

4 HAPPIER HUNTING GROUNDS

When I was at home, I was in a better place.

—SHAKESPEARE, *As You Like It*

Ida Weitz of Victoria, Texas, had a son in the Marine Corps. She bought him a car to use at Camp Lejeune in North Carolina where he was stationed. One of his friends there borrowed the car and got into an accident with it, and the family of the accident victim decided to see a lawyer.

Injury lawyers spend a lot of time thinking about how to find new people to sue for old problems. In this case they could obviously sue the friend who drove the car and try to show he was negligent. Less obviously they could go after young Weitz, arguing that he should have known his friend was the sort of character who might get into an accident. The theory is called "negligent entrustment" and has made a lot of money for lawyers.

Trouble was, one young Marine was not likely to have much more money than another, and money, not blame, is often the real point of the exercise. Deeper pockets were needed. Why not Mrs. Weitz's? She had entrusted the car to her son knowing he might reentrust it to persons of unknown character. So she could be accused of negligence too. She had some insurance, and nothing says lawyers have to be content just with insurance either. In a 1989 case that provoked something of a public outcry, ninety-two-year-old Vermont widow Luella Wilson almost lost her house after lawyers got a \$950,000 jury verdict against her; her offense, by coincidence also one of "negligent entrustment," had been to lend her great-nephew the money to buy a car that he later crashed.

Mrs. Weitz's lawyers hoped things would never reach that point, especially since they had what they thought was a very strong argument. It would be one thing to sue her in Texas where she lived, but these lawyers were trying to sue her in North Carolina. And she had never set foot in that state in her life. No matter, said a federal court of appeals in a landmark 1961 decision: she could properly be forced to come into North Carolina to stand trial under the state's "longarm" law.

Over the centuries no legal rules were framed as loftily or guarded as jealously as the rules on whether a court could exert rightful authority over you. The law of jurisdiction had the special solemnity of law that governs law, law meant to bind the courts themselves. A court can get the factual details of a case wrong and its errors may stand as permanent findings. It can mistake the law it is applying and its blunders will still obtain some deference from other courts. But if it oversteps its jurisdiction—so runs the older rule, at least—its verdict is void, a mere nullity, entitled to no respect from other courts; given to the winds. The law of jurisdiction sets the ultimate limit, if there is to be one, on who is to rule over whom.

In private lawsuits, for many centuries, the chief rule of jurisdiction was clear and straightforward. To sue someone you had to pay him a visit. You could not just denounce him to the first court that seemed convenient; you had to go to a court that was in some

sense his. The "most important principle of all municipal law of Anglo-Saxon origin," a Pennsylvania court sonorously declared in 1874, was "that a man shall only be liable to be called to answer for civil wrongs in the forum of his home, and tribunal of his vicinage." Actually the principle was ancient when the Anglo-Saxons came on the scene. The Roman law's pithy maxim was *actor forum rei sequitur*, "the plaintiff must pursue the defendant in his forum."

Why? Some thought it was a matter of consent. If you were nestling under a state's protective wing you could not complain about having to submit to its talons and beak. Others reduced the issue to one of raw physical power. Maryland courts took sole charge of suits against Maryland residents because their sheriffs were the ones who could compel them to stand trial. For much the same reasons they could hear a dispute over who owned a tract of land in Baltimore or a ship in its harbor, even if the owner were absent, because Maryland sheriffs could physically seize and dispose of the goods.

Framed thus in terms of the raw might of the sovereigns, the doctrine does not much sound like a bulwark of individual liberty. What was interesting was its corollary: by submitting to one sovereign, you could escape the whims of the others. By staying in Maryland you had nothing to worry about from the Virginia civil courts. Of course you might owe money in Virginia or have wronged someone there, and for that the Maryland courts and sheriffs would hold you to account. But first your Virginia opponents had to make proper application to the Maryland courts, lest Virginia entrench on the majesty of its sister state.

If the only courts that could try you were those of the place you *called* home, it would be too easy to frustrate your creditors by naming as your imaginary home some distant place. Instead a court's power over you was tied to your literal presence. The state you were physically in, even if just on a day trip, was the state where you could be sued at any moment. So a state line was something real and momentous. When you stepped across it the Indiana sheriffs lost their power over you and the Ohio sheriffs' power suddenly loomed large—however vexing that might be to you or your creditors.

The formality of these rights could (and sometimes still can) turn the "service of process" with which a lawsuit begins into a faintly ridiculous game of tag. Hard-pressed debtors retired to remote places, while syndicates of creditors kept agents at transit hubs who checked passenger lists and tagged unwary riders with process as they changed trains. (Long ago, when Sundays and holidays were off-limits for lawful tagging, much gadding about was done on those days.) A court upheld the tagging of a traveler at a Connecticut hotel although the whole point of choosing that place was to make the lawsuit hard for him to defend. Likewise held valid was the serving of a defendant with an Arkansas complaint while flying over the state in an airplane.

Fortunately, judges had ways of tempering the harshness of these rules for the innocent traveler. The judge in the place where you were tagged might let you go of his own accord, or your lawyers back home might get a judge there to order your hometown creditors to stop pestering you by use of distant actions. In either case, however, you got relief at the court's discretion, not by right, and one precondition would probably be your agreement to stand trial on the same charge at home.

Otherwise, a successful tag pretty much ended the jurisdictional game. If you skipped town after coming under a court's lawful dominion, it would enter a "default judgment" against you, and when your opponent tracked you down in another state you would have

no chance to reargue the merits: the U.S. Constitution requires states to give "full faith and credit" to each other's duly entered judgments.

For all their occasional gamesmanship, the old rules of jurisdiction had some definite advantages. They were easy to understand and follow: they basically let you know off the bat where you could sue or be sued. They also discouraged litigation. In disputes between persons at a distance from each other, the cost of travel and the little inertias of life cut against suing. Many lawsuits did not seem worth the trouble of taking to a distant forum, and were not filed at all.

It never seemed entirely fair that some people had to drop otherwise good cases because travel was such a bother. It seemed even less fair that they might have to drop good cases because they feared that the strange court they would visit would be biased against outsiders. Trouble is, these two sources of unfairness cannot be done away with; they can only be shifted. In a long-distance dispute, at least one side always has to travel and be an outsider upon arriving, like the bride coming to Yellow Sky. Earlier generations of Americans were more frightened of being summoned before an unfamiliar tribunal as an accused wrongdoer than of having to go there as an accuser. Maybe distant states could not always be relied on to lend a neighborly hand to the visiting complainant. But if so, could they be trusted not to plunder the visiting defendant? At least this way if you saw the courts of some state as corrupt or biased against people like you, you could stay out.

Of course lawyers searched for loopholes that would let them pull outsiders into local courts; and many state lawmakers and judges would have been glad to accommodate them. But through much of American history the Supreme Court steadfastly upheld the right not to be abducted to a distant court. It considered that right a crucial part of the due process of law guaranteed each American citizen by the Constitution. In a much-cited 1878 case called *Pennoyer v. Neff*, the Court declared that a judgment entered without proper jurisdiction could not be enforced even in the state where it had been issued, let alone anywhere else.

The right not to be sued except at home was, in short, a fullfledged constitutional right, one that has never been rolled back by any constitutional amendment. Had the courts been vigilant against its infringement we would enjoy it to this day.

The beginnings were modest and reasonable, more an evolution than an erosion. Almost from the start special rules had been applied to corporations, which can be in more than one place at a time. The worry was that a corporation might send salesmen into a state to peddle its bogus patent medicines or whatever, and then pull its cash receipts out before anyone got around to suing. Individuals or partnerships might get away with the same trick, of course, but what seemed new and unfair was that the same team could come in under the guise of a different corporate shell the next month. A state could pass a law requiring the out-of-state corporation that wanted to do business within its borders to appoint an ongoing local agent suitable for future tagging. If a corporation simply ignored that requirement, the offended state could sue in the corporation's home state for the violation of its laws; but in the meantime it could not throw open its own courts to suits against the wrongdoers.

The other major target of discontent under the old rules was the out-of-state driver who got into a local accident and escaped the state too fast to be tagged with process. The

problem as such was nothing new, having dated back to the days of the horse, but it seemed to be getting worse as the automobile made rapid interstate travel a pastime of the millions.

The first breaches were opened in the jurisdictional fortress by the creative use of ideas of tacit consent. Way back in 1856 the Court had ruled that if an unregistered corporation entered a state to do business, it could conveniently be *assumed* to have appointed a state official as local agent to be sued. And in 1927 it upheld a Massachusetts law providing that visiting motorists, like visiting corporations, tacitly consented to appoint local agents by the act of rolling across the state line.

There was something breezy in saying that a genuine bit of constitutional due process could be waived without any explicit consent. But the Court had closely limited reasons for its rulings. Driving on public roads was a privilege, and corporations were artificial creations. Since a state could keep people from driving or running incorporated businesses entirely, it could exercise the lesser power of allowing them on conditions. The Court emphasized that the Constitution protected people's natural liberty to go in and out of states for almost any purpose but these two, without fear of having to return to face suit. A 1918 Court opinion by Oliver Wendell Holmes reaffirmed that the Kentucky courts could not use the tacit-consent fiction to corral an unincorporated Illinois partnership that had done some business in the Bluegrass State.

Lawmakers, however, find tacit consent to be heady stuff. Even in this noisy world most people are still silent most of the time. If silence is consent, it would seem that the commodity of submission is being proffered in boundless supply. And now the long arm of the state courts, as it flexed more often, was growing muscular. New laws reached out to nonresident boat and plane operators as well as drivers. And lawyers began pushing at the bounds of what it meant for a corporation to have been "present" in a state and thus subject to its courts. What counted as being present? Hiring a fulltime employee? Or would a part-timer do the trick? Keeping a regular place of business? Or would a single advertising brochure tacked to a bulletin board be enough? It was universally conceded that a company had not entered a state when it merely accepted orders from buyers there and shipped them the goods. But what if it sent in a troubleshooter to investigate a complaint that a shipment was spoiled?

In the early 1940s the International Shoe Company of St. Louis had (as it thought) carefully arranged its affairs to stay out of unfamiliar courts. It kept no offices or agents in the state of Washington. It paid commissions to traveling salesmen who visited the state, but took care not to let them collect money or enter contracts on its behalf. Instead it provided them with one sample shoe each of a pair in various styles. The salesmen would show the samples to the managers of local shoe stores, who then placed direct orders for shoes from the International Shoe factories in Missouri and elsewhere. The state of Washington claimed jurisdiction over the company anyway, and the case went up to the U.S. Supreme Court.

By now the Court had tired of the fiction-on-fiction game of widening chinks in the constitutional wall that protected defendants. In its 1945 *International Shoe* decision it simply took a bulldozer to the offending structure. It announced a new, all-purpose rule of jurisdiction that would apply to companies and just as momentously to individuals as well. From now on, any state court could haul you in so long as you had "certain minimum contacts" with its territory. What sort of contacts might those be? Those such

that letting the suit go forward did not offend "traditional notions of fair play and substantial justice."

No one knew at the time what this language meant. No one knows to this day. Of course courts are supposed to aim for fair play and substantial justice, but a court whose orders stop there is a court left to its own devices. In the decades that followed the state courts began grabbing one outsider and then another and then another, and the Court turned down all chances to stop them. The lone exception for many years was a 1958 case where a Florida court had tried to get its hands on a Delaware trust fund, but that decision was criticized in the academic commentary and in time virtually ignored. In essence the federal court resigned control over its whole fractious state brood, like the beleaguered parent who was reduced to shouting, "Do whatever the hell you want— now let's see you disobey *that*."

The sudden overthrow of the old limits on jurisdiction vastly multiplied the options for filing suits. It meant people and businesses could be sued not only in places where they had been active in the past but also in places they had never visited at all but with which they had unspecified "contacts" as they went about their affairs. The only question would be whether taking them there would offend the sense of fairness of the court that would be trying them.

The business world felt the first effects. Courts quickly seized jurisdiction over enterprises that had never entered a state but did ship goods regularly into it, purchase supplies from within it, or accept checks from customers who lived in it. The most profound impact was not on the really big companies, which with their sprawling nationwide presence were already used to being sued in many places, but on the typical small to mid-sized firm that serves a nationwide market from a single location. Suddenly these companies found themselves defending suits in Skowhegan and Winnemucca, Kissimmee and Juneau. It mattered not how tiny a share of overall business they had done in a state: an Illinois company was made to go to the U.S. Virgin Islands to be sued though only \$1,800 of its \$35 million in annual sales came from that territory. A magazine publisher might find itself sued not just where its editing or printing took place, but wherever it had subscribers or newsstand sales.

Nor was there much hope of staying out of a state's courts by screening its citizens from one's customer list, because indirect contacts counted too. After a bus crash an English company that made component parts found itself compelled to stand trial in Hawaii even though it had no direct commercial connections with that island state. The court explained that a businessman should expect "to defend his product wherever he himself has placed it, either directly or through the normal distributive channels of trade." Everyone in the chain of commerce was vulnerable. Auto dealers and car rental companies began to be sued in distant states to which customers had driven their cars.

Surprising things were happening to individuals as well. Tennessee, Iowa, Washington, and California grabbed jurisdiction over out-of-state men who, it was alleged, had fathered children during time spent in the state. California passed a law providing that anyone who had sexual intercourse within its borders automatically submitted to later suit in its courts. Nor was it necessary, as Ida Weitz discovered, for an individual to visit a state physically to experience its justice. In 1984 the Supreme Court ruled that a Florida journalist, like the national magazine he wrote for, could be made to

