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Recommended Citation

James T. Friedman, *Extension of the Illinois Long Arm Statute: Divorce and Separate Maintenance*, 16 DePaul L. Rev. 45 (1966)
Available at: <https://via.library.depaul.edu/law-review/vol16/iss1/3>

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EXTENSION OF THE ILLINOIS LONG ARM STATUTE: DIVORCE AND SEPARATE MAINTENANCE

JAMES T. FRIEDMAN*

IN 1955, amendments to Sections 16 and 17 of the Civil Practice Act¹ authorized extra-territorial service on non-residents as a basis for personal jurisdiction in certain classes of cases. In 1965, sub-section (e) was added to Section 17 to include actions of divorce and separate maintenance.

This extension of personal jurisdiction beyond state lines is a practical step towards overcoming many of the hardships arising from family separation in our highly mobile society. State boundaries have traditionally provided a shield for a spouse wishing to abandon home, family, and financial responsibility. A plaintiff's inability to obtain personal jurisdiction over a spouse who has fled to another state has no doubt encouraged family abandonment as the easy way out when domestic difficulties arise.

The State of Kansas extended personal jurisdiction in matrimonial actions to non-resident defendants by a statute effective January 1, 1964.² Illinois is the second state to pass such a law and thus qualifies as a pioneer in this aspect of marital legislation.

A casual glance at the new Section 17(e) impresses the reader with its brevity and simplicity. But when the lawyer attempts to put this new law to work for his client, brevity gives rise to frustration and apparent simplicity gives way to a multitude of questions. The fact that answers to these questions are not readily available is attributable to the newness of the law and the lack of interpretive authority in the area of divorce and separate maintenance. Keeping in mind the problem of practical application, we shall examine some of the questions

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¹ ILL. REV. STAT. ch. 110, §§ 16, 17 (1965).

² KAN. GEN. STAT. ANN. § 60-308 (Supp. 1964).

raised by the statute and suggest answers to those questions wherever possible.

PRIOR REMEDIES

Prior to the passage of 17(e) a plaintiff was not entirely without remedy for obtaining family support when the absent spouse could not be served with summons in Illinois. Section 16(1) of the Civil Practice Act, as amended in 1955, provided that personal service upon an Illinois citizen or resident outside the state boundaries has the same force and effect as personal service within the state. Under this method of service a plaintiff could obtain an order of alimony or child support binding upon the defendant personally, no matter where he might be temporarily living as long as he could be found for personal service of summons according to Section 13 of the Civil Practice Act.

Where the defendant was not an Illinois resident, but had real or personal property within the State of Illinois, the holder of the property could be made a party to the action for purposes of satisfying the plaintiff's claim to alimony or child support.³

The court's jurisdiction would be in rem or quasi-in rem rather than in personam, and while the property holder in Illinois would have to be served personally the defendant spouse would bear no personal liability for support. Furthermore, the order or judgment would be effective only until the Illinois property was exhausted.⁴ The Illinois court could also determine ownership rights of the parties in respect to property located within the state.⁵ Where defendant was not an Illinois resident and had no property within the state, and could not be served with process within the state, a plaintiff was without remedy in a matrimonial action in Illinois for obtaining support or a determination of property rights.

The only alternatives were to bring an original action where defendant resided or to obtain a decree in Illinois without personal service and then domesticate the decree in defendant's state of residence and seek an adjudication of support and property rights there.⁶ Unfortunately

³ *Failing v. Failing*, 4 Ill. 2d 11, 122 N.E.2d 167 (1954); *Ragen v. Ragen*, 4 Ill. App. 2d 445, 124 N.E.2d 628 (1954); ILL. REV. STAT. ch. 22, §§ 42, 44 (1965).

⁴ *Wilson v. Smart*, 324 Ill. 276, 155 N.E. 288 (1927).

⁵ *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Killebrew v. Killebrew*, 398 Ill. 432, 75 N.E.2d 855 (1947); ILL. REV. STAT. ch. 40, § 18 (1965).

⁶ *Parker v. Parker*, 335 Ill. App. 293, 81 N.E.2d 745 (1948); *Darnell v. Darnell*, 212 Ill. App. 601 (1918).

those who need support the most can least afford litigation across state lines. In many cases the Uniform Reciprocal Enforcement of Support Act⁷ was available, but this remedy often proves unsatisfactory in terms of the amount of support obtained and administration by officials of other states.

With the passage of 17(e) and the extension of personal jurisdiction to non-resident defendants under certain circumstances, many of the practical disadvantages of the prior support remedies have been eliminated. Plaintiff can now remain in the forum and obtain a money judgment against the wandering spouse who can be located for personal service of process. There is still the problem of collecting such judgments, but it would seem logical that a non-resident defendant, who knows that he is subject to personal jurisdiction in the Illinois court, will be far more likely to come to Illinois and defend himself and his property. He would also be less apt to depart the state in the first place if avoiding family responsibilities is his motive for leaving.

ACTS GIVING RISE TO A MATRIMONIAL CAUSE OF ACTION
WHICH SUBJECT A NON-RESIDENT SPOUSE TO
PERSONAL JURISDICTION

Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, 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 of such acts: . . . (e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action.⁸

Section 17(e) indicates two separate categories of action by a non-resident defendant which constitute a submission to personal jurisdiction: the maintenance of a matrimonial domicile by him in Illinois when the cause of action arose, and the commission of any act in Illinois which gives rise to the cause of action. Let us examine the "commission of any act" category of action first.

Is the defendant's act in Illinois amounting to only part of a cause of action a submission to Illinois jurisdiction? For example, is the husband who struck his wife once in Ohio and once in Illinois now personally

⁷ ILL. REV. STAT. ch. 68, §§ 50-59 (1965).

⁸ ILL. REV. STAT. ch. 110, § 17(1)(e) (1965).

liable in his wife's Illinois divorce suit although he resides elsewhere? Section 17(e) requires "the commission in this State of any act giving rise to the cause of action." Of the nine grounds for divorce in Illinois, five can be accomplished by a single act, while all the others require a multiplicity of acts, non-acts, or the passage of time.⁹

Having chosen to use the word "act" in the singular, we must assume the legislature intended that the commission of only one part of a multiple part cause of action would bring the defendant-actor within the purview of the Statute. Having made this assumption, the question then arises whether any particular act in a multiple part cause of action must be committed within Illinois to subject the actor to personal jurisdiction? For example, must the second act of cruelty be committed in Illinois, or must the one year desertion period begin or end while the defendant is physically present in Illinois? The phrase "giving rise to" causes confusion in trying to answer these questions because by dictionary definition "to give rise to" means "to cause to appear or come into existence."¹⁰ In the case of cruelty, the cause of action does not come into existence until the second striking; the desertion does not come into existence as a cause of action until it has persisted for one year. Is it then the final act or culmination of the statutory time period which brings the defendant within the purview of the statute? The language of the statute does not suggest that any such requirement is intended.

First, the use of the word "any" before "act giving rise to" suggests that no particular act is required. Were the clause to read "*the* act giving rise to the cause of action" it would appear that the legislators intended that the final act must be committed within the state. The word "any" suggests part of a whole cause of action or one of several acts, no one particular part of which has particular significance. Secondly, the legislators chose the phrase "giving rise to the cause of action" rather than any act "constituting" or "amounting to" a cause of action. These words would have clearly indicated an intent of finality in reference to the act giving rise to the cause of action.

⁹ ILL. REV. STAT. ch. 40, § 1 (1965). Those grounds for which a single act is sufficient are; adultery, conviction of a felony, infiction with a venereal disease and bigamy. Requiring a multiplicity of acts is cruelty. The remaining three grounds are impotency, a non-act, and desertion and drunkenness, which are dependent on a passage of time.

¹⁰ WEBSTER, NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 1257 (College ed. 1960).

In reference to those divorce grounds mentioned previously requiring a series of actions or actions persisting for a statutory period of time, we know that no single act standing by itself gives rise to the cause of action or causes it to come into existence. As the legislators were certainly aware of these multi-part grounds when they drafted the statute, their choice of the words "any" and "giving rise to" indicate an intention that no particular act need be committed by the defendant, as long as it is committed in Illinois and is part of the plaintiff's cause of action.

In interpreting the "commission of any act" clause in reference to matrimonial actions, we must keep in mind the due process limitations of the Constitution as well as legislative intent. The Illinois courts have construed the original clauses of Section 17 in reference to doing business and committing tortious acts within the state with particular attention to the due process guidelines set down in the *International Shoe Company case*.¹¹ In that case the Supreme Court decided that in order to justify extending in personam liability to non-resident defendants, the defendant must have "minimum contacts" with the forum state so that the necessity of defending himself there is consistent with "traditional notions of fair play and substantial justice."¹² The question of primary importance for us is what acts within our state constitute sufficient "minimum contacts" to justify the assumption of in personam jurisdiction over the non-resident actor.

A series of Illinois cases have discussed this problem in the other areas covered by Section 17, but there is no case law as yet defining "minimum contacts" in the matrimonial field.¹³ Nevertheless, the same due process requirements will have to be met in determining what act or acts giving rise to a cause of action of divorce or separate maintenance justify extension of the forum's jurisdiction over a non-resident defendant.

In *Nelson v. Miller*¹⁴ the Illinois Supreme Court decided that the defendant, a Wisconsin appliance dealer, committed a tortious act covered by Section 17(b) when his employee injured the plaintiff

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

¹² *Id.* at 316.

¹³ For a detailed study of the development of Section 17 in Illinois see Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. F. 533 (1963).

¹⁴ 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

while delivering a stove in Illinois. The court found that the delivery man's acts in Illinois giving rise to plaintiff's injury were sufficient contacts with the state to reasonably and fairly make the defendant stand trial in Illinois:

The defendant sent his employee into Illinois in the advancement of his own interests. While he was here, the employee and the defendant enjoyed the benefit and protection of the laws of Illinois, including the right to resort to our courts. In the course of his stay here the employee performed acts that gave rise to an injury. The law of Illinois will govern the substantive rights and duties stemming from the incident. Witnesses, other than the defendant's employee, are likely to be found here, and not in Wisconsin. In such circumstances, it is not unreasonable to require the defendant to make his defense here. If, in a particular case, trial in an Illinois court will be unduly burdensome to the non-resident defendant, the doctrine of *forum non conveniens* is available.¹⁵

The idea of invoking the benefits and protections of the forum as a test of what minimum contacts subject a non-resident defendant to personal jurisdiction was applied four years after the *Nelson* case where the defendant's acts in Illinois were substantially less than in that case. In *Gray v. American Radiator and Standard Sanitary Corp.*,¹⁶ the defendant's only contact with the State of Illinois arose from the manufacture of an allegedly defective valve in Ohio which was incorporated into a hot water heater in Pennsylvania. The heater ultimately was sold to an Illinois consumer who was injured when it exploded. The defendant manufacturer contended that since Section 17(b) required the commission of a "tortious act" within Illinois, they were not subject to this state's jurisdiction because their wrongful conduct occurred in Ohio where the valve was manufactured. In determining what the legislature meant by "tortious Act" the court said:

We think the intent should be determined less from technicalities of definition than from considerations of general purpose and effect. To adopt the criteria urged by defendant would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence of each, whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature. As we observed in *Nelson vs. Miller*, the statute contemplates the exertion of jurisdiction over non-resident defendants to the extent permitted by the due process clause.¹⁷

Applying this reasoning to the language of Section 17(e), it appears to support the conclusion that the legislators intended that a single act

¹⁵ *Id.* at 390, 143 N.E.2d at 680.

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

¹⁷ *Id.* at 436, 176 N.E.2d at 763.

of a multiple act cause of action is within the purview of the statute, at least where requirements of "convenience and justice" are met.

In determining the quantum of acts necessary to meet due process requirements, the Court in the *Gray* case¹⁸ noted a trend towards liberalizing jurisdictional requirements:

The question cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable in the circumstances. In the application of this flexible test the relevant inquiry is whether defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum.¹⁹ . . . The relevant decisions since *Pennoyer vs. Neff* show a development of the concept of personal jurisdiction from one which requires service of process within the State to one which is satisfied either if the act or transaction sued on occurs there or if defendant has engaged in a sufficiently substantial course of activity in the State, provided always that reasonable notice and opportunity to be heard are afforded.²⁰

Again it would seem that by applying this test of due process to matrimonial actions where only part of the cause of action occurs within Illinois, the Court could find sufficient contact in order to subject the defendant to personal jurisdiction. Certainly the state is as interested in marriage and the family as it is in tortious acts or the doing of business, and the Court might well examine all of a defendant's marital conduct within the state, not just acts related to the cause of action, in determining whether substantial connection exists.

It should also be noted that the application of Section 17 is not automatic or absolute. Both the *Nelson* and the *Gray* cases recognized the possible application of forum non conveniens. In other words, the minimum contacts may be present but the court may decline application of Section 17 because of unreasonable inconvenience to the defendant.

Applying the minimum contacts test quoted above in *Gray*, the court might also decline jurisdiction in a case where the necessary acts were committed within Illinois, but where the contacts with the forum were not sufficiently substantial to satisfy due process limitations. For example, a Wisconsin resident might commit adultery in Illinois on a train traveling from Milwaukee to St. Louis, but it is doubtful whether

¹⁸ *Supra* note 16.

¹⁹ See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *International Shoe v. Washington*, *supra* note 11, at 319.

²⁰ *Supra* note 16, at 440, 176 N.E.2d at 765.

that act alone is sufficiently connected with Illinois to invoke Section 17(e).

When courts seek to apply the *Gray* test of due process to acts giving rise to grounds for separate maintenance or to complaints alleging drunkenness, desertion or impotency, the determination of minimum contacts and substantial connection will be even more difficult. The court will have to weigh a defendant's action in Illinois, in the light of the facts of the particular case before it, to determine whether those actions have a sufficiently substantial connection with the State so as to make it reasonable and fair to subject the defendant to personal liability.

MAINTENANCE OF A MATRIMONIAL DOMICILE AS A BASIS FOR PERSONAL JURISDICTION

The second category of action in Section 17(e) subjecting a defendant to personal jurisdiction is "the maintenance of a matrimonial domicile in this State at the time the cause of action arose."²¹ This clause suggests three primary questions: what is a matrimonial domicile? does the whole or only part of the cause of action have to arise during the maintenance of the Illinois matrimonial domicile? must the acts giving rise to the cause of action be committed within Illinois?

The term "matrimonial domicile" defies accurate definition. Courts have variously described it as the place where the marriage contract is being performed²² or the place where two people last lived together as husband and wife with the intention of making it their permanent home.²³ It has been said that a person can have several residences at one time but only one matrimonial domicile,²⁴ which domicile continues until a new one has been established²⁵ and which domicile follows the innocent party in the event of a separation.²⁶ One can go on and on listing descriptive characteristics of matrimonial domicile without ever achieving a satisfactory definition. Historically the only real

²¹ ILL. REV. STAT. ch. 110, § 17 (1965).

²² *Gill v. Gill*, 18 N.Y.S.2d 114 (Sup. Ct. 1940).

²³ *Ruderman v. Ruderman*, 193 Misc. 85, 82 N.Y.S.2d 479 (Sup. Ct. 1943). See also *Stillwell v. Continental Illinois National Bank*, 31 Ill. 2d 546, 202 N.E.2d 477 (1964).

²⁴ *Reese v. Reese*, 179 Misc. 665, 40 N.Y.S.2d 468 (Sup. Ct. 1940).

²⁵ *Ex parte Allan*, 220 Ala. 482, 125 So. 612 (1929). See also, 16 ILL. L. & PRAC. 2D *Domicile*.

²⁶ See *Haddock v. Haddock*, 201 U.S. 562 (1906); *Dunham v. Dunham*, 162 Ill. 589, 44 N.E. 841 (1896); *Bowman v. Bowman*, 24 Ill. App. 165 (1887).

significance of the term was to provide a basis for granting or refusing, most often the latter, full faith and credit to sister state divorce decrees.

Fortunately, this question of definition became moot when the U.S. Supreme Court rejected the concept of matrimonial domicile as a basis for assuming jurisdiction in matrimonial cases.²⁷

While it was formerly held that only a divorce based on the matrimonial domicile of both parties is deemed to be entitled to the protection of the full faith and credit clause of the United States Constitution, the decision of the Williams Case changed the rule, and banished the doctrine of Matrimonial Domicile from consideration.²⁸

We can do no more than speculate why the legislature chose to resurrect the concept of matrimonial domicile by using those words in Section 17(e) but will forbear the temptation to do so. This term does not appear in the Divorce Act²⁹ or the Separate Maintenance Statute³⁰ and has been infrequently discussed in Illinois court decisions. In those divorce cases where the word "domicile" or "matrimonial domicile" are mentioned, the Illinois courts have unanimously agreed that the husband and wife can establish separate domiciles upon which jurisdiction for divorce can be based.³¹ Consequently, our primary concern with Section 17(e) should be directed to whether the defendant was domiciled in Illinois when the cause of action arose.

Accordingly the matrimonial residence is now regarded as following both spouses, so that the marital status, as a residence on which to base jurisdiction may even be divided and exist in separate states if the parties in good faith establish separate domiciles, and it is sufficient if one spouse is domiciled in the State, since both carry the marital *res*, at least insofar as marital residence or status, as far as property rights or obligations is concerned.³²

The fact that the defendant must maintain a matrimonial domicile in Illinois at "the time the cause of action arose" raises a question of legislative intent similar to that raised by the words "giving rise to the cause of action." Did the legislature intend that the entire cause of action arise while the matrimonial domicile is here, and if only part, is any particular part necessary?

²⁷ Williams v. North Carolina, 317 U.S. 287 (1942).

²⁸ 27B C. J. S. Divorce § 338 at 803 (1959).

²⁹ ILL. REV. STAT. ch. 40, §§ 1-32 (1965).

³⁰ ILL. REV. STAT. ch. 68, §§ 22-23.2 (1965).

³¹ Berlingieri v. Berlingieri, 372 Ill. 60, 22 N.E.2d 675 (1939); Bowman v. Bowman, *supra* note 26.

³² *Supra* note 28, at 803-4.

We note that the word "arose" is used, the past tense of arise, which suggests a finality of action or the final accrual of the cause of action. It appears, however, that arose and accrue are not necessarily synonymous in reference to a cause of action. In the case of *Hunter v. Cummings*,³³ the court was confronted with the Oregon Real Estate Brokers Act,³⁴ which stated that no person shall maintain an action for compensation who is not a licensed broker at the time the cause of action arose. The plaintiff in this case was suing for his broker's commission for arranging a sale of real estate. He was not licensed when the sale was arranged but had received his broker's license by the time his commission was due and unpaid, the last event giving rise to the cause of action. The court held that "arose" as used in the statute was not synonymous with accrue. They construed the phrase "at the time the cause of action arose" to include all the acts and elements which culminated in the cause of action, and plaintiff was denied recovery because he was not licensed at the time his brokerage services were performed. The court went on to say that the purpose of the statute was the controlling factor in their construction of "arose."³⁵ In the case of *Schreiber v. Combs*,³⁶ the court reached an opposite construction of "arose" on a nearly identical fact situation.

Not being able to find an applicable construction of "arose" by an Illinois court and having no reliable clues in Section 17(e) as to the intent of the legislators we might best revert to the method of the Oregon Court in looking to the overall purpose of the statute as a guide to legislative intent. As was stated in *Nelson v. Miller*,³⁷ and repeated with approval in the *Gray* case,³⁸ ". . . the Statute contemplates the exertion of jurisdiction over non-resident defendants to the extent permitted by the due process clause."³⁹ With the limits of due process as guide lines there is no apparent reason why "arose" should be construed differently than the "giving rise to" clause previously discussed. The court, in any case, will have to weigh the defendant's connection with the state, whether by acts within the boundaries or maintenance of a matrimonial domicile in the forum, on the scale of mini-

³³ 176 Ore. 250, 154 P.2d 582 (1944).

³⁴ ORE. REV. STAT. §§ 696.710-696.730 (1959).

³⁵ See 4 WORDS AND PHRASES 226 (1940), for the comparison of "arose" with "accrued."

³⁶ 337 F.2d 410 (7th Cir. 1964).

³⁸ *Supra* note 16.

³⁷ *Supra* note 14.

³⁹ *Supra* note 16, at 436.

mum contacts and substantial justice and fair play. In weighing the facts of a given case to see if due process requirements are being met, the precise moment when a cause of action arose or the quantum of acts within the forum necessary to give rise to the cause of action will be of secondary importance.

The basic difference between the "commission of any act" and the "matrimonial domicile" clauses of Section 17(e) would seem to be that under the latter, defendant's acts constituting the cause of action need not be committed in Illinois as long as defendant's matrimonial domicile is here. If that were not the case then the matrimonial domicile clause would have no function, for any act committed in Illinois giving rise to the cause of action is already covered in Section 17(e). In this clause the substantial connection with Illinois, for purposes of due process, is based on the maintenance of the matrimonial domicile in the forum and not on the situs of the acts of the defendant.

As mentioned previously, Illinois has long recognized the fact that husband and wife can establish separate domiciles for purposes of divorce jurisdiction. It would therefore seem logical that a wife need never be domiciled in Illinois prior to the time her cause of action arose but could still invoke the benefits of Section 17(e) if her husband had been domiciled here when it arose. While this might appear to be a logical extension of the Illinois concept of domicile for divorce purposes, there is some question whether such a case would meet the test of due process. For example, husband and wife are domiciled in Indiana, but the husband leaves the wife and establishes bona fide domicile in Illinois. He returns twice to Indiana and strikes his wife, giving rise to her cause of action. The husband then changes his domicile from Illinois to California. Could the wife then invoke Section 17(e) after meeting the residence requirements in the Divorce Act? The answer would probably be no if substantial connection with the matrimonial domicile means connection with more of the marital *res* than the mere domicile of the husband. In this example, there would be no question of the application of Section 17(e) had both parties been domiciled in Illinois when the husband struck the wife on two occasions while temporarily out of the state. It would clearly be a case of matrimonial domicile in Illinois at the time the cause of action arose.

Another difficult question arises where the wife in the same example leaves the husband in Indiana for good cause and establishes bona fide

domicile in Illinois. If she were subsequently struck on two occasions by the husband while she was temporarily in Indiana, would Section 17(e) apply? Again the answer is probably no because Section 17(e), when read in conjunction with Section 17(1), states that the *defendant* must maintain a matrimonial domicile in Illinois. If you accept the old concept of matrimonial domicile following the innocent party, Section 17(e) might apply in this case. This was the very point, however, that the Supreme Court found most objectionable in the *Williams* case⁴⁰ because jurisdiction became dependent on the final determination of the case. Also, the defendant in such a case does not have a substantial connection with Illinois.

The choice of the term "matrimonial domicile" will no doubt lead to a good deal of confusion in applying Section 17(e), but the overriding requirement of due process in terms of substantial connection with the forum and fairness to the defendant provide us with at least some reasonable guidelines for interpreting various fact situations.

RETROACTIVE APPLICATION OF SECTION 17(e).

The retroactivity of Section 17(e) suggests a twofold question: are causes of action accrued in part or entirely prior to August 2, 1965, included in the amendment, and can the statute be utilized in connection with decrees entered prior to August 2, 1965?

As a general rule retroactive legislation is not favored by the courts,⁴¹ but Section 17 has been held retroactive in effect. In *Nelson v. Miller*⁴² the court describes the Long Arm Statute as effecting the plaintiff's remedy and method of procedure rather than the substantive cause of action. Since a party has no vested right in a particular remedy or method of procedure, they have no basis for claiming an unfair infringement of their rights when a new method of procedure is presented by legislation to protect and secure rights of the plaintiff already in existence.

In the case of *Ogden v. Gianakos*,⁴³ the court stated that retroactive application of statutes regarding procedure was not based on the

⁴⁰ *Supra* note 27.

⁴¹ *Hegan v. Bleeker*, 29 Ill. 2d 181, 193 N.E.2d 844 (1963); *McQueeney v. Catholic Bishop of Chicago*, 21 Ill. App. 2d 553, 159 N.E.2d 43 (1959); *Nobel v. Nobel*, 349 Ill. App. 535, 11 N.E.2d 383 (1953).

⁴² *Supra* note 14.

⁴³ 415 Ill. 591, 114 N.E.2d 686 (1953).

implied consent or agreement of the defendant but on legislative declarations in the valid exercise of the policy power of the state.⁴⁴

It would appear that matrimonial cases are not so unlike the tort, doing business, and other cases covered by Section 17, that a different rule of retroactivity should apply to accrued causes of action. The cases decided under the other areas of Section 17 are of no help, however, in determining whether Section 17(e) can be used to modify and extend decrees entered prior to August, 1965. The continuing nature of a divorce or separate maintenance decree and the unresolved questions of support and property rights attendant thereto make Section 17(e) somewhat unique.

The cause of action does not merge in an *ex parte* divorce judgment where there is no personal jurisdiction over the defendant so as to bar future litigation over the question of support. The defendant can be served with summons after decree and personal jurisdiction assumed at that time.⁴⁵ Section 17(e) then changes the plaintiff's method of procedure rather than cause of action, and one could argue that questions of support or property rights can be raised by applying Section 17(e) to decrees already entered.

On the other hand it could be argued that Section 17(e) refers to "actions of divorce and separate maintenance" and does not include post decretal actions for support or the determination of property rights which are not in themselves actions for divorce or separate maintenance. The impracticality of opening up many thousands of divorce and separate maintenance decrees is also a factor which might encourage the courts to limit the retroactivity of Section 17(e).

CONCLUSION

The amendment of Section 17 to include actions of divorce and separate maintenance is a logical and a forward step in matrimonial legislation. However, the application of this amendment to the complex fact situations which frequently surround matrimonial cases will cause a great deal of confusion until a body of case law is accumulated

⁴⁴ See also, Tone, *Applicability of Civil Practice Amendments to Pending Cases and Causes of Action Not Yet in Suit—Retroactive Application to Judgments Which Became Applicable Prior to January 1, 1956*, 37 CHICAGO B. REC. 183 (1956), and ILL. ANN. STAT. ch. 110, § 17, at 171. (Smith-Hurd 1956).

⁴⁵ *Karcher v. Karcher*, 204 Ill. App. 210 (1917); *Larson v. Larson*, 2 Ill. 2d 451 (1954); Ill. Ann. Stat., ch. 40 § 19 (1965). See also, *Darnell v. Darnell*, *supra* note 6; 2A NELSON, DIVORCE AND ANNULMENT §§ 17.02-17.09 (2d ed. 1961).

clarifying the requirements of constitutional due process in matrimonial litigation extending beyond state boundaries.

The lawyer's only recourse at this time is to evaluate his client's total fact situation in terms of the defendant's substantial connections with the forum and substantial justice and fair play for both parties. It is unlikely that the Illinois courts will assume jurisdiction over a non-resident defendant under this act if the defendant is unfairly disadvantaged thereby. By the same token the courts will no doubt be liberal in their construction of Section 17(e) where fairness and substantial justice would seem to require it.