Buffalo Law Review

Volume 15 | Number 1 Article 12

10-1-1965

Civil Procedure—Jurisdiction Under "Tortious Act" Provision of New York Long-Arm Statute Obtainable Over Non-Residents Only When Such Acts Are Committed Within the State

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Erratum
On page 192, line 26 which read: plaintiff Should have read: defendant.

torts doctrine of *respondeat superior* might shed some light on the majority's underlying decision, to put the risk of an agency relationship on the principal rather than an outsider. Among others, there are two social policy reasons behind *respondeat superior* which may have been in the back of the Court's mind.[17] One is the ability of the master to control his servants as opposed to the lack of control in an outsider. In the instant case, defendant was in a better position to control his agent than was the plaintiff, even if this meant finding a new agent. And secondly, the master, not the outsider, benefits by the master-servant relationship. So too, a principal is benefited by being able to do business through an agent instead of doing it in person. Because the agency relationship is vital to our society it should be held effective whenever possible. To penalize a person for depending on a relationship which, to all appearances, exists, would substantially weaken the usefulness of agency law. Plaintiff, it would seem, had no reason to doubt Cash's authority as an agent empowered to receive notice of the outstanding equity. He therefore proceeded to do everything he thought necessary to protect his interest. Thus, it is difficult to see why plaintiff, an innocent third party, should bear the risk of the questionable activities of another's agent. It was, after all, the defendant who selected Cash as his agent and, at least vis-à-vis an innocent stranger should assume the risk of his conduct.[18] Had plaintiff not dealt with Cash as an agent, he could not have claimed reliance on the agency; if that had been the case, and in the absence of other facts, this might have been a stronger case for refusing to impute to the defendant the knowledge of Cash because of the latter's adverse interests.[19]

MICHAEL SWART

CIVIL PROCEDURE—JURISDICTION UNDER "TORTIOUS ACT" PROVISION OF NEW YORK LONG-ARM STATUTE OBTAINABLE OVER NON-RESIDENTS ONLY WHEN SUCH ACTS ARE COMMITTED WITHIN THE STATE

In two recent cases New York residents brought suits on theories of negligence and breach of warranty against non-domiciliary defendants involved in the manufacture of products used in or sent into New York. Mr. and Mrs. Feathers, plaintiffs in the first case, sued for personal injuries and property damage caused

17. Latty, Introduction to Business Associations 56 (1951).
18. Moore v. Metropolitan Nat'l Bank, 55 N.Y. 41, 47 (1873).
19. This action commenced by Farr against Newman and Hardy appears to be the only substantial basis for his remedy. Unfortunately, Newman left the jurisdiction. Though it has been suggested in 9 Utah L. Rev. 496 (1964) that plaintiff might be able to recover damages from the attorney on the theory of interference with contractual rights, this would be a doubtful remedy in light of the court's statement that the attorney had not acted fraudulently in considering the contract unenforceable. Defendant, on the other hand, because of the agency relationship could possibly sue the attorney for a breach of that relationship and stand a better chance of recovery than plaintiff would. The attorney appears to have breached the ABA Canons of Professional and Judicial Ethics 3 (Canon 6) (1957) as well as general agency principles long accepted.

by the explosion in New York of a steel tank of liquefied propane gas while it was being hauled from Pennsylvania through New York to Vermont by a Pennsylvania interstate carrier. The tank had been manufactured in Kansas by defendant-appellant Darby Corporation and sold to a Missouri corporation which mounted it on a trailer and sold it to the carrier. Darby had no office, representatives, agents or facilities in New York; it did not transact or solicit any business within the state, but presumably knew that the tank was intended for the Pennsylvania carrier and might be used in New York in the course of the carrier's business. The only jurisdictional basis alleged by plaintiffs in the complaint served on Darby in Kansas was that Darby had committed a "tortious act" in New York within the meaning of New York Civil Practice Law and Rules Section 302(a)(2),[1] and was thereby subject to in personam jurisdiction. A motion by appellant to dismiss the complaint for lack of jurisdictional basis[2] was granted at Special Term,[3] but the order of dismissal was reversed by the Appellate Division.[4] The Court of Appeals, one judge dissenting, *held*, the order of the Appellate Division reversed and the Supreme Court order dismissing the complaint reinstated. The court held that CPLR Section 302(a)(2) does not confer jurisdiction over defendants who have committed, outside New York, acts which lead to harmful consequences in New York.

Michael Singer, plaintiff in the second action, was injured in Connecticut while on a trip, when a geologist's hammer broke and a steel chip struck his eye. The hammer, made and labeled "unbreakable" by defendant-appellant Estwing in Illinois, was purchased and presented to the infant plaintiff in New York by an aunt. The aunt obtained the hammer from one of several independent retail stores in New York which handled appellant's merchandise, shipped to New York in large quantities f.o.b. Illinois. Estwing solicited orders from such stores by a manufacturer's representative in New York, by catalogues mailed into the state, and by general public advertising here. A previous suit, brought prior to the effective date of the CPLR, was dismissed since appellant was not "doing business" in New York; that is, plaintiff could not show defendant's "presence with 'a fair degree of permanence and continuity,' "[5] or that defendant conducted "a substantial part of his main business here."[6] The new complaint, brought under CPLR Section 302 was dismissed by the Court at Special Term[7] on the ground that appellant did not commit a tortious act within the state or transact

1. Hereinafter cited CPLR. See also 29A McKinney's Consolidated Laws of New York Ann. (pt. 3): New York Uniform Dist. Ct. Act, § 404(a)(1); New York City Civil Ct. Act, § 404(a)(1).

2. As provided by CPLR § 3211(a)(8).

3. Feathers v. McLucas, 41 Misc. 2d 498, 245 N.Y.S.2d 282 (Sup. Ct. 1964).

4. Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964) (per curiam).

5. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 261, 115 N.E. 915, 917 (1917).

6. Holzer v. Dodge Bros., 233 N.Y. 216, 221, 135 N.E. 268, 269 (1922). See also Brocia v. Franklin Plan Corp., 235 A.D. 421, 257 N.Y.S. 167 (4th Dep't 1932).

7. Order entered in the office of the Clerk of the County of New York, November 21, 1963, by Supreme Court Judge Jacob Markowitz.

any business within the state as required by that section. The Appellate Division[8] reversed the order dismissing the complaint, holding that Estwing had committed a tortious act in New York. On appeal the Court of Appeals *held* jurisdiction does not exist under CPLR Section 302(a)(2) (tortious act), as appellant Estwing neither made nor mislabeled the hammer in New York; but in personam jurisdiction may be asserted over appellant under CPLR Section 302(a)(1), since appellant did transact business in New York out of which plaintiff's cause of action arose. The two cases, *Feathers v. McLucas* and *Singer v. Walker*, were decided in a single opinion with a companion case, *Longines-Wittnauer Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).[9]

The states have expanded their jurisdiction over nondomiciliary defendants in response to the "invitation"[10] of the United States Supreme Court in *International Shoe Co. v. Washington.*[11] In that case the Court interpreted the due process clause to require only that such defendants "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[12] Several states soon enacted "long arm" or "single act" statutes[13] to avail themselves of the opportunities created by this interpretation of constitutional requirements. A milestone[14] was reached in 1956 when Illinois amended its Civil Practice Act so as to subject—

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8. Singer v. Walker, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964) (leave granted to appeal, 21 A.D.2d 966).

9. The *Longines-Wittnauer* case proper involved the solicitation, negotiation, and performance of services pursuant to a contract (along with the execution of a supplementary contract) in New York by a foreign corporation. Jurisdiction was upheld over the foreign corporation, in an action for breach of warranty by the New York firm, under the "transacts any business" provision (CPLR § 302(a)(1)). This case will not be further discussed herein.

In the *Singer* case, petition for writ of certiorari was denied by the United States Supreme Court on November 9, 1965, *sub nom.* Estwing Mfg. Co. v. Singer; Docket No. 473, 34 Law Week 3159, 3160 (Nov. 9, 1965). See also American Cyanamid v. Rosenblatt, 16 N.Y.2d 621, 261 N.Y.S.2d 69, 209 N.E.2d 112 (1965) (memorandum); appeal pending in United States Supreme Court, filed August 26, 1965; Docket No. 501, 34 Law Week 3081 (Sept. 14, 1965).

10. Cleary, *The Length of the Long Arm*, 9 J. Pub. L. 293 (1960).

11. 326 U.S. 310 (1945). For an excellent history of the expansion of jurisdiction over non-domiciliaries, see Note, *Developments in the Law: State Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960). See also Note, *Personal Jurisdiction Over Foreign Defendants*, 43 Minn. L. Rev. 569 (1959); O'Brien v. Comstock Foods, 123 Vt. 461, 194 A.2d 568 (1963).

12. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), quoting, in part, Milliken v. Meyer, 311 U.S. 457, 463 (1940). Compare Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923), and dissenting opinion of four Justices in Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 655 (1949). *Cf.* Inglis, *Jurisdiction, the Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws*, 81 L.Q. Rev. 380 (1965).

13. See, *e.g.*, Vermont Statutes 1947, § 1562 [now Vt. Stat. Ann., Title 12, § 855 (1958)]; Maryland Laws 1951, Art. 23, § 88 [now Md. Ann. Code, Art. 23, § 92B]; Minnesota Laws 1957, Ch. 538, § 1 [now Minn. Stat. Ann., § 303.13, subd. 1, par. 3 (1947) (Supp. 1964)]; Texas Acts 1959, 56th Leg., p. 85, Ch. 43 [now Tex. Rev. Civ. Stat. Ann., Art. 2031(b)(4) (Vernon 1964)]; North Carolina Sess. Laws 1955, Ch. 1143, § 1371(1) [now N.C. Gen. Stat. § 55-145 (1965)]; Washington Laws 1959, Ch. 131, § 2, p. 669 [now Wash. Rev. Code Ann., § 4.28.185 (1962)].

14. O'Connor & Goff, *Expanded Concepts of State Jurisdiction Over Non-Residents: The Illinois Revised Civil Practice Act*, 31 Notre Dame Law. 223 (1956).

> any person . . . to the jurisdiction of the courts of this State . . . as to any cause of action arising from the doing of any of said acts: (a) The transaction of any business within this State; (b) The commission of a tortious act within this State. . . .[15]

The purpose of this statute is to permit the Illinois courts to exercise in personam jurisdiction to the extent allowed by the *International Shoe* case.[16] The intent of the legislature was, in the words of one authority,[17] "to have the Illinois courts occupy the constitutionally permissible field of state court jurisdiction far more fully than has previously been done,"[18] by any other state. This was the effect of the quoted language, since previous statutes applied only to foreign corporations.[19] Until this amendment went into effect, jurisdiction could be obtained in Illinois only if a foreign corporation was "doing business" in the state.[20]

Many of the early Illinois decisions under the new statute reflected a recognition that "transaction of any business"[21] required less by way of detailed or continuous contacts than did "doing business."[22] Still, there seems to be little question that some act by the non-resident defendant in Illinois is required for the exercise of jurisdiction under this new provision.[23]

The "tortious act" phrase[24] has been the subject of considerable controversy among courts[25] and commentators[26] over whether an act within the state is required. A federal district court, interpreting the provision prior to any

15. Illinois Rev. Stat., ch. 110, § 17(1) (1963).
16. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
17. Professor Edward Cleary, Univ. of Illinois; Reporter, Joint Committee on Illinois Civil Procedure.
18. Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. Rev. 599 (1955).
19. As opposed to individuals; Vermont Statutes 1947, § 1562 [now Vt. Stat. Ann., Title 12, § 855 (1958)]; Maryland Laws 1951, Art. 23, § 88 [now Md. Ann. Code, Art. 23, § 92B (1957)]; North Carolina Sess. Laws 1955, Ch. 1143, § 1371(1) [now N.C. Gen. Stat. § 55-145 (1965)].
20. See text accompanying notes 5, 6, *supra*.
21. Illinois Rev. Stat. ch. 110, § 17(1)(a) (1963).
22. See, *e.g.*, National Gas Corp. v. AB Electrolux, 270 F.2d 472 (7th Cir. 1959), *cert. denied*, 361 U.S. 959 (1960); Walrus Manufacturing Co. v. New Amsterdam Cas. Co., 184 F. Supp. 214 (D.C. Ill. 1960); Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (D.C. Ill. 1958); Haas v. Fancher Furniture Co., 156 F. Supp. 564 (D.C. Ill. 1957); Nelson v. Miller, 11 Ill. 2d 673 (1959); Berleman v. Superior Dist. Co., 17 Ill. App. 2d 522, 151 N.E.2d 401 (1958); Sunday v. Donovan, 16 Ill. App. 2d 116, 147 N.E.2d 401 (1958).
23. Orton v. Woods Oil & Gas, 249 F.2d 198 (7th Cir. 1957); Grobark v. Addo Machine Co., 11 Ill. 2d 426, 158 N.E.2d 73 (as modified on a denial of rehearing) (1959); Saletko v. Willys Motors, Inc., 36 Ill. App. 2d 7, 183 N.E.2d 569 (1962). See also, Hanson v. Denckla, 327 U.S. 235 (1958); Shealy v. Challenger Mfg. Co., 198 F. Supp. 151 (D.C.S.C. 1961), *aff'd*, 304 F.2d 102 (4th Cir. 1962); Tyee Construction Co. v. Dulien Steel Prod., Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963); Harrington v. Croft Steel Prod., 244 N.C. 675, 94 S.E.2d 803 (1956).
24. Illinois Rev. Stat., ch. 110, § 17(1)(b) (1963).
25. See the opinion of Chief Judge Campbell in McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961).
26. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). For discussions generally approving the result reached, see: Note, *Civil Procedure: State Jurisdiction Over a Foreign Corporation*, 23 U. Pitt. L. Rev. 804 (1962); Note, *Conflicts of Laws and Minimum Jurisdictional Contacts*, 19 Wash. & Lee L. Rev. 271 (1962). *But see*, Note, *Jurisdiction Over Foreign Corporations—Single Tortious Act*, 36 Tul. L. Rev. 336 (1962); Note, 50 Geo. L.J. 310 (1961).

state decisions, held that an act (of negligence, etc.) within the state was required, since the phrase "tortious act" comprised more than damage or injury only.[27] In *Gray v. American Radiator & Standard Sanitary Corp.*,[28] the Illinois Supreme Court took the opposite view, apparently asserting that an injury in Illinois—the consequences of a negligent act elsewhere—is sufficient to satisfy the statutory language.[29] The court later made reference to "a reasonable inference that [defendant's] commercial transactions . . . result in substantial use and consumption"[30] in Illinois. While this may have forestalled due process criticism, it also obscured the precise ground of the decision,[31] as it injects a transaction of business tone into the discussion.[32] This imprecisely answered question—what a "tortious act within the state" is—has now been brought to New York.

The State of New York adopted the language of the Illinois statute[33] as CPLR Section 302.[34] Many of the early New York cases decided under the tortious act provision[35] sounded much like the *Gray* case;[36] that is, jurisdiction was upheld over non-domiciliaries who committed foreign "tortious acts" resulting in forum injuries. As in *Gray*[37] the courts then found sufficient "contacts, ties, or relations"[38] with New York to satisfy due process requirements. The

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27. Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957). *Accord*, Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957); Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961). See also Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1956).

28. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

29. See Note, *Torts—In Personam Jurisdiction Over Foreign Corporations and Due Process—A New Frontier*, 11 DePaul L. Rev. 368, 372-73 (1961). *Contra*, McLaughlin, *Practice Commentary*, 7B McKinney's Consolidated Laws of New York Ann. 428, 432 (1963).

30. 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961).

31. See Thornton, *First Judicial Interpretations of the New York Single Act Statute*, 30 Brooklyn L. Rev. 285, 291-92 (1964).

32. The relevance of this assertion to a discussion of a "single tortious act" basis for jurisdiction is questionable, unless it is intended to reinforce the decision by suggesting that the generic test of reasonableness is thereby satisfied. See McLaughlin, *supra* note 29, at p. 433; Thornton, *supra* note 31, at 291.

33. New York, Second Preliminary Report of the Advisory Committee on Practice and Procedure [N.Y. Legis. Doc. 1958, No. 13], p. 39. See note 15 *supra* and accompanying text. The language of the New York statute is not identical, but only stylistic changes were made.

34. N.Y. Sess. Laws 1962, ch. 308, § 302, effective September 1, 1963. For a thorough discussion of the statute and the effect thereon of the instant cases, see Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, *supra* p. 61.

35. Johnson v. Equitable Life Assurance Soc. of the U.S., 43 Misc. 2d 850, 252 N.Y.S.2d 477 (Sup. Ct. 1964); Moss v. Frost Hempstead Corp., 43 Misc. 2d 357, 251 N.Y.S.2d 194 (Sup. Ct. 1964); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Fornabaio v. Swissair Transp. Co., 247 N.Y.S.2d 203 (Sup. Ct. 1964) (all containing dicta indicating *Gray* case ruling). *Contra*, Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (Sup. Ct. 1964) where jurisdiction over foreign corporation was denied, on the authority of Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957) (*supra*, note 27 and accompanying text). See generally, Weeks, *Business Associations*, 16 Syracuse L. Rev. 280 (1964).

36. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

37. *Ibid.*

38. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

lower court opinions in the cases under review[39] also seemed to forecast a broad interpretation of the tortious act language. But the Court of Appeals has now ended that trend.

The pre-CPLR basis of "doing business"[40] in New York as a means of acquiring jurisdiction over a non-resident defendant for any cause of action (whether related to the business or not) has now been supplemented by CPLR Section 302(a)(1).[41] By this provision, the New York Legislature intended "to make non-domiciliaries doing acts within the state amenable to suit within the state,"[42] with regard to any cause of action arising[43] from those commercial[44] acts.[45] Most New York courts have applied the statute as it is commonly understood: a "single act" provision.[46] These courts have found no impediment either in the statutory language or the due process decisions to subjecting a defendant to suit on the basis of a single transaction, saying, e.g., that CPLR Section 302(a)(1) "apparently requires no continuity"[47] of contacts.[48] The discussion

39. Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964) (per curiam); Singer v. Walker, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964).

40. See *supra* notes 5, 6, and accompanying text. See also, Comment, *Transacting Business as Jurisdictional Basis—A Survey of New York Case Law*, 14 Buffalo L. Rev. 525 (1965); Homburger, *Book Review, New York Civil Practice, Weinstein, Korn, Miller*, 112 U. Pa. L. Rev. 1222 (1964).

41. Providing that New York courts may exercise jurisdiction in personam over any person who "transacts any business within the state . . . ," but the cause of action must arise out of that business. CPLR § 302 does not affect the pre-existing basis for jurisdiction; CPLR § 301 provides that "a court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." See Bryant v. Finnish Nat'l Airlines, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

An unauthorized foreign corporation cannot be subjected to jurisdiction by service of process on the Secretary of State (under N.Y. Bus. Corp. Law § 307), despite its "transaction of business" in New York (CPLR § 302); if the corporation is not "doing business," service must be made in person under CPLR § 313. Railex Corp. v. White Mach. Co., 243 F. Supp. 381 (E.D.N.Y. 1965).

42. New York, Second Preliminary Report of the Advisory Committee on Practice and Procedure [N.Y. Legis. Doc. 1958, No. 13], p. 37.

43. CPLR § 302. See also note 41, *supra*. Nor may any other cause of action be asserted against a defendant who is in New York to defend an action brought under CPLR § 302, unless it also arises from one of the enumerated acts. CPLR § 302(b).

44. See Willis v. Willis, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. 1964) holding that separation agreement is not "business" contemplated by the statute. See also Root v. Root, 43 Misc. 2d 337, 250 N.Y.S.2d 933 (Sup. Ct. 1964) holding substituted service improper in matrimonial action brought under this provision.

45. For a thorough discussion of prior case law, see, Comment, *Transacting Business as Jurisdictional Basis—A Survey of New York Case Law*, 14 Buffalo L. Rev. 525 (1965).

46. See, *e.g.*, Patrick Ellam, Inc. v. Nieves, 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1964); Iroquois Gas Corp. v. Collins, 42 Misc. 2d 473, 248 N.Y.S.2d 494 (Sup. Ct. 1964) (both containing dicta to the effect that the making of a contract in New York, without more, would be sufficient contact for exercise of jurisdiction). *But see*, Weeks, *Business Associations*, 16 Syracuse L. Rev. 280 (1964), for a discussion of problems raised by this assertion; see Homecrafts Inc. v. Gramercy Homes Inc., 41 Misc. 2d 591, 246 N.Y.S.2d 153 (Dist. Ct. Nassau Co. 1964).

47. Moss v. Frost Hempstead Corp., 43 Misc. 2d 357, 251 N.Y.S.2d 194 (Sup. Ct. 1964) (dicta). It is not enough, however, that goods on their way between two points outside New York chance to pass through New York. Brunette Sunapee v. Zeolux Corp., 288 F. Supp. 805 (S.D.N.Y. 1964).

48. There is dicta to the contrary: see, *e.g.*, Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (Sup. Ct. 1964) (wherein it was said, ". . . use of the quoted words [any business] connotes some consistent contacts or organized functions with or within the state." [*sic*]), *id.* at 108, 247 N.Y.S.2d at 603.

herein does not relate to any large extent to the "transacts any business" provision. But since the *Singer* case turned on this part of the statute, it does deserve mention at this point.

In deciding the instant cases, the Court of Appeals,[49] per Judge Fuld, first reaffirmed at considerable length its previously announced position that CPLR Section 302 can be retroactively applied,[50] citing several cases[51] and quoting CPLR Section 10003.[52] Then focusing on the individual cases, the Court reviewed the facts[53] of *Feathers* as they relate to jurisdiction under CPLR Section 302(a)(2).[54] The only acts of negligence charged to appellant[55] occurred in Kansas,[56] but the Appellate Division sustained jurisdiction[57] by concluding that "foreign wrongful acts"[58] coupled with "resulting forum consequences"[59] satisfied the statutory language. The Appellate Division found due process requirements satisfied by appellant Darby's "knowledge that the instant tank was constructed for"[60] the Pennsylvania firm, "intended for use in interstate commerce."[61] The opinion continues, ". . . it is a fair inference that respondent, . . . could be expected reasonably to foresee that its acts, if wrongful, might well have consequences in adjoining New York."[62] The Appellate Division went on to suggest that CPLR Section 302 was merely a codification of the minimum contacts test.[63] The majority of the Court of Appeals disagreed with the reasoning and the conclusions of the Appellate Division, asserting that the only question was not what the legislature could or should have done, but whether it had in fact "enacted legislation expanding the jurisdiction of our courts to the extent deter-

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49. Chief Judge Desmond concurring in the result only in *Singer v. Walker* and dissenting in *Feathers v. McLucas* in separate opinion; Judge Van Voorhis concurring in both cases and writing a separate opinion.

50. In actions brought for causes of action arising prior to the effective date of the statute.

51. The Court relied in part on United States v. First Nat'l City Bank, 379 U.S. 378 (1964); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964). *Accord*, Teague v. Damascus, 183 F. Supp. 446 (E.D. Wash. 1960) (construing Washington statute copied from Illinois). *Contra*, Davis v. Jones, 247 Iowa 1031, 78 N.W.2d 6 (1956).

52. Providing, in part, "This act shall apply to all actions hereafter commenced. . . ."

53. *Supra*, pp. 181-82.

54. As the Court notes, "There being no showing—indeed, not even a claim that the appellant transacted any business in this State . . . , the case necessarily turns on . . . paragraph 2." 15 N.Y.2d at 459, 209 N.E.2d at 76, 261 N.Y.S.2d at 20.

55. Viz., faulty design and defective fabrication.

56. Longines-Wittnauer Co. v. Barnes & Rienecke, Inc., 15 N.Y.2d 443, 459, 209 N.E.2d 68, 77, 261 N.Y.S.2d 8, 20; at any rate, they occurred outside New York.

57. Feathers v. McLucas, 21 A.D.2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964).

58. *Id.* at 559, 251 N.Y.S.2d at 550.

59. *Id.* at 559, 251 N.Y.S.2d at 550, citing Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), and Conklin v. Canadian-American Airways, 266 N.Y. 244, 194 N.E. 692 (1935). *But see* Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

60. Feathers v. McLucas, 21 A.D.2d 558, 560, 251 N.Y.S.2d 548, 551 (3d Dep't 1964).

61. *Id.* at 560, 251 N.Y.S.2d at 551.

62. *Id.* at 560, 251 N.Y.S.2d at 551.

63. *I.e.*, that the provisions were meant to establish the criteria for the exercise of jurisdiction under the minimum contacts test. Id. at 560, 251 N.Y.S.2d at 551.

mined by the Appellate Division. . . ."[64] The Court decided that the Appellate Division, in upholding jurisdiction, had gone beyond the limits prescribed by the statute. The majority said that it would refuse to read the phrase " 'commits a tortious act *within* the state' . . . as if it were synonymous with 'commits a tortious act *without* the state which causes injury within the state.' "[65] The Court explicitly denies the Appellate Division conclusion that "the acts complained of can be said to have been committed in this State,"[66] saying "the mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording."[67] Considering "the plain language of the statute and the expressed design of those who drafted it,"[68] the majority thus interpreted the statute to require that the non-domiciliary perform, while in New York,[69] some act to which the injury may be attributed.[70] Since the appellant was never in New York, the Court held there was no basis for jurisdiction.[71] The majority discussed but refused to follow *Gray v. American Radiator & Standard Sanitary Corp.*,[72] as they regarded it to have been decided on conflict of laws principles,[73] and in disregard of sound statutory construction.[74] To equate the terms "tort" and "tortious act" as did the Illinois court in *Gray*[75] is clearly a legislative function, according to the Court. Furthermore, had the legislature so desired or intended, there was no lack of models at hand which would have accomplished this result.[76]

In *Singer* the Court set out the facts relating to the tortious act ground for jurisdiction.[77] The interpretation of the statute announced in *Feathers* compelled

64. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21.

65. *Id.* at 459-60, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21.

66. Feathers v. McLucas, 21 A.D.2d at 559, 251 N.Y.S.2d at 550 (3d Dep't 1964).

67. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21. *But see* Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47 (Sup. Ct. 1964).

68. *Id.* at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21.

69. This would seem to re-open the question of whether jurisdiction may be obtained in a stockholders' suit against non-resident directors for neglect of corporate duties. It seems difficult to say that acts of omission are committed in any particular place, unless it is where the acts should be performed; but the directors are not there in most cases. See Platt Corp. v. Platt, 42 Misc. 2d 599, 249 N.Y.S.2d 1 (Sup. Ct. 1964). See also Barnes v. Andrews, 298 Fed. 614 (S.D.N.Y. 1924); Imberman v. Alexander, 16 Misc. 2d 330, 184 N.Y.S.2d 801 (Sup. Ct. 1959); Mannheim Dairy Co. v. Little Falls Nat'l Bank, 54 N.Y.S.2d 345 (Sup. Ct. 1945).

70. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24.

71. *Id.* at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24.

72. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

73. The Illinois court recited the familiar principle of conflict of laws that "the place of the wrong is where the last event takes place that is necessary to render the actor liable." Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 435, 176 N.E.2d 761, 762 (1961). See also Restatement, Conflict of Laws, § 377, n.1 (1934).

74. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 463, 209 N.E.2d at 79, 261 N.Y.S.2d at 23.

75. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

76. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 461-62, 209 N.E.2d at 78, 261 N.Y.S.2d at 21-22.

77. *Id.* at 464-65, 209 N.E.2d at 80, 261 N.Y.S.2d at 24-25; petition for certiorari was

the conclusion that appellant was not subject to jurisdiction here under CPLR Section 302(a)(2). "The tortious conduct . . . consists solely of its acts in manufacturing an assertedly defective hammer and in attaching to it a false label, both of which unquestionably took place in Illinois."[78] The conclusion of the Appellate Division that the putting into circulation in New York of a defectively made and mislabeled hammer was a new and independent in-state[79] tortious act of "creating . . . a continuing condition of hazard"[80] was rejected by the majority. Jurisdiction will not lie under CPLR Section 302(a)(2) in the absence of a tortious act by appellant within the forum.[81]

Jurisdiction was however upheld in this case under the transaction of business provision.[82] Pointing out that CPLR Section 302(a)(1) "is not limited to actions in contract; it applies as well to actions in tort when supported by a sufficient showing of facts,"[83] the Court discussed appellant's other contacts with New York. The Court noted that, in addition to the solicitation activities mentioned previously, appellant had shipped substantial quantities of its goods here and that the presence in New York of the fateful hammer was traceable to appellant's solicitation.[84] These facts were held "to satisfy [both] the statutory criterion of transaction of business"[85] and the "minimum contacts" due process test.[86] Since the cause of action arose from the transaction of the business, jurisdiction is sustained.

Chief Judge Desmond concurred in the result in *Singer*, but strongly took issue with the majority decision that CPLR Section 302(a)(2) does not confer jurisdiction in both cases.[87] Characterizing the interpretation of the majority as "restrictive,"[88] the Chief Judge cited several similar statutes[89] and cases construing them to show that "tortious act" means "part of a tort." The tort here charged involves three parts, he asserts: manufacture, distribution, and injury.

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denied by the United States Supreme Court on November 9, 1965, *sub nom.* Estwing Mfg. Co. v. Singer; Docket No. 473, 34 Law Week 3159, 3160 (Nov. 9, 1965).

78. *Id.* at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

79. *Id.* at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

80. Singer v. Walker, 21 A.D.2d 285, 289, 250 N.Y.S.2d 216, 221 (1st Dep't 1964) referred to in quoted language, Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 25.

81. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 25.

82. *Id.* at 467, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

83. *Id.* at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

84. *Id.* at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 26. For similar result under analogous Alabama statute, see Boyd v. Warren Paint & Color Co., 254 Ala. 687, 49 So. 559 (1950). See also Hanson v. Denckla, 357 U.S. 235 (1958); Note, 43 Minn. L. Rev. 569, esp. 576 (1963).

85. *Id.* at 467, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

86. *Id.* at 467, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

87. *Id.* at 470, 472, 209 N.E.2d at 83, 85, 261 N.Y.S.2d at 29, 31.

88. *Id.* at 470, 209 N.E.2d at 84, 261 N.Y.S.2d at 29. *Cf.* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Note, 15 Syracuse L. Rev. 78 (1963); applying "grouping of contacts" test in favor of New York resident injured in Ontario auto accident.

89. In addition to the statutes cited *supra* note 13, the Chief Judge cites Connecticut Gen. Stat. Rev. § 33-411(c) (1959) and West Virginia Code Ann. § 3083 (1961).

By sending the hammer into New York, the appellant committed part of the tort.[90] And this to the Chief Judge is synonymous with "tortious act."[91] Chief Judge Desmond relies in part on *Gray*[92] in so construing CPLR Section 302(a)(2), and justified his reliance by saying, "When our Legislature adopted the language of the Illinois Legislature it presumably adopted with it the construction given the statutory language by the Illinois courts in Gray . . . ."[93] The Chief Judge also voted to affirm the finding of jurisdiction in *Feathers*[94] on the same basis: that when appellant's "conduct of his business is such that he contemplates the delivery of his product in a forum state he is guilty of a tortious act in the forum state if the product is defective in such manner that the manufacturer is liable in tort."[95]

It can hardly be disputed that the words "act within the State,"[96] if taken literally, strongly suggest the construction given them by the Court of Appeals.[97] But there are several grounds for arguing that this construction is neither dictated by the language nor by the policy considerations underlying its enactment. First, the expansion of jurisdiction over non-domiciliaries has long since passed the point allowed by this interpretation.[98] This does not mean that the legislature necessarily intended to confer jurisdiction beyond the limits now imposed; it does suggest that precedent existed, and that the Court might have construed the language in keeping with the powers asserted by other states.[99] Had the majority entertained doubts about the constitutionality of exercising jurisdiction

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90. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30.

91. *Id.* at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30.

92. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

93. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30.

94. *Id.* at 472, 209 N.E.2d at 85, 261 N.Y.S.2d at 31.

95. *Id.* at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30. See McLaughlin, *Civil Practice*, 16 Syracuse L. Rev. 419, esp. 434 (1964).

96. CPLR § 302(a)(2).

97. See text accompanying note 67, *supra*. *Cf.* State v. Associated Building Contractors of Triple Cities, Inc., 47 Misc. 2d 699, 263 N.Y.S.2d 74 (Sup. Ct. 1965) (relying on a "careful reading" of CPLR § 302 to deny jurisdiction over individual defendant who was New York resident when acts were committed, but a resident of Ohio when papers were served on him in the latter state). See also McLaughlin, *Supplementary Practice Commentary*, 7B McKinney's Consolidated Laws of New York Ann. 19, 22 (1964 Cum. Supp.). *Contra*, O'Connor v. Wells, 43 Misc. 2d 1075, 252 N.Y.S.2d 861 (Sup. Ct. 1964).

98. See Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Nixon v. Cohn, 62 Wash. 2d 987, 385 P.2d 305 (1963); Weinstein, *Trends in Civil Practice*, 62 Colum. L. Rev. 1431, II.A. "Easier Acquisition of Jurisdiction," at 1435 (1962)

99. One anomalous result of these decisions is illustrated by the following example: Suppose a New York firm and an Illinois firm make identically defective widgets. Each widget travels through the hands of several intermediaries and finally arrives (as have many of its predecessors) in the other's state, where its manufacturer does not transact any business directly. When the respective purchasers are injured, both suits will probably be brought in Illinois, despite the fact that the jurisdictional statutes of both states are substantively identical. By these decisions New York has foregone jurisdiction over the Illinois manufacturer.

in the cases under review, it is doubtful that they would advance statutes which purport to do so as alternatives available to the legislature.[100]

Secondly, it is a settled rule of statutory construction that the legislature of the state adopting a statute from a foreign jurisdiction "is presumed to have adopted the construction which has been put on the statute by the courts of the state of its inception."[101] That construction, announced by the Illinois court in *Gray*[102] in 1961, would probably permit the exercise of jurisdiction in the *Feathers* case.[103] Had the legislature wished to avoid this result, it could have changed the language of the statute or added a caveat to restrict the statute as it saw fit, before its passage in 1962.[104] It is curious that this rule of construction is not mentioned in the majority opinion;[105] the Illinois interpretation was treated as having no special significance, when it should have been given "great weight"[106] in construing the New York statute. And since "tortious act within the State"[107] could be considered a term of art, the Court need not have felt impelled to give the words such a literal treatment.

Thirdly, while the legislative history is so brief as to be of little assistance in interpreting the statute, it does not compel the result reached by the Court, and may even suggest the opposite result. The basic premise of the draftsmen (as

100. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 461-62, 209 N.E.d at 77-79, 261 N.Y.S.2d at 21-22. "Long-arm" or "single-act" statutes of various types have been upheld against constitutional challenges: See, *e.g.*, United States v. First Nat'l City Bank, 379 U.S. 378 (1964); McGee v. International Ins. Co. 355 U.S. 220 (1957); Gkiafis v. Steamship Yiosonas, 342 F.2d 546 (4th Cir. 1965); Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 247, 251 N.Y.S.2d 443 (1964); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Nelson v. Miller, 11 Ill. 2d 278, 143 N.E.2d 673 (1959). It must be borne in mind that extreme applications of these states may, however, violate due process: See, *e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Lone Star Motor Import, Inc. v. Citroen Cars Corp., 185 F. Supp. 48 (S.D. Texas 1960) (unconstitutional in part) (But see Hearne v. Dow-Badische Chem. Corp., 224 F. Supp. 90 (S.D. Texas 1963), upholding similar application of Texas statute.). *Cf.* Peters v. Robin Airlines, 281 A.D. 903, 120 N.Y.S.2d 1 (2d Dep't 1953).

101. 2 Sutherland, *Statutory Construction*, § 5209, pp. 551-52 (1945). See also Iacone v. Cardillo, 208 F.2d 696 (2d Cir. 1953); Great Northern Tel. Co. v. Yokahama Specie Bank, 297 N.Y. 135, 76 N.E.2d 117 (1947); 1 McKinney's Consolidated Laws of New York Ann., Statutes §§ 261-62, pp. 314-19 (1942). The adopting state may refuse to follow the precedent if it finds the decision to be poorly reasoned, contrary to the purpose of the statute, or offensive to settled forum policy.

102. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

103. There is not much question that the Gray rationale would permit the exercise of jurisdiction over the appellant in *Feathers*. The language of the *Gray* decision does not rule out the same result in *Singer*, despite the fact that the injury occurred in Connecticut, since the appellant had sufficient contacts with New York to make it reasonable for it to defend here. See McLaughlin, *Practice Commentary*, 7B McKinney's Consolidated Laws of New York Ann., at 432 (1942).

104. Approved by the Governor April 4, 1962; effective September 1, 1963.

105. The reason given by the majority for considering the *Gray* case was "the emphasis given the decision by the appellants. . . ." 15 N.Y.2d at 462, 209 N.E.2d at 79, 261 N.Y.S.2d at 23.

106. 1 McKinney's Consolidated Laws of New York Ann., § 262, pp. 317-18 (1942). See also Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. Rev. 559, 609 (1955).

107. CPLR § 302(a)(2).

set out in the Second Preliminary Report) was stated to be "that persons in the state should be permitted to protect their interests by resort to the courts of the state."[108] Furthermore, one of the objectives was "to make it possible, with very limited exceptions, for a litigant in the New York courts to take full advantage of the state's constitutional power over persons and things."[109] The advisory committee apparently anticipated some latitude being left to the courts, since it was noted that the proposed statute (the present CPLR Section 302) did not define jurisdiction directly, but left that to the case law.[110] Thus it appears that the "expressed design of those who drafted"[111] CPLR Section 302 was to broaden jurisdiction beyond the limits now imposed.

Moreover, the advisory committee chose to reprint the practice notes[112] to the Illinois statute, which include the assertion that the scope of Illinois Civil Practice Act Section 17[113] is equivalent to that of the Vermont and the Maryland statutes, with regard to tortious acts.[114] Since the New York draftsmen do not, in their own comments, disagree with or criticize this assertion, it might be inferred that they accepted this supposition. Thus assuming the Vermont and Maryland statutes would be broad enough to confer jurisdiction in the instant cases, as the Court suggests,[115] the legislative history can be read to mean that the New York statute does likewise. This argument lends further weight to Chief Judge Desmond's assertion[116] that "tortious act" means "part of a tort,"[117] since the Vermont statute[118] extends to "a tort in whole or in part" within the state, and the Maryland statute[119] to "acts giving rise to liability in the state."

Finally, the application of a jurisdictional statute must balance the interests of the plaintiff, the defendant, and the court.[120] To the extent that the interests of the parties are safeguarded elsewhere, they need less emphasis in deciding whether or not to exercise jurisdiction in any given case. The oppressed plaintiff

108. New York, Second Preliminary Report of the Advisory Committee on Practice and Procedure [N.Y. Legis. Doc. 1958, No. 13], p. 37.

109. *Ibid.*

110. *Ibid.*

111. Fuld, J., writing for the majority in Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 560, 209 N.E.2d at 77, 261 N.Y.S.2d at 21. See also text accompanying notes 68-70, *supra.*

112. Jenner & Tone, *Historical and Practice Notes*, Illinois Rev. Stat. Ann. (Smith-Hurd 1956), pp. 165-171; New York, Second Preliminary Report of the Advisory Committee on Practice and Procedure [N.Y. Legis. Doc. 1958, No. 13], pp. 471-78.

113. Illinois Rev. Stat., ch. 110, § 17 (1963).

114. Jenner & Tone, *op. cit. supra*, at 168; reprinted at 474-75 of the New York work cited.

115. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 461-62, 209 N.E.2d at 77-78, 261 N.Y.S.2d at 21-22.

116. Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30.

117. See text accompanying notes 89-91, *supra.*

118. Vermont Stat. Ann., Title 12, § 855 (1958). See, *e.g.*, Deveny v. Rheem, 319 F.2d 124 (2d Cir. 1963); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

119. Maryland Ann. Code, Art. 23, § 92B (1957). See, *e.g.*, Gkiafis v. Steamship Yiosonas, 342 F.2d 546 (4th Cir. 1965); White v. Caterpillar Tractor Co., 235 Md. 368, 201 A.2d 856 (1964).

120. Weinstein, *op. cit. supra* note 98, at 435.

may be able to obtain relief by removal to, and change of venue in the Federal courts.[121] The specter of remaining due process restrictions should not be too quickly invoked to make the plaintiff's task unreasonably difficult or expensive.[122] It must be remembered that there is a point at which the denial of a nearby forum to the injured plaintiff is offensive to "traditional concepts of fair play and substantial justice."[123]

DOUGLAS C. DODGE

COMMERCIAL LAW—UNIFORM COMMERCIAL CODE—DRAWER-BANK OF TELLER'S CHECK CANNOT STOP PAYMENT WHEN NOT PARTY TO UNDERLYING TRANSACTION

Carole Kuebler purchased a teller's check from the drawer Savings Bank. The check was in the sum of $450 payable to the order of payee Malphrus and drawn on the Commercial Bank. Payee Malphrus received the check in part payment for an automobile delivered to Miss Kuebler. Drawer Savings Bank stopped payment on its teller's check upon the request of Miss Kuebler. When payee Malphrus presented the check to the Commercial Bank, payment was refused due to drawer Savings Bank's stop order. Payee Malphrus sued the drawer Savings Bank for the amount of the check. The court *held* that where a bank issued a teller's check payable to a seller and received consideration for the check from the buyer, the check was considered a certified check and payment could not be stopped by the bank. *Malphrus v. Home Savings Bank*, 44 Misc. 2d 705, 254 N.Y.S.2d 980 (Albany County Ct. 1965).

Generally, an ordinary check is taken as conditional payment of an underlying obligation.[1] It does not operate as an assignment of funds in the hands of a drawee bank available for its payment, and the drawee bank is not liable on a check until accepted.[2] A drawer of a check is not discharged on an underlying debt until a seller or creditor presents a check to a drawee bank and the check is accepted[3] or paid.[4] Since delivery of an ordinary check does not constitute absolute payment nor discharge of a drawer, a drawer may stop payment on the check.[5] Payment may be stopped for any valid reason[6] if timely notice is given

121. Assuming requisite jurisdictional amount is involved; see 28 U.S.C.A. §§ 1441, 1404(a), 1406(a). In light of the typical injuries in the cases involved herein, this assumption seems warranted.

122. See Jesmer, *Recent Decisions Affecting* § *17*, 48 Ill. Bar Jour. 132 (1959).

123. Milliken v. Meyer, 311 U.S. 457, 463 (1940); quoted with approval in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

1. See Carroll v. Sweet, 128 N.Y. 19, 27 N.E. 763 (1891); Burkhalter v. Second Nat'l Bank, 42 N.Y. 538 (1870); 1 Paton, Digest of Legal Opinions 1091 (1940).

2. N.Y. Uniform Commercial Code (hereafter referred to as U.C.C.) § 3-409(1).

3. "Acceptance is the drawee's signed engagement to honor the draft as presented." N.Y. U.C.C. § 3-410(1).

4. See N.Y. U.C.C. § 4-213(1) for determination of when an item is finally paid.

5. Florence Mining Co. v. Brown, 124 U.S. 385, 391 (1888); see Glennan v. Rochester Trust & Safe Deposit Co., 209 N.Y. 12, 16, 102 N.E. 537, 539 (1913).

6. Generally, payment is stopped because of fraud or failure of consideration in the