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THE EMERGENCE OF METROPOLITAN CENTERS AS LITIGATION CENTERS FOR THE "BIG CASE": NEW CONCEPTS IN FEDERAL AND STATE COURT JURISDICTION

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During this century most American commerce, like the majority of our population, has clustered in the great metropolitan centers. These centers host a vast array of commercial entities which, with their technological and organizational genius, have brought about such modern phenomena as the jet transport and the conglomerate corporate enterprise. These innovations, in turn, have given rise to modern legal phenomena such as mass catastrophe litigation and complex commercial cases which are described by the Judicial Conference of the United States as "protracted cases."[1] With such litigation-producing enterprises centralizing in our urban centers it is inevitable that these cities will also develop as great litigation centers. These centers should expedite and facilitate the disposition of litigation primarily through economical consolidation of related actions.

The following example is illustrative of the application of the litigation center concept and its advantages.

On March 5, 1966, a Boeing 707 jet liner, operated by a British airlines, en route from Tokyo, Japan, to Hong Kong, China, crashed on the eastern slope of Mt. Fuji, Japan, approximately 50 miles from Tokyo. In the litigation that followed, thirty-two cases, representing the claims of the next of kin of sixty-four decedents from no less than fifteen states, all filed suit in Chicago, Illinois in the Circuit Court of Cook County.[2] After substantial pretrial discovery the cases were settled.

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[1] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE REPORT — PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1953), 13 F.R.D. 62 (1953); PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES FOR UNITED STATES CIRCUIT AND DISTRICT JUDGES, 21 F.R.D. 395 (1957); HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351 (1960); *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 YALE L. J. 493 (1954).

[2] Vanderwall v. Boeing Co. & British Overseas Airways Corp., 66L-4429 (Ill. Cir. Ct., Cook County, Ill., dismissed Mar. 14, 1967).

The thought of these numerous citizens from foreign states bringing suit in Chicago, Illinois against a British air carrier and a Washington aircraft manufacturer, for injuries that occurred in Japan may be bewildering to those attuned to traditional principles of forum selection. Yet the defendants did not challenge the jurisdiction of the court over their persons or the convenience of the forum. Both were apparently willing to litigate the matter in Chicago in order to dispose of the controversies in what was basically one proceeding. Assumedly, the respective plaintiffs were also pleased with the result as they had selected the forum and the grouping of the many cases undoubtedly reduced litigation expenses with a corresponding increase in net recovery. Thus, from the standpoint of overall judicial adiministration and economy, the litigation reached a laudable objective. One court summarily disposed of cases which could have involved considerable work for many courts.

Unfortunately, expedient disposition of the protracted case in a litigation center equipped to facilitate such disposition, as experienced in the Mt. Fuji litigation, is the exception rather than the rule. In the normal protracted case individual actions are separately filed and disposed of in a number of cities and a number of courts hear basically the same suit. Objections to jurisdiction, venue, and the convenience of the forum are generally raised in each of the many already overburdened courts.

The development of the metropolitan litigation center has been retarded primarily by jurisdictional limitations of the state and federal courts. Constitutionally, a state must have some interest in, or contact with, a controversy before it may exert judicial authority over it.[3] These state-court limitations have generally been respected by the federal courts as a natural application of the *Erie* doctrine.[4] The extent to which a court is willing, and permitted by constitution and statute, to exert jurisdiction is obviously crucial to the potential development of a litigation center.

Recent federal legislation, offered and adopted as a partial solution to the "big case" problem in the state and federal courts, and certain state court decisions indicate a tendency to expand the jurisdictional limitations of state and federal courts. Principles of venue and the convenience of the forum which also determine the available situs for litigation are similarly being adjusted to meet modern litigation needs. To illustrate the state court developments two states, Illinois and New York, are em-

[3] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[4] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752 (1964).

phasized, both of which contain litigation centers and enjoy reputations for progressive law making.

THE JURISDICTION CONCEPT AND ITS BACKGROUND

In 1877, the United States Supreme Court in *Pennoyer* v. *Neff*[5] embraced the "physical presence" concept of jurisdiction.[6] In that case a personal action had been brought in an Oregon court, the non-resident defendant having been served by publication only. After judgment for plaintiff the defendant's Oregon land was sold by sheriff's sale causing the title to be transferred. Reversing the judgment, the Court held that personal jurisdiction over a defendant could only be obtained by personal service of process within the state, reasoning:

> [E]very State possesses *exclusive jurisdiction and sovereignty over persons and property within its territory.* . . . The other principle of public law referred to follows from the one mentioned; that is, that *no State can exercise direct jurisdiction and authority over persons or property without its territory.* . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that *the laws of one State have no operation outside of its territory,* except so far as is allowed by comity; and that *no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.*[7]

Thus, the presence of a defendant's property within the state did not empower the state to exercise personal jurisdiction over him, although it did confer upon the state power over his property (in rem jurisdiction) if properly invoked.

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[5] 95 U.S. 714 (1877).

[6] The physical presence concept of in personam jurisdiction is largely an outgrowth of medieval theories of "sovereignty" and "physical power." The physical power doctrine can be traced to the allegiance or fidelity a subject owed the sovereign.

> Each subject directly submitted to the regal power of the sovereign or did so indirectly through submission to an intermediate lord. There existed an implied, if not express, covenant between the individual and his sovereign. The individual obtained lands, protection and other benefits from the sovereign or intermediate lord; in return the individual provided services and payments. The king or lord had large areas of control over the enfoeffed vassel. He could, among other things, demand submission of the individual to the adjudication of legal relations with himself or with others in court.

Johnston, *The Fallacy of Physical Power,* 1 JOHN MAR. J. PRAC. & PROC. 37, 44 (1967). Jurisdiction based on this theory operated justly and conveniently at that time since the population was stable rather than mobile as it is today, subjects often spending their whole lives within the territorial boundaries of one sovereign. Even the occasional transient, although owing no allegiance to a sovereign, was presumed to have requested and accepted the protection and benefits of the sovereign so long as he was within his territory. *Id.* at 45. These early feudal theories were apparently commingled with equally restrictive European theories advocated for adoption by American courts by Justice Story. Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241. Professor Hazard attributes the origin of the Story principles to continental sources, particularly the Dutch jurist Huber.

[7] 95 U.S. at 722 (emphasis added).

> [T]he State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled.[8]

Under *Pennoyer,* a plaintiff could first proceed by attachment against a defendant's property located within the state; after attachment a personal judgment in an amount equal to the value of that property would not offend the state territorial sovereignty concept.

If for no other reason, *Pennoyer* must be admired for its inflexible simplicity and ease of application. One was either present within the state — as evidenced by service of process — and was therefore under the physical power of the court, or he was not.[9] The same held true for disputes concerning property. Property was either located within the state's borders and subject to its judicial power, or was not. Even the complexities of corporate enterprise did not disrupt this simple approach. Jurisdiction over a corporation (which did not "exist" outside the borders of the state of its incorporation)[10] depended upon establishing both the corporation's presence by its conducting business, and the availability of an agent for the acceptance of process.[11] In the absence of either, a corporation could send its products, contracts and corporate securities into a state, or operate its trains, buses and aircraft within a state and would not be "present" in terms of jurisdiction, and therefore not subject to the jurisdiction of that state's courts.

The over-simplification of this approach becomes apparent when applied to the protracted case which generally involves a number of defendants, some of whom are physically and continuously present within the state, and others who are not, with no state being available where all are physically and continuously present.[12]

For more than seventy years following the *Pennoyer* decision, the courts struggled within the unrealistic limitations imposed on jurisdiction, creating fictions of "consent" and "pres-

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[8] *Id.* at 723. *See* 95 U.S. at 748 (dissenting opinion).

[9] Barry, *Jurisdiction Over Non-Residents,* 13 VA. L. REV. 175, 176-77 (1926); Beale, *The Jurisdiction of Courts Over Foreigners,* 26 HARV. L. REV. 283, 284-85 (1913).

[10] Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

[11] Simon v. Southern Ry., 236 U.S. 115 (1915); St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913). *See* Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts,* 25 U. CHI. L. REV. 569, 598 (1958).

[12] For a discussion of these problems see articles cited note 1 *supra.* Parenthetically, the physical power doctrine may operate not only to deprive a court of appropriate jurisdiction, but might also vest jurisdiction quite inappropriately, when, for example, a traveler fortuitously enters or even flies above the physical borders of the state. Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

ence" in order to avoid the literal effects of the decision and meet the practical realities of a rapidly changing society.[13] In 1945, apparently frustrated with the fictions it was forced to employ, the Supreme Court in *International Shoe Co.* v. *Washington,*[14] rejected the territorial sovereignty doctrine as it applied to in personam actions.[15]

In *International Shoe,* the Court candidly acknowledged the impracticality of its "physical power" doctrine, and held that continuous physical presence would no longer be essential where the defendant had "certain minimum contacts" with the jurisdiction:

> Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff,* 95 U.S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[16]

In conceiving its new "fairness" or "minimum contacts" test, the Court set forth a number of factors to be considered in determining whether, in a particular case, the demands of due process were met:

> Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. . . .
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> 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.[17]

In weighing the delicate balance of its "fairness" test, the Court plainly recognized that:

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[13] *E.g.,* Edwards v. California, 314 U.S. 160 (1941); Hess v. Pawloski, 274 U.S. 352 (1927).

[14] 326 U.S. 310 (1945).

[15] For a discussion of this historical development see Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts,* 25 U. CHI. L. REV. 569 (1958).

[16] 326 U.S. at 316.

[17] *Id.* at 317.

> [T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. . . .
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> Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it . . . other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.[18]

In subsequent cases, the Supreme Court further demonstrated its awareness of the realities of twentieth century life and its willingness to interpret the state courts' jurisdictional limitations in a manner consistent with these realities. In *McGee* v. *International Life Insurance Co.*,[19] for example, the Court held that the mailing of a single life insurance policy into the State of California subjected the insurer to the jurisdiction of the California courts. Justice Black, writing for the Court, noted the necessities which required the expansion of state court jurisdiction in our changing economy:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[20]

ILLINOIS AND THE FAIRNESS TEST

On the impetus of *International Shoe,* and in order to reap its full benefits, many states amended their statutes concerning personal jurisdiction. Illinois, in the forefront, enacted the present section 17 of its Civil Practice Act,[21] which became, with

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[18] *Id.* at 318.

[19] 355 U.S. 220 (1957).

[20] *Id.* at 222-23.

Within a year after the *McGee* decision, a closely divided (five to four) Court decided Hanson v. Denckla, 357 U.S. 235 (1958), often cited as authority for limiting the broad application of *McGee* and a step back toward the territorial sovereignty concept. However, *Hanson* involved peculiar facts concerning probate and trust administration, and should be of no avail to a defendant attempting to avoid jurisdiction in a forum where he is actually doing business. In fact, the *Hanson* opinion emphasized the defendant's lack of voluntary contact with the forum and restated the principles of *McGee,* indicating that *Hanson* may have no application in cases involving a commercial enterprise *voluntarily* doing business, however minimal, in the forum state.

[21] ILL. REV. STAT. ch. 110, §17 (1967).

the liberal interpretation afforded it by the Illinois Supreme Court, the most progressive enactment of its kind.[22]

> With the adoption of this section . . . Illinois has expanded the in personam jurisdiction of its courts to the limits permitted under the Due Process clause of the Fourteenth Amendment.[23]

In its first opportunity to construe the statute, the Illinois Supreme Court exhibited the same progressive initiative.[24] And, although there was one regressive interval,[25] the Illinois court, in *Gray* v. *American Radiator and Standard Sanitary Corporation,*[26] produced what stood for years as the most forward looking decision in the field of extra-territorial jurisdiction. In *Gray,* an Ohio manufacturer sold a valve to an assembler in Pennsylvania where it was incorporated in a water heater which was eventually shipped into Illinois where it exploded injuring an Illinois resident. The court held that the Ohio manufacturer was subject to the jurisdiction of Illinois.

In discussing the developments of the law since *Pennoyer,* the Illinois court noted the impracticalities of applying a seventeenth century doctrine to twentieth century commerce:

> The relevant decisions since *Pennoyer* v. *Neff* show a development of the concept of personal jurisdiction from one which requires service of process within the State to one which is satisfied either if the act or transaction sued on occurs there or if defendant has engaged in a sufficiently substantial course of activity in the State, provided always that reasonable notice and opportunity to be heard are afforded. As the Vermont court recognized in the *Smyth case,* the trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard: from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute.[27]

Since the *Gray* decision, the Illinois courts have continued to exert jurisdiction based on the most minimal of contacts, emphasizing the practicalities of each situation.[28]

THE LONG ARM OF NEW YORK

The New York experience is a particularly interesting study of the development of "long arm" jurisdiction. In the period which saw Illinois progress from *International Shoe* to *Gray,* New York was unable to formulate a modern practice act provision on jurisdiction. Although, as early as 1958, the New York

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[22] *See* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L. F. 533.

[23] Historical & Practice Notes *following* ILL. ANN. STAT. ch. 110, §17 (Smith-Hurd 1956).

[24] *See* Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957).

[25] Grobark v. Addo Mach. Co., 16 Ill.2d 426, 158 N.E.2d 73 (1959).

[26] 22 Ill.2d 432, 176 N.E.2d 761 (1961).

[27] *Id.* at 440-41, 176 N.E.2d at 765.

[28] Gordon v. International Tel. & Tel. Corp., 273 F. Supp. 164 (N.D. Ill. 1967); Ziegler v. Hodges, 80 Ill. App. 2d 210, 224 N.E.2d 12 (1967); Koplin v. Thomas, Haab & Thomas, 73 Ill. App. 2d 242, 219 N.E.2d 646 (1966).

Advisory Committee on Practice and Procedure had drafted a proposal modeled after the Illinois Act, the new provisions were not in effect until September of 1963.[29] Even with the benefit of the Illinois experience, the effect of the 1963 New York Act was anything but certain, particularly with regard to a provision which subjected one to the jurisdiction of New York courts upon his "commission of a tortious act," within the state, a crucial provision in the products liability field.[30]

The New York Court of Appeals had equal difficulty in determining the breadth of the "tortious act provisions" of the new statute. In *Feathers* v. *McLucas*[31] and *Singer* v. *Walker*,[32] the first cases to come before it, the court, after a thorough discussion of the Illinois experience, particularly *Gray*, rejected the Illinois approach in favor of a more limited exercise of jurisdiction. In *Feathers*, a tank truck, manufactured in Kansas by the defendant Kansas corporation, was sold to a Missouri corporation which completed its assembly before reselling it to a Pennsylvania corporation. The latter, an interstate carrier, used the truck in a number of eastern states, including New York. The truck exploded in New York injuring plaintiff, a New York resident. In *Singer*, a geologist's hammer, manufactured by defendant in Illinois and labelled unbreakable, was shipped to New York where it was purchased from a New York dealer and given to the infant (ten-year-old) plaintiff, a resident of New York. While on a brief field trip in Connecticut, the hammer proved faulty causing injury to plaintiff. Had the New York court adopted the rationale of *Gray*, it would have had little difficulty holding the defendants in both cases subject to its jurisdiction. The New York Court of Appeals rejected *Gray*, however, in favor of a more limited view of its jurisdiction.

Chief Judge Desmond strongly disagreed with the limitations imposed on the statute in these cases:

> The statutory language (302, subd. [a], par. 2), 'commits a tortious act within the state', is taken verbatim from Illinois law (Ill. Rev. Stat., ch. 110, §17). . . . When our Legislature adopted the language of the Illinois Legislature it presumably adopted with it the construction given the statutory language by the Illinois court in *Gray* . . . .[33]

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[29] Law of April 4, 1962, ch. 308, §302, [1962] Laws of N.Y. 615, *as amended*, N.Y. CPLR §302 (McKinney Supp. 1967).

[30] 1. J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE §§302.01, 302.10a (1967) suggests that the New York provision, unlike that of Illinois, was not intended to reach the limits of constitutional power. *But see* Practice Commentary *following* N.Y. CPLR §302 (McKinney 1963); *Tortious Act as a Basis for Jurisdiction in Products Liability Cases*, 33 FORDHAM L. REV. 671 (1965).

[31] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

[32] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965).

[33] *Id.* at 470-71, 209 N.E.2d at 84, 261 N.Y.S.2d at 29-30 (concurring opinion).

Unable to convince his brothers, Chief Judge Desmond apparently took his case to the Judicial Conference. Primarily on the recommendation of the Judicial Conference Report,[34] the 1966 legislature enacted the present section 302(a)(3) of the New York Civil Practice Law and Rules,[35] which specifically authorized the exercise of jurisdiction over non-residents who had caused injury within New York through the commission of tortious acts outside New York, as long as the non-resident could foresee possible harm in New York *or* the defendant carried on substantial business in New York.[36]

Despite the provincial tendencies of the New York Court of Appeals in construing the "tortious act provision," it was extremely liberal in its construction of other provisions of the Act, particularly that provision which authorized the exertion of jurisdiction over those who transact any business within the state.[37] In fact, in the *Singer* case, though the court failed to find a "tortious act" committed within the state, it did find that the defendant's substantial shipment of products into the state was sufficient to satisfy the transaction of business provision and subjected defendant to its jurisdiction on that basis. Al-

[34] 1966 JUDICIAL CONFERENCE REPORT ON THE CIVIL PRACTICE LAW AND RULES, [1966] Laws of N.Y. 2780.

> In the light of the *Feathers* decision, it is clear that amendment of CPLR 302(a)(2) is necessary if legal protection is to be accorded to New York residents who are injured within the state by foreign tortfeasors who cannot be reached through implementation of the transaction of business clause.
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> . . . CPLR 302(a)(2) does not reach a non-resident who causes tortious injury in the state by an act or omission without the state.
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> . . . .
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> In view of this serious gap in the coverage afforded by CPLR 302(a)(2) the Judicial Conference believes that an amendment is required which will be broad enough to protect New York residents yet not so broad as to burden unfairly non-residents whose connection with the state is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York.

Id. at 2786-88.

[35] N.Y. CPLR §302(a)(3) (McKinney Supp. 1967), which reads in part:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
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> . . . .
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
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> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . .

[36] *Id.*

[37] *Id.* at (a)(1).

though the injury occurred in Connecticut, the cause of action arose from "the purposeful activities engaged in by the [defendant] in this State in connection with the sale of its products in the New York market."[38]

The court of appeals further expressed its willingness to exercise jurisdiction under the "doing business" criteria in *Bryant* v. *Finnish National Airline*.[39] In that case, a stewardess-employee of Trans World Airlines, who was a resident of New York, was injured through the alleged negligence of a Finnish airline at Orly Airport, Paris, France. The defendant did not operate any aircraft within the United States and was not qualified to do business in New York. The New York office accepted reservations for Finnair flights in Europe, but did not sell tickets or receive payment for fares. Finding the "doing business" test a "simple pragmatic one," the court concluded that the defendant had had sufficient contacts with New York so as to be "doing business" there and hence answerable to its courts for any cause of action, even if unrelated to its New York activities.

Illinois courts have expressed equal willingness to exert jurisdiction over defendants doing business in that state, even when the alleged cause of action neither arises from nor is in any way related to the defendants' activities there. In the recent federal district court case of *Gordon* v. *International Telephone and Telegraph Corp.*,[40] Judge Hubert L. Will stated that: ". . . Illinois has confirmed that it wishes to exercise all possible bases of jurisdiction which are consistent with the due process clause."[41] The court then held that the mere solicitation of business in Illinois subjected the corporate defendant to the jurisdiction of Illinois courts for claims completely unrelated to the soliciting activities.

The propensity of the New York and Illinois courts to exert jurisdiction on such minimal contacts, opens the doors of those courts to many suits which, under a more restrictive interpretation, could not be heard in those states. As a consequence of this policy, any corporate defendant conducting any substantial business in New York or Illinois may be sued in that state for any claim, related or unrelated, arising anywhere in the world. Thus, those states — more specifically the metropolitan areas therein — may be established as litigation centers merely on the basis of the great number of corporate defendants subject to suit there by virtue of their business activities.

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[38] 15 N.Y.2d at 467, 209 N.E.2d at 82, 261 N.Y.S.2d at 26-27.

[39] 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

[40] 273 F. Supp. 164 (N.D. Ill. 1967).

[41] *Id.* at 168.

IN REM JURISDICTION — THE ATTACHMENT GAME

While *Pennoyer* v. *Neff* limited the states' in personam jurisdiction to cases where the defendant was personally served with process within the state, it also held that the presence of property of the defendant within the state could have authorized jurisdiction over the property.[42] This aspect of *Pennoyer* (in rem jurisdiction, where the proceedings are instituted against the property itself, and quasi in rem jurisdiction, where the property is sought to satisfy personal claims against the defendant) is still viable law, apparently not having been affected by *International Shoe* and its progeny. Considerable expansion of the judicial powers of the states, particularly those which contain a metropolitan center where many insurance companies are based, may result from employment of the full potential of this aspect of jurisdiction.

The New York Court of Appeals exploited this potential in *Seider* v. *Roth*,[43] where plaintiff, a resident of New York, was injured in an automobile collision on a highway in Vermont, allegedly through the negligence of defendant, a resident of Quebec. Ignoring conventional concepts of jurisdiction which would have required the action to have been brought in Vermont or Quebec, the plaintiff sought jurisdiction over the defendant in New York by attaching property of the defendant in New York. The property attached was a debt due defendant, a contractual obligation of his insurance company to defend and indemnify him. The insurer did business in New York and was thereby amenable to process there. The lower courts refused to vacate the attachment. The court of appeals, Chief Judge Desmond writing for the majority of a divided (four to three) court, affirmed the lower court's upholding of the attachment procedure.

Almost as surprising as the result in *Seider* was the ease in which it was accomplished. Indeed, the court only saw one issue: "The whole question . . . is whether [the insurance company's] contractual obligation to [defend] is a debt or cause of action such as may be attached."[44] *International Shoe*, and, in fact, the whole question of "contacts" and due process were not mentioned; the constitutional questions were apparently never raised.[45]

Actually, the *Seider* decision should have come as no surprise to those familiar with *In re Riggle*,[46] decided by the same

[42] *See* text following note 7 *supra*.
[43] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
[44] *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.
[45] *See* Nationwide Mut. Ins. Co. v. Vaage, 265 F. Supp. 556, 561-62 (S.D. N.Y. 1967).
[46] 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

court four years earlier. That case resulted from an automobile accident in Wyoming in which an Illinois resident, Robert Riggle, the would-be defendant, was killed. The conventional forums were Wyoming, where the accident occurred, or Illinois, where Riggle's estate was being administered. The unconventional plaintiff, a resident of New York, opened ancillary administration of Riggle's estate in New York. While ancillary administration may only be commenced within a state in which the deceased has left real or personal property, the only property left by Riggle in New York was the personal obligation of an indemnity insurance carrier which was doing business in New York. The Court of Appeals of New York upheld jurisdiction based on these factors.

On the theory of these two decisions a plaintiff may sue most defendants in most large cities in which their insurance carriers are doing business regardless of the situs of the occurrence or the residence of the defendant tort-feasor. The recovery, however, is limited to the value of the property, *i.e.*, the coverage of the insurance policy.

The *Riggle* decision relied on *Furst* v. *Brady*,[47] a 1941 Illinois decision granting identical relief. In the Illinois case the accident occurred in Illinois, but there is no indication in the opinion that that fact was controlling, and furthermore, the case was decided years before the Illinois "long arm statute"[48] was enacted.

Later Illinois Appellate Court decisions[49] have limited the application of the *Furst* case to situations where the accident occurred in Illinois, thereby ignoring the opportunity to expand their jurisdiction through the use of the insurance policy attachment device. Illinois does, however, have an attachment statute which allows quasi in rem jurisdiction in tort actions against non-residents.[50]

SEIDER V. ROTH AND THE FAIRNESS TEST OF INTERNATIONAL SHOE

The *Seider* decision was met by a flurry of commentary, most of which challenged its constitutional validity.[51] The Court

[47] 375 Ill. 425, 31 N.E.2d 606 (1940).

[48] ILL. REV. STAT. ch. 110, §17 (1967).

[49] Hinshaw v. Johnson, 19 Ill. App. 2d 239, 153 N.E.2d 422 (1958); *In re* Lawson, 18 Ill. App. 2d 586, 153 N.E.2d 87 (1958); Shirley v. Shirley, 334 Ill. App. 590, 80 N.E.2d 99 (1948).

[50] ILL. REV. STAT. ch. 11, §§1, 8 (1967).

[51] Supplementary Practice Commentary *following* N.Y. CPLR §5201 (McKinney Supp. 1967); Reese, *The Expanding Scope of Jurisdiction Over Non-Residents — New York Goes Wild*, 35 INS. COUNSEL J. 118 (Jan. 1968; *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); *cf. Jurisdiction: Quasi In Rem Jurisdiction Obtained By Attaching Obligations Under an Automobile Liability Policy*, 51 MINN. L. REV. 158 (1966); *Quasi In Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654 (1967).

of Appeals of New York had an opportunity to answer these challenges when lower appellate courts certified the question for review in *Simpson* v. *Loehman*[52] and *Victor* v. *Lyon Associates, Inc.*[53] The facts in *Simpson* were typical of the attachment cases. A resident of New York was injured in Connecticut as a result of the alleged negligence of a Connecticut resident. The defendant's insurer did business in New York. The facts in *Victor* were not so typical. There, a resident of New York was injured in a collision with defendant's truck in Da Nang, South Viet Nam. Defendant, a Maryland corporation, did not do business in New York. Its insurance policy was issued in Okinawa and its coverage was limited to activities in Ryu Kyu Islands, Formosa, Japan, Thailand, Korea, South Viet Nam and Cambodia. The insurer, Hanover Insurance Company, did business in New York. The court disposed of both cases with its opinion in *Simpson.* The defendants in these cases presented three constitutional arguments: First, that the attachment procedure offended due process; second, that it imposed an undue burden on interstate commerce in the field of insurance; and third, that it impaired the obligations of the contract of liability insurance. The court devoted little discussion to the last two arguments and concentrated on the due process question. In upholding the attachment procedure of *Seider* v. *Roth,* the court stated:

> It was our opinion when we decided that case, and it still is, that jurisdiction was acquired by the attachment in view of the fact that the policy obligation was a debt to the defendant. And we perceive no denial of due process since the presence of that debt in this State . . . contingent or inchoate though it may be — represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him. . . . [S]uch value is its face amount and not some abstract or hypothetical value.[54]

Within days after the *Simpson* decision was announced, a United States District Court for the Southern District of New York disagreed with its constitutional holding.[55] The district court's analysis began with the following accurate summary of the holding of the New York Court of Appeals in *Simpson*:

> The requisites necessary for *in rem* or *quasi in rem* jurisdiction are the presence of the *res* within the state, effective seizure, and adequate notice to its owner. Judge Fuld found these requisites present in *Simpson* for there was personal service upon the owner of the debt and under the rule in Harris v. Balk, 198 U.S. 215, 227 . . . (1905), the situs of a debt follows the debtor and is subject to garnishment wherever the debtor may be found. As the insurance company was doing business in New York the situs of the debt was New York.

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[52] 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).
[53] 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967).
[54] 21 N.Y.2d 305, 310, 234 N.E.2d 669 ,671, 287 N.Y.S.2d 633, 636 (1967).
[55] Podolsky v. Devinney, 281 F. Supp. 488 (S.D. N.Y. 1968).

> Judge Keating concurring in the opinion of the court expanded upon the theme, also expressed by Judge Fuld, that the procedure sanctioned in Seider v. Roth can be sustained on the ground that the State of New York has a sufficient governmental interest in accidents involving New York plaintiffs to legislate a direct action statute. In Judge Keating's view the procedure in Seider v. Roth accomplishes this result by compelling the insurer, the real party defendant, to defend in this state provided it transacts business here and is thus subject to the jurisdiction of the New York courts.[56]

In concluding that the attachment procedure was unconstitutional, the court discussed quasi in rem concepts, emphasizing the physical power doctrine and citing *Pennoyer* v. *Neff*, stated: "As such it must be recognized that the authority of any tribunal is necessarily restricted by the territorial limits of the State in which it is functioning."[57]

The district court then presented the practical dilemma which, as to the constitutional question, it found controlling. If the initial defendant (the insured) appeared, he might subject himself to a judgment exceeding the policy limits.[58] If he did not appear, the insurer's attempted defense would have been difficult if not impossible. Moreover, by refusing to appear and cooperate, the insured might jeopardize his rights to a later defense and to indemnity.

The New York Court of Appeals in *Simpson* considered the problem of the insurance carrier and concluded that "realistically, the insurer . . . is in full control of the litigation . . . ."[59] Certainly the insured would appear rather than run the risk of losing the protection of his policy for failure to cooperate.

As to the possibility that the defendant might subject himself to liability in excess of the policy limits, in cases where "excess" exposure appears possible, the court might consider the rights of that defendant by limiting its judgment to the policy limits. Further, a hardship imposed by defending in a forum might also be considered pursuant to a motion to transfer to a more convenient forum or to dismiss on the basis of *forum non conveniens*. In most mass catastrophe or protracted commercial cases, the defendant will be a substantial commercial or transportation entity and the selection of any one forum will present no grave hardship.

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[56] *Id.* at 493.

[57] *Id.* at 493-94.

[58] The appearance to defend will be a personal appearance subjecting the defendant to personal jurisdiction. N.Y. CPLR §320(c) (McKinney Supp. 1967). *See also* ILL. REV. STAT. ch. 110, §20 (1967). However, the court of appeals in *Simpson* specifically states that neither that decision nor *Seider* authorizes any judgment in excess of the policy limits. 21 N.Y.2d 305, 310, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 636-37.

[59] 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

THE RESIDENCE OF THE PLAINTIFF

In *Vaage* v. *Lewis*,[60] the New York Supreme Court, Appellate Division limited the application of *Seider* and *Simpson* to cases where the plaintiff was a New York resident. In refusing to permit a Norwegian plaintiff to avail himself of its attachment procedure, the court stated that "[t]he only New York contact is the rather tenuous fact that the defendant's insurance company is authorized to do business in New York."[61] However, the United States Supreme Court did not think "doing business" was so tenuous a fact in *International Shoe*. Also, Judge Keating's opinion in *Simpson* stressed the fact that the defendant's insurance carrier was the real party in interest. Requiring insurance companies to respond in a state where they are doing business certainly would not offend due process in the eyes of the courts which decided *Finnish Airway, Gordon* and *Gray*. More importantly, the court overlooked the basic nature of the action — attachment — which is in rem or quasi in rem where control over the property itself vests the court with jurisdiction.

A number of cases dealing with in personam jurisdiction under the "commission of a tort" provisions stress the residency of the plaintiff,[62] but there are a number of convincing arguments to rebut the claim that residency is crucial.[63] Residency of the plaintiff should be of even less importance in a proceeding which is basically in rem.

FUTURE OF THE ATTACHMENT PROCEDURE

Victor v. *Lyon Associates, Inc.*[64] has been appealed to the United States Supreme Court.[65] Hopefully, the Supreme Court will acknowledge jurisdiction in *Victor* and accept the opportunity to reassess the principles upon which state court jurisdiction is based.

In reassessing the limits on state court jurisdiction, the Court should consider the following propositions.

First, the Court should consider whether it serves any purpose to continue the troublesome distinction between actions in rem and in personam and whether the fairness test of *Interna-*

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[60] 29 A.D.2d 315, 288 N.Y.S.2d 521 (Sup. Ct. App. Div. 1968).

[61] *Id.* at 316, 288 N.Y.S.2d at 523.

[62] *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961); *Tortious Act as a Basis for Jurisdiction in Products Liability Cases*, 33 FORDHAM L. REV. 671, 695-96 (1965).

[63] *See* Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); *Tortious Act as a Basis for Jurisdiction in Products Liability Cases*, 33 FORDHAM L. REV. 671, 695-96 (1965).

[64] 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967). See text at note 53 *supra*.

[65] *Appeal docketed*, Hanover Ins. Co. v. Victor, *sub nom.*, (U.S. March 28, 1968) (No. 1273, 1967 Term; renumbered No. 50, 1968 Term).

tional Shoe should be applied to in rem as well as in personam actions. The primary distinction set forth in *Pennoyer* related to the quality of notice required. This distinction has been eliminated by subsequent Supreme Court decisions[66] which require, even for in rem actions, that "if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."[67] The elimination of this distinction between the actions and the application of the principles of *International Shoe* to in rem and quasi in rem actions should not invalidate the attachment procedure. Property located within the state should in and of itself have no independent jurisdictional significance, but it does provide a "contact" with the state which under certain circumstances may authorize the exercise of state judicial power consistent with the teachings of *International Shoe.*

In the insurance company cases, which make up the great bulk of personal injury actions, the presence of the insurance company doing business in the state and the presence of its "debt" to the insured defendant should be adequate "contact" to vest jurisdiction in the courts of that state. In Judge Keating's words, the attachment procedure merely recognizes "that the real party in interest is the insurer. . . ."[68] and is "a recognition of realities and not fictions."[69] In order to obviate all fictions, the attachment game should be disregarded in favor of a procedure which permits the insurer to be sued directly, though not necessarily in its own name.

Many factors generally considered in jurisdiction cases (*i.e.,* the hardship imposed upon defendant; practical problems in litigating at the forum selected; the residence of plaintiff; and the location of the operational facts) should more properly be presented in a motion to transfer or dismiss based on *forum non conveniens.* It has been pursuasively argued that the jurisdictional limitations presently applied in state courts are actually an outgrowth of the *forum non conveniens* doctrine.[70] In this regard it should be noted that the federal statute providing for transfer well facilitates such a transfer.[71] The various states should be urged to adopt interstate transfer provisions to cover the circumstances of the inconvenient forum, without imposing the hardship of dismissal.[72]

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[66] Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[67] Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956).

[68] Simpson v. Loehmann, 21 N.Y.2d 305, 313-14, 234 N.E.2d 669, 673, 287 N.Y.S.2d 633, 639 (1967).

[69] *Id.* at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 640.

[70] Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 YALE L. J. 289 (1956).

[71] 28 U.S.C. §1404(a) (1964).

[72] *See* Ehrenzweig, *supra* note 70; Johnston, *supra* note 6, at 58.

THE FEDERAL COURTS

The primary impetus in the attempts to consolidate mass litigation, thus establishing the litigation center, has come from the Federal Judiciary — particularly the Coordinating Committee for Multiple Litigation — and from the Judiciary Committee of the United States Senate. Due to the sponsorship of the Senate Committee and the Federal Judiciary a number of important innovations have been introduced and enacted into law. Furthermore, a number of the impediments preventing state court consolidation of actions are not present in the federal courts. As previously stated, when presented with cases imposing hardship through inconvenience the federal statutes provide for transfer[73] rather than dismissal, which is required by state court procedures. Consolidation is further facilitated by an intervention rule which permits additional parties to intervene with the approval of the court, whenever their "claim or defense and the main action have a question of law or fact in common."[74] In a multiparty case, additional parties may intervene in the first filed action rather than commence a new one. Many questions of jurisdiction, venue, adequacy of service and convenience of the forum are thus avoided and consolidation is achieved voluntarily.

This is not to suggest that all possible progress has been made in the federal courts. Again, as stated earlier, federal courts have generally observed the limitations of state court jurisdiction as a natural result of *Erie Railroad Co.* v. *Tompkins*,[75] though it may be convincingly argued that they are not constitutionally required to do so.[76] Nor is consolidation aided by retaining such outmoded provisions as a rule which limits the subpoena powers of a federal court to that limited area covering a radius of 100 miles.[77]

On the progress side, however, two far-reaching proposals should be discussed in detail. The first has recently been enacted into law and had been operating by authority of the Judicial Conference of the United States for some time. The second is a new proposal still under consideration in the United States Senate.

MULTI DISTRICT LITIGATION ACT

The Multi District Litigation Act,[78] in the words of its pre-

[73] 28 U.S.C. §1404(a) (1964).
[74] FED. R. CIV. P. 24(b); Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962).
[75] 304 U.S. 64 (1938).
[76] *See Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752 (1964).
[77] FED. R. CIV. P. 45(e).
[78] 28 U.S.C.A. §1407 (Supp. July, 1968).

amble, provides "for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact. . . ."[79] Known in the 90th Congress as Senate Bill 159, it was finally approved and effective as of April 29, 1968. The Act gives statutory authority to the previously operative Coordinating Committee for Multiple Litigation of the United States District Courts.

The potential breadth of its application is noted in the legislative history:

> The types of cases in which massive filings of multidistrict litigation are reasonably certain to occur include not only civil antitrust actions but also, common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others.[80]

The new law provides for a panel of federal judges on multidistrict litigation, which panel shall consist of seven circuit and district judges designated by the Chief Justice of the United States. In essence the Act provides that when civil actions involving one or more common questions of fact are pending in different districts, the actions may be transferred by the judicial panel on multidistrict litigation to any district for coordinated or consolidated *pretrial* proceedings upon the panels' determination that such transfers will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. The transfer may be initiated by the Committee on its own motion or by motion filed with the Committee by a party to an action in which consolidation may be appropriate.

It is important to note that this new legislation disregards forum jurisdictional limitations and weighs only the factor of the basic convenience of the participants and the just and efficient disposition of the actions.

The coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. Upon completion of the consolidated or coordinated pretrial proceedings the cases are to be returned to the original district. (The supporters of the legislation presume, of course, that many of these matters will be settled after pretrial proceedings and before being returned to the original district.)

Just prior to the final passage of the Act, the Anti-Trust Law Section of the American Bar Association illustrated the growing need for the legislation in a report urging its adoption:[81]

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[79] *Id.*

[80] 1968 U.S. CODE CONG. & AD. NEWS 1052.

[81] A.B.A. REP. NO. 2 OF THE SECTION OF ANTI-TRUST LAW, RECOMMENDATION OF THE SECTION OF ANTI-TRUST LAW TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION ON S. 159, 90th CONGRESS, 7 (1968).

> Finally, in the almost three years since this bill was first introduced a great many new facts have come to our attention tending to support the need for this legislation. Many of these facts were brought to our attention by members of the Judicial Conference. And many of the factors supporting the need for the legislation arise outside the antitrust field, where the electrical equipment antitrust cases were originally said to justify the need for the bill. For example, many cases for personal injuries and wrongful death arising out of a single airplane accident have been filed in multiple districts involving the common fact issues of the cause of an airplane accident.[82]

The report of the Anti-Trust Section refers to the report of the Senate Committee on the Judiciary for an explanation of how the then pending Senate Bill 159 would operate. Important from the viewpoint of this article are the factors to be weighed in the selection of the transferee district. The Judiciary Committee report states that the factors to be weighed should include: the state of the court's docket; the availability of counsel and the availability of courtroom facilities. The Anti-Trust Section adds the following observations:

> We assume that other factors will also be considered and that equal weight will be given to the extent to which the transferee district is centrally located to the district from which the largest number of cases are transferred as well as the availability of airplane transportation to the transferee district.[83]

Consideration of these factors should result in the referral of these cases by the Coordinating Committee to large metropolitan centers where counsel, courtroom facilities and convenient transportation services are available.

The Aviation Tort Act

An even more important series of bills have been introduced by Senator Tydings and are presently before the Senate Committee on the Judiciary.[84] These bills vest in the United States District Courts exclusive jurisdiction over all actions seeking damages for injury or loss of property or death caused by the negligent, tortious or wrongful act or omission arising out of, or in the course of, aviation activity. They also include a number of somewhat revolutionary concepts, all of which support the propositions advanced herein. First, the airline may be sued anywhere it does business or may be found, without regard to diversity jurisdiction; second, the action may be brought in any judicial district without regard to venue or process; and, third, when actions arising out of the same occurrence are brought in more than one district or division all such actions

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[82] *Id.* at 7.
[83] *Id.* at 6.
[84] S. 3305, 90th Cong., 2d Sess. (1968); S. 3306, 90th Cong., 2d Sess. (1968).

are first to be collected in one district and division by transferring all others to the district and division wherein a larger number of such actions are pending or, if there is no such district or division, to the district or division in which the earliest filed action is pending. When such actions have been collected in one district and division the court there may retain them and proceed as if they were originally brought there (presumably through final disposition) or it may further transfer any or all of them or otherwise order separate trials on any claims or issues.

To be fully effective a few revisions are suggested. First, the provision that all cases be transferred to where the first were filed or the most are pending could be improved. For example, suppose after a mass tragedy the first case was filed in San Diego, California, the most (three) were pending in Los Angeles, and fifteen others were scattered throughout northeastern districts. As the act is presently written, the fifteen northeastern cases would be transferred to either San Diego or Los Angeles when an eastern district would be a much more logical and convenient forum for the parties involved. Amendments should be offered adopting the criteria presently in effect for pretrial consolidation under the Multi District Litigation Act for transfer and disposition.

Second, the legislation should not be limited to injury or death caused by aviation activity, but should include all mass catastrophies involving interstate transportation (*e.g.*, rail and bus transportation).

With these revisions and working in conjunction with the Multi District Coordinating Committee the mass catastrophe cases like the protracted commercial cases will naturally and appropriately gravitate to the litigation centers.

CONCLUSION

The trend to expand state court jurisdiction is expected to continue through liberal interpretation of the various long arm statutes, particularly in tort cases and by recognition of the insurance carrier as the real party in interest in actions where a defendant is insured. Most defendants in protracted or multiparty cases will be amenable to suit in many large metropolitan areas where their products are consumed or where they or their insurer does business.

Through the transfer and consolidation of related cases pursuant to the Federal Rules of Civil Procedure, the Multi District Litigation Act, and in the future, the Aviation Tort Act, and pursuant to interstate transfer provisions adopted for state

courts, more cases will be transferred to metropolitan centers which are more convenient from the standpoint of transportation and facilities and better suited from the standpoint of experience and expertise.

The net result is that these centers will develop into litigation capitols particularly capable of disposing of the protracted case.