that Elmora had a substantial connection with Wisconsin[103] and that the due process test depends on the quality and nature of the activity, rather than the quantity of acts done by the foreign corporation.[104] The court also mentioned the "national common market" theory put forth in *McGee*.[105]

The court in *Koepp v Peters*,[106] held that the defendant, a Michigan corporation, was amenable to process under the Single Act statute, when it advertised its product in Wisconsin, owned property in Wisconsin as a result of financing some of the sales of its products through mortgages, and had a number of authorized dealers in Wisconsin who were contacted by the defendants representatives at regular intervals. The court cited *American Type Founders*[107] and referred to the Supreme Court decisions mentioned in that case. The court also mentioned that the defendant had constructed a marketing system that resulted in the continuous sale of its products in Wisconsin and that system had resulted in a long established and well organized venture in Wisconsin.

Wisconsin Metal and Chemical Corp. v Dezurik Corporation,[108] involved a suit by a Wisconsin resident against a Minnesota corporation for breach of warranty with respect to valves purchases by the plaintiff from the defendant. The court said that where the defendant had authorized a Wisconsin company, Dorner, to solicit orders for its products in Wisconsin and Dorner secured an order from the plaintiff for the defendant's products, and the defendant filled this order, due process was not denied the defendant as to service under section 262.05. The court considered *International Shoe* and *McGee*, and decided that the suit did not offend traditional notions of fair play and substantial justice; the defendant was involved in a contract that had a substantial connection with the state. The court said:

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103. 326 U.S. at 316.
104. *Id.* at 319.
105. 355 U.S. at 222.
106. 193 F.Supp. 296 (E.D.Wis. 1961).
107. *Supra* note 102.
108. 222 F.Supp. 119 (E.D.Wis. 1963).

> It is reasonable for a corporation that authorizes a manufacturer's representative to solicit orders for the sale of its goods in the state and then delivers the product in Wisconsin pursuant to such order to defend an action brought by the buyer for breach of warranty arising out of such sale. The due process clause is violated only (1) if the state attempts to reach defendants who have had no minimum contact with the state so that it would be unreasonable and unfair to require them to respond to that state's process, or, (2) if the method of notice to the defendant is not adequate.[109]

The court then considered the *Hanson v Denckla* limitation[110] and found that the defendant had availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.[111]

The defendant fought jurisdiction, relying on *Grobark*,[112] where the court held there were insufficient minimal contacts. The court dismissed the defendant's argument by saying that the court in *Grobark* was dealing with the early legalistic definition of doing business rather than the minimal contact concept established in *International Shoe*[113] and *McGee*.[114] The court found that section 262.05 is applicable to a true single act situation, without violating the due process clause.

In *Sun-X Glass Tinting of Mid-Wisconsin, Inc. v Sun-X International Inc.*,[115] the court held that a nonresident corporation which had solicited and procured distributorship contracts in Wisconsin had sufficient minimal contacts with Wisconsin to be amenable to service in actions by resident plaintiffs, but that four causes of action based on four separate contracts would be severed. The court cited *Huck*,[116] *Lau*,[117] and distinguished *Holiday on Ice Shows v Dancing Waters, Inc.*[118] In *Sun-X*, various officers and managerial personnel from the defendant company come into Wisconsin for the purpose of negotiating and entering into various contracts. The court distinguished the cases on the basis of the powers of the

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109. *Id.* at 123.
110. 357 U.S. at 251.
111. *Id.* at 253.
112. 18 Ill. App.2d 10, 151 N.E.2d 425 (1st Dist. 1958).
113. 326 U.S. 310 (1945).
114. 355 U.S. 220 (1957).
115. 227 F.Supp. 365 (W.D.Wis. 1964).
116. 4 Wis.2d at 137-139, 90 N.W.2d at 157-158, 159.
117. 14 Wis.2d 329, 111 N.W.2d 158 (1961).
118. 155 F.Supp. 763 (W.D.Wis. 1957). Here, a contract was made in Illinois between the Wisconsin plaintiff and a New York defendant, that provided the plaintiff was to assemble the equipment in Wisconsin under the direction of an employee of the defendant, and the machine was to be operated by one of the defendants mechanics. The court denied jurisdiction because no officer, agent, or director of the defendant entered Wisconsin.

employees that entered Wisconsin. The mechanic in *Holiday* had no contract making powers; the officers in *Sun-X* did.

The court then stated that it was sufficient for purposes of due process that the action was based on a contract which had a substantial connection with Wisconsin.[119]

The four causes of action that were severed, were brought by nonresidents of Wisconsin. The court cited *Huck*[120] in restricting the use of section 262.05 to Wisconsin residents. The court also mentioned *Mitchell*[121] which held that the casual presence of the corporate agent or even his conducting of single or isolated items of activities in the state on the corporation's behalf is not enough to subject it to suit on causes of action unconnected with its activities there. The four nonresident plaintiffs' causes of action are apparently unconnected with Wisconsin and with the defendant's activities undertaken in Wisconsin.

Jurisdiction was denied in *Travelers Insurance Company v George McArthur and Sons*[122] over a Pennsylvania corporation on the basis of situs of the contract through its sale of products to a Wisconsin corporation, where the product did not come into Wisconsin, but was sent from Pennsylvania to Connecticut. The court said that section 262.05 contemplates a requirement for jurisdiction similar to that of doing business within the state. Thus, the statute requires not just an isolated contact, but substantial activities in the state that are continuous and systematic.

The trial court felt this was a case in which jurisdiction could be taken. It relied on section 262.05 (3), reasoning that this section was applicable since the injury occurred outside the state as the result of an act within the state by the defendant. The act within the state was the defendants' entering into a contract in Wisconsin. The appellate court found there was no evidence that this contract was made in Wisconsin, nor was there evidence as to the defendants performing any act in Wisconsin. Section 262.05 (1) (d) was also used in attempting to get jurisdiction over the defendant, claiming that the products were used in Wisconsin in the ordinary course of trade. In denying jurisdiction the court cited *Flambeau Plastics Corporation v King Bee Manufacturing Company*,[123] where the court had indicated its doubt that a single act by the defendant, entering into a single contract with a Wisconsin resident to be performed

119. Kappus v. Western Hills Oil, Inc., 24 F.R.D. 123 (E.D.Wis. 1959), Dettman v. Nelson Tester Co., 275 Wis. 569, 83 N.W.2d 162 (1957).
120. *Supra* note 116.
121. 265 Wis. 313, 61 N.W.2d 469 (1953).
122. 25 Wis.2d 418, 130 N.W.2d 852 (1964).
123. 24 Wis.2d 459, 129 N.W.2d 237 (1964).

in Wisconsin, would be sufficient contact with Wisconsin to subject it to jurisdiction under section 262.05 (1) (d) The court in *Flambeau* also claimed that to subject a foreign corporation to the jurisdiction of Wisconsin courts under section 262.05, the complaint must allege sufficient facts to establish jurisdiction.

The court shortly limited *Flambeau* to the extent that the court will no longer base a determination of lack of personal jurisdiction over a defendant upon the failure of the complaint to allege facts necessary to establish personal jurisdiction.[124]

In *Pavalon v Fishman*,[125] after the court took jurisdiction over the defendants in the previous case,[126] Fishman moved for dismissal on the grounds that jurisdiction as to him was in violation of due process. Because there was no personal or property injury, jurisdiction was based on section 262.05 (5) (e) Under subsection (5) there must be some degree of consensual privity between the plaintiff and defendant with respect to the action brought, but "it is not necessary that the defendant have done any act within the state; the basis for personal jurisdiction is rather that the defendant has entered some consensual agreement with the plaintiff which contemplates a substantial contact in Wisconsin."[127] Fishman called Pavalon from Chicago to sell him stock, followed up the call by sending Pavalon a prospectus, called a second time, and then sent a letter to Pavalon instructing him to mail his check payable to Sulray, the original name for the defendant in the previous case. The defendant received a finders fee from Sulray for raising the money in controversy Even though Sulray had no direct contact with Wisconsin, the courts took jurisdiction, because Fishman was acting as an agent for Sulray in this matter The ultimate issue of jurisdiction depended on whether Fishman was an agent of Sulray It was decided that Fishman was an agent of Sulray and, being part of the transaction having such contacts with Wisconsin, was amenable to suit.

In *Belcher Corporation v Anderson Tully Co.*,[128] the plaintiff, a Wisconsin corporation, sued the defendant, a Michigan corporation, for damages arising out of defendant's alleged defective manufacture of products it sold to the plaintiff. The defendant, in fighting jurisdiction, claimed that *McGee*[129] has been limited to the insurance field by *Denckla*.[130] The court rejected this, claiming that it did not

124. Pavalon v. Thomas Holmes Corp., 25 Wis.2d 540, 131 N.W.2d 331 (1964).
125. 30 Wis.2d 459, 129 N.W.2d 237 (1964).
126. *Supra* note 124.
127. *Supra* note 123, at 464, 129 N.W.2d at 238.
128. 252 F.Supp. 631 (E.D.Wis. 1966).
129. 355 U.S. 20 (1957).
130. 357 U.S. 235 (1958).

see any difference in the state protecting its residents and allowing them to bring suit in insurance cases, and allowing them a forum for other types of contract cases.

On the facts of the case, the court found that as long as the defendant had entered into approximately 50 contracts, in the normal course of its profit making activities in the six years prior to the commencement of the action, he had formed a consistent pattern of business activity with a Wisconsin resident. The defendant had established a substantial connection with Wisconsin, so due process was not offended by the assumption of this suit in Wisconsin courts.

The treatment of section 262.05 and 262.09 (4) by the courts in contract cases has, in general, been liberal and within constitutional limitations. The federal courts have not been unduly restrictive in construing this statute in the light of due process.[131] In fact, the federal courts possibly would give the statute a more liberal reading than would Wisconsin state courts.[132] Even so, Wisconsin courts have not felt bound to some of the more conservative holdings and have not hesitated in avoiding unwanted precedents.[133]

Wisconsin has a statute[134] which embodies the principles of the common law doctrine of forum non conveniens. Forum non con-

131. Belcher Corp. v. Anderson-Tully Co., 252 F.Supp. 631 (E.D.Wis. 1966), Wisconsin Metal & Chemical Corporation v. DeZurik Corp., 222 F.Supp. 119 (E.D.Wis. 1963).

132. As to the application of the statute to single act situations, compare Flambeau Plastics v. King Bee Mfg. Co., 24 Wis.2d 459, 129 N.W.2d 237 (1964), and Wisconsin Metal & Chemical Corp. v. DeZurik Corp., 222 F.Supp. 119 (E.D.Wis. 1963).

133. *See* the treatment of Holiday on Ice Shows v. Dancing Waters, Inc., 155 F.Supp. 763 (W.D.Wis. 1957), in Sun-X Glass Tinting of Mid-Wisconsin, Inc. v. Sun-X International, Inc., 227 F.Supp. 365 (W.D.Wis. 1964) and compare the holdings of Flambeau Plastics v. King Bee Mfg. Co., 24 Wis.2d 459, 129 N.W.2d 237 (1964), and Pavalon v. Thomas Holmes Corp., 25 Wis.2d 540, 131 N.W.2d 331 (1964).

134. WIS. STAT. 262.19 (Supp. 1966). The statute reads:

"(1) Stay on inititive of parties. If a court of this state, on motion of any party finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with sub. (3) enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate his consent to suit in the alternative forum and waive his right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state. A stay order may be granted although the action could not have been commenced in the alternative forum without consent of the moving party.

(2) Time for filing and hearing motion the issues raised by this motion shall be tried to the court in advance of any issue going to the merits of the action

(3) Scope of trial court discretion on motion to stay proceedings. The decision on any timely motion to stay proceedings pursuant to sub. (1) is within the discretion of the court in which the action is pending. In the exercise of that discretion the court may appropriately consider such factors as.

(a) Amenability to personal jurisdiction in this state and in any alternative forum

(b) Convenience to the parties and witnesses of trial in this state and in any alternative forum,

(c) Differences in conflict of law rules applicable in this state and in any alternative forlm or

(d) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial."

veniens is recognized by Illinois,[135] Wisconsin,[136] and Minnesota,[137] and it is applied in the federal courts.[138]

The doctrine of forum non conveniens assumes that the plaintiff could have brought his action in more than one state and any forum the plaintiff selected has discretion to dismiss the action when it appears that it may be tried more conveniently and justly in another state.

The criteria for dismissing a case under the doctrine of forum non conveniens have been subject to much discussion. Basically, it is agreed, the doctrine applies only to exceptional situations, and its object is to promote convenience and justice. Within these terms, the trial court has much discretion in deciding when to apply the doctrine and dismiss a case, and appellate courts hesitate to interfere with the exercise of the trial court's discretion, absent clear abuse of this discretion, for fear that the doctrine may be converted into a ground for appeal, delay, and inconvenience.

Exact standards for applying the doctrine have not yet been formulated, but this is for the good. The flexible and equitable nature of the doctrine make the formulation of precise standards difficult and unwise when looked at in the light of the many factors that may be involved in the decision.[139]

The problem of forum non conveniens and the Single Act statutes is fairly obvious. Even though a company has sold goods in the state and the basic fact situation on which the claim is founded subjects the company to the state's jurisdiction under the Single Act statute, the company's proof of its non-negligence may lie in its manufacturing process or some other function that is impossible to move to the forum state to offer into evidence. So a Single Act statute without the companion qualification of forum non conveniens is a possible tool of injustice.

The problem of too liberal usage of the doctrine would probably not arise because it would be a rare court that would give up jurisdiction easily It would seem that courts would be most zealous in protecting the interests of the citizens of the state in which they sit, and it would be very unusual for a court to disclaim jurisdiction of a fact situation over which it had power, without excellent reasons.

Forum non conveniens is not a doctrine by which the court takes jurisdiction to decide if it has jurisdiction. The court decides

135. Gray v. American Radiator and Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961).
136. Lau v. Chicago & N.W Ry. Co., 14 Wis.2d 329, 111 N.W.2d 158 (1961).
137. Fourth Northwestern National Bank of Mpls. v. Hilson, 264 Minn. 110, 117 N.W.2d 732 (1962).
138. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
139. WIS. STAT. 262.19 (Supp. 1966).

jurisdiction when it takes the case; forum non conveniens is a "formula" by which the court decides if the venue is correct. The venue (forum non conveniens) question should be decided only after the court has decided it has valid jurisdiction.[140]

MINNESOTA

The Minnesota Single Act statute[141] was construed in *Mueller v Steelcase*,[142] where the nonresident defendant was not licensed to do business and did not lease or own any property in Minnesota. His contact with the state was a salesman who resided elsewhere, but made occasional selling trips into the state. On one of these trips the salesman sold one of defendant's chairs to a retailer, who in turn, sold it to the plaintiff, who was injured when the chair collapsed. The collapse and subsequent injury was allegedly caused because of the faulty design and construction of a part that the defendant obtained from another manufacturer. The court in this case held that the defendant's contacts with Minnesota were too scanty to subject it to jurisdiction. The court felt that to make the defendant defend in Minnesota would not be in line with the "fair play and substantial justice" concept of *International Shoe*.[143] The court also mentioned that the little business that the defendant did in Minnesota gave rise to Michigan contracts.

This decision is unique in the light of the others that have been studied. In this case the court, after discussing forum non conveniens, resorts to a "parade of horrors" argument—"if jurisdiction were sustained in this case, the door would be open to practically unlimited jurisdiction over foreign corporations and the concept of the required contacts and connections in this state to sustain jurisdiction would be whittled away"[144] The fear of a court as to what will happen in the future is not the best basis on which to decide a case. The fact that in the future frivolous suits may arise under section 303.13

140. *See* the concurring opinion in *Lau, supra* note 136.

141. MINN. STAT. 303.13 (3) (Supp. 1965). The statute reads as follows: "Subdivision 1. Foreign corporation. A foreign corporation shall be subject to service of process, as follows;

(3) 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 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 actions 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."

142. 172 F.Supp. 416 (D. Minn. 1959).

143. 326 U.S. at 316.

144. *Supra* note 142, at 419-420.

(3) should not really concern the court in deciding a case before it that involved actual damage; this was not an advisory opinion. But in all fairness, it must be remembered that this case was decided in 1959, when the concept of Single Act statutes had not reached the state of development they have today

In *Bard v Bemidji Bottle Gas Co., Inc.*,[145] a nonresident plaintiff was injured as a result of a defective product sold by the defendant. The defendant tried to join his supplier as a third party defendant under section 303.13 (3) The court held that section 303.13 (3) did not apply to the supplier In construing the contract section, "A contract to be performed in whole or in part in Minnesota,"[146] the court said that the supplier's agent had no authority to enter into contracts, the gas was sold f. o.b. Tulsa, and dedendant's payment was to be sent to Fort Worth; thus, no part of the contract was performed in Minnesota. The court did not seem to recognize delivery of the goods as part of the contract. As to the tort section of the statute, which reads, "commits a tort in whole or in part in Minnesota against a resident of Minnesota,"[147] the court said the only injuries were against nonresidents and the defendant is only injured when his liability to the plaintiffs is established. The court concluded that the defendant's action against his supplier did not grow out of a contract with the supplier or a tort against itself, and that the defendant had not obtained jurisdiction over its supplier by reason of section 303.13 (3)

In *Atkins v J and L Steel Corporation*,[148] the plaintiff was injured while transporting chemicals, because of an alleged defect in the chemical containers caused by their manufacturer, the defendant. The court held all defendants amenable to service. The court quoted *Beck v Spindler*,[149] which held that due process requires that the defendant, if he is not present within the territory of the forum, have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The court, after distinguishing away *Mueller*,[150] said it recognized the merits of protecting the rights of foreign corporations not doing business in Minnesota, but felt that such considerations were outweighed by the general objective of section 303.13 (3), which is to permit a Minnesota resident injured in Minnesota by the wrong-

145. 23 F.R.D. 299 (D.Minn. 1959).
146. MINN. STAT. 303.13 (3) (1965).
147. *Ibid.*
148. 258 Minn. 571, 104 N.W.2d 888 (1960).
149. 256 Minn. 543, 99 N.W.2d 670 (1959).
150. *Supra* note 142.

ful act of a foreign corporation to seek recompense in Minnesota courts.[151]

Hutchinson v Boyd and Sons Press Sales, Inc.,[152] involved a situation where the defendant, a foreign corporation, sold a punch press to a Minnesota corporation at the request of another foreign corporation. The press in question injured the plaintiff, and the defendant was served under section 303.13 (3) The court, in upholding jurisdiction, said that all or one of the defendants may be guilty of committing a tort in Minnesota against a citizen, and thereby constitute doing business as defined by section 303.13 (3), making the defendant amenable and subject to service of process. The place of wrong is where the injury occurs and if the allegations are established by competent evidence, the defendants tortious conduct in Minnesota amounts to doing business as to come within the jurisdiction of the court and law of the forum.[153] The court also mentioned that a single act, depending on the quality of the contacts, may amount to doing business.

In *Ewing v Lockheed Aircraft Corporation*,[154] the cause of action arose out of the crash of an Electra, manufactured by the defendant and sold to Northwest Airlines, a Minnesota corporation. The crash occurred in Indiana, and the plaintiff's decedent and plaintiff were residents of South Dakota. Under the contract for sale, defendant was to provide Northwest with a field service representative to aid with problems that would arise with the Electras. Lockheed sold approximately 18 Electras to Northwest at a price of 2¼ million apiece. Lockheed had no contact with Minnesota except the contract with Northwest and the field service representative stationed in Minnesota, and the communication there must necessarily be between the field representative and the home office. The first problem considered, was whether this situation was within section 303.13 (3) The defendant claimed the statute restricted its benefits to Minnesota residents and was applicable only to suits by one party against another under contract, and concluded it could not apply here because the decedent was not in privity of contact. The court said that because the Electra was sold to transport passengers, any warranty would inure to the benefit of those who were expected to be carried on the plane, so decedent was within the scope of the warranties.[155]

151. *Contra,* Pendzimas v. Eastern Metal Products Corp., 218 F.Supp. 524 (D.Minn. 1961).
152. 188 F.Supp 876 (D.Minn. 1960).
153. *Id.* at 878.
154. 202 F.Supp. 216 (D.Minn. 1962).
155. Compare Thiele Engineering Co. v. Weldon Farm Products, 224 F.Supp. 809 (1963). where the plaintiff, after suffering a tort injury, sued under warranty theory. The court held that lack of privity was enough to invoke due process and dismissed service of process under section 303.13 (3).

This case is within the spirit of the statute, in as far as it grows out of a contract between Lockheed and Northwest, a Minnesota resident. There is no reason for concluding that this section of the statute should not be applied to a nonresident; however, when Lockheed is amenable to suit by a resident, being that plaintiff's intestate boarded the plane at the Minneapolis-St. Paul airport. If Lockheed is doing business in this state within the purview of the statute and is amenable to service in actions growing out of the contract involving the Electras, there is no basis for the contention that jurisdiction should be limited to residents. The statute does not so provide.[156]

The court also considered whether there were sufficient minimal contacts to satisfy due process. The court mentioned the sale of the Electras, and Lockheed's field representative coming into Minnesota as part of the contract, in holding that Lockheed had substantial enough contacts in Minnesota to be amenable under section 303.13 (3) Also discussed was the problem that the contacts of Lockheed with Minnesota did not give rise to the cause of action. The court said section 303.13 (3) does not require that the cause of action result from the foreign corporations activities in the state. If the contract with Northwest is performed in whole or in part in Minnesota and the cause of action arises from it, in this case the contract with its warranties, then jurisdiction that is consistent with due process can be obtained.[157]

It is an interesting sidelight that *Bard, Mueller,* and *Pendzimas,* were decided by the same court that decided *Ewing.* All four cases involved tort injuries, but in *Ewing* the plaintiffs chose to sue under a warranty theory rather than under tort. The court that decided these cases seems to give the tort application of this statute an unduly restrictive construction, while being very liberal with the contract application. It is not truly inconsistent treatment, but it is certainly not uniform, when considered in the light of what the statute was meant to accomplish.

Ehlers v U S. Heating and Cooling Manufacturing Corporation,[158] also involved a warranty situation, in which jurisdiction was sustained over a foreign corporation, when a product it had manufactured caused damage in Minnesota. No one connected with the manufacturer was involved in the installation of the product and there were three sales of the product from the time of manufacture until it reached the plaintiff. The defendant never had been licensed to

156. *Supra* note 154, at 219.
157. *Id.* at 219-220.
158. 267 Minn. 56, 124 N.W.2d 824 (1963).

or transacted any business in Minnesota, owned no property, and had no contract that relates in any way to Minnesota, in connection with this product. The court quoted *Hanson v Denckla*,[159] "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 that are a prerequisite to its exercise of power over him," and went on to sustain service on the "national common market" theory The product was manufactured for use by the general public, and it was not claimed that the area of foreseeable use of the product was so limited as to exclude Minnesota. The fact that such a product would in the regular course of distribution be purchased and used by a Minnesota buyer, would seem reasonably to be anticipated by the manufacturer The court declined to say what it would decide if the manufacturer were able to prove that the use of his product, that is the sale of his product, in Minnesota were unforeseeable.[160]

Williams v Connolly[161] involved a situation in which a nonresident plaintiff attempted to sue a resident motel owner and his nonresident supplier for injuries sustained by reason of an explosion, under the warranty theory The court, after giving an excellent analysis of the basic problems involved in the use of section 303.13 (3), denied jurisdiction because there was no contract shown between the nonresident defendant and a Minnesota resident although such a contract is necessary to bring the action within the contract provisions of section 303.13 (3), and since there was no contract, there was no evidence from which an analysis of the contacts between the defendant and Minnesota could be made.

United Barge Co. v Logan Charter Service, Inc.,[162] was an action to recover damages for losses suffered when a barge struck a dam on the Mississippi and sank. The nonresident defendant, who was towing the barge in question, had no offices or permanent employees in Minnesota, but its tugs came to Minnesota several times each year to perform towing contracts. The defendant claimed that the plaintiffs were all foreign corporations also, and not Minnesota residents. The court replied that the word resident should be construed to allow the statute to fulfill its purposes and that the plaintiffs would be considered residents of Minnesota because of the extensive contacts they had with the state. The court felt justified in reaching this conclusion because the Minnesota Supreme

159. 357 U.S. at 251.
160. *Supra* note 158, at 827. For opposite result see Dahlberg v. American Sound Products, Inc. 179 F.Supp. 928 (D.Minn. 1959).
161. 227 F.Supp. 539 (1964).
162. 237 F.Supp. 624 (1964).

Court has given section 303.13 (3) a broad interpretation and appears ready to take jurisdiction over any case in which Minnesota had a reasonable interest in providing a remedy for the plaintiff.[163]

The second objection by the defendant was not the standard objection that jurisdiction in this case was violative of due process, but that jurisdiction in this case would be an unreasonable burden on interstate commerce. The court mentioned that this theory had been rejected in *International Milling Co. v Columbia Transportation Co.*,[164] and that in the light of Single Act statutes, there probably is a concurrent easing of restrictions under interstate commerce as is going on under the due process clause. The court also mentioned that the burden on commerce argument had been presented to the court in *Ewing*, which presented a much stronger case for dismissal, and the court in that case did not even see fit to discuss it.[165]

Aftanase v Economy Boiler,[166] involved a situation in which a Minnesota resident sued a Michigan corporation, which had shipped its machine directly into Minnesota without intermediate sales, for injuries sustained while working at the machine. The defendant for years had shipped, directly into Minnesota, its machines, brochures, and replacement parts. The court felt it should treat the situation as it thought the Minnesota Supreme Court would, and in the light of that court's liberal interpretation and the federal relaxation of the due process clause, the court felt that the use of section 303.13 (3) in this situation did not violate federal due process. The court cited extensively from the state and federal decisions that interpreted section 303.13 (3),[167] and from the Supreme Court decisions that are the backbone of this whole concept of jurisdiction.[168] The court said that Economy had sold for years in Minnesota, so there was a large quantity and quality of contacts.[169] The machine was powerful and contained potent possibilities of harm if negligently designed or manufactured. The machine was shipped directly to the user, so the defendant voluntarily placed his product on the Minnesota market, received protection from Minnesota law, and could have anticipated that this activity would have consequences within

163. *Id.* at 628.
164. 292 U.S. 511 (1934).
165. *Supra* note 162, at 630.
166. 343 F.2d 187 (8th Cir. 1965).
168. Carlson v. Chatfield Machine Co., 288 F.Supp. 162 (D.Minn. 1964), where in a situation similar to Aftanese, the court felt that the defendant's activity in Minnesota was not of such little consequence as to avoid the liberal trend tword sustaining service, McMenomy v. Wonder Building Corp., of America, 188 F.Supp. 213 (D.Minn. 1960), in which service was sustained when the contract was executed in Minnesota and mailed to Illinois, and the defendant's agents came to Minnesota to adjust claims and negotiate.
168. International Shoe v. Washington, 326 U.S. 310 (1945) Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952), Hanson v. Denckla, 357 U.S. 235 (1958).
169. *See* Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1960).

the state because it was sold into Minnesota for use there. The court also said that Minnesota had an interest in providing a forum for an injured resident, and in this situation the matter of forum non conveniens is a small factor either way [170]

In *Haldeman-Homme Manufacturing Co. v Texecon Industries, Inc.*,[171] the court held that jurisdiction over a foreign corporation under section 303.13 (3) would be taken where the defendant entered a contract to sell a business to a Minnesota corporation, and the sale was made with knowledge that all assets and operations of the business would be moved to Minnesota. The contract, notes, and mortgage accompanying the sale would normally have required enforcement in Minnesota. The only requirement of section 303.13 (3) is that some portion of the contract is to be performed in Minnesota by either party The Minnesota Supreme Court has given this requirement a broad interpretation, as in *Paulos v Best Securities*,[172] where the defendant's contacts with Minnesota were by long distance phone and mail, and the plaintiff had paid for the shares sold by the defendant by mailing his check to New York. The court indicated that the execution and the mailing of the check would be enough to bring the transaction within section 303.13 (3)

In *Haldeman* the defendant sought protection of Minnesota courts by the acceptance of a note, that was designed to be valid under Minnesota law, and a chattel mortgage covering goods permanently located in Minnesota. The court cited *Williams v Connolly*[173] and brought the "national common market" into the context of section 303.13 (3) The court also mentioned that Minnesota might be permitted to take jurisdiction over a nonresident on the basis of substantially fewer contacts with Minnesota when the plaintiff is an individual, than would be required when the plaintiff is a corporation, since a corporation could more easily bear the burden of suing in a foreign state. Here, the contacts of the defendant were sufficient to allow Minnesota to take jurisdiction and to satisfy the due process requirement of minimal contacts.[174]

In *Kornfuhrer v Philadelphia Bindery, Inc.*,[175] where the nonresident defendant accepted an order submitted by resident plaintiff, and then attempted to cancel the contract, the court held there were sufficient contacts to hold the defendant amenable to suit under section 303.13 (3) Section 303.13 (3) requires only a portion of the

170. *Supra* note 166, at 197.
171. 236 F.Supp. 99 (D.Minn. 1964).
172 260 Minn. 283, 109 N.W.2d 576 (1961).
173. 227 F.Supp. at 547.
174. *Supra* note 171, at 102.
175. 240 F.Supp. 157 (D.Minn. 1965).

contract need be performed in Minnesota. In this case the plaintiff would accept and pay for the goods in Minnesota, and the defendant was to ship the goods into Minnesota. In finding the defendant had sufficient minimal contacts to be amenable to jurisdiction, the court quoted from the *Restatement 2d, Conflict of Laws*:[176] "It is reasonable that a state should have judicial jurisdiction over an individual as to causes of action arising from an act done for pecuniary profit, having substantial consequences within the state, even though the act is an isolated act not constituting the doing of business within the state." The major loss to the plaintiff came from his inability to meet resale agreements. This damage could be considered a substantial consequence within the state.[177]

In *McDermott v Bremson*,[178] the defendant, a foreign corporation, sold a franchise to the plaintiff. The defendant sold five other franchises to Minnesota residents, but they were not in question here, and employed a Minnesota resident as a field agent. The court ruled that the maintenance of this suit under section 303.13 (3) did not offend the traditional notions of fair play and substantial justice.[179] The court quoted extensively from Moore in determining whether there were sufficient contacts to maintain jurisdiction. Since the defendant's contact with Minnesota was sufficiently substantial to relieve the plaintiff of approximately three thousand dollars, the court felt that it was not unreasonable that the defendant assert its defenses in Minnesota courts.

In *Fourth Northwestern National Bank of Minneapolis v Hilson Industries, Inc.*,[181] jurisdiction under section 303.13 (3) was refused as to a nonresident buyer. Hilson wrote to three Minnesota firms engaged in the manufacture of cooling boxes. Atland replied and sent an officer to Hilson to discuss terms, which resulted in Hilson's placing an order for fifty boxes with Atland. Prior to this time, Hilson had no commercial contact with Minnesota. Hilson claimed that soon after the boxes were installed serious defects occurred, and they were obliged to spend large sums to have these defects fixed. Because of this, Hilson withheld payments due Atland. The notes being sued upon in this case were executed in Ohio by Hilson to Atland, for the amount owed by Hilson to Atland, as a result of a conference between the two companies. These notes were made payable in Minnesota. Action was brought on these notes by use of section 303.13 (3), and the defendant claimed this was in viola-

176. § 84, Comment c at 91 (Tent. Draft No. 3, 1956).
177. *Supra* note 175, at 162.
178. 139 N.W.2d 809 (1966).
179. International Shoe v. Washington, 326 U.S. 310 (1945).
180. 2 MOORE, FEDERAL PRACTICE, 2d Ed., Paragraph 4.25 (5).
181. 264 Minn. 110, 117 N.W.2d 732 (1962).

tion of due process. The court discussed *International Shoe*[182] and the *Hanson v Denckla*[183] limitation. Also mentioned was that in this case the defendant was a buyer, not a seller, and that there is a distinction between suing a nonresident seller and a nonresident buyer when the plaintiff is seeking to envoke section 303.13 (3) "The general tendency of courts to require less in the way of sales activity to bring a foreign corporation within the jurisdiction of a state has not been accompanied by any parallel lessening of requirements as to purchasing activities."[184] The court relied heavily on the difference between selling products into Minnesota, and the purchasing of products from Minnesota manufacturers. "It would seem shortsighted indeed to discourage the sale of Minnesota products to nonresidents by subjecting buyers to our jurisdiction where the contacts are so casual. The only connection with Minnesota is that the notes are payable here."[185] The court mentioned that even if section 303.13 (3) could be constitutionally applied, it would dismiss on the grounds of forum non conveniens. The defendant was going to enter a cooler into evidence that weighed several tons, and the court felt it was impractical to move that to Minnesota for trial. Also Hilson was planning to call witnesses from the states surrounding its home state (Ohio) and being these witnesses were not under Hilson's control, it seemed only fair to encourage their attendance by having the trial in a forum more convenient for them than Minnesota. Atland did not have the same proof problems as did Hilson.

Hilson mentioned *Dahlberg v Western Hearing Aid Center, Ltd.*,[186] where a nonresident buyer had been held amenable to suit under section 303.13 (3) Western had very substantial contacts with Minnesota, in that the contract sued on was executed there, several meetings were held in Minnesota between Dahlberg and Western, and there were extensive business dealings in Minnesota in relation to the contract sued upon as to advertising and promotion. In *Hilson* the only contacts that Hilson had were the initial solicitation and the designation of Minnesota as the place where the notes were payable. The court in *Hilson* pointed out that Hilson had not received any benefits or protection of Minnesota law[187] and dismissed the only significant contact, that of the notes being payable in Minnesota: "Fixing the place of payment at the plaintiff's business residence is hardly the kind of commercial benefit to defendant that

182. 326 U.S. 310 (1945).
183. 357 U.S. at 251.
184. Waltham Precision Inst. Co. v. McDonnell Aircraft Corp., 203 F.Supp. 539, 541 (D.Mass. 1962).
185. *Supra* note 181, at 736.
186. 259 Minn. 330, 107 N.W.2d 381 (1961).
187. *Supra* note 181, at 734-735.

must be balanced by a countervailing capitulation to jurisdiction."[188]

Regardless of the wording of the various long arm statutes, the courts all seem to reach similar results in construing them. There are the conservative holdings, as in *Mueller*,[189] *Grobark*,[190] and and *Travelers Insurance*,[191] and the liberal, as in Kornfuhrer,[192] Bel-*Belcher*[193] and *Gray* [194] The two guiding principles that seem to be the basic idea behind the statutes are that foreign corporations should defend where they are involved in legal problems, and the individual court's interpretation of the landmark Supreme Court cases.

The big difference in the statutes is the language restricting their use to certain persons or situations. The Illinois statute[195] is general in its terms and does not limit its use to Illinois residents. It requires that the defendant do any business or commit any tortious act in Illinois. This criteria has been given a very liberal construction in tort situations,[196] but in contract situations it seems to be a requirement to obtain service on the defendant that he be present in the state in his corporate capacity, that is, he be physically present in the state, and do jurisdictional acts, namely, acts in furtherance of the contract.[197] While the extension of this statute to a single act situation has been refused,[198] in the light of a later acceptance of the "national common market"[199] theory, such refusal seems inconsistent with the present interpretation of the statute in Illinois. *Morgan*[200] would seem to be weak precedent at this time.

The Wisconsin statute[201] is also a general statute, and is quite extensive in laying out the fact situations which it covers. But subdivision (1) (d) restricts the use to cases involving substantial, not isolated activity This seems to deny the test that activities, to subject a foreign corporation to jurisdiction under these statutes, be based on the quality of the acts done in the forum, not mere quantity [202] Even though the statute reads as it does, in *Dezurik*,[203] the court said that a single act situation was within the purview of the statute. This would seem to be the prevalent view, as *American*

188. *Supra* note 181, at 736.
189. 172 F.Supp. 416 (D.Minn. 1959).
190. 18 Ill.App.2d 10, 151 N.E.2d 425 (1st Dist. 1958).
191. 25 Wis.2d 418, 130 N.W.2d 852 (1964).
192. 240 F.Supp. 157 (D.Minn. 1965).
193. 252 F.Supp. 631 (E.D.Wis. 1966).
194. 22 Ill.2d 432, 176 N.E.2d 761 (1961).
195. ILL. REV. STAT. ch. 110 § 17 (Supp. 1965).
196. Gray v. American Radiator and Standard Sanitary Corp., *supra* note 196.
197. 270 F.2d 472 (7th Cir. 1959).
198. 171 F.Supp. 482 (E.D.Ill. 1965).
199. 248 F.Supp. 645 (N.D.Ill. 1965).
200. *Supra* note 198.
201. WIS. STAT. 262.05 (Supp. 1966).
202. 326 U.S. at 319-320.
203. 222 F.Supp. 119 (E.D.Wis. 1963).

Type Founders[204] accepted the "national common market" theory and *Beleher*[205] looked favorably on *McGee*,[206] which was a single act situation. In *Travelers Insurance*,[207] the court refused jurisdiction because the goods the defendant sold never physically entered the state, but later in *Pavalon v Fishman*[208] the court said the defendant need not act within the state. Since *Pavalon* is the latest of the two cases, it would be controlling on this point. *Sun-X*,[209] reaffirms *Huck*,[210] in restricting the use of the statute to Wisconsin residents. This restriction is judicial in nature, not statutory

Minnesota's statute[211] is broad in nature, and the only restrictions as to suit, are that the action be founded on a contract with a Minnesota resident, to be performed in whole or in part in Minnesota, or a tort in whole or in part against a Minnesota resident. *Ewing*[212] extended the concept of resident, when it allowed a nonresident to make use of the statute when bringing an action for a tort injury, under warranty contract theory Not only was the statute applied in favor of a nonresident, but privity was shown not to be in favor with the court. The liberal attitude towards construing who is a resident is also shown in *United Barge*.[213] The nonadhering to the privity concept and the liberal attitude as to who are residents are fortunate precedents to use in expanding this type of statute to its fullest logical extent, under present business methods. In early cases[214] the federal courts in Minnesota construed the statute in a very conservative manner, but now both the state[215] and federal[216] courts recognize the liberal viewpoint when deciding what is due process. Both courts allow jurisdiction in a single act situation,[217] but this has not always been so,[218] thus, there is a conflict in the construction of the statute. The conservative cases have not been specifically overruled, but in fact they are, as they are studiously and obviously avoided.

Hilson,[219] may be a hard case, but it is an excellent case when

204. 171 F.Supp. 249 (E.D.Wis. 1959).
205. 252 F.Supp. 631 (E.D.Wis. 1966).
206. 355 U.S. 220 (1957).
207. 25 Wis.2d 418, 130 N.W.2d 852 (1964).
208. 25 Wis.2d 540, 131 N.W.2d 331 (1964).
209. 227 F.Supp. 365 (W.D.Wis. 1964).
210. 4 Wis.2d 132, 90 N.W.2d 154 (1958).
211. MINN. STAT. 303.13 (3) (Supp. 1965).
212. 202 F.Supp. 216 (D.Minn. 1962).
213. 237 F.Supp. 624 (D.Minn. 1964).
214. Mueller v. Steelcase, 172 F.Supp. 416 (D.Minn. 1959), Bard v. Bemidji Bottle Gas Co., Inc., 23 F.R.D. 299 (1959).
215. Atkins v. J. and L. Steel Corp., 258 Minn. 571, 104 N.W.2d 888 (1960).
216. Hutchinson v. Boyd and Sons Press Sales, Inc., 188 F.Supp 876 (D.Minn. 1960).
217. Ehlers v. U.S. Heating and Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963), Kornfuehrer v. Philadelphia Bindery, Inc., 240 F.Supp. 157 (D.Minn. 1965).
218. Dahlberg v. American Sound Products, Inc. 179 F.Supp. 928 (D.Minn. 1959).
219. 264 Minn. 110, 117 N.W.2d 732 (1962).

looking at the attitude of the Minnesota courts towards the statute. It is obvious that the Minnesota courts have a realistic approach to the whole concept involved and do not use the statute as wholesale license to take jurisdiction. They realize there are restrictions and respect this fact. *Hilson* adds, rather than detracts, from the construction given the statute by the Minnesota courts, especially in the light of *Dahlberg v Western Hearing Aid Center, Ltd.*[220]

North Dakota has no Single Act statute per se. What exists is a section of the Business Corporation Act that relates to service of process on foreign corporations.[221]

This statute has never been construed, but it has all the qualifications of a Single Act statute. There must be contact with the state, and the defendant is given, within reason, actual and not constructive notification. There is no reason why this statute cannot be used as a Single Act statute, as long as the Supreme Court tests are kept in mind. The fact that it is not designated as a Single Act statute or that no qualifications are listed should not militate against its use as such.

The fact that section 10-22-10 has not been construed as a Single Act statute, may result from the conservative view that North Dakota has towards "doing business" in the state. In *Brevick v Cunard S. S. Co.*,[222] an agent of the defendant sold to plaintiff, a North Dakota resident, a ticket to Norway The plaintiff claimed that because of the defendant's agent's false representations he was injured. (He never did get to Norway) The court refused jurisdiction because the cause of action did not arise in North Dakota, (plaintiff bought the ticket in North Dakota, but was stranded on the west coast of Middle Europe) and the defendant owned no property in the state. This case was decided under subdivision 6 of section 7426, Compiled Laws of 1913, which construed in section 28-0608 of the North Dakota Revised Code of 1943, required the foreign corporation to hold property within the state, or that the cause of action arise therein in order for jurisdiction to be sustained. In *Wheeler v Boyer Fire Apparatus Co.*,[223] where the defendant's agent had the authority to solicit orders, which were forwarded to the defendant for approval, the court held the defendant liable to service. Under section 7426, the court held that a foreign corporation whose agent

220. 259 Minn. 330, 107 N.W.2d 381 (1961).

221. N.D. CENT. CODE 10-22-10 (1960). The statute reads as follows: "Whenever a claim shall arise out of business transacted in this state by a foreign corporation transwithout a certificate of authority, service of process may be made upon any person who acting 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,

222. 63 N.D. 212, 247 N.W. 373 (1933).

223. 63 N.D. 403, 248 N.W 521 (1933).

systematically solicited sales contracts that resulted in a continuous shipment of the corporation's products into North Dakota, is amenable to suit through its agent, where the cause of action arose in North Dakota and the corporation had not designated the secretary of state as attorney for service of process. In *Ellsworth v Martindale-Hubbell Law Directory, Inc.*,[224] the court held the defendant amenable to service under section 7426, where the corporation had extensive business dealings, and the cause of action arose in the state.

In *Asbury Hospital v Cass County*,[225] the court said that in order for a foreign corporation to be doing business in the state, there must be the doing of some works, or an exercise of some functions, for which the corporation was created and not merely what the corporation might have authority to do. The doing of an act that is within the power of a corporation, but not a part of the business which it is authorized to do, is not doing business.

In *Anderson v Page and Hill Homes, Inc.*,[226] the defendant, a Minnesota corporation, had a representative who traveled through North and South Dakota for the purpose of establishing dealerships for the defendant's product. What agreements the representative made were subject to whatever action the home office chose to take on them. The representative was paid from the Minnesota office and the defendant had no other connection with Minnesota. The plaintiff, a North Dakota resident, entered into an exclusive dealership contract with the defendant, then the defendant entered into a dealership contract with another party The court refused to take jurisdiction in this case, on the basis that the mere solicitation of business within the state by a foreign corporation is not engaging in business, and as the representative was merely soliciting, the foreign corporation was not doing business as far as the statute is concerned. The plaintiff put forth a forum non conveniens argument which the court rejected, intimating that the argument would be without force in any situation.

Not only has section 10-22-10 not been construed, but the courts seem to have a very conservative attitude towards the subject altogether If the North Dakota courts are not going to construe section 10-22-10 as a Single Act statute, then it is for the legislature to enact one.

A Single Act statute is strictly in the interests of the residents of the state. They are saved the inconvenience of going out of state

224. 65 N.D. 297, 258 N.W 486 (1935).
225. 72 N.D. 438, 7 N.W.2d 359 (1943).
226. 88 F.Supp. 408 (D.N.D. 1950).

and suing corporations that have chosen, either by direct choice or by putting their goods into the flow of national commerce, to use North Dakota as a market for their goods. Defending suits in North Dakota is a small price to pay for marketing goods in an area that has a population in excess of a half million people. The fact that there is such an extensive population would be incentive enough for a foreign corporation to trade in North Dakota even if there were a Single Act statute.

If section 10-22-10 does not suffice, North Dakota needs a Single Act statute as a protective shield for its citizens. A statute such as this should be flexible in nature and general in language. Where the factors involved are so numerous, a statute should be termed in general policy considerations, leaving the courts a large degree of leeway in determining the applicability of the statute to the various fact situations as they arise. In such a statute the legislature should make clear what areas it does not want to be included and jurisdiction taken.

It would seem the ideal statute would include the following considerations:

(1) The state should have sufficient interest in the case to feel it is within due process to subject the defendant to the law of the state.

(2) The defendant should have acted with such knowledge that he could realize that his acts would have consequences in the state. This would include the "national common market" theory and the concept included in North Carolina General Statutes 55-145 (a) (3) [227]

(3) Although the interest of the resident plaintiff is foremost in this type of statute, the defendant should be protected. Provision should be made in the statute, as in the Illinois statute,[228] so that only causes of action connected with the state will be tried. Joinder of causes of action should not be encouraged when jurisdiction is obtained under a Single Act statute.

(4) Above all, make clear the qualification that the statute does not offend the concept of fair play and substantial justice and that the statute will be coterminous with the federal concept of due process.

If the state were to pass such a statute now, it would get the

227. N.C. GEN. STAT. § 55-145 (a) (3) (1965).
228. ILL. REV. STAT. ch. 110 § 17 (3) (1956).

benefit of years of decisions on the subject and avoid the unfortunate conservative construction that was given to Single Act statutes when they first came into use.

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