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Constitutional Law-Conflicts-In Personam Jurisdiction in Missouri

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preme Court,[49] thereby indicating that this type of aid complies with the federal standards.

It is clear that *Rogers* evidences a perceptible movement away from the traditional policy of absolute separation of church and state in Missouri. It rejects the proposition that the Missouri Constitution prohibits *any* program which in some manner aids an institution with religious affiliations. Instead, the Missouri Supreme Court properly directed its attention to the issue of whether or not the educational function is benefitted and supported. In this respect the court in *Rogers* accepted the reasoning of the federal approach which recognizes that states should be permitted to provide assistance to schools whose predominant function in higher education is to provide students with a secular education, even though the schools have religious functions.[50] As long as the school uses the money for secular purposes, an equilibrium between church and state can be effectively maintained.

WILLIAM G. REEVES

CONSTITUTIONAL LAW—CONFLICTS—IN PERSONAM JURISDICTION IN MISSOURI

State ex rel. Gering v. Schoenlaub[1]

Plaintiff Lyle sold cattle to Tige Enterprises of Gering, Nebraska, and received in payment several checks drawn on Tige's account at the Bank of Gering. Plaintiff deposited these checks in the American National Bank of St. Joseph, Missouri. American National Bank in turn forwarded the checks to the Bank of Gering for collection. Although some of the checks were paid, some could not be paid because Tige's balance in the Bank of Gering could not cover all the checks. The Bank of Gering held on to the unpaid checks for six months before it sent them back to American National and made no attempt prior to returning the checks to notify plaintiff or American National that the checks would not be honored. Because he was not given prompt notice that the checks would be unpaid, plaintiff was unable to recover the cattle from Tige. Plaintiff brought suit in Missouri against the Bank of Gering for negligently failing to notify him that the checks were not honored. The Bank of Gering entered a special appearance to challenge the jurisdiction of the court, arguing that jurisdiction in

49. Tilton v. Richardson, 403 U.S. 672 (1971).
50. *Id.* at 687.

1. 540 S.W.2d 31 (Mo. En Banc 1976).

Missouri would violate due process. This motion was overruled, and the Bank of Gering petitioned for a writ of prohibition. The Supreme Court of Missouri granted the writ, holding that in personam jurisdiction could not be exercised over the Bank of Gering.

Since Missouri enacted its long-arm statute in 1967, the Missouri courts have consistently expanded Missouri's reach over nonresidents.[2] However, the Missouri Supreme Court's decision in *State ex rel. Gering v. Schoenlaub* threatens to severely limit Missouri's long-arm jurisdiction. The language of *Gering* appears to require that a nonresident defendant know that his conduct will have consequences in Missouri before a Missouri court can exercise jurisdiction. This is a much more restrictive standard than that employed by most courts, which require only that a defendant could foresee that his conduct would have consequences in the forum state. Therefore, although the result reached in *Gering* does serve the best interests of the banking industry, the reasoning in the opinion implies needless restrictions on the jurisdiction of Missouri courts and should not be applied in future cases. The court could have reached the same result had it distinguished between the exercise of jurisdiction in tort and in contract cases, and had it recognized that in contract cases, it is the agreement of the parties which should be given primary emphasis in determining whether they are amenable to suit in foreign jurisdictions.

The development of the so-called long-arm statutes[3] was made possible by the United States Supreme Court's 1945 decision in *International*

2. Prior to *Gering* the only Missouri case limiting Missouri's long-arm jurisdiction was Washington v. Washington, 486 S.W.2d 668 (Mo. App., D. St. L. 1972), where it was held that Missouri's long-arm statute could not be used in divorce proceedings to obtain personal jurisdiction over a nonresident husband. The rule in *Washington* was subsequently abrogated by MO. R. CIV. P. 54.06. *See generally* Keet, *Rule 54 Extends the Long Arm to the Peregrine Male,* 29 J. MO. BAR 363 (1973).

3. §506.500, RSMo 1969 provides:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:
>
> (1) The transaction of any business within this state;
>
> (2) The making of any contract within this state;
>
> (3) The commission of a tortious act within this state;
>
> (4) The ownership, use, or possession of any real estate situated within this state;
>
> (5) The contracting to insure any person, property or risk located within this state at the time of contracting.
>
> 2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

See also CONN. GEN. STAT. § 52-596 (Supp. 1971); ILL. REV. STAT. ch. 110, § 17(1)(a) (1971); IOWA CODE § 617.3 (1973); MICH. COMP. LAWS ANN. § 600.705 (1968); NEB. REV. STAT. § 25-536 (Supp. 1972); N.C. GEN. STAT. § 1-75.4 (1969).

Shoe Co. v. Washington.[4] In *International Shoe* the Court discarded the old rule that due process prevents jurisdiction from being exercised over a defendant not served with process within the forum state.[5] Instead, the Court introduced a radically new line of reasoning, holding that the exercise of personal jurisdiction over a nonresident defendant does not violate due process as long as there exist minimum contacts between the nonresident and the forum state, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[6]

The thrust of *International Shoe* was that a state may exercise in personam jurisdiction where reasonable to do so, and the Court made no attempt to define the limiting effect of state boundaries. In 1957, the Court in *McGee v. International Life Insurance Co.*[7] expanded the definition of reasonableness, upholding a California court's assertion of jurisdiction over an insurance company which merely had mailed a single insurance policy into the state. One year later, however, the Court found occasion, for the first time since *International Shoe,* to reaffirm the relevance of state boundaries as a factor in determining the extent of a state court's jurisdiction. In *Hanson v. Denckla*[8] the Court emphasized that the jurisdictional power of any particular state is still limited to some degree by its boundaries.

In *Hanson* a woman executed an inter vivos trust in Delaware, making a Delaware trust company trustee of certain securities, reserving the income for life, and providing that the remainder should be paid to whomever she should appoint by inter vivos or testamentary instrument. Later, after becoming domiciled in Florida, the settlor purported to exercise the power of appointment. After she died, suit was filed in a Florida court to determine the validity of the exercise of the power of appointment. The nonresident trust company, as trustee, was made a party and served by mail and publication. The only contact the trustee had with Florida was the mailing of trust income and other correspondence to the settlor. The Supreme Court held that these contacts were insufficient for a Florida

4. 326 U.S. 310 (1945). The development and history of long-arm jurisdiction has been the subject of many excellent studies. The leading articles include Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 533; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review,* 25 U. CHI. L. REV. 569 (1958); *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909 (1960). *See also* Kaplan, *Expanding Permissible Bases of Jurisdiction in Missouri: The New Long-Arm Statute,* 33 MO. L. REV. 248 (1968).

5. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). *Pennoyer* held that an in personam judgment was not valid against a nonresident defendant who had not been served with process within the state. Mr. Justice Field writing for the Court stated that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Id.* at 720.

6. 326 U.S. at 316.

7. 355 U.S. 220 (1957).

8. 357 U.S. 235 (1958).

court to assume jurisdiction over the trust company. The major factor the Court stressed in denying jurisdiction was the absence of any act by which the defendant "purposely avail[ed] itself of the privilege of conducting activites within the forum State, thus invoking the benefits and protections of its laws."[9]

Some courts have interpreted *Hanson* to require a conscious association, in addition to minimum contacts.[10] These decisions have required that the defendant purposely conduct or solicit business in the forum state before jurisdiction can be exercised. On the other hand, the requirement of purposeful activities has been firmly rejected in other cases.[11] In those cases it is reasoned that, in view of the circuitous route by which many manufactured goods enter a state, requiring a purpose on the part of a defendant to sell its goods in the forum state would preclude jurisdiction in a great number of product liability cases.[12] There exists a vast discrepancy in financial resources between the usual parties involved in product liability cases. The corporate defendant generally can afford to defend suits brought out of state, but the typical plaintiff cannot afford to sue in any state other than that in which he is domiciled. As a result, limited jurisdiction would thwart the public policy behind products liability: to provide damages for every party injured by negligent manufacturers.[13]

Consequently, some courts have extended jurisdiction beyond the literal language of *Hanson*[14] by developing the "stream of commerce" theory. It is thought fair that a manufacturer injecting his product into the stream of interstate commerce should be subject to suit in the state in which the product causes injury.[15] Therefore, these courts have sustained juris-

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9. *Id.* at 253.

10. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966); O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 194 A.2d 568 (1963); Oliver v. American Motors Corp., 70 Wash. 2d 875, 425 P.2d 647 (1967).

11. Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Jones Enterprises, Inc. v. Atlas Serv. Corp., 442 F.2d 1136 (9th Cir. 1971); Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970); Williams v. Vick Chem. Co., 279 F. Supp. 833 (S.D. Iowa 1967); Keckler v. Brookwood Country Club, 248 F. Supp. 645 (N.D. Ill. 1965); Metal-Matic, Inc. v. 8th Judicial Dist. Ct. of Nevada, 82 Nev. 263, 415 P.2d 617 (1966).

12. *See* Comment, *In Personam Jurisdiction over Nonresident Manufacturers in Product Liability Actions,* 63 MICH. L. REV. 1028 (1965).

13. *See generally* Levin, *The "Long Arm" Statute and Products Liability,* 4 WILLAMETTE L. J. 331 (1967); Comment, *Constitutionality of the Consumer Protection Long Arm Statute,* 10 GONZ. L. REV. 509 (1975).

14. In Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966), the court reasoned that *Hanson* was not meant to be literally construed in cases involving negligence, because by definition a negligent act cannot be purposeful.

15. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) was the seminal case which first formulated the "stream of commerce" theory:

> With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer

diction if the defendant could reasonably foresee that his transactions would have consequences in the forum state.[16]

The problem in applying the stream of commerce theory has been how to define that theory's outward boundaries. The stream of commerce theory could be limited to cases involving tangible personal injuries.[17] However, the decided trend is to allow jurisdiction based on foreseeability in economic as well as tangible injury cases.[18] In fact, it has been argued that jurisdiction should be even broader in the case of economic injuries.[19]

A more meaningful distinction can be made by analyzing the transaction underlying the controversy over which a state court attempts to assert long-arm jurisdiction. Even where applied to both economic and tangible injuries, the stream of commerce theory has typically been limited to tort actions. In the first place, relaxed jurisdictional limitations in tort actions are consistent with society's judgment that tortfeasors, as wrongdoers, owe a moral obligation to innocent parties injured by their actions. For this reason courts are not as sensitive in providing a convenient forum for alleged tortfeasors as they are in other cases.[20] Furthermore, due process

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deals directly with consumers in other states. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this state to justify a requirement that he defend here.

Id. at 442, 176 N.E.2d 766.

16. *See, e.g.*, Southern Mach. Co. v. Mohasco, 401 F.2d 374 (6th Cir. 1968). "The defendant has purposefully availed himself of the opportunity of acting there [the forum state] if he should have reasonably foreseen that the transaction would have consequences in that state." *Id.* at 382-83.

17. *See, e.g.*, Gypsy Pipeline Co. v. Ivanhoe Petroleum Corp., 256 F. Supp. 567, 569 (D. Colo. 1966). *Gypsy Pipeline* involved a conspiracy to bring about the breach of a contract, and the court held that "[n]o case has recognized the applicability of the long-arm statute in a situation like the present one, that is, where what might be described as an intangible injury takes place within the forum state . . . ."

18. Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Florendo v. Pan Hemisphere Transport, Inc., 419 F. Supp. 16 (N.D. Ill. 1976); Hitt v. Nissan Motor Co., 399 F. Supp. 838 (S.D. Fla. 1975).

19. Hitt v. Nissan Motor Co., 399 F. Supp. 838 (S.D. Fla. 1975) was a private antitrust suit in which the court made the argument that, if anything, jurisdiction should be extended even more for some economic injuries. The court reasoned that injuries of a pecuniary nature are as foreseeable as are personal injuries. Furthermore, "every buyer of such a 'tainted' product is injured and thus the injury is widespread whereas injuries due to defective products are generally relatively rare . . . ." *Id.* at 848.

20. The courts often confuse the issues of due process and statutory interpretation. Subsequently, the relaxation of due process limitations in tort cases is obscured by the courts' discussion of a particular statute. The opinions rarely, if ever, explicitly express the courts' readiness to expand the boundaries of due process in the case of a nonresident defendant alleged to have committed a tort. However, the courts' willingness to do so is apparent from the broad interpretation given statutes which base jurisdiction on "[t]he commission of a tortious act within

limitations that are overly restrictive impose a considerable burden on individuals injured by the negligence of a party with far greater financial resources.[21]

In cases based on contract, however, the stream of commerce theory should no longer be applied. Unlike tort cases, the parties in contract cases do not fit into the roles of wrongdoer and innocent victim. A party may be in breach of contract, but the parties have bargained on a supposedly equal basis. Therefore, there is not as great a need to protect a plaintiff with limited financial resources, because the parties were aware of any financial inequality and the difficulty of bringing suit in a foreign state when they entered into the contract. In other words, mere foreseeability should not be allowed to sustain jurisdiction in contract cases, because the parties, through their agreement, structure their expectations as to a forum.

If the parties have dealt with jurisdiction in the contract, their agreement should be given effect as long as it is reasonable.[22] Of course, the majority of cases do not involve such an agreement, and the court must infer the parties' expectations from the substance of the contract. In these cases the criteria presented in section 188 of the *Restatement (Second) of Conflict of Laws* are a viable jurisdictional test.[23] These standards are useful

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this state." *See, e.g.*, § 506.500, RSMo 1969. For example, in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) the court applied *Restatement of Conflict of Laws* § 377 (1934) to determine if a tortious act occurred in Illinois: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Section 377 of the 1934 *Restatement* has been superseded by § 145 of the second *Restatement* which lists the place of injury as only one factor. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). This standard would be somewhat restrictive if used to determine in what state a tortious act occurred. Therefore, for purposes of jurisdiction the courts still concern themselves with the state in which the injury occurred. *See, e.g.*, Fulton v. Chicago R. I. & Pac. R.R., 481 F.2d 326 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973). "Missouri case law construes the phrase 'commission of a tortious act within this state' to include extraterritorial acts producing actionable consequences in Missouri." *Id.* at 331.

21. *See* text accompanying notes 12 and 13 *supra*.

22. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); National Equipment Rental, Ltd., v. Szukhent, 375 U.S. 311 (1964); Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 80 (1971). *The Bremen* is concerned with the special circumstances present in admiralty cases, and therefore may not be direct authority for the proposition that reasonable forum-selection clauses should always be given effect. Nevertheless, Chief Justice Burger's reasoning is equally applicable to domestic as well as to international transactions. *But see* Seilon, Inc. v. Brema S.p.A., 271 F. Supp. 516 (N.D. Ohio 1967). For an excellent discussion of the problem of forum-selection clauses in contractual relations, see Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300 (1970).

23. RESTATEMENT (SECOND) CONFLICTS OF LAWS § 188 (1971) provides five contacts to be taken into account: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.

not because they are the *Restatement's* approach to the choice of laws, but because they present reliable criteria for deciding which state has the most significant relationship to the contract.[24] The parties to a contract would usually expect to be amenable to suit within the state which is most closely related to their agreement. Therefore, if after applying the *Restatement* criterion the chosen forum has the most significant relationship to the case, it should normally have jurisdiction.

If there is a forum with a more significant relationship, then the court needs to extend its analysis one step further. It is inherently important that the same substantive law govern a jural relationship wherever the litigation takes place, but it is not always necessary to pinpoint one forum. Therefore, even if the chosen forum does not have the most significant relationship to a contract, jurisdiction might still be allowed as long as that state has some reasonable connection with the case. The court should look to the parties' agreement to determine if there are important reasons for insisting on resort to another forum, and should not deny jurisdiction unless such reasons exist.

It must be stressed that even if the courts apply different specific criteria for determining jurisdiction in tort actions than in contract actions, the underlying principle for all cases is the same. Jurisdiction cannot be exercised over a nonresident unless it is reasonable and fair to do so, and this standard cannot be applied mechanically.[25] Given the ambiguities of due process, no test can be applied without examining the specific facts of each case.

For example, in *Kerrigan v. Clarke Gravely Corp.*[26] the plaintiff, a Pennsylvania resident, was injured by a snowblower attached to a tractor. The plaintiff brought suit against the manufacturer of the tractor on a theory of strict liability and also against a New Jersey partnership which had repaired the tractor. The partnership moved to dismiss for lack of jurisdiction over its person, and the federal judge granted the motion. The court recognized the line of cases utilizing foreseeability as a test, and realized that under these cases an argument could be made for holding the partnership subject to jurisdiction as the partnership knew that plaintiffs were Pennsylvania residents. It therefore was reasonably foreseeable that any negligent repairs would have harmful consequences in Pennsylvania. Nevertheless, the court stressed that the defendant partnership was a small operation with little interstate impact, and considered that a blanket application of the foreseeability test would produce unfair results in particular situations.

The flexibility of the constitutional standard as exhibited in *Kerrigan* also explains the Court's statement in *Hanson* that jurisdiction cannot

24. *Id.*
25. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
26. 71 F.R.D. 480 (M.D. Pa. 1975).

always be predicated on the choice of laws.[27] Just as there will be exceptional tort cases where the stream of commerce theory should not be applied, there might also be contract cases where the state with the most significant relationship to a contract could not exercise jurisdiction, for example, if the contract were one of adhesion. This does not mean that there are not valid guidelines available for determining jurisdiction, but simply that the Supreme Court decisions do not allow totally valid generalizations.[28]

Although the *Gering* court dealt with the language of Missouri's long-arm statute, it has been decided that the Missouri legislature's intent was to pass a long-arm statute that would act as a functional equivalent of due process.[29] If jurisdiction over the Bank of Gering met due process requirements, it should have been sustained under the Missouri statute. Therefore, despite the court's language, *Gering* was decided on constitutional grounds.

The majority in *Gering* realized that the Bank of Gering could have foreseen that a customer would write checks in a nearby state and that the failure to notify of dishonor would cause injury in that state. Under the reasoning of cases applying the stream of commerce theory, a strong argument could be made for sustaining jurisdiction. As a result, the court felt that in order to deny jurisdiction in *Gering* it first was necessary to distinguish past product liability cases on the ground that the defendant-manufacturers in those cases knew their goods were to be sold in the forum state.[30] The Bank of Gering, the court said, did not purposely avail itself of the privilege of conducting business in Missouri, since the business involving the drafts was not solicited.[31]

The implication of the court's language is that there must be a pur-

27. 357 U.S. at 253. "For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant."

28. *See* Kurland, *supra* note 4, in which the writer said:

> They do not reveal how each factor is to be weighed in combination with the others. It may be that it is not possible to do so and that here as elsewhere in our constitutional law the Supreme Court must depend on the good faith and good judgment of the other courts in the American judicial system.

Id. at 623.

29. In State *ex rel.* Deere & Co. v. Pinnell, 454 S.W.2d 889, 892 (Mo. En Banc 1970) the court held:

> In concluding our effort to determine the legislative intent of the General Assembly of Missouri, we are convinced that the ultimate objective was to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Of course, states are not required to extend their jurisdiction to the limits of due process. *See, e.g.*, Lowd v. California Fund Management Co., 235 F. Supp. 486 (D. Mass. 1964).

30. 540 S.W.2d at 35.

31. *Id.*

poseful exploitation of a Missouri market before a Missouri court can exercise jurisdiction over a nonresident, and it is not sufficient that the defendant could foresee that his actions would have consequences in Missouri. Such an interpretation of due process requirements is unduly restrictive and would limit Missouri's jurisdiction well within the bounds held constitutional in other states.[32] Moreover, prior to *Gering,* Missouri courts had never required that a nonresident manufacturer know his goods were to be shipped into Missouri in order to exercise long-arm jurisdiction.

In *State ex rel. Birdsboro Corp. v. Kimberlin,*[33] one of the cases distinguished by the *Gering* majority, the court's statement that the defendant knew his goods were to be sold in Missouri was simply a parenthetical remark made to strengthen the court's argument, not to limit its rationale.[34] In addition, in *State ex rel. Deere v. Pinnell*[35] the Missouri Supreme Court cited with favor *Gray v. American Radiator & Standard Sanitary Corp.,*[36] in which the defendant did not know the ultimate destination of his products.

Furthermore, even if past precedent did support the *Gering* majority's distinction based on the knowledge of the defendant, that distinction does not necessarily support the court's decision. As the dissent pointed out, the Bank of Gering knew that any injury which might result from its failure to give timely notice of dishonor would occur in Missouri.[37] The Bank of Gering also knew that as a result of each new checking account, the bank might be called upon to make payments to banks in other states. Therefore, the *Gering* court's reasoning not only creates an undesirable precedent, but is logically unsatisfactory.

The difficulties in the *Gering* opinion stem from the court's treatment of the case as one based in tort. Superficially, Lyle's claim against the bank did appear to be in tort. He alleged that the Bank of Gering breached a statute[38] and that violation of the statute was negligence per se. It must be stressed, however, that the classification of actions as tort or contract for purposes of jurisdiction must not be based merely on general categories. The court must analyze the basis for the action, giving particular attention to the role played by consent in the parties' relationship.

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32. *See* cases cited note 11, *supra.*

33. 461 S.W.2d 292 (K.C. Mo. App. 1970).

34. The context of the court's statement follows:

> The facts in the Gray case are at least almost identical with ours. There is an allegation of negligent manufacture and construction in a foreign state, sale to a foreign corporation, with the product in the course of commerce, sold to an Illinois consumer (in our case Relator knew it was for use in Missouri and shipped the product directly to Cameron, Missouri) and personal service in a foreign state.

Id. at 296.

35. 454 S.W.2d 889, 892 (Mo. En Banc 1970).

36. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

37. 540 S.W.2d at 37. (Bardgett, J., dissenting).

38. § 400.3-508, RSMo 1969 provides: "(2) Any necessary notice must be given by a bank before its midnight deadline."

When the facts in *Gering* are scrutinized closely, the contractual nature of Lyle's claim becomes apparent. The Bank of Gering's failure to notify American National was a breach of a duty imposed by the Bank of Gering's consent, implied when it accepted the drafts for collection. Furthermore, acceptance of the drafts by the Bank of Gering constituted a contract for collection at common law,[39] and it is that contractual obligation that the Uniform Commercial Code codified.[40]

The *Gering* court could have reached the desired result by distinguishing between the bases for jurisdiction in tort and in contract cases, and applying the standards for contract cases to the facts in *Gering*. The drafts were accepted in Nebraska. The location of the subject matter, Tige's bank account, was in Nebraska. The checks, if paid, would have been honored in Nebraska. Under such analysis the court would not have felt constrained to distinguish *Gering* from past tort cases based on the state of mind of the defendant. In contract cases it is not important that the defendant knew his actions would have consequences in the forum state. In fact, in contract cases the parties will normally know where their actions will impact, and where any injury due to a breach will occur. However, the major concern in a case based on contract is to what extent the parties' agreement justifies imposing upon the defendant the obligation to defend in a foreign state.[41] Furthermore, there were important considerations that dictated that the court not grant jurisdiction in this case. If banks were subject to long-arm jurisdiction wherever a customer wrote a check, they might be forced to impose inconvenient restrictions on their customers' freedom to pay their obligations by check. In fact, to grant jurisdiction under the facts of *Gering* might well be a violation of the commerce clause of the Constitution.[42]

By distinguishing *Gering* from product liability cases based on the cause of action involved, the *Gering* court could have reached the same result without severely limiting Missouri's long-arm jurisdiction. The Missouri Supreme Court's decision not to subject banks to jurisdiction wherever their customers might write checks was wise. Nevertheless, the court's requirement of a purpose and intent to conduct activities in Missouri before jurisdiction over a nonresident defendant can be exercised could prove troublesome if extended beyond the facts in *Gering*. Such a strict interpretation of *Hanson v. Denckla* would unnecessarily restrict the rights of Missouri citizens to file suit in their home state.

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39. *See* 2 PATON'S DIGEST § 1:6 (1942). This section cites cases to the effect that a bank may refuse to handle an item sent to it for collection, but once the bank's conduct is consistent with having accepted the items, a contract for collection is implied. *See, e.g.,* Collier v. Municipal Acceptance Corp., 227 Ala. 37, 148 So. 743 (1933); Jacobs v. Mohnton Trust Co., 299 Pa. 527, 149 A. 887 (1930); 9 C.J.S. *Banks and Banking* §216 (1938).

40. 540 S.W.2d at 37. (Bardgett, J., dissenting).

41. *See* note 23 *supra* and accompanying text.

42. For a discussion of the commerce clause as a limitation on in personam jurisdiction over nonresidents, see *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 983-87 (1960).