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CAN THE "LONG-ARM" REACH OUT-OF-STATE PUBLISHERS?

I. Introduction

One of the most distinguishing characteristics of our present age is the growth and influence of mass communication. Radio and television are permeating nearly every American home, and magazines and newspapers are being circulated and read on an unprecedented scale. The sociological impact of mass communication on our society and the unique problems to which it gives rise have been duly noted.¹ The purpose of this Note is to concentrate on an increasingly insistent legal problem which has come about as a by-product of the national circulation of many magazines and newspapers. The problem arises when one who alleges he has been libelled by one of these publications, published outside his state of residence but circulated within it, tries to bring an action at home before "twelve men, good and true" of his own community.

The first problem faced by such a plaintiff is to compel the appearance of the out-of-state defendant. This can only be accomplished by service of process upon the magazine or newspaper involved, and this requires that the publication be subject to the personal jurisdiction of the local state or federal court.² The modern judicial trend has been to expand the constitutional limits within which a state can validly exercise *in personam* jurisdiction over non-resident individuals and corporations.³ Taking advantage of this judicial development, the states have, with increasing regularity, enacted so-called "long-arm" statutes to give nonresidents notice of the activities which could make them subject to the jurisdiction of that state. These statutes have taken various forms. For the purpose of bringing a libel action against a nonresident publisher, there are three types of statutes which are relevant: those which subject him to jurisdiction because he is "doing business" within the state; those which subject him to jurisdiction because he has distributed his goods within the state; and those which subject him to jurisdiction because of some particular act,

1 See generally PEOPLE, SOCIETY, AND MASS COMMUNICATIONS (Dexter and White eds. 1964); SCHRAMM, MASS COMMUNICATIONS (1960).

2 By virtue of a recent amendment to section 4(e) of the Federal Rules of Civil Procedure, a federal district court is allowed to use the "long-arm" statute of the state in which it is sitting to acquire *in personam* jurisdiction over nonresident defendants.

3 The leading cases are *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The reasons for this trend have been well stated by the Supreme Court:

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. *McGee v. International Life Ins. Co.*, *supra* at 222-23.

For a more thorough discussion of this judicial trend see Anderson, *Personal Jurisdiction Over Outsiders*, 28 Mo. L. Rev. 336 (1963), and Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A. L. Rev. 198 (1958).

usually a tort, which he has committed within the state.⁴ It will be the last category, the so-called "single-act statutes," which will be explored in this Note as a possible basis for a libel proceeding against an out-of-state publisher who merely circulates his product within the proposed forum state.⁵ In many cases, this kind of statute may be the only approach open to a litigant desirous of bringing such an action.⁶

But a plaintiff attempting to use a single-act, long-arm statute in a libel action will encounter several legal pitfalls, any one of which may be sufficient to prevent him from subjecting the publisher to the jurisdiction of the local court. As in every attempt to subject a nonresident to jurisdiction, it must first be shown that the nonresident had sufficient contacts within the state so as to make it reasonable and just that he be obliged to defend there. There may be some question as to whether single-act statutes meet this requirement. But, in addition, because this is a libel action, other barriers peculiar to this branch of law may prevent a suit in the plaintiff's home state. These barriers are the "single publication rule" and the first amendment's guarantee of freedom of the press. This Note will analyze these obstacles in detail and examine their effectiveness in preventing libel actions founded upon single-act statutes.

II. Minimum Contacts

The gradual liberalization of the constitutional requirements for subjecting a nonresident defendant to the *in personam* jurisdiction of a state has been adequately treated elsewhere.⁷ The story need be only briefly retold here for the purpose of evaluating the constitutionality of single-act statutes. Any discussion of the present constitutional doctrine relevant to state jurisdiction over nonresidents must begin with the landmark case of *International Shoe Company v. Washington*⁸ decided by the Supreme Court in 1945. This case overturned a general rule of long standing, that in regard to *in personam* jurisdiction, due process compels that "process from the tribunals of one State cannot run into

4 Quite often the statutes make all three activities the bases of *in personam* jurisdiction. For a discussion of the various activities upon which state legislatures have pegged jurisdiction, see Dambach, *supra* note 3, at 212-32.

5 Litigants frequently choose the "doing business" route in order to acquire jurisdiction over a nonresident. An extensive list of cases dealing with "doing business" within a state by out-of-state newspapers and magazines can be found in Annot., 38 A.L.R.2d 747 (1954).

6 The following are representative of the many cases holding that a foreign publishing corporation is not transacting business in a state when it merely ships its periodicals into the state: *Walker v. General Features Corp.*, 319 F.2d 583 (10th Cir. 1963); *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959); *Reed Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945).

There has been little litigation on the question of whether an out-of-state publisher can be subject to a state's jurisdiction under a state long-arm allowing jurisdiction when a nonresident distributes goods within the state. It is unlikely, however, that a state legislature intended such statutes to encompass libel actions; usually they are aimed at a manufacturer who ships defective products into the state. *Buckley v. New York Post Corp.*, 373 F.2d 175, 177-78 (2d Cir. 1967). But at least one court has held that a distribution of goods statute is broad enough to sustain such an action. *Putnam v. Triangle Publications*, 245 N.C. 432, 96 S.E.2d 445, 453 (1957).

7 Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

8 326 U.S. 310 (1945).

another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."⁹ The defendant had to be either literally, or figuratively,¹⁰ within the state or had to consent to suit there. *International Shoe*, involving an action for unemployment compensation taxes initiated in the state courts by the state of Washington against an out-of-state corporation, held that, under certain circumstances, a nonresident could be subject to the *in personam* jurisdiction of another state. *In personam* jurisdiction was held to attach as soon as the defendant had such "minimum contacts" with the forum state that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹¹ In finding that jurisdiction was not repugnant to notions of fair play, the Court placed strong emphasis on the quality of the nonresident defendant's contacts with the proposed forum state rather than the quantity of such contacts:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the quality and the nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.¹²

Single-act, long-arm statutes carry this reasoning to its logical maximum by asserting that the commission of a single tort within the state is of such significant quality as to make it reasonable for the state to exert jurisdiction over a nonresident who commits such an act. Thus, these statutes rely exclusively on the quality of the defendant's contacts rather than their quantity. Since the decision in *International Shoe*, single-act statutes have been enacted in numerous jurisdictions.¹³ The legislative movement to adopt such statutes has been accelerating, and the outlook is that more states will follow this trend.¹⁴

9 *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878).

10 Because of the harshness of the *Pennoyer* rule, the courts engaged in various fictions in order to find a nonresident to be "within" the proposed forum state. The most commonly used devices were the "consent theory" and the "presence theory" whereby it was held that a corporation, by transacting business within a state, had either consented to suit there, *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856), or established its presence there, *International Harvester Co. of America v. Kentucky*, 234 U.S. 579 (1914).

11 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

12 *Id.* at 319.

13 ALA. CODE tit. 7, § 199(1) (Supp. 1965); CONN. GEN. STAT. ANN. § 33-411(c) (1960) (corporations only); IDAHO CODE ANN. § 5-514(b) (Supp. 1965); ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); IOWA CODE ANN. § 617.3 (Supp. 1966); KAN. STAT. ANN. § 60-308(b) (1964); LA. REV. STAT. § 13:3201 (Supp. 1966); ME. REV. STAT. ANN. tit. 14, § 704(1)(B) (1964); MD. ANN. CODE art. 23, § 92 (1966); MICH. STAT. ANN. §§ 27A.701, 27A.715 (1962); MINN. STAT. ANN. § 303.13(3) (Supp. 1966); MONT. REV. CODES ANN., M. R. CIV. P. 4(B)(1)(b) (Supp. 1967); N.M. STAT. ANN. § 21-3-16(A)(3) (Supp. 1965); N.Y. CIV. PRAC. § 302(a)(3) (McKinney Supp. 1967); N.C. GEN. STAT. § 55-145(a) (1965); OHIO REV. CODE ANN. § 2307.382(A)(3) (Page Supp. 1966); OKLA. STAT. ANN. tit. 12, § 187(a)(2) (Supp. 1966); TENN. CODE ANN. § 20-235(b) (Supp. 1966); TEX. REV. CIV. STAT. art. 2031b(4) (Vernon's 1964); VT. STAT. ANN. tit. 12, § 855 (1958) (corporations only); VA. CODE ANN. § 8-81.2(a) (Supp. 1966); WASH. REV. CODE ANN. § 4.28.185(1)(b) (1962); W. VA. CODE ANN. § 3083 (1961); WISC. STAT. ANN. § 262.05 (Supp. 1967).

14 See Legislation, *Personal Jurisdiction in Nebraska: The Need for a Long Arm Statute*,

When considering the constitutionality of single-act statutes as applied to a tort committed within the proposed forum state, the question to be asked is whether a tort, in and of itself, is sufficient contact so as to make it reasonable and fair for the perpetrator to defend there. The Supreme Court has yet to speak directly on the point. But in a pre-*International Shoe* case, *Hess v. Pawloski*,¹⁵ the Court upheld a Massachusetts statute which declared that use of that state's highways by a nonresident motorist was deemed equivalent to an appointment by him of the state registrar as his attorney for service of process for any action growing out of an accident which the nonresident may have had in the state. Since this case was decided in an era in which *Pennoyer v. Neff*,¹⁶ a decision which severely restricted service of process on nonresident defendants, was the last word on *in personam* jurisdiction, the Court was forced to rely largely on a theory of implied consent. This fiction asserts that, by using the state's roads, the defendant had impliedly consented to be subject to jurisdiction there.¹⁷ Even though the theories of "consent" and "presence" have given away to the doctrine of "minimum contacts," the shift in the underlying theory of jurisdiction cannot alter the fact that the Supreme Court, by its holding, gave explicit recognition to the contention that due process is not subverted merely because jurisdiction rests upon a single act.¹⁸ *International Shoe* itself by emphasizing the quality, rather than the quantity, of defendant's contacts, seems to approve of basing jurisdiction on a single tort as long as that tort arises out of defendant's activities within the state.¹⁹ And, in *McGee v. International Life Insurance Company*,²⁰ the Court upheld a California statute which subjected foreign corporations to suit in California on insurance contracts with its residents, even though there was no showing that the nonresident defendant had solicited or done any other insurance business in California apart from the policy involved in this case.²¹ Although *McGee* involved a single contract, rather than a single tort, there would seem to be no constitutional distinction when weighing the requirements of the due process clause.²² The only due process limitation on *in personam* jurisdiction which the Court has imposed in recent years is that the defendant must purposely avail himself of the privilege of conducting activities within the proposed forum state.²³

Aside from the Supreme Court, other courts which have considered single-

45 NEB. L. REV. 166 (1966); Clifford, *Colorado's "Short-Arm" Jurisdiction*, 37 COLO. L. REV. 309 (1965). Also, the Commissioners on Uniform State Laws have recently approved a model long-arm statute containing single-act provisions. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03.

15 274 U.S. 352 (1927).

16 95 U.S. 714 (1878).

17 *Id.* at 356.

18 Note, *The Virginia "Long Arm" Statute*, 51 VA. L. REV. 719, 746 (1965).

19 Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599, 606-07 (1955).

20 355 U.S. 220 (1957).

21 *Id.* at 222.

22 It is significant to note that *McGee* cited *Smyth v. Twin State Improvement Corporation*, 116 Vt. 569, 80 A.2d 664 (1951), a case upholding the constitutionality of Vermont's single-act tort statute, as support for the proposition that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 & n.2 (1957).

23 *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

act, long-arm statutes have given an overwhelming endorsement of their constitutionality.²⁴ Thus, when one alleges that an out-of-state publisher has committed the tort of libel against him in his state of residence, and seeks to acquire *in personam* jurisdiction over the publisher on the basis of a single-act, long-arm statute, there is little likelihood that he will be denied on the ground that to so subject the defendant to jurisdiction would amount to a deprivation of due process. But, although such a plaintiff may be able to easily overcome this barrier, others, more difficult, lie ahead.

III. The Single Publication Rule

A. History

The single publication rule represents the modern judicial response to the common-law concept of "separate publication," a theory sound in logic, but often unworkable in practice. The common-law rule was established in the historic English case of *Duke of Brunswick v. Harmer*.²⁵ The Duke, upon learning of a libel printed some eighteen years previously in defendant's newspaper, sent an agent to buy from defendant a copy of the original newspaper, and then brought suit. Against a plea of the statute of limitations, it was held that the communication of the libel to the agent was a separate publication and, hence, that it prevented the tolling of the statute. Under this rule, each communication of a libel is a separate cause of action. The rule was adopted and applied in this country as a part of the common law of libel.²⁶ Although one who is libelled is in fact injured by every communication of the libel and, thus, it seems logical that a separate cause of action arise upon each communication, the practical problems inherent in the concept of "separate publication" gradually undermined its legal status. If each communication is considered to be a separate publication of the libel, there results the strong possibility of a multiplicity of suits²⁷ and an almost endless suspension of the tolling of the statute of limitations.

These practical considerations led the New York courts to abandon the doctrine, at least with respect to the statute of limitations, in the well-known case of *Wolfson v. Syracuse Newspapers, Incorporated*.²⁸ New York had a one-year statute of limitations for libel actions. Alleged libels concerning the plaintiff had been published by the defendant newspaper more than one year before the commencement of the suit. The plaintiff contended, however, that

24 See, e.g., *Elkhart Eng'r Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965); *Hutchinson v. Boyd & Sons Press Sales, Inc.*, 188 F. Supp. 876 (D. Minn. 1960); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951); *Reese & Galston, Doing An Act or Causing Consequences As Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 259 (1959); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 926 (1960). But see *Stimson, Omnibus Statutes Designed to Secure Jurisdiction Over Out-of-State Defendants*, 48 A.B.A.J. 725 (1962) (asserting that the defendant, or his agent, must have been physically present within the state).

25 117 Eng. Rep. 75 (Q.B. 1849).

26 Leflar, *The Single Publication Rule*, 25 ROCKY MT. L. REV. 263 (1953).

27 This is especially true in this era of unprecedented use of mass communications. See *Prosser, Interstate Publication*, 51 MICH. L. REV. 959, 960-62 (1953).

28 254 App. Div. 211, 4 N.Y.S.2d 640 (1938), *aff'd without opinion*, 279 N.Y. 716, 18 N.E.2d 676, *rehearing denied*, 280 N.Y. 572, 20 N.E.2d 21 (1939).

he was not barred by the statute because a third party had read the alleged libel in defendant's public library within a year before the filing of his suit. In rejecting plaintiff's contention that the communication to the third party was sufficient to start the running of the statute anew, the court reasoned:

If the bar of the Statute of Limitations can be lifted by means such as the plaintiff now seeks to employ, we may no longer term it a "statute of repose" which makes effective a purpose which the Legislature has conceived to be imperative — to outlaw stale claims. . . . Believing that such a rule would nullify the clear purpose of the Statute of Limitations, we affirm the order dismissing the complaint. . . .²⁹

Several jurisdictions have followed the reasoning of *Wolfson* and the rule emerging from these cases has been styled as the "single publication rule."³⁰ Although there has not been universal agreement on the exact time at which the libel takes place,³¹ all the jurisdictions adhering to the rule are in accord that there is a single fixed point in time at which it can be said that the libel has been committed. The time most frequently seized upon is the time at which the alleged libellous material was first released to the public.³²

If the jurisdiction in which the litigant seeks to bring his libel action against an out-of-state publisher follows the single publication rule, he may be in serious trouble. This is so because the rule has been used to determine where, as well as when, the libel took place.³³ Under this reasoning, the tort is anchored to a particular place, and when proceeding against an out-of-state publisher, this place is almost invariably one which is outside the state. Thus, it would seem that the plaintiff's reliance upon a single-act statute is misplaced, for the tort of which he is complaining has not, in the eyes of the law, been committed within his state. Whether adherence to the single publication rule will in fact sound the death knell for this kind of action depends on the particular jurisdiction's policy towards the rule and the single-act statute involved.

B. Policy

Whether a jurisdiction will allow the single publication rule to interfere with "long-arm" actions depends on its view of the policy underlying the rule and the strength of its commitment to the goals which the rule seeks to achieve.

29 *Id.* at 213, 4 N.Y.S.2d at 642-43.

30 The following jurisdictions adhere to the single publication rule: Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, New Mexico, New York, North Dakota, Oklahoma and Pennsylvania. R. PHELPS & E. D. HAMILTON, *LIBEL: RIGHTS, RISKS, RESPONSIBILITIES* 104 (1966). In addition, the rule has been codified by the Commissioners on Uniform State Laws. UNIFORM SINGLE PUBLICATION ACT.

31 Prosser, *supra* note 27, at 974.

32 R. PHELPS & E. D. HAMILTON, *supra* note 30, at 104; W. PROSSER, *THE LAW OF TORTS* 788 (3d ed. 1964).

33 This result has been reached in several state cases in which the issue was whether venue would lie in a county other than that in which the libellous material was published. In each of the following cases, the action was dismissed for lack of proper venue on the authority of the single publication rule: *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921) (venue to lie in the county "where the injury occurred"); *O'Malley v. Statesman Printing Co.*, 60 Idaho 326, 91 P.2d 357 (1939) (venue to lie in the county "in which the cause of action arose"); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943) (venue to lie in the county "where the cause of action may occur or accrue").

A court may choose to apply the single publication rule literally in every context, regardless of the distinct policy considerations militating against it. This was the approach of the court in *Insull v. New York World-Telegram Corporation*.³⁴ The Court of Appeals for the Seventh Circuit, finding that Illinois followed the single publication rule, refused to allow the plaintiff to bring a libel action in Illinois against the foreign corporation on the basis of the Illinois single-act statute.³⁵ The court reasoned that, since the single publication rule anchors the tort to the place where the libel was first published, and since that place was New York, there was no tort committed in Illinois.³⁶

The type of reasoning employed in *Insull* has not escaped sharp criticism. It has been pointed out that the aim of the comprehensive long-arm statutes, such as the Illinois statute in *Insull*, is to establish jurisdiction wherever constitutionally possible. To hold that jurisdiction cannot be asserted unless the last event necessary for liability has occurred in the proposed forum state is to add an irrelevant standard.³⁷ A recent decision of the Second Circuit expressly rejected the *Insull* approach and closely evaluated the role which the single publication rule should play in the area of *in personam* jurisdiction. *Buckley v. New York Post Corporation*³⁸ involved a libel action by William Buckley, a resident of Connecticut, against the *Post*, a Delaware corporation having its principal place of business in New York City. The *Post* argued that, since the lower federal court was bound to follow Connecticut decisions favoring the single publication rule,³⁹ it was not subject to the jurisdiction of that court because the tort was committed, if at all, outside the state. The Court of Appeals, Judge Friendly writing, rejected this contention:

Elliptical statements that a libel by newspaper is "complete" upon publication, though often accurate enough in their particular context, should not obscure that the purpose of the single publication rule is not to deprive a plaintiff defamed in another state of a privilege to sue there which the legislature had granted generally to persons injured by wrongful conduct within its borders, but rather to protect the defendant — and the courts — from a multiplicity of suits, an almost endless tolling of the statute of limitations, and diversity in applicable substantive law. . . . These goals can be sufficiently accomplished by holding that that plaintiff must collect all his damages in one action, that the statute of limitations begins to run on the initial publication, and that substantive issues will be governed by a single law⁴⁰

Thus the court surmounted the barrier of the single publication rule, not by reverting to a theory of multiple publication, but by holding the rule to be irrelevant in a long-arm action.

³⁴ 273 F.2d 166 (7th Cir. 1959).

³⁵ *Id.* at 171.

³⁶ *Id.* A similar result was reached by the Fifth Circuit in *New York Times Company v. Connor*, 291 F.2d 492 (5th Cir. 1961). The decision in this case was subsequently vacated after the Alabama Supreme Court held, in another case, that the Fifth Circuit had erroneously applied Alabama law. *Connor v. New York Times Co.*, 310 F.2d 133 (5th Cir. 1962).

³⁷ Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

³⁸ 373 F.2d 175 (2d Cir. 1967).

³⁹ *Id.* at 179.

⁴⁰ *Id.* at 179-80.

C. The Long-Arm Statutes

The preceding section demonstrated the two different basic philosophies by which the courts have approached the relationship between the single publication rule and single-act, long-arm statutes. Under the *Insull* approach, the plaintiff is immediately defeated because the tort upon which he is attempting to base jurisdiction is deemed to have been completed outside the state. Under the *Buckley* approach, the plaintiff is allowed to argue that the single publication rule is inapplicable to the jurisdictional question, and that he is entitled to rely on his state's single-act statute without regard to such a rule. Even if this is allowed, however, the very terms of the statute upon which he relies may act to defeat his attempt to acquire jurisdiction. For the purposes of determining whether single-act statutes will allow defamation actions against out-of-state publishers who merely circulate their publications within the proposed forum state, the various statutes may be broken down into eight groups:

1) *Tortious act within the state*—The Illinois statute is typical — one is subject to jurisdiction for a cause of action arising from "the commission of a tortious act within this state,"⁴¹ and has been widely followed.⁴² Even if one disregards the single publication rule, it could be persuasively argued that the defendant publisher has committed no tortious act within the proposed forum state; his only act was the printing and the initial distribution of the alleged libel, all of which took place within the state of publication. This argument seems to rely strongly upon the legislative use of the term "tortious act" rather than "tort" as indicative of the legislature's intent to distinguish the act or conduct itself and any consequences thereof.

The controversy over whether "tortious act" includes the situation in which only the consequences of defendant's act take place within the proposed forum state has been raging in the analogous field of product liability actions against out-of-state producers. The issue was raised in Illinois in *Gray v. American Radiation & Standard Sanitary Corporation*.⁴³ In that case, plaintiff was injured by a defective product shipped into the state by the defendant. Seeking to avoid the jurisdiction of the Illinois courts, the defendant interposed the defense that he had committed no tortious act in Illinois — the negligence had occurred outside of the state and only the consequences of that negligent act had taken place within the state. The Supreme Court of Illinois discarded this defense as a mere "technicality":

We think the intent [of the legislature] should be determined less from technicalities of definition than from considerations of general purpose and effect. To adopt the criteria urged by defendant would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence of each, whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature.⁴⁴

41 ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

42 Other states having a similar statute are Connecticut, Idaho, Kansas, New Mexico, North Carolina, Oklahoma, Tennessee and Washington. The location of these statutes is given in note 13 *supra*.

43 22 ILL. 2d 432, 176 N.E.2d 761 (1961).

44 *Id.* at 436, 176 N.E.2d at 763.

The court went on to hold that the statute, so construed, was not an unconstitutional violation of due process.⁴⁵

If the *Gray* reasoning is applied to libel actions in which only the consequences of defendant's tortious act of publication are felt within the state, the plaintiff would clearly be able to acquire jurisdiction under a "tortious act" statute. The *Gray* rationale, however, has not been universally followed. It has been attacked on the grounds of statutory construction⁴⁶ and constitutionality.⁴⁷ Thus, whether the libel action can be brought under the "tortious act" statute depends on whether the particular jurisdiction follows, or can be persuaded to follow, the *Gray* approach.

2) *Tort in whole or in part*—The typical language of this type of single-act, long-arm statute allows jurisdiction when a nonresident "commits a tort in whole or in part" within the state.⁴⁸ The use of the term "tort" in itself tends to avoid the problems inherent in the use of "tortious action." And the additional use of "in part" would seem to leave no doubt that this type of statute would give jurisdiction when only the consequences of the tortious act are felt within the proposed forum state. In *Atkins v. Jones & Laughlin Steel Corporation*,⁴⁹ it was held that the "in part" language in such a statute conferred jurisdiction in a product liability case when the nonresident corporation's only contact with the forum state was its shipment of its defective product into the state. The Minnesota court relied upon the "tort in part" language to distinguish the case from the contra-*Gray* line of decisions holding that a "tortious act" statute does not confer jurisdiction under such circumstances.⁵⁰ Thus, it seems clear that a defamation action against an out-of-state publisher would be allowed under such a statute.

3) *Tortious act within the state; tortious act outside of the state plus doing business*—These single-act statutes draw a distinction between injury that is suffered as a result of a tortious act within the state and that which is a result of a tortious act outside of the state. The Virginia statute is an example:

A court may exercise personal jurisdiction over a person . . . as to a cause of action arising from the person's . . . (3) [c]ausing tortious injury by an act or omission in this State; (4) [c]ausing tortious injury in this State by an act or omission outside of this State if he 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 this State . . . ⁵¹ (Emphasis added.)

⁴⁵ *Id.* at 436-44, 176 N.E.2d at 763-67. *Accord*, *Nixon v. Cohn*, 62 Wash. 2d 987, 385 P.2d 305 (1963).

⁴⁶ *Longines-Wittnauer Watch Co. v. Barnes & Reinecke Inc.*, 15 N.Y.2d 443, 462, 261 N.Y.S.2d 8, 23 (1965).

⁴⁷ *The Virginia "Long Arm" Statute*, *supra* note 18, at 749.

⁴⁸ MINN. STAT. ANN. § 303.13(3) (Supp. 1966). States having a similar provision are Iowa, Texas, Vermont and West Virginia. The location of these statutes is given in note 13 *supra*.

⁴⁹ 258 Minn. 571, 104 N.W.2d 888 (1960).

⁵⁰ *Id.* at 579-80, 104 N.W.2d at 893-94. *Accord*, *Andersen v. National Presto Indus., Inc.*, 257 Iowa 911, 135 N.W.2d 639 (1965). *Contra*, *Mann v. Equitable Gas Co.*, 209 F. Supp. 571 (N.D. W.Va. 1962) (holding that to so construe the West Virginia statute would be a violation of due process).

⁵¹ VA. CODE ANN. § 8-81.2(a) (Supp. 1966). States having similar statutes are Louisiana, Ohio, and Wisconsin. The location of these statutes is given in note 13 *supra*.

Under this type of statute, a nonresident publisher's liability is quite clear. If he merely ships his publication into the state, he will only be subject to jurisdiction for a libel action if he is held to be "doing business" within the state.

4) *Causing consequences to occur that result in a tort action*—This type of statute has been adopted by Michigan. It allows jurisdiction over a nonresident for "[t]he doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."⁵² There have been no relevant decisions under this statute, but the language leaves little room for doubt that this long-arm would reach an out-of-state publisher whose circulated publication causes consequential damage to a resident of the state.

5) *Acts done within the state*—The Maryland long-arm statute provides for jurisdiction on any "liability incurred for acts done within this State."⁵³ Under this type of statute, it is clear that an out-of-state publisher would be immune from jurisdiction unless he had performed some acts within the proposed forum state. Mere shipment of the publication into the state would not be enough.⁵⁴

6) *Any cause of action relating to doing business within the state whether or not any acts within the state constitute a cause of action*—The Alabama statute provides that:

Any non-resident . . . who shall do any business or perform any character of work or service in this State shall . . . be deemed to have appointed the secretary of state . . . agent of such non-resident, upon whom process may be served in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service, or relating to or as an incident thereof, by any such non-resident . . . And such service shall be valid whether or not the acts done in Alabama shall of and within themselves constitute a complete cause of action.⁵⁵

The Alabama Supreme Court has interpreted this statute as allowing jurisdiction as broad as the permissible limits of due process.⁵⁶ The last sentence of the quoted part of the statute would apparently allow jurisdiction over a nonresident publisher even though the cause of action accrues beyond the borders of the state. Thus, it would allow an action against an out-of-state publisher whose circulation results in an action within the state.⁵⁷

7) *Accrual within this state of a tort action*—The Montana long-arm reaches out to snare nonresidents responsible for "the commission of any act which results in accrual within this state of a tort action."⁵⁸ It has been suggested that this type of statute would permit jurisdiction over a nonresident

52 MICH. STAT. ANN. §§ 27A.701, 27A.715 (1962).

53 MD. ANN. CODE art. 23, § 92 (1966).

54 Cf. *Rosenberg v. Andrew Weir Ins. Co.*, 154 F. Supp. 6 (D. Md. 1957).

55 ALA. CODE tit. 7, § 199(1) (Supp. 1965).

56 *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964).

57 As a matter of fact there is evidence that the act was worded in this way for the avowed purpose of facilitating the filing of libel suits against out-of-state newspapers. *N.Y. Times*, Sept. 13, 1961, at 23, col. 7.

58 MONT. REV. CODES ANN., M.R. CIV. P. 4(B)(1)(b) (Supp. 1967).

whose acts outside the state result in injury within the state.⁵⁹ If this be so, the libel action against an out-of-state publisher would clearly be allowed.

8) *Libel actions disallowed*—Two state legislatures answer very clearly the question of whether their statutes allow libel actions against out-of-state publishers. In New York, such actions are expressly disallowed under the single-act statute;⁶⁰ in Maine, the statute limits actions to those for physical injury.⁶¹

D. Conclusion

The preceding sections have dwelled upon the first two barriers that a plaintiff, aggrieved by a libel shipped into his home state by an out-of-state publisher, must hurdle in order to compel the publisher to defend in that state. If his state is committed to the single publication rule, his action may be dismissed because of lack of *in personam* jurisdiction on the theory that the tort was complete at the place of initial publication, and not within the proposed forum state. It is submitted, however, that the approach taken by the Second Circuit in *Buckley* is the more reasonable one. The single publication rule should be considered irrelevant when considering *in personam* jurisdiction. The rule arose as a response to unrelated problems; and it is unlikely that a state legislature, adopting the rule either by express provisions or acquiescence, desires to frustrate an otherwise permissible libel action under its long-arm statute. If the legislature did intend to disallow such actions, it could have done so in clear terms as has been done in New York and Maine.

Aside from the single publication rule, however, a plaintiff seeking to bring such action may be defeated by the terminology employed in the statute upon which he seeks to base jurisdiction. In all probability, state legislatures have not fully considered the type of action treated in this Note when passing their long-arm statutes. The purpose of classifying the various types of statutes and the decisions that they have generated is to demonstrate how the terminology employed by a legislature determines the extent of relief available to the citizens of that state. Regrettably, the use of one term rather than another is more likely the result of accident rather than conscious choice. In order to avoid a repetition of the current controversy over the extent of coverage of these long-arm acts, it will be necessary for legislatures in the future to clearly express their intent in this regard.

IV. First Amendment

The final, and perhaps the most difficult, hurdle faced by a plaintiff

⁵⁹ Currie, *supra* note 37, at 553 n.126.

⁶⁰ N.Y. CIV. PRAC. § 302(a) (McKinney Supp. 1967). In the Practice Commentary to this section it is said:

Because of the facility with which a newspaper article or a television broadcast may find its way into the state, although its origin may be far removed, considerations of public policy prompted the Legislature to exclude defamation from the tortious acts which subject defendants to jurisdiction under this section. 7B MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK 433 (1963).

A "long-arm" libel action can still be brought if the plaintiff can acquire jurisdiction under one of the other provisions of the New York statute. *Tortero v. World Telegram Corp.*, 41 Misc.2d 594, 245 N.Y.S.2d 870 (1963) (jurisdiction in libel action based on defendant's transaction of business within the state).

⁶¹ ME. REV. STAT. ANN. tit. 14, § 704(1)(B) (1964).

seeking jurisdiction over an out-of-state publisher is provided by the first amendment. First amendment rights enjoy high priority in our constitutional system. And one of these "sacred" rights is freedom of expression, as epitomized in freedom of the press. As so eloquently put by Judge Learned Hand, the first amendment's guarantee of free expression

presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.⁶²

The first amendment is relevant in this consideration of jurisdiction over out-of-state publishers because of the fear that newspapers and other publications might restrict their sales to those places in which such sales are substantial. If the publisher is subject to process for libel actions in any jurisdiction in which he circulates his product, he might choose to cut off circulation in those areas in which return revenue is low rather than run the risk of unfair treatment by hostile local juries⁶³ or of the expense of defending sham suits.⁶⁴ When viewed in this manner, the extension of jurisdiction over out-of-state publishers may be construed to be an unconstitutional restraint on freedom of the press.

This problem was considered by a recent Fifth Circuit decision in *New York Times Company v. Connor*.⁶⁵ This libel action was brought by a resident of Alabama against the *Times*. The plaintiff attempted to establish jurisdiction upon the strength of Alabama decisions interpreting the Alabama statute as allowing the state courts to exert *in personam* jurisdiction over nonresidents who had committed an isolated tort within the state. The circuit court held that the single-act statute could not constitutionally be applied because to do so would result in curtailment of freedom of the press.

[N]ewspapers with even one copy circulating within a state would conceivably be subjected to libel actions and the risk of large judgments at the hands of local juries incensed by the out-of-state newspaper's coverage of local events. In the face of this very real risk, could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of this liability? Certainly, a mere 395 issues

62 *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

63 An example was the \$500,000 verdict in the famous *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). As an intervening party in another case pointed out, "[t]he inability to obtain a fair trial is not peculiar to the New York Times but exists whenever a foreign publisher must defend an article or editorial away from home and in a community that bears antipathy towards his editorial viewpoint and his publication's content. Motion of Chicago Tribune Company to file a brief as Amicus Curiae, at 5, in *New York Times Co. v. Connor*, 291 F.2d 492 (5th Cir. 1961).

64 The incidence of sham, or unworthy, suits is bound to increase as it becomes more convenient for plaintiffs to sue. The cost of defending against such suits can be substantial, especially if the defense must be entered in a court far from home. Of interest is the following anecdote.

Some years ago the *Chicago Tribune* called Henry Ford an anarchist. Mr. Ford sued the *Tribune* for libel and received a verdict of six cents. The *Tribune* never paid that six cents because it claimed the judgment was not suable in Michigan where the trial took place. Reported at more than \$500,000, the *Tribune's* defense cost \$303,968.72, according to its counsel. F. THAYER, *LEGAL CONTROL OF THE PRESS* 211 (4th ed. 1962) (footnote omitted).

65 365 F.2d 567 (5th Cir. 1966).

per day as involved in the instant case would not be sufficient. As the result, those people in the State of Alabama who wish to read a publication such as the New York Times would be deprived of this opportunity.⁶⁶

The court concluded that there must be "a greater degree of contacts to sustain jurisdiction over nonresident newspaper corporations"⁶⁷ than other nonresident defendants, but did not specify what would be sufficient. In view of the language employed by the court, this point would perhaps be reached when the size of the publisher's circulation *does* balance the danger of liability.

The Second Circuit also took up the question of the first amendment's effect in this area in the previously discussed case of *Buckley v. New York Post Corporation*.⁶⁸ The court's approach was a balancing of the restraint placed on the press by allowing jurisdiction against the hardship placed on the individual by not allowing it:

Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public, such as providers of food or shelter or manufacturers of drugs designed to ease or prolong life, they must pay the freight; and injured persons should not be relegated to forums so distant as to make collection of their claims difficult or impossible unless strong policy considerations demand it.⁶⁹

Against the background of this kind of thinking, the *Buckley* court allowed jurisdiction. The decision rested heavily on the fact that the Connecticut court in which *Buckley* brought suit was only forty miles from the home of the *Post*. Judge Friendly's opinion pointed out that the opposite result would be incongruous in that the *Post* would clearly have to defend a similar suit in Buffalo, many more miles away; the first amendment cannot so exalt state lines.⁷⁰

The Supreme Court has yet to speak on this first amendment problem. There is precedent, however, for denying an otherwise valid assertion of jurisdiction over a nonresident because of constitutional provisions other than the due process clause. In a series of cases, the Court has prohibited *in personam* jurisdiction over nonresidents because, even though the assertion of jurisdiction was not violative of due process, the allowance of jurisdiction would interfere with interstate commerce.⁷¹ Although these cases have not been utilized by the Court since *International Shoe*, they apparently have not been abandoned.⁷²

66 *Id.* at 572.

67 *Id.* at 573.

68 373 F.2d 175 (2d Cir. 1967).

69 *Id.* at 182.

70 *Id.* at 184.

71 The leading case is *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923). Others are *Denver & R.G.W.R.R. v. Terte*, 284 U.S. 284 (1932); *Michigan C.R.R. v. Mix*, 278 U.S. 492 (1929); *Atchison, T. & S.F.Ry. v. Wells*, 265 U.S. 101 (1924). However, the Court has held that, where the nonresident's contacts are many, jurisdiction will be sustained even if this results in a burden on interstate commerce. *Missouri ex rel. St. Louis, B. & M.Ry. v. Taylor*, 266 U.S. 200 (1924).

72 See *Overstreet v. Canadian Pac. Airlines*, 152 F. Supp. 838 (S.D.N.Y. 1957); *Hershel Radio Co. v. Pennsylvania R.R.*, 334 Mich. 148, 54 N.W.2d 286 (1952); *Hayman v. Southern Pac. Co.*, 278 S.W.2d 749 (Mo. 1955) (alternative ground). In *Erlanger Mills, Incorporated*

As such, they could serve as precedent for a holding that the assertion of jurisdiction over out-of-state publishers on the basis of a single tort, while satisfying the "minimal contacts" of due process, is unconstitutional under the first amendment. The fact that a state may be exercising a legitimate state interest in asserting jurisdiction would also be disregarded if the Court should find that the exercise of that interest unduly impinges first amendment freedoms.⁷³

There is little doubt that the first amendment should play a role in this area of expanding jurisdiction over out-of-state publishers. The extent of that role depends to a certain degree upon whether one approaches that amendment as an "absolutist" or a "balancer."⁷⁴ But even under the "absolute test," there is a recognition of legitimate state interests.⁷⁵ It is submitted that the effect of the first amendment on long-arm libel actions should be considered on a case-by-case basis. In each case, the court should consider the distance the defendant publisher must travel in order to defend, the resources of the defendant,⁷⁶ and the number of publications distributed in the jurisdiction that is proposed as a forum. To proceed on a case-by-case basis is more tortuous and less expedient than the alternative of proceeding under a hard-and-fast rule denying such jurisdiction on first amendment grounds. But, as *Buckley* points out, injured persons must also be protected; their claims should not be made practically worthless unless there are very strong policy considerations that mandate it.

V. Conclusion

A plaintiff seeking to utilize a single-act, long-arm statute to acquire jurisdiction over an out-of-state publisher in a libel action is faced with serious obstacles. Just to get the defendant into court he may be forced to wage three separate battles, with the outcome of each being by no means certain. If his jurisdiction follows the single publication rule, he must first persuade the court that such a rule is irrelevant in considering whether the tort of libel was committed in the state within the meaning of that state's long-arm statute. Secondly, he must show that such an action is contemplated by the terms of his state's statute.

v. Cohoes Fibre Mills, Incorporated, 239 F.2d 502, 507 (4th Cir. 1956), it was suggested that expanding jurisdictional concepts since *International Shoe* may indicate the increased usefulness of this limitation in order to prevent undue burdens on commerce that might arise under the current extensions of state power that have been held to satisfy due process.

73 See *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) in which the Court struck down an otherwise legitimate tax on newspapers because it thought the tax was too great a restraint on freedom of the press. *Grosjean* was heavily relied upon by the Fifth Circuit in *Connor* as support for its position that the granting of jurisdiction would unduly hamper a free press. *New York Times Co. v. Connor*, 365 F.2d 567, 572-73 (5th Cir. 1966).

74 A full discussion of these approaches is clearly beyond the scope of this Note. For an excellent treatment of the various theories on the first amendment, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). See also Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073 (1962); Justice Black and the First Amendment "Absolutes": *A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

75 See Emerson, *supra* note 74, at 914.

76 The purpose, of course, is not to penalize the affluent publisher. But the first amendment argument strongly relies upon the possibility that the publisher may eliminate circulation in a particular jurisdiction because of a fear of incurring the expense of defending a suit in that jurisdiction. Such curtailment is more likely to come from the marginal publisher than one who services a nationwide market as a matter of course.

And, thirdly, he must show that to allow jurisdiction is not unconstitutional as violative of the safeguards of either due process or the first amendment.

As has been illustrated, some of these obstacles appear to be more the result of chance rather than deliberate choice. The single publication rule has crept into this area as a ready-made legal maxim adopted by courts apparently unaware that the rule was a judicial response to problems unrelated to questions of *in personam* jurisdiction. The uncertainty arising from the terms of the various single-act statutes is definitely attributable to the failure of the legislatures to make clear the extent of coverage of their long-arm statutes. The obstacle posed by the first amendment, however, is a very serious one that calls for a careful evaluation of the effect of expanding jurisdiction upon freedom of the press. Taken together, these various considerations combine to place an overwhelming burden on a party attempting to recover on an alleged libel by an out-of-state publisher under a single-act, long-arm statute.

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