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*International Shoe* and Long-Arm Jurisdiction - How about Pennsylvania?

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International Shoe and Long-Arm Jurisdiction
—How About Pennsylvania?
INTRODUCTION

Much has been written concerning the due process requirements for the assertion of jurisdiction over nonresident defendants. The problem, however, is to a great extent academic in Pennsylvania where, as Mr. Justice O'Brien of the Pennsylvania Supreme Court commented in a recent case, the legislature has "been erring too much on the side of safety." Justice O'Brien, in a case which dealt with a limited long-arm statute of Pennsylvania, recognized that currently a "due process gap" exists, namely that the legislature has failed to pass long-arm statutes which are as broad as due process would permit. It is the purpose of this comment to examine the serious "gap" that exists and its consequences to the Pennsylvania resident.

In order to exercise jurisdiction over a person or a corporation a court must meet two jurisdictional tests. First, there must be statutory authority for the court's exercise of jurisdiction over the defendant. Second, the imposition of jurisdiction by the state over a particular defendant must fall within the bounds set out by the Due Process Clause of the Fourteenth Amendment. The second test—the requirements of due process—will be dealt with first since it serves as the outer limit beyond which no state can proceed in its exercise of jurisdiction over nonresident defendants.

THE OUTER LIMIT—DUE PROCESS

"Minimum Contacts"

Any discussion of the modern demands of the Due Process Clause on in personam jurisdiction over nonresident defendants must nec-


3. Id. The "due process gap" is noted at 7 Duq. L. Rev. 138, 143 (1968).

4. Heaney v. Mauch Chunk Borough, 322 Pa. 487, 490, 185 A. 732, 733 (1936) provides that in personam service must be made within a state "unless a statute clearly and definitely manifests that a different method as to service has been promulgated by the legislature."
essarily begin with the landmark case of *International Shoe Company v. State of Washington.* Prior to *International Shoe,* jurisdiction over foreign corporations was asserted on the fictional bases of presence and implied consent. *International Shoe* abolished the fictions and squarely faced the issue of due process. If it failed to give definitive answers to cover all situations, it was only because the very nature of due process renders such a task impossible. It is inescapable that the often nebulous demands of due process (essentially a test of fairness) be examined upon the merits of each case. Thus the test set forth by the court was as precise as any that might have been formulated:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." [Emphasis added.]

In deciding whether the "minimum contacts" test is met, a court should look to the "quality and nature of the activity" and its relation to the "fair and orderly administration of the laws." Additionally, an "estimate of the inconveniences" to the defendant who is to conduct the defense is "relevant."

Essentially, four basic factual patterns are possible with a nonresident defendant and all were alluded to by the court. The chart, Figure 1, illustrates the possible fact situations.

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5. 326 U.S. 310 (1945).
8. Kurland, *supra* note 1. But see, Towe, *Personal Jurisdiction Over Nonresidents and Montana’s New Rule 4B,* 24 MONT. L. REV. 3 (1962) where it is suggested that due process is not met unless three requirements are satisfied: (1) there must be a governmental interest in providing the forum for the litigation; (2) the forum must figure favorably with regard to trial convenience; and (3) the defendant must have done some purposeful act by which he has attained the benefits and protections of the laws of the forum.
9. 326 U.S. at 316.
10. Id. at 317.
11. Id. *But see,* Anderson v. National Presto Industries, Inc., 257 Iowa 911, 919, 135 N.W.2d 639, 643 (1965), which states that "[c]onvenience . . . is not in any event a good test . . . but so far as it has any weight here, the argument is at least as available to the plaintiff. . . ."
12. We are unable to identify the originator of this chart, but our source is the class notes of Associate Professor Aaron D. Twerski who teaches conflict of laws at Duquesne University School of Law. It is, admittedly, an oversimplification, but is nevertheless valuable in outlining the area.

The discussion of due process which follows assumes a sufficiently broad jurisdictional statute. See note 4, *supra.*
<table>
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<tr>
<th>Continuous Activity</th>
<th>Isolated Activity</th>
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<td>I. State can take jurisdiction in all cases.</td>
<td>III. Under certain circumstances state can take jurisdiction.</td>
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<td>II. Under certain circumstances state can take jurisdiction.</td>
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<td>IV. State cannot take jurisdiction.</td>
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**FIGURE 1. Jurisdictional Due Process Factual Patterns**

I. **Continuous Activity, Action Related**

The court easily disposed of the situation where defendant conducts continuous activity within a state and the cause of action is related to the activity. In personam jurisdiction in such a case “has never been doubted.”

II. **Continuous Activity, Action Unrelated**

In this category a nonresident defendant is conducting continuous activity within the forum state but the cause of action is unrelated to these activities. *International Shoe* gave no clear indication as to the solution, but intimated that jurisdiction would depend on the “nature and quality” of defendant’s acts and “the circumstance of their commission.” In *Perkins v. Benguet Consolidated Mining Company* the Supreme Court found that the “continuous and systematic” activities of the foreign corporation made it proper for the Ohio courts to assert jurisdiction if they wished to do so though the cause of action sued upon was unrelated to the defendant’s Ohio activities.

However, continuous activity within a state will not always serve as a basis for jurisdiction over a nonresident defendant. In *Fisher Gover-*

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13. 326 U.S. at 317 where it is stated that “‘Presence’ in the state... has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on...”
15. 342 U.S. 437 (1952). Here the fact situation was unique. A nonresident sued a Philippine corporation in Ohio on a cause of action which neither arose in the jurisdiction nor was related to defendant’s activities there. Defendant, a South Pacific mine owner, had its operations halted during the Japanese occupation. The president, a principal shareholder, was carrying on the firm’s operations from an Ohio office at the time of the suit. Ohio was the only forum reasonably available to the plaintiff. *Developments—Jurisdiction* at 932.

In *Rufo v. Bastian-Blessing Co.*, 405 Pa. 12, 173 A.2d 123 (1961) the Pennsylvania Supreme Court indicated that it would assert jurisdiction in a fact situation similar to *Perkins* but was unable to do so because of the limited Pennsylvania long-arm statute. See text at note 57, infra, for the affect of the 1963 amendments to the Business Corporation Law which overrule *Rufo*.

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nor Company v. Superior Court\textsuperscript{16} defendant was an Iowa corporation doing business in California through manufacturers' agents. The cause of action in the California court was for wrongful death and personal injuries which had occurred in Idaho. In holding that jurisdiction could not be assumed, Justice Traynor of the California Supreme Court listed the following as relevant factors:

The interests of the state in providing a forum for its residents, ... or in regulating the business involved ...; the relative availability of evidence and the burden of defense and prosecution in one place rather than another ...; the ease of access to an alternative forum ...; the avoidance of multiplicity of suits and conflicting adjudications ...; and the extent to which the causes of action arose out of defendant's local activities. ...\textsuperscript{17} [Citations omitted.]

III. Isolated Activity, Action Related

This category must be further divided between tort and contract actions. It appears to be well settled that jurisdiction will be allowed where a tort resulted from the nonresident defendant's isolated or sporadic activity conducted within the forum state.\textsuperscript{18}

A suit on an isolated contract, on the other hand, presents some difficulty for the contract is likely to have contacts with more than one state. The place of execution and the place of performance may not coincide and neither may coincide to the place or places of negotiation.

An important case and one often referred to as the "high water mark" in the Supreme Court's expansion of the permissible basis of in personam jurisdiction over nonresidents is McGee v. International

\textsuperscript{16} 53 Cal. 2d 222, 347 P.2d 1 (1959).
\textsuperscript{17} Id. at 225, 347 P.2d at 3, 4.
\textsuperscript{18} In Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951), cited with apparent approval in McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957), jurisdiction was based upon a "single act" statute which gave Vermont courts jurisdiction over a nonresident who commits a negligent act within the state. In Rosenblatt v. American Cyanamid Co., 86 Sup. Ct. 1 (1965), Mr. Justice Goldberg acting as a single justice, while not deciding the constitutionality of the "single tort" statutes, recognized that such statutes have been uniformly upheld in situations where defendant has committed a tortious act within the forum. He quoted Currie, supra note 1, at 540, which provides:

[T]he constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorists statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on "consent," but on the interest of the forum State and the fairness of trial there to the defendant.
Life Insurance Company. There jurisdiction was allowed though the only contact that a Texas insurer had with the State of California was the mailing of an offer of reinsurance to a California resident who accepted and thereafter mailed the insurance premiums to Texas.

McGee seemed to go a long way in allowing personal jurisdiction over the nonresident defendant for now a single transaction of business served to satisfy the requirements of due process. However, just six months after the McGee decision the Supreme Court in Hanson v. Denckla indicated that some limitations on a state's jurisdictional powers were still required by due process. There a trust agreement was entered into by a Pennsylvania domiciliary and a Delaware trustee. The Pennsylvania domiciliary moved to Florida and continued to correspond with the trustee regarding the administration of the trust. In holding that Florida could not exercise long-arm jurisdiction over the Delaware trustee, and hence could not litigate the validity of the trust, Mr. Chief Justice Warren for a majority of five said:

it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

IV. Isolated Activity, Action Unrelated

The court quickly disposed of this category in International Shoe, stating that:

it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

20. It has been argued that McGee cannot be sustained as a precedent of general applicability for it involved an area—insurance—in which the states have a special regulatory interest. Developments—Jurisdiction at 928. Only one circuit has adopted this view. Trippe Mfg. Co. v. Spencer Gifts, Inc., 270 F.2d 821, 822 (7th Cir. 1959). Contra, Deveny v. Rheem Mfg. Co., 319 F.2d 124, 127 (2d Cir. 1963). Professor Currie argues, Currie at 549, that he cannot see why a State is any less strongly concerned to insure that its injured residents recover compensation from those who injure them than from those who promise to pay for injuries caused by others. See also Note, 51 Va. L. Rev. 719, 727 (1965) where it is asserted that the Due Process Clause could not, in any event, be emasculated by any special state interest.
22. Id. at 253.
23. 326 U.S. at 317.
The court added that a burden to defend in such a situation would "lay too great and unreasonable burden on the corporation to comport with due process."  

Foreign Act, Local Injury

A category of cases that falls within boxes I or III of Figure 1 (cause of action related to either isolated or continuous activity) involves situations where the defendant, by its out-of-state activities, has caused an injury within the state. This is the problem often raised in a products liability case.

The exact requirements of due process in products liability cases have consistently puzzled state and federal courts. Primarily responsible has been the Supreme Court's language in *Hanson v. Denckla* that defendant must "purposefully [avail] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."  

There should be little difficulty in asserting jurisdiction where goods are shipped directly into a state by a nonresident manufacturer and sent through the distribution process for in such cases defendant has voluntarily entered the state and, in the *Hanson* language, has purposefully availed itself of the benefits and protections of its laws.

Where a defendant regularly conducts business within a state, jurisdiction will be allowed and it will generally be of no significance that the alleged negligent act occurred outside the forum.

However, in products liability situations where the defendant's only contact with the forum is that his product has caused an injury within the forum itself, the courts and writers are in disagreement as to what type of "minimum contacts" are necessary to satisfy the due process clause. In an exhaustive opinion thoroughly examining both the cases' and the writers' approach to this problem, the Arizona Supreme Court in *Phillips v. Anchor Hocking Glass Corporation* concluded that *Hanson v. Denckla* "was an unusual situation in which the court achieved substantial justice" but that the decision "is of questionable value as a precedent regarding the problem of personal jurisdiction.

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24. *Id.*
25. 357 U.S. at 258.
over non-resident defendants." In *Phillips* defendant's only contact with the state was the presence of a single allegedly defective product which it manufactured and which the court assumed was sold to plaintiff outside the state. After the injury defendant's products were shown to be present for sale within the state. The court recognized that other jurisdictions have found it fair to assume jurisdiction over non-resident defendants in such situations, but constrained by the language in *Hanson* they have adopted a test of foreseeability. However, the Arizona court refused to be bound to such a test and relying upon the test set forth in *International Shoe* framed the issue in terms of whether or not defendant's contacts with the state made it fundamentally fair to assert jurisdiction. It listed the following factors to be considered by the trial court:

First, the court should consider the nature and size of the manufacturer's business. As the probability of the product entering interstate commerce and the size or volume of the business increase, the fairness of making the manufacturer defend in the plaintiff's forum increases. Second, the court should consider the economic independence of the plaintiff. A poor man is likely to become a public ward if his injuries are uncompensated. Moreover, he may not be able to afford a trip to another jurisdiction to institute suit. . . . Third, the court should consider the nature of the cause of action including the applicable law and the practical matters of trial. As the number of local witnesses increases and their availability to travel decreases, it seems fairer to make the manufacturer defend in the plaintiff's forum.

This, briefly sketched, represents the demands of due process imposed by the Fourteenth Amendment. It is essential to point out that the "minimum contacts" test of *International Shoe* applies to private as well as corporate persons insofar as it broadens the scope of long-arm jurisdiction.

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30. *Id.* at 254, 413 P.2d at 735.
31. *Id.* at 257, 413 P.2d at 738.
32. Mr. Justice Traynor's statement in *Owens v. Superior Court*, 52 Cal. 2d 822, 831, 345 P.2d 921, 924-5 (1959) that the "rationale of the *International Shoe* case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over nonresident motorists make it clear that the minimum contacts test for jurisdiction applies to individuals as well as for corporations" is in accord with the position taken by the American Law Institute, *Restatement (Second) Conflicts of Laws* §§ 84-86 (Tent. Draft No. 8, 1956), and is embodied in the *Uniform Interstate and International Procedure Act* §§ 1.01, 1.03. Query whether the "minimum contacts" test would invalidate "tag" service where defendant's only contact with the state is his presence there.
THE LONG-ARM IN PENNSYLVANIA

Following *International Shoe* many state legislatures drafted statutes to take advantage of the broader standard of due process established for in personam jurisdiction over nonresidents. Without a sufficiently broad statute, of course, a state cannot assert jurisdiction. The Pennsylvania legislature surprisingly failed to react in any meaningful way. Prior to *International Shoe*, Pennsylvania had legislation providing for service of process over (1) nonresident motorists, (2) aircraft owners or operators involved in an accident “within or above” the state, and (3) the “owner, tenant, or user” of “involved” real estate. In apparent response to *International Shoe*, the legislature amended the non-resident motorist and aircraft owners statutes. In addition, it passed statutes providing for long-arm jurisdiction over (1) certain distributors of “malt or brewed beverages,” (2) the owner or operator of a water vessel, (3) uninsured insurers, and (4) unregistered corporations.

The Pennsylvania long-arm statutes as a whole are severely limited in nature and thus fail to encompass the permissible scope of jurisdiction over nonresidents in terms of the Due Process Clause. The motorist, aircraft, beverage, insurance, and vessel statutes purport to cover extremely limited situations and have thus given the courts little difficulty in application. Similarly, the real estate statute purports to deal with a limited situation, but has been the source of some controversy as attempts have been made to broaden its scope by interpretation. *These statutes serve as the only means for attaining long-arm jurisdiction.*

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33. The following include in part those states which have adopted a comprehensive long-arm such as the statute proposed herein: New York, Rhode Island, New Jersey, Arkansas, Louisiana, Illinois, Michigan, Wisconsin, Arizona, Maine, Oklahoma, Massachusetts and Washington. The following states, unlike Pennsylvania, have a “single act” statute for corporations: West Virginia, Vermont, Ohio, Maryland, and Minnesota. This list is by no means exclusive.


35. *Pa. Stat. Ann.* tit. 2, § 1410 (1955) provides for service on an aircraft “operator or owner” following any “accident or collision” which is “within or above” the Commonwealth. It can be found in the Appendix.


jurisdiction over a non-corporate entity. The corporate enactment, repealed, re-enacted and amended three times since its inception, has been an even more fruitful source of litigation.

In the remainder of this comment the restrictive provisions of the corporate and real estate statutes will be examined in detail to reveal their inadequacies and to suggest the legislative reform needed to ensure that courts in this state are able to exert the full range of jurisdiction that the Due Process Clause permits. This, it is submitted, is necessary to eliminate the current hardships that are imposed upon the Pennsylvania plaintiff who is not only deprived of a convenient forum but may also be denied substantive justice at the hands of a foreign court which may choose to apply its own law or the law of another state thereby reducing or eliminating plaintiff's chances of recovery.

THE CORPORATE "LONG-ARM"—SECTION 2011

1851 to 1951—"Doing Business"

Before any statutory direction in the form of "long-arm" jurisdiction existed in Pennsylvania, the limitations for exercising jurisdiction over nonresident corporations "doing business" in this state were laid down in Shambe v. Delaware & Hudson R.R. Company which held that (1) the corporation must be present in the state; (2) by an agent; (3) duly authorized to represent it in the state; (4) the business transacted therein must be by or through such agent; (5) the business engaged in must be sufficient in quantity and quality; and (6) there must be a statute making such corporation amendable to suit. The

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41. By the Act of April 8, 1851, P.L. 353 § 6 suit against a corporation could be brought in any county where it had an agency or transacted business. Service had to be made upon an agent of the corporation.

Today, Rules 2179 and 2180 of the Pennsylvania Rules of Civil Procedure (PA. STAT. ANN. tit. 12, §§ 2179, 2180) provide venue and service requirements for suits against a corporation. Rule 2180 is not a "long-arm" provision except to the extent that the sheriff is unable to make service, in which case service is authorized through the Secretary of the Commonwealth. If service is made under Rule 2180 the test for whether or not a corporation was "doing business" will be the same as the applied for Section 2011C of the Business Corporation Law. Botwinick v. Credit Exchange, Inc., 419 Pa. 65, 213 A.2d 349 (1965). However, service may not be proper under Rule 2180 though a corporation is "doing business" under Subsection C of Section 2011. If the corporation has no agent in the state service must be made pursuant to Subsection B of Section 2011. Myers v. Mooney Aircraft, 429 Pa. 177, 240 A.2d 505 (1967).


43. Id. at 246-47, 135 A. at 757. It is interesting to note that the Pennsylvania Supreme Court in 1927 felt that it was able to exercise jurisdiction over unregistered corporations to the extent of due process. The writers of this note find this somewhat ironic in view of the current state of Pennsylvania "long-arm" jurisdiction.
test was known as the “solicitation plus” doctrine and obviously rendered it difficult to assert jurisdiction over foreign corporations.\textsuperscript{44}

1951—A “Long-Arm” Enacted (Subsections B and C)

In 1951 Subsections B and C of Section 2011 of the Business Corporation Law were added. These subsections are the substance of Pennsylvania jurisdiction over unregistered corporations. In their present form they provide as follows:

B. Any foreign business corporation which shall have done any business in this Commonwealth, without procuring a certificate of authority to do so from the Department of State, shall be conclusively presumed to have designated the Secretary of the Commonwealth as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth.

C. For the purposes of determining jurisdiction of courts within this Commonwealth, the doing by any corporation in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth for such purpose, with the intention of thereby initiating a series of such acts, shall constitute “doing business.” For the purposes of this subsection the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.

In \textit{Rufo v. Bastian Blessing Company},\textsuperscript{45} these provisions were held to have been enacted for the purpose of abolishing the “solicitation plus” doctrine and increasing foreign corporations’ amenability to suit within the state. However, \textit{Rufo} also forecast a certain amount of gloom for Pennsylvania plaintiffs. Subsection B as it then existed\textsuperscript{46} was held to embody two jurisdictional requirements: (1) the corporation must have done business within the meaning of Subsection C, and (2) the cause of action must arise out of acts or omissions of the corporation within the Commonwealth.\textsuperscript{47} Thus, while the defendant in \textit{Rufo} was found to have been doing business within the state for purposes of Subsection C, the negligent act did not occur within the state.

\textsuperscript{44} See generally, Developments—Jurisdiction at 919-923.
\textsuperscript{45} 405 Pa. 12, 173 A.2d 123 (1961).
\textsuperscript{46} Before the 1963 amendment Subsection B provided for long-arm jurisdiction in “... any action arising out of acts or omissions of such corporation within this Commonwealth.”
\textsuperscript{47} 405 Pa. at 22, 173 A.2d at 128.
thereby failing without Subsection B. Hence jurisdiction could not be assumed. The court recognized that due process would not have been offended by the assertion of jurisdiction, but felt that the jurisdictional requirements of Subsection B were clear on their face.48

The requirement that a foreign corporation be “doing business” within the state has resulted in the denial of jurisdiction in many cases where due process would unquestionably have allowed its assertion. Primarily responsible have been the restrictive features of the statute. However, unlike courts in other jurisdictions,49 the Pennsylvania Supreme Court has been unwilling, without legislative direction, to adopt a liberal interpretation of “doing business” to reflect the increased scope of jurisdiction initiated by International Shoe.

Until the 1968 amendments, the statutory language of Subsection C required an “entry”50 by the foreign corporation into the state. In Swavley v. Vandergrift51 a Pennsylvania resident had suffered property damage when a fire destroyed his home. The fire was caused by an allegedly defective incinerator manufactured by a foreign corporation. In a suit against the retailer, the retailer attempted to join the nonresident manufacturer who had no officers or property in Pennsylvania. Defendant manufacturer marketed its incinerators on a nationwide basis through independent wholesalers. Orders were accepted at defendant’s home office and sold outright to distributors. Advertising expenses were shared with distributors who were required to submit monthly reports of sales and inventories and were forbidden to sell similar products. Additionally, there were two “manufacturers repre-

48. Prior to this decision the Court of Appeals for the Third Circuit had interpreted Subsection B’s language of “arising out of acts or omissions within this Commonwealth” as including situations as in Rufo where the negligent act occurred outside the state and the injury occurred within it. Florio v. Powder Power Tool Co., 248 F.2d 367 (1957). The court in Rufo expressly rejected this interpretation.

49. See, e.g., Northern Supply, Inc. v. Curtiss—Wright Corp., 397 P.2d 1013 (Alas. 1965) where the Alaska Supreme Court construed the statutory language of “transacting business” as “encompassing all those activities which would subject a foreign corporation to the jurisdiction of our courts when measured by the outer limits of the federal constitution.” Of course, it is recognized that the language of Subsection C would not permit as broad a construction as that made by the Alaska court. But it is believed that liberalizing the concept of “doing business” would have permitted jurisdiction in a substantially larger number of cases. See also, Note, Jurisdiction Over Nonregistered Corporations Doing Business in Pennsylvania: Confusion in Perspective, 27 U. Pitt. L. Rev. 879 (1966).

50. Subsection C previously provided:

For the purpose of determining jurisdiction of courts within this Commonwealth, the entry of any corporation into this Commonwealth for the doing of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth with the intention of thereby initiating a series of such acts, shall constitute “doing business.” [Emphasis added.]

sentatives" whose Pennsylvania functions included seeking new distributorships as well as overseeing those already in existence. The court, in holding that both men were independent parties not subject to the requisite degree of control by the foreign manufacturer necessary to render it amenable to suit within the Commonwealth, stated:

Obviously an impersonal corporate entity organized and located in another jurisdiction can be said in the words of the statute, to have "entered" the state of Pennsylvania only if its agents or property have been physically present therein . . . . 52 (Emphasis added.)

There can be little doubt that defendant's Pennsylvania activities were more than sufficient to satisfy the "minimum contacts" test of International Shoe.

Thus, until the 1963 amendments not only did the negligent act or omission have to occur within the state for purposes of Subsection B, but Subsection C could not be satisfied if the foreign corporation, desirous of a Pennsylvania market, but unwilling to establish offices there, were careful in setting up its distributorship so as to avoid its being labeled the corporation's agent rather than an independent contractor.

1963—Subsections B and C Amended

In the 1963 amendments of Subsections B and C the legislature deleted from Subsection B the phrase "out of acts or omissions of such corporation." 53 Subsection C was changed from "For the purposes of this section" to "For the purpose of determining jurisdiction of courts within this Commonwealth." The legislature retained the definition of "doing business" in Subsection C.

Under the 1963 amendments the question was raised as to whether they eliminated the requirement that the situs of the injury be within the state. The district courts went both ways. 54 The issue was first raised, but unanswered, by the Pennsylvania Supreme Court in Miller v. Kiamesha-Concord Inc. 55 The court finally decided, without discussion, in Myers v. Mooney Aircraft 56 that the "statutory requisite

52. Id.
53. See note 50, supra.
56. 429 Pa. 177, 240 A.2d 505 (1967).
that the action must arise out of 'acts or omissions' in Pennsylvania is eliminated and the sole question is whether . . . [the corporation] was 'doing business' in the Commonwealth."  

Thus, under the 1963 amendments it was possible to secure jurisdiction over a nonresident corporation for (1) a negligent act occurring outside the state, and (2) a cause of action unrelated to the corporation's Pennsylvania activities. However, the "doing business" provisions of the 1951 act remained unchanged. With an unwillingness to expand on its own the definition of "doing business," the Pennsylvania Supreme Court, and consequently the federal courts sitting in Pennsylvania, continued to deny jurisdiction in many cases where the assertion would have undoubtedly comported with due process.

In Miller v. Kiamesha-Concord, Inc., two Pennsylvania residents were injured at defendant's New York hotel. Defendant had no property and paid no rent in Pennsylvania. However, a Pennsylvania representative had solicited a substantial amount of business in the state borne out by the fact that she was paid commissions on more than $200,000 worth of business per year. Defendant supplied her with all necessary forms and materials. Its name was listed in the telephone directory though the service charges were paid by the Pennsylvania representative. The court held that the New York hotel was not "doing business" in this state for the Pennsylvania representative was an independent contractor whose activities were not subject to the hotel's control.

57. Id. at 184, 240 A.2d at 510. At no point in the opinion did the court speak of the constitutionality of its assertion of jurisdiction. It seems clear in Myers that defendant's activities in the state were a sufficient basis for jurisdiction though the cause of action was unrelated to its Pennsylvania activities. However, this will not always be true. See text at note 14 et. seq., supra.

58. It has been pointed out that the Federal Courts sitting in Pennsylvania have taken a more liberal approach in determining whether an unregistered corporation has done business within the state than has the Pennsylvania Supreme Court, Note, Jurisdiction Over Nonregistered Corporations Doing Business in Pennsylvania: Confusion in Perspective, 27 U. Prrt. L. Rev. 879 (1966). However, the federal courts have also denied jurisdiction in many cases where due process would have allowed its assertion. Meench v. Raymond Corp., 283 F. Supp. 68 (E.D. Pa. 1968) (manufacturer who sold and advertised on a nationwide basis held to have entered the Pennsylvania market through an independent contractor); Smeltzer v. Deere & Co., 252 F. Supp. 552 (W.D. Pa. 1966) (parent corporation distributed products through wholly-owned subsidiary); Rachelson v. E.I. duPont de Nemours & Co., 257 F. Supp. 257 (E.D. Pa. 1966) (Pennsylvania dealer the exclusive outlet for unregistered corporation).


60. Accord, Yoffe v. Golin, 413 Pa. 154, 196 A.2d 317 (1964); Namie v. DiGirolamo, 412 Pa. 589, 195 A.2d 517 (1963). It is interesting to note that in Miller the Pennsylvania representative wished to sue the hotel for commissions due her, a Pennsylvania forum would have been unavailable though the contract may well have been entered into in Pennsylvania and was to be performed here.
Other cases involved factual situations similar to that in *Swavley*, and the test for "doing business" continued to be applied rigidly. The courts remained troubled by the language of Subsection C requiring an "entry" by the corporation into the state. Thus, even where a foreign corporation had carried on substantial business in the state by the sale of its machines both directly and through jobbers the jurisdictional requirements were not met where the corporation had not "entered" the state either by physical presence or through agents. Only where the corporation's contacts were very heavy has jurisdiction been asserted under Subsection C. Thus jurisdiction was allowed when the corporation's salaried employees made monthly visits to the state and where a "close collaboration" existed between the corporation and its distributors.

1968—"Doing Business" within Subsection C Redefined

The 1968 amendments appear to change a large body of existing case law. The requirement of Subsection C that the corporation "enter" the state has been abolished and thus the entire *Swavley* line of cases where unregistered corporations marketed their goods in Pennsylvania through independent retailers and those cases such as *Miller v. Kiamesha-Concord, Inc.* where representatives found to be "independent contractors" had substantial Pennsylvania contacts and were directly furthering the business of an unregistered corporation should fall. However, the first appellate court to interpret Subsection C as amended seems to have taken a contrary view. It reasoned that the requirement of "entry" by a foreign corporation has long been dismissed as a necessary element of due process. While the court was certainly correct as to the matter of due process, it unfortunately overlooked the long line of cases interpreting Subsection C as re-

63. Frish v. Alexson Equipment Corp., 423 Pa. 247, 224 A.2d 183 (1966). See also *Myers v. Mooney Aircraft*, 429 Pa. 177, 240 A.2d 505 (1967), where the unregistered corporation was found to be "doing business" though it had no agents within the state and distributed its products through an independent contractor.
64. See notes 58, 61 and 62, *supra*.
65. See notes 59 and 60, *supra*.
66. Nettis v. DiLido Hotel, 215 Pa. Super. 284, 296, 257 A.2d 643, 649 (1969). There the Superior Court in discussing the opinion of the lower court stated: The court reasoned that the word "entry" had been eliminated from this amendment, and that the elimination of the word which had appeared in that section prior to the 1968 amendment made a difference in cases decided in Pennsylvania before and after the amendment. We do not agree with this reasoning.
quiring the corporation's "entry" into the state by its actual physical presence. If the court's interpretation of the amendment is that it fails to command the reversal of these cases it must surely be overruled by the Pennsylvania Supreme Court. This, it is believed, would be entirely proper for the cases fall well within the demands of due process and the inconvenience to Pennsylvania residents forced to sue in a foreign court is readily apparent. The 1968 amendments were enacted in apparent response to this situation and to apply the same standard of "entered" to Subsection C would be to ignore a clear legislative mandate.

It must be emphasized that the legislature has not succeeded in bridging the "due process gap" through the 1968 amendments. Retained in Subsection C is the language requiring "the doing of a series of similar acts . . . or doing a single act . . . with the intention of thereby initiating a series of such acts." Based on this language, the Pennsylvania plaintiff in *Tudesco v. Publishers Company* was unable to secure jurisdiction over a foreign corporation that had come into the state and entered into a contract with him apparently to be performed at least in part in Pennsylvania. The decision must stand based upon Subsection C in its present form though once again due process would allow, and fairness would seem to require, the assertion of jurisdiction. Beyond the facts in *Tudesco*, it is not difficult to envision situations where the denial of jurisdiction would lead to an even more inequitable result. Suppose an Ohio contracting firm agrees to build a new house for a Pennsylvania resident. It is negligent in construction and one week after work is completed the roof begins to leak. Construction of the house was the only Pennsylvania activity of the Ohio corporation and it had no intention of any further Pennsylvania contacts. It seems clear that Subsection C would prohibit the Pennsylvania homeowner from maintaining suit in a Pennsylvania forum, though due process would not be offended, and a Pennsylvania forum would certainly be the most appropriate. In such business settings where defendants' activities within the state are designed to secure an eco-

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67. See notes 58 through 62, *supra*.
68. 232 F. Supp. 638 (E.D. Pa. 1964). See also Greco v. Bucciconi Engineering Co., 246 F. Supp. 261 (W.D. Pa. 1965) where this section of the statute was construed as contemplating a "systematic course of conduct rather than isolated or sporadic occurrences."
69. WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958).
70. See note 18, *supra*, discussing the constitutionality of "single tort" statutes. Of course, by requiring a "series of acts" Subsection C fails to reach the single tort situation.
nomic benefit there simply is no reason to deny jurisdiction to an injured or disappointed Pennsylvania plaintiff.

Of even greater significance is the last sentence of Subsection C, added by the 1968 amendments, which provides:

For the purposes of this subsection the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.

The legislature, as it has done by deleting the word "entry" from the first sentence, is providing Pennsylvania courts with a significantly broader standard for asserting jurisdiction over nonresident corporations. However a question of interpretation is presented. The first sentence of Subsection C provides for jurisdiction for the doing of a single act only when it is done "with the intention of thereby initiating a series of similar acts." Yet the new sentence equates the "shipping of merchandise directly or indirectly" into the state with the "doing of such an act" within the preceding sentence. The new sentence appears on its face to indicate that a single shipment of merchandise into the state will constitute "doing business." This, in effect, would make Subsection C a "single act" statute for the shipment of goods into the state. If this interpretation is adopted, the section might be unconstitutional applied to the following facts: A Pennsylvania resident on vacation in California notices a small advertisement for potted plants in a local California newsweekly. The California plant distributor sells only to a limited local market. The Pennsylvania resident returns home with the newsweekly and orders one of defendant's potted plants. Upon opening the package containing the plant, the Pennsylvania plaintiff is bitten by a blackwidow spider. Plaintiff alleges that defendant was negligent in failing to inspect the potted plant before shipment and brings suit in Pennsylvania. It seems clear that defendant's connections with Pennsylvania would be insufficient to meet the "minimum contacts" test of International Shoe.71 Yet the statute would purport to give jurisdiction in just such a case.

Moreover, it will be recalled that in Myers v. Mooney Aircraft72 it was held that Subsections B and C would allow jurisdiction where the

71. See Judge Sobeloff's famous discussion in Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) of the California dealer who sells a set of tires to a Pennsylvania tourist who is injured in Pennsylvania.

72. See text at note 56, supra.
cause of action is unrelated to the corporation's Pennsylvania activities. The sole inquiry is whether or not the corporation is "doing business" within the state. Thus, if Subsection C equates a single shipment of merchandise with "doing business," it would follow that a suit could be maintained on a cause of action unrelated to the shipment. However, *International Shoe* made it perfectly clear that due process would not permit jurisdiction in such a case.73

This is not to suggest that Subsection C should not be read as a "single act" statute. Given a manufacturer who contracts to send his product to a Pennsylvania resident, it does not seem unfair to make him responsible in a Pennsylvania forum for any injuries which result from the negligent design of the product.74 Additionally, jurisdiction could be asserted over the manufacturer who distributes his goods on a nationwide basis and, through a "single shipment" into the state, merely places his product into the stream of commerce.75 Finally, the statute, so interpreted, would allow jurisdiction consistent with due process over the manufacturer of a component part who, in the truest sense of the word, ships his product "indirectly" into the state if he derives substantial revenue from the sale.76

However, if the new sentence of Subsection C is read as providing for jurisdiction over a single shipment only when done with the intention of initiating further similar shipments, Pennsylvania residents will often be denied a convenient forum to litigate. It is submitted that the Pennsylvania Supreme Court should read Subsection C as a "single act" statute for the shipment of goods limited only by the demands of the Due Process Clause.

**Subsection D—Specific Exclusions to "Doing Business"

D. For the purposes of determining jurisdiction of courts within this Commonwealth, inspecting, appraising and acquiring real estate and mortgages, and other liens thereon, and personal prop-

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73. See text at note 4, *supra*.

Now that the "entry" requirement has been abolished and the shipment of goods into the state, directly or indirectly, constitutes "doing business," there should be no difficulty, either statutorily or constitutionally, asserting jurisdiction over the manufacturer whose products regularly enter the state whether by direct shipment or indirectly through the chain of distribution.
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erty and security interests therein, and holding, leasing away, conveying and transferring the same, as fiduciary or otherwise, or collecting debts and enforcing mortgages and rights in property securing the same by any foreign business corporation shall not constitute "doing business."

As a postscript to Section 2011, the legislature in 1966\(^7\) added the loosely worded Subsection D which specifically excludes certain activities from the definition of "doing business." Subsection D has never been interpreted by a Pennsylvania court. Moreover, the writers of this note have been unable to find a similar provision in any other long-arm statute. The following hypotheticals illustrate the harsh results which Subsection D would command.

(1) Defendant is a New York Corporation specializing in inventory financing. It enters the state to act on certain secured debts of plaintiff, a local businessman. The claim is settled, but due to defendant's negligence, plaintiff is listed as a credit risk with the local credit agency. Plaintiff's business is seriously and directly injured. Plaintiff's relief must be found in a New York court.

(2) Defendant, a Washington, D.C. bank, sends an agent to Pennsylvania to contact plaintiff, an appliance dealer. After negotiation, the parties contract for defendant to finance plaintiff's inventory. Subsequently, defendant breaches the contract and plaintiff is forced to secure a new financing arrangement at a substantially higher interest rate. Again, plaintiff would be unable to maintain suit in a Pennsylvania court.

It is indeed difficult to conceive of the policy considerations embodied in Subsection D which would support these results.\(^7\)

77. Subsection D was also amended in 1968 but its substantive provisions remain unchanged.

78. Apparently the Pennsylvania Bar Association Corporation Law Committee felt that Subsection D would encourage investors to make loans to Pennsylvania residents. \(2\) \textit{SELL, PENNSYLVANIA BUSINESS CORPORATIONS} § 1011.12. However, one must wonder to what extent, if at all, immunity from suit is a real factor in a foreign investment company's decision to enter the Pennsylvania market, especially in light of the fact that they are given no such sanctity in other states. Even assuming that it is a factor, it is believed that Subsection D is probably an unnecessary inducement in terms of the availability of loans, and may well result in substantial hardship to Pennsylvania residents deprived of a convenient forum. Moreover, Subsection D seems to cover situations beyond a foreign corporation's entering the state merely to make a loan. For instance, a corporation which comes to Pennsylvania to purchase real estate or collect debts secured by property is apparently immune from suit within the commonwealth.
ACCIDENTS INVOLVING REAL ESTATE—SECTION 331

Pennsylvania's other major long-arm statute, enacted in 1937, is entitled "Actions Against Non-residents Which Involve Real Estate." Section 331 provides:

[A]ny nonresident . . . being the owner, tenant, or user, of real estate . . . within the Commonwealth . . . shall . . . make and constitute the Secretary of the Commonwealth . . . his . . . agent for the service of process in any civil action or proceedings instituted . . . against such owner, tenant, or user . . . arising out of or by reason of any accident or injury occurring within the Commonwealth in which such real estate, footways, and curbs are involved.

The Pennsylvania Supreme Court has dealt with this section on four occasions. The earliest case of consequence, Murphy v. Indovina, merely provides that the nonresident defendant must be an "owner, tenant or user" at the time the cause of action occurred.

Betcher v. Hay-Roe (When Is Realty "Involved"?)

A 1968 case, Betcher v. Hay-Roe, provides more insight into the statute and the tests to be applied in determining whether or not Section 331 should be applied to a particular defendant. There plaintiff was babysitting for defendants in their rented house when her chair collapsed. When the suit was commenced defendants had given up their lease and moved to Hawaii. Defendants' preliminary objections to service under Section 331 were overruled by the lower court. In affirming, the Pennsylvania Supreme Court, speaking through Mr. Justice O'Brien, rejected defendants' contention that since the chair was personalty the terms of the statute had not been met because the real estate was not at least casually connected with the accident. The court said the issue was whether real estate was "involved." In de-

79. PA. STAT. ANN. tit. 12, § 331 (1937), which is provided in its entirety in the Appendix.
80. 384 Pa. 26, 119 A.2d 258 (1956). In Gearhart v. Pulakos, 207 F. Supp. 369 (W.D. Pa. 1962) it was held in a sidewalk fall case that defendants, who owned the property at the time the cause of action accrued but not when the suit was instituted, could be served under Section 331.
81. Rumig v. Ripley Mfg. Corp., 366 Pa. 343, 77 A.2d 360 (1951) held that a New York parent corporation could be served under this section as an "owner, tenant, or user" or realty located in Pennsylvania which was held by its wholly-owned subsidiary, a Pennsylvania corporation.
83. Id. at 374, 240 A.2d at 503.
ciding that it was, two prior Common Pleas Court decisions, Andrews v. Jaffa and Shouse v. Wagner, which required the casual connection, were rejected, the court stating that "[w]e cannot agree" that involvement under Section 331 "requires more than the occurrence of the accident or injury on the real estate."

In Andrews, plaintiff suffered a gunshot wound which was inflicted by the minor defendant on a farm owned by the minor defendant's father, who was also named defendant. While the farm was located in the state, defendants resided in Ohio. In holding there was no statutory authority for in personam jurisdiction the court stated:

[t]he accident did not arise out of or occur by reason of any accident or injury within this commonwealth in which real estate, footways and curbs were involved. According to the complaint, the accident did occur on the defendants' property but the property itself was not involved.

In Shouse, plaintiff stored his car overnight in defendant's leased parking garage from which it was stolen. Suit was initiated following recovery of the car in a damaged condition, but not before defendant gave up his lease and moved to Florida. In holding the service under Section 331 invalid the court said, "[b]eing 'involved' is not the same as being the site of location of an accident." The court added that the realty's condition should be "casually connected" with the injury.

In Betcher v. Hay-Roe the court rejected the requirement of a casual relationship as being necessary for involvement and stated that it is only necessary that the accident or injury occur on the real estate. The court said its result was "consonant with justice" arguing:

Where an accident involving a Pennsylvania resident occurs in the Pennsylvania home of other Pennsylvania residents, and the victim is treated by Pennsylvania doctors in Pennsylvania, then surely it is unjust to require the plaintiff to go to Hawaii to sue. And it would be wrong to attribute any such unjust motive to the legislature. [Emphasis added.]

The court's rationale is subject to criticism since its enumeration of

84. 3 Crawford Co. L.J. 192 (1963).
86. 429 Pa. at 375, 240 A.2d at 503.
87. 3 Crawford Co. L.J. 192, 196 (1963).
88. 84 Pa. D. & C. 82, 84 (1952).
89. Id. at 85.
90. 429 Pa. at 377, 240 A.2d at 505.
the Pennsylvania contacts do little to explain why the realty was "involved" within the meaning of Section 331. These contacts may be good reasons why Pennsylvania should exercise jurisdiction and surely are far in excess of the "minimum contacts" required by *International Shoe*, but what do they tell of the legislature's intent when it required that the realty be "involved"?

*Messick v. Gordon (Who Is a User?)*

Shortly after *Betcher* was decided, the court again faced the language of Section 331. *Messick v. Gordon* arose when defendant, an overnight patron in plaintiff's motel, allegedly caused a fire which resulted in extensive damage. Defendant's preliminary objections were sustained by the lower court which stated that defendant's occupancy of the room did not constitute a "use" within the meaning of Section 331. Again speaking through Mr. Justice O'Brien, the court affirmed saying that if defendant were a "user" then in every accident occurring in Pennsylvania defendant would "be a user of real estate." The court added that since Section 331 was enacted prior to *International Shoe*, it had to be interpreted as having been intended by the legislature to be constitutional according to the limited earlier standards. The court felt its view was consistent with the lower court decisions of *Dubin v. City of Philadelphia* and *Bates v. Kelly* which were decided shortly after the act was passed and required a user to have a "substantial connection" with the realty.

In *Dubin*, plaintiff brought suit following a fall on a broken sidewalk. Defendant, a New Jersey mortgagee of the property, was leasing it to another because the mortgagor had defaulted. Defendant had never been in physical possession of the property. In holding that defendant was a "user" within the meaning of Section 331, Judge Bok said:

92. The dissent, written by Mr. Justice Roberts with Chief Justice Bell concurring, argued that defendant was both a "tenant" and "user," and if not the former then surely the latter. It was argued that "use" was the right to "hold or occupy and have the fruits thereof" and that defendant clearly had the "use" of the motel room. 434 Pa. at 36, 252 A.2d at 630.  
93. 434 Pa. at 34, 252 A.2d at 630.  
94. The court noted that PA. STAT. ANN. tit. 46, § 552(3) sets up the presumption that the legislature did not intend to violate the constitution; that Section 331 was passed in 1937, eight years before *International Shoe* was handed down by the Supreme Court. See the discussion at note 101, infra.  
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While [defendant's] use is not based on *possessio pedis*, it is shown by her collecting rents, by her using them to pay city taxes and water rents, and by her leasing the property to the present tenants. This . . . is an active exercise of the "right to possession" which inured in her when the mortgage was executed.97

The plaintiff in *Bates*, a Boy Scout, slipped and fell into a gorge while under the supervision of defendant, a Scoutmaster who later became a resident of New York State. The occupancy of the land was with permission of the owner, who was not a party to the action. In sustaining defendant's preliminary objections to service under Section 331, the court said that "mere presence on the property, without more, is not such a use as authorizes service."98

Discussion—Betcher and Messick

Taking *Betcher* and *Messick* together it would appear that the Supreme Court has adopted a test by which the court should be extremely liberal in determining whether an accident or injury arises out of circumstances in which real estate is "involved." No casual connection between the realty and the injury will be required. On the other hand, the court is quite restrictive when the question is whether defendant is an "owner, tenant, or user" of real estate. Indications are that Mr. Justice O'Brien was of the opinion that a broad test in both instances would allow in personam jurisdiction over a nonresident defendant whenever an accident occurred here. This, he feels, would violate due process.99

It is submitted that the liberal reading in *Betcher* was based upon a realization of the problem that Pennsylvania faces with its limited long-arm statutes.100 Of course, the court, given a limited statute such as Section 331, incapable of a broad interpretation, was forced to curtail its application at some point. *Messick* was that point. This being so, it is possible that had *Messick* been decided before *Betcher* instead

97. 34 Pa. D. & C. at 70.
98. 32 Pa. D. & C.2d at 446.
99. See 434 Pa. at 34, 252 A.2d at 690, where the court states that "even current standards of due process" may be violated when in personam jurisdiction is permitted *whenever* an accident occurs in Pennsylvania. But see discussion in the text at footnotes 117 and 118, infra.
100. This statement is made with full awareness of the general rule of construction that nonresident service statutes, because they are in derogation of the common law, are to be strictly construed. *Williams v. Meredith*, 326 Pa. 570, 192 A. 924 (1937); *McCall v. Gates*, 254 Pa. 158, 47 A.2d 211 (1946). However, it is strongly believed that in both *Betcher* and *Messick* the court wanted very much to permit service which would be as broad as possible under the statute.
of after it, the "involved" test could well be strict today requiring a casual relationship, and the "owner, tenant, or user" test could be broad, perhaps applying to even licensees or trespassers. This construction of Section 331 without reference to its date of enactment would be just as logical since the word "user" is capable of broader construction and would have provided just results in cases such as Messick or Andrews.

The current tests, on the other hand, are consistent with the court's stated purpose of interpreting the 1937 statute in light of the due process standards which existed prior to International Shoe. Even then a cause of action which was related to continuous activity within the state permitted the assertion of jurisdiction.\(^{101}\) The strict interpretation of the "user" test insures defendant's continuous activity while the real estate does not have to be "involved" for the activity to be related to the cause of action. Thus, whenever the accident or injury occurs on defendant's realty the cause of action would be related to continuous activity within the state and would satisfy the pre-International Shoe tests for due process.

Nevertheless, the court in its interpretation of Section 331 felt that it was on the horns of a serious dilemma: a narrow interpretation of either requirement of Section 331 will result in some manifest injustices, but a broad interpretation of both may well, in the court's opinion, render the statute in violation of the Due Process Clause.\(^{102}\)

"Accident or Injury"

Another limitation of Section 331 revolves about the requirement of an "accident or injury."\(^{103}\) Whether this phrase would include an injury due to a breach of contract has not been decided by any appellate Pennsylvania court. In Shouse, however, it was held that the phrase does not include contract actions. The court noted that "injury may result also from the failure to perform a duty imposed by a contract, but an injury involving a breach of contract is not provided for in the act."\(^{104}\) It is doubtful whether any court would apply Section 331 more broadly and allow in personam jurisdiction based upon causes of action sounding in assumpsit.

\(^{101}\) This is the factual pattern of "continuous activity, action related" discussed in the text at footnotes 12 and 13 supra.

\(^{102}\) Under certain circumstances this could occur. See text at notes 117 and 118 infra.

\(^{103}\) Pa. Stat. Ann. tit. 12, § 331, quoted in the Appendix, provides that "any civil action . . . arising out of or by reason of any accident or injury."

\(^{104}\) 84 Pa. D. & C. at 84.
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Due Process and Section 331

The Pennsylvania real estate statute was first declared constitutional in _Dubin v. City of Philadelphia_ where Judge Bok, relying upon _Hess v. Pawloski_105 and similar nonresident motorists cases decided in Pennsylvania, found that "the legal philosophy which supports the one should also support the other."106 His analysis centered upon the state's interest in the condition of real estate located within the Commonwealth.

In _Betcher_ the Pennsylvania Supreme Court held that the statute as applied did not violate due process. It quoted the passage from _International Shoe_ reproduced in the text, supra at note 9, and said that the "mere stating of the factual posture of the case shows that notions of fair play and justice are not violated" by the exercise of in personam jurisdiction.107

In _Messick_, the dissent failed to mention due process. Their vote to reverse, however, was an indication that due process would have been satisfied in their opinion by the exercise of jurisdiction over the nonresident motel patron.108 The majority, on the other hand, failed to indicate where it felt the particular fact situation fell, but did state that if defendant were a user then it would be "difficult to conceive of an accident occurring in Pennsylvania in which the defendant would not be a user of real estate."109 The court added that the legislature did not intend to permit in personam jurisdiction over a nonresident "whenever an accident occurs here" and that there is "doubt that even current standards of due process" would permit such a broad exercise of jurisdiction.110

Since _International Shoe_, however, other state legislatures have intended to exercise in personam jurisdiction _whenever_ an accident occurred within their state arising out of defendant's activities there, and state courts have upheld the statutes as constitutional in situations involving no continuous activity by defendant within the state.111 Illinois, for example, provides for in personam jurisdiction over nonresi-

105. 274 U.S. 352 (1927). There a long-arm motorists statute was held constitutional.
106. 34 Pa. D. & C. at 64.
107. 429 Pa. at 377, 240 A.2d at 505.
108. This is because, as explained in the text at note 4, supra, in personam jurisdiction over a nonresident requires both a sufficiently broad statute and the "minimum contacts" necessary for due process.
109. 434 Pa. at 34, 252 A.2d at 630.
110. Id.
111. See the discussion in note 18, supra.
students following "The commission of a tortious act within the state." In *Nelson v. Miller*,113 service under the statute was upheld where defendant, an out-of-state appliance dealer, sent his agent into Illinois to deliver a stove. While plaintiff was assisting with the unloading, the appliance fell due to the agent's negligence causing plaintiff's injury. In such "single-tort" cases no connections with the real estate are shown and the realty is not "involved" in the tort in any meaningful sense.

Beyond the single-tort situations, the cases indicate that the owner, tenant, or user of real estate who is a nonresident can be served within the bounds of due process when realty is involved. Illinois, for example, allows service based upon "any cause of action arising from ... The ownership, use, or possession of any real estate" located within the state.114 This was upheld in *Porter v. Nahas*115 where an Illinois apartment owner sued a former tenant on a cause of action arising from the use of the apartment in violation of the terms of the lease. In *Bowsher v. Digby*,116 which arose under a similar statute, an Arkansas realtor sued on a listing contract made with the nonresident owner of Arkansas realty. The court held the exercise of in personam jurisdiction constitutional.

Thus, other states with sufficiently broad long-arm statutes have held constitutional in personam jurisdiction over nonresidents whenever (1) any tort arose out of defendant's activities within the state or (2) any cause of action arose from the ownership, use or possession of real estate within the state.

Applying the modern tests for due process to the Pennsylvania cases which have arisen under Section 331, it is apparent that the state's exercise of jurisdiction in every case (except perhaps *Murphy* and only because the ownership was before the cause of action complained of) would have come well within the "minimum contacts" required by *International Shoe*. In *Messick* the motel patron entered the state and contracted for the room thus availing himself of the protections and benefits of the Pennsylvania laws. The tort arose out of his use of the motel room. In *Andrews* the minor defendant's negligence occurred in the Commonwealth on land owned by the other defendant. They

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113. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
benefited from the state laws and entered the state to conduct the activities complained of. The defendant in *Shouse* leased a building in the state and operated a business within the Commonwealth where the contract sued upon was executed and was to be performed. The Boy Scout in *Bates* as well as the defendant were residents of Pennsylvania where their relationship arose and the negligence occurred.

In addition, the application of the narrowly-drafted Pennsylvania statute to fact situations which have arisen in other states where jurisdiction was exercised would lead to an opposite result. In *Nelson v. Miller*, for example, Section 331 would suffice to the extent that real property was "involved" and the cause of action arose out of an "accident or injury." Defendant, however, was not a "user" of the real estate. *Porter v. Nahas* and *Bowsher v. Digby*, clearly involving an "owner, tenant, or user" of real estate which was "involved," would fall without Section 331 for they arose on causes of action sounding in assumpsit.

Thus, it would seem apparent that the Pennsylvania plaintiff is denied the use of his own forum when plaintiffs of other states, given an identical cause of action, would not be. This denial is in no way required by the Due Process Clause. Even on what could be considered a small claim, such as in *Shouse*, the injured Pennsylvania plaintiff may be forced to travel across the country, hire out-of-state counsel, and transport witnesses. This, it is submitted, is such inconvenience that many small claims are never prosecuted. Larger claims, on the other hand, may be so costly that the plaintiff who does recover is not made whole.

It is also submitted that Justice O'Brien's assertion that doubt exists as to the constitutionality of exercising in personam jurisdiction "whenever an accident occurs here" is only partially correct. Clearly, due process would support the assertion of jurisdiction if the negligent act occurs within the state. The only area of doubt that exists under the current tests for due process is where the negligent act occurs outside the state, but the accident or injury occurs within.

**HARDSHIP BEYOND MERE INCONVENIENCE**

The inconvenience to a Pennsylvania plaintiff who is forced to sue in Florida, California or even New York is manifest. But the un-

117. See text at note 18 and note 18 *supra*.
118. See the discussion of "foreign act, local injury" in text at note 25 *supra*.
availability of a Pennsylvania forum may work an even more substantial hardship. It may well deny the plaintiff substantive justice.

*Mickley v. Kessel (Legislative Intent Frustrated)*

The possibility of such a denial of substantive justice is well demonstrated by the 1963 Common Pleas Court case of *Mickley v. Kessel*. There defendants, residents of West Virginia, entered plaintiff's land in Adams County and unlawfully cut and carried away timber valued at over $2,600. Ruling on defendants' preliminary objections to service under Section 331, the court held that defendants were neither an owner, tenant nor user of the real estate which, in addition, was not "involved." While the court's decision that the land was not "involved" may well be incorrect in light of *Betcher*, the holding of *Messick* would dictate that the same result as to defendant's "use" be reached. Thus, plaintiff could not sue in Pennsylvania for a tort committed here.

In this case, as in many of the other Pennsylvania cases, there would not appear to be any difficulty in finding that service under a sufficiently broad statute would meet the requirements of due process. Defendant allegedly entered the state and committed a serious tort directly related to the land and one which has important economic consequences; important enough that the Pennsylvania Penal Code provides for the recovery of treble damages following such a conversion. Yet plaintiff was unable to sue in Pennsylvania. The importance of this fact lies in the thought that plaintiff, in pursuing his remedy in West Virginia, may well lose the benefit of treble damages which the legislature intended to afford him. This result could accrue because the West Virginia court could well consider the Pennsylvania statute penal and therefore hold that it is not entitled to enforcement under the Full Faith and Credit Clause.

The plight of the plaintiff in *Mickley v. Kessel* is far from unique since it could occur in innumerable other ways. Furthermore, the laws of a foreign jurisdiction may preclude the Pennsylvania plaintiff from ever maintaining suit. For example, a recent Pennsylvania enactment provides for a twelve year statute of limitations in actions involving, among other things, injuries arising out of the construction of an im-

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improvement to real property.\textsuperscript{122} West Virginia's statute of limitations for such an action is two years.\textsuperscript{123} If in personam jurisdiction could not be gained over a West Virginia defendant under a Pennsylvania long-arm and suit were commenced in West Virginia more than two years from the date the cause of action accrued, the Pennsylvania plaintiff would be denied any forum to litigate. The result would be dictated by the West Virginia court's application of its own two-year statute since a forum generally applies its own "procedural" law.\textsuperscript{124}

**Choice of Law**

Whenever a case involving parties or transactions from two or more states comes before a court, a decision has to be made as to which state's law to apply. Many times this is easily resolved because the law of all concerned states is identical. Problems arise, however, when the laws differ. One state, for example, may limit recovery on a wrongful death action while another does not; one may provide that contributory negligence is a complete bar to recovery while in another it is only a limitation; or one state may hold manufacturers of consumer goods to only a negligence standard of care while another provides for a strict liability.

Currently there are two methods used to resolve these conflict of laws problems, \textit{lex loci} and interest analysis. The \textit{lex loci} rule is well stated by Chief Justice Bell in his dissenting opinion in \textit{Griffith v. United Air Lines, Inc.}:\textsuperscript{125}

\begin{quote}
For over 100 years the law of Pennsylvania has been clearly settled, namely, the substantive rights of the parties, as well as the damages recoverable are governed by the law of the place of the wrong or as it is sometimes expressed, the law of the place where the injury occurred—\textit{lex loci delicti}.\textsuperscript{126} (Emphasis original.)
\end{quote}

In \textit{Griffith} Pennsylvania adopted the modern methodology of interest analysis. Essentially, this permits a court to examine the policies of each state's laws and relevant state interests to determine, first, if in

\begin{itemize}
\item \textsuperscript{122} PA. STAT. ANN. tit. 12, § 65.1 (Supp. 1965).
\item \textsuperscript{123} W. VA. CODE ANN. § 55-2-12 (1959).
\item \textsuperscript{124} In \textit{Wells v. Simonds Abrasive Co.}, 345 U.S. 514 (1953) it was held that a state could constitutionally apply its own statute of limitations to a foreign based cause of action. See also H. GOODRICH & E. SCOLES,\textit{ HANDBOOK OF THE CONFLICT OF LAWS} (4th ed. 1964).
\item \textsuperscript{125} 416 Pa. 1, 203 A.2d 796 (1964).
\item \textsuperscript{126} Id. at 26, 203 A.2d at 808.
\end{itemize}
fact a real conflict of laws exists, and, if so, which interest should be furthered by the appropriate choice of law.

If a real conflict is found to exist, the jurisdictional issue becomes crucial for it has been suggested that in such an instance a court should presumptively apply its own law. Moreover, the choice influencing considerations include a state’s governmental interest. Thus, where two states have an “interest” in the outcome of the litigation the plaintiff who is able to choose his forum may often dictate the terms of his recovery.

On the other hand, a plaintiff forced to litigate in a *lex loci* state may find that forum enforcing rules limiting his recovery which in no way further the policies or interests of any state.

**Hypothetical Cases**

The following illustrations demonstrate how the legislature by failing to provide for adequate long-arm jurisdiction may send plaintiff and possibly the outcome of his litigation to a foreign court.

(1) An Oregon statute provides that contracts entered into by a spendthrift for whom a guardian has been appointed shall be voidable by the guardian. Pennsylvania has no such provision. *D*, an Oregon spendthrift, flies to Pennsylvania. There he negotiates and signs a promissory note in favor of *P*, a Pennsylvania resident. The note is executed and delivered in Pennsylvania. *D* repays the note by a personal check which is returned because of insufficient funds. *P* had no knowledge that *D* was under a spendthrift guardianship.

These facts can be “flipped” to create a real conflict. *P* and *D* are Georgia residents flying to New York when the plane crashes in Pennsylvania. Georgia now has an interest as does Pennsylvania with its higher standard of care designed to control conduct and provide a fund for local creditors. See *Kell v. Henderson*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep’t 1966) where in a similar fact situation the court applied the law of the place of the accident.

127. See, Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657 (1959). Pennsylvania found a “false conflict” in *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966) where *D*, a friend, was flying *P* to Florida when the plane crashed in Georgia. Georgia required guests to demonstrate gross negligence; Pennsylvania required only negligence. The court noted that Georgia’s policies of protecting insurers from collusive suits and defendants from suits by “ungrateful” guests were unaffected since *D* and *P* were residents of Pennsylvania, the forum.

128. Ehrenzweig, *Guest Statutes In The Conflict of Laws—Towards A Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 Yale L.J. 595 (1960). Wisconsin first adopted this approach giving *lex fori* an “analytical primacy.” *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). However, more recently the Wisconsin Supreme Court said that *lex fori* would no longer be “a choice-influencing consideration as such” but would be “a weak presumption to be used as a starting point in applying the choice of law rule, . . .” *Zelinger v. State Sand and Gravel Co.*, 38 Wis. 2d 98, 106, 156 N.W.2d 466, 469 (1968).


Based upon these facts, the Oregon Supreme Court has applied its spendthrift statute and voided the contract.\textsuperscript{131} It seems clear that given this situation Pennsylvania's general policy of enforcing contracts would be upheld by a Pennsylvania court. Additionally, application of Pennsylvania law would appear proper in view of the fact that $D$ entered the state and executed a contract which was to be performed here.

(2) $D$, a New York corporation, writes $P$, a resident of Pennsylvania, asking that he come to New York to negotiate a contract for $P$ to render certain services for $D$ in Pennsylvania for a period of two years. An oral agreement to this effect is reached. $D$ breaches the contract. Pennsylvania has no statute of frauds rule to cover such a contract but the New York statute requires a writing.\textsuperscript{132}

In the New York court $D$ would plead the New York statute of frauds as a defense to the contract while $P$ would argue that Pennsylvania law should apply. Without speculating as to the result the New York Court would reach, it is clear that New York has an interest in the litigation and could constitutionally apply its own law. Given these facts, a Pennsylvania court might be more prone to look to the circumstances surrounding the contract; the fact that $D$ asked $P$ to travel to New York to negotiate a contract which was to be performed in Pennsylvania. Consequently $P$'s claim might come before a more sympathetic court if access to a Pennsylvania forum were possible.

(3) The same facts as example (2) except that $D$ is an Ohio corporation and suit is brought in an Ohio court. The Ohio statute of frauds,\textsuperscript{133} like New York's, requires a writing for contracts not to be performed within a year. Ohio, unlike New York, is a \textit{lex loci} state\textsuperscript{134} and it would apply its own law for the contract was executed there.

(4) $D$, a Maryland partnership, solicits and sells pleasure boats in the Pennsylvania market through independent contractors. $P$, a Pennsylvania resident, purchases one of $D$'s boats and while sailing it on a Maryland lake is killed as a result of the negligent design of the boat. Maryland has interpreted its survival act as allowing damages only for decedent's conscious pain and suffering\textsuperscript{135} while Pennsylvania permits recovery for "the present worth of decedent's likely earnings

\textsuperscript{132} N.Y. GEN. OBLIGATIONS LAW § 5-701 (McKinney 1964).
\textsuperscript{133} OHIO REV. CODE ANN. § 1335.05.
\textsuperscript{135} Tri-State Poultry Co-op v. Carey, 190 Md. 116, 57 A.2d 812 (1948).
during his life expectancy, diminished by the probable cost of his own maintainence during the time he would have lived."136 Maryland, a *lex loci* state,137 would apply its own limitation though if suit could be brought in Pennsylvania a substantial recovery would be possible.138

(5) *D*, an individual, operates a nightclub in New Jersey just across the Pennsylvania state line. He advertises extensively in Pennsylvania newspapers and a substantial amount of his business is comprised of Pennsylvania clientele. *P* and *X*, Pennsylvania residents, travel to *D*'s nightclub where *D* sells liquor to both men though they are visibly intoxicated. Returning home they are involved in an automobile accident. The Pennsylvania dram shop act as interpreted makes a tavern owner negligent per se for the sale of liquor to any person visibly intoxicated.139 New Jersey has no dram shop act.

A real conflict is presented but it is believed that given these facts a Pennsylvania court with personal jurisdiction over *D* may apply the Pennsylvania statute. However, a New Jersey court would almost certainly refuse to apply Pennsylvania law.

(6) *P*, a Pennsylvania resident, while traveling in New England buys an "unbreakable" glass coffeepot from *D*, a *single proprietorship* and manufacturer located in Connecticut. *D* advertises for mail orders in several national magazines and does a considerable amount of mail order business along the East Coast, including Pennsylvania. *P* returns home and eventually takes the coffeepot to West Virginia for use in her cottage where it explodes causing injury. There is no evidence of negligence.

Pennsylvania140 and Connecticut141 impose strict liability on distributors in such cases, while West Virginia follows a negligent standard.142 Unlike Pennsylvania, Connecticut and West Virginia are *lex loci* and "last act" states.143 Thus, if suit were brought in either

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Connecticut or West Virginia, the law of West Virginia would be applied. Yet, this is a classic false conflict for West Virginia's policy of protecting its merchants and manufacturers would be in no way affected by the adoption of the higher standard of care imposed by both \( P \)'s and \( D \)'s home states.

**Conclusion**

The above examples demonstrate that plaintiff's travel to an out-of-state forum may not only be inconvenient, but may also result in the loss of his substantive rights which the legal system of Pennsylvania has indicated he is entitled to. In each of the above instances due process would have allowed the assertion of jurisdiction under a sufficiently broad statute. A Pennsylvania resident's substantive rights should not be lost merely because his cause of action fortuitously falls within a category for which the legislature has provided no long-arm jurisdiction. This, it is submitted, is an unconscionable hardship.

**A Suggested Remedy—A Comprehensive Long-Arm**

The preceding discussion points to the inadequacies of Pennsylvania long-arm jurisdiction. Judge Davis's comment that Section 2011 of the Business Corporation Law as interpreted is an “outmoded anomaly”\(^{144}\) was certainly well taken. Justice O'Brien's observation in denying jurisdiction under Section 331 that the legislature has “been erring too much on the side of safety”\(^{145}\) strikes to the crux of the problem. Indeed, the legislature has been remiss in failing to provide its residents with the just protection afforded residents in nearly every other state.

Section 2011 in its present form will very likely raise serious questions of interpretation. Moreover, it still fails to encompass the full scope of in personam jurisdiction allowed by due process.\(^{146}\) Section 331 has undergone attempts to broaden its application to cases never envisioned by the General Assembly when it enacted the statute in 1937. That such attempts have been only partially successful may possibly be a result of a feeling on the court that legislative action would

\(^{262}\) (2d Cir. 1957) the court said the place of the accident (the "last act"), and not the place of the negligence controlled. This is consistent with West Virginia law. Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936). See Note, 69 W. VA. L. REV. 950 (1967).


\(^{146}\) See notes 68-71 supra and accompanying text.
be generated if it failed to interpret the section beyond its restrictive provisions.

Pennsylvania jurisdiction over non-corporate entities is, at best, ineffective beyond the nonresident motorist cases. It is strongly urged that the Pennsylvania legislature react quickly and meaningfully to this generally neglected area of Pennsylvania Law. To do this necessitates the enactment of a comprehensive long-arm. We shall proceed to critically examine approaches taken in other jurisdictions and ultimately suggest a statute for Pennsylvania. Our bases of discussion will be the Uniform Interstate and International Procedure Act.¹⁴⁷

Jurisdiction to Extent of Due Process

Two states presently subject non-resident defendants to the jurisdiction of their courts to the extent permitted by the Due Process Clause of the Fourteenth Amendment.¹⁴⁸ While the writers of this note wrestled with the thought that such a statute would best serve Pennsylvania interests, we have concluded that its uncertainty is too great and that a well conceived long-arm would be more useful.

The Uniform Act

Section 1.01 provides the following:
As used in this Article, “person” includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state.

Section 1.03 provides for specific jurisdiction in instances where a cause of action arises directly from defendant's activities. The section states:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's
   (1) transacting any business in this state;
   (2) contracting to supply services or things in this state;
   (3) causing tortious injury by an act or omission in this state;
   (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or en-

¹⁴⁷ Uniform Interstate and International Procedure Act. [Hereinafter referred to as Uniform Act.]
Comments

gages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; [or]

(5) having an interest in, using, or possessing real property in this state; or

(6) contracting to insure any person, property, or risk located within this state at the time of contracting.

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him.

(1) Transacting any Business within the State

The Commissioners of the Uniform Act intended that this section be given an “expansive interpretation.”149 If adopted, the section would do much to clear the murky waters of Section 2011C. The legislature should make it clear that “transacting any business” is much broader than the concept of “doing business” as defined by the Pennsylvania cases.150

(2) Contracting to Supply Services or Things in This State

As is apparent by the wording of the section its coverage would include any isolated business transaction. In Pennsylvania jurisdiction in such a case is presently unavailable.151 Significantly, the section would appear to cover products liability cases where pursuant to a contract defendant ships his negligently designed product to a resident in the state.152

Subsection two is not as broadly framed as other jurisdictional statutes. It would not apply to contracts where the nonresident defendant is either (1) the party who has contracted for the plaintiff to supply services within the state, or (2) the buyer rather than the supplier of goods.153 It is therefore believed that subsection two should be changed to parallel the Minnesota provision which allows juris-

149. Uniform Act § 1.03 Commissioners' Notes. For an extended discussion of Illinois' “transacting any business” provision see Currie at 560-581.

150. See e.g., La. REV. STAT. § 13.3201, Comment (d) (Supp. 1964).

151. See notes 68 to 71, supra, and accompanying text.


diction over nonresidents based on any contract made with a resident of the state to be performed in whole or in part by either party within the state.154

(3) Causing Tortious Injury by an Act or Omission in this State

The Commissioners felt that this section was narrower in scope than that of states such as Illinois which provides for jurisdiction following "the commission of a tortious act within this state,"155 or Vermont, which permits jurisdiction when "such foreign corporation commits a tort in whole or in part in Vermont."156

The Uniform Act clearly limits jurisdiction to situations where the tortious act or omission occurs within the state, and there would be no constitutional difficulty in asserting jurisdiction in such a situation. Indeed, Pennsylvania already has limited provisions for such assertions of jurisdiction in its Motorists, Vessel, and Airplane statutes.157 The Commissioners cited Nelson v. Miller158 and Smyth v. Twin State Improvement Corporation159 which involve negligent acts by the nonresident defendant after he enters the state.

Illinois has construed its statute to include in-state injuries resulting from out-of-state wrongs.160 Vermont, on the other hand, has refused to exercise jurisdiction under its statute where plaintiff merely alleged that defendants negligently-produced product was put "into the stream of commerce" elsewhere and subsequently injured plaintiff in Vermont. It indicated, however, that the substantial use of the product in Vermont would permit jurisdiction.161

As a caveat to this proposed section and to the statute generally we wish to make it clear that it is inevitable that there be instances where a particular factual setting will fall within the statute but to exercise jurisdiction would still be violative of due process. For instance, if a small buyer in State X contracts there for a nationwide seller in State Y to ship an insignificant purchase into State X, it is highly possible that State Y could not constitutionally assert jurisdiction in a suit against the buyer. Thus, notwithstanding the exactitude of any long-arm statute, there will be cases where the court must still examine the nature and quality of defendant's acts to determine whether the "minimum contacts" test of International Shoe is met.

155. UNIFORM ACT § 1.03, Commissioners' Notes. ILL. ANN. STAT. ch. 110 § 17(1)(b) (1963).
156. VT. STAT. ANN. tit. 12, § 855 (1958).
157. These acts are included in the appendix.
158. 11 Ill. 2d 378, 143 N.E.2d 675 (1957) discussed in the text at note 113, supra.
159. 116 Vt. 569, 80 A.2d 664 (1951) discussed in note 18, supra.
Under the Uniform Act there would be no need to construe this particular subsection of the statute to include the local-injury, foreign-act situation since the act contains a specific provision dealing with that situation. Our proposed long-arm statute similarly contains such a provision for foreign-act, local-injury situations.

Maine, which interprets its statute to the limits of due process, provides for the commission of “a tortious act within the state resulting in physical injury to person or property.”162

New York includes the tortious act language “except as to a cause of action for defamation of character arising from the act.”163

It is submitted that the language of the Uniform Act and similar acts is sufficient since it would clearly appear beyond constitutional challenge and would provide more precise statutory guidelines for the courts when combined with a suitable foreign-act, local-injury statute.

(4) Causing Tortious Injury in this State by an Act or Omission Outside this State If He Regularly Does or Solicits Business, or Engages in Any Other Persistent Course of Conduct, or Derives Substantial Revenue from Goods Used or Consumed or Services Rendered, in this State

The relevant Pennsylvania provision is embodied in Subsection C of Section 2011 of the Business Corporation Law as amended and as yet has not been interpreted by an appellate court. The troublesome provisions of the statute have been discussed at length above.164

The Commissioners recognized that the rules set forth in this section are more restrictive than the Illinois statute as interpreted in Gray v. American Radiator & Standard Sanitary Corporation165 and the Michigan statute, which provides for jurisdiction for “The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.”166 Sharing the Commissioner’s view that statutes like Michigan’s may violate due process in certain situ-

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164. See note 64, supra, and the accompanying text.
165. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
ations, it is suggested that the legislature adopt as another clause to subsection four, a New York provision allowing jurisdiction “when defendant expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from [pervasive] interstate or [any] international commerce.”

(5) Having an Interest in, Using, or Possessing
Real Property in this State

Ironically, Pennsylvania is a pioneer in this type of legislation. Indeed, as recently as 1959 only one other state—Illinois—had a similar statute. The Illinois statute, however, provides for jurisdiction following “any cause of action” arising from “the ownership, use, or possession of any real estate situated within this state.”

The Commissioners rely on one case, Dubin v. City of Philadelphia, which prior to International Shoe held the limited Pennsylvania statute constitutional. Dubin has been thoroughly discussed by the writers as well. Maine and New York among others substantially follow the Illinois statute. In Porter v. Nahas the Illinois act was held constitutional and the Uniform Act was held to be within the bounds of due process in Bowsher v. Digby, which quoted the following passage of Developments—Jurisdiction:

Such a generalized provision [as that of Illinois] would, however, also appear to be constitutional, even in the extreme situation in which a nonresident owner and another nonresident contract outside the state with respect to the property, because of the state’s recognized interest in the title to land within its borders in addition to the defendant’s substantial relationship with the state.

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167. N.Y.C.P.L.R. § 302(a)(3)(ii) (McKinney 1966) does not include the words pervasive preceding the word “interstate” or any preceding the word “international.” We believe that these additions are essential if due process is to be met in every products liability case where the presence of defendant’s product is his only contact with the state.


169. ILL. ANN. STAT. ch. 110, § 17(c) (1968).

170. 34 Pa. D. & C. 61 (1938) discussed in the text at note 95, supra.


172. 35 III. App. 2d 360, 182 N.E.2d 915 (1st Dist. 1962), discussed in the text at note 115, supra.

173. 243 Ark. 799, 802, 422 S.W.2d 671, 674 (1968).

174. Developments—Jurisdiction at 948. It is doubtful whether the “extreme situation” referred to would be constitutional. Suppose, for example, two nonresidents contracted for the sale of real property located in Pennsylvania. One party breached, and the other wanted to sue for damages. Pennsylvania would appear to have no interest in such a suit unless it would affect title to the land and the contacts with the defendant would appear to be insufficient.
The Montana statute goes further allowing jurisdiction in "any claim for relief" arising from "the ownership, use or possession of \textit{any} property, or any interest therein, situated within the state."\textsuperscript{175} 

As to personal property it would appear that its mere presence within the state would be insufficient.\textsuperscript{176} Professor Currie states that it "is just as well" that the Illinois statute does not include personalty since in some areas it would "raise problems" as to its constitutionality and that most cases will probably "fall within the provisions concerning torts or the transaction of business."\textsuperscript{177}

Some cases involving personalty have come before the courts but the ultimate question is still "What minimum contacts will suffice?"\textsuperscript{178} 

Insofar as real property is concerned the Uniform Act would appear desirable. The courts would be left to determine what "use" of real property is adequate, but it is submitted that "use" should be broadly construed to include licensees and even trespassers.\textsuperscript{179}

The personal property sections are unnecessary. The Commissioners excluded such a provision because of "difficulties" that might be posed in situations involving stolen property, conditional sales and chattel mortgages.\textsuperscript{180}

\begin{enumerate}
\item \textit{Contracting to Insure any Person, Property, or Risk Located Within this State at the Time of Contracting}\textsuperscript{181}

It would be unnecessary to enact this section for Section 1005.2 of Pennsylvania's Unauthorized Insurer's Process Act makes the Insurance Commissioner the implied agent for service when the unregistered insurer issues delivers, solicits, or collects premiums on insurance contracts or transacts any insurance business in the state.\textsuperscript{181}

\end{enumerate}

\textbf{General Jurisdiction}

Section 1.02 of the Uniform Act provides for general jurisdiction as to any cause of action "over a person domiciled in, organized under

\begin{itemize}
\item \textsuperscript{175} MONT. REV. CODES ANN. 98-2702-4B(1)(c) (Supp. 1969).
\item \textsuperscript{176} Developments—Jurisdiction at 948.
\item \textsuperscript{177} Currie at 580.
\item \textsuperscript{178} Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961) (sub-permittee's operation of nonresident defendant's cars held sufficient); Roumel v. Drill Well Oil Co., 270 F.2d 550 (5th Cir. 1959) (owner of undivided interest in Texas oil lease not amenable to suit there); Owens v. Superior Court, 52 Cal. 2d 822, 345 P.2d 921 (1959) (dictum stating that ownership of dog by nonresident sufficient for due process in dog-bite case).
\item \textsuperscript{179} Here again, the "minimum contacts" test of \textit{International Shoe} will have to serve as an outer limit and in some situations a licensee or trespasser may not be constitutionally subjected to in personam jurisdiction.
\item \textsuperscript{180} UNIFORM ACT § 1.03, Commissioners' Notes.
\item \textsuperscript{181} PA. STAT. ANN. tit. 40, § 1005.2 (1949).
\end{itemize}
the laws of, or maintaining his or its principal place of business" in the state. The section would fail to encompass the situation where defendant carries on continuous and systematic activity within the state but is neither domiciled, registered, nor maintains its principal place of business there. In *Perkins v. Benguet Consolidated Mining Company* the Supreme Court made it clear that jurisdiction in such circumstances could be exercised. Our suggested statute is taken completely from the Wisconsin long-arm. It provides:

A court . . . has jurisdiction over a person . . . in any action whether arising within or without this state, against a defendant who . . . is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

Forum Shopping and Vexatious Suits

Adoption of a comprehensive long-arm would greatly increase the range of Pennsylvania jurisdiction over nonresident defendants. Thus plaintiffs will be given considerable leeway in the choice of their forum. The danger of vexatious suits and the possible choice of an unfavorable forum in terms of trial convenience necessitates that a viable *forum non conveniens* doctrine be embodied in statutory form. It is believed that Section 1.05 of the Uniform Act is sufficient for this purpose. It provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

Another possible hazard accruing from long-arm legislation is that plaintiffs will attempt to utilize the statutory provisions in cases where they are clearly not applicable. The real danger lies in the fact that nonresident defendants might be induced to settle the frivolous claim rather than incurring the expenses of litigating the jurisdictional issue. The Michigan and Wisconsin statutes offer a solution to this

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182. See note 15, *supra*, and accompanying text.  
186. *Wis. Stat.* § 262.20(1) (1963) allows recovery of up to $500 when plaintiff's cause of action is dismissed for lack of jurisdiction as reimbursement for litigation expenses.
problem. Our suggested provision is included below as section 1.5 entitled “Defendant’s Costs In Certain Cases.”

Proposed Pennsylvania Statute

The following comprehensive long-arm statute is proposed for the Commonwealth of Pennsylvania:187

Section 1.1. "PERSON" DEFINED.—As used in this Article, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this Commonwealth and whether or not organized under the laws of this Commonwealth.

Section 1.2. PERSONAL JURISDICTION BASED UPON CONDUCT.—
(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to any cause of action arising from the person’s

1. transacting any business in this state;
2. making a contract with a resident of this state to be performed in whole or in part by either party in this state;
3. causing tortious injury by an act or omission in this state;
4. causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state, or expects or should reasonably expect the act or omission to have consequences in the state and derives substantial revenue from pervasive interstate or any international commerce;
5. having an interest in, using, or possessing real property in this state

(b) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Section 1.3. GENERAL JURISDICTION.—A court may exercise jurisdiction over a person who is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

Section 1.4. INCONVENIENT FORUM.—When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

187. Our proposed statute deals only with substantive provisions of the long-arm itself. Matters such as the service requirements and pleading are not discussed.
Section 1.5. Defendant's Costs in Certain Cases.—In all civil actions initiated under Section 1.2 or 1.3 of this Act, or under Section 1005.2 of the Unauthorized Insurer's Process Act, the court shall, upon motion of the defendant, require plaintiff to post a bond in the sum fixed by the court. Upon a judgment in favor of defendant on the question of in personam jurisdiction, so much of the bond as may be required shall be applied to the satisfaction of any judgment for defendant's court costs and any other actual expenses, excluding attorney's fees, incurred by defendant in his defense of the action. In addition, on the conditions here stated, the court may also grant to defendant his actual and reasonable attorney's fees.

Attorney's fees shall be awarded if another forum was more convenient for plaintiff and defendant and the bulk of the trial conveniences were located elsewhere.

Attorney's fees shall not be awarded if:
(a) plaintiff had no other reasonably available forum; or
(b) plaintiff resided in this state and a substantial number of trial conveniences were located within this state; or
(c) defendant conducted a substantial amount of business and maintained officers or agents within this state.

In all other cases, the court shall consider the inconvenience to the defendant and determine whether or not plaintiff's assertion of in personam jurisdiction was in good faith, and, if not, award reasonable attorney's fees.

Charles J. Romito
David J. Brightbill

APPENDIX

(a) That from and after the passage of this act any nonresident of this Commonwealth, being the operator or owner of any aircraft, who shall accept the privilege, extended by the laws of this Commonwealth to nonresident operators and owners, of operating an aircraft, or of having the same operated over or above the lands and waters of the Commonwealth of Pennsylvania, or of using its aviation facilities, or both, or any resident of this Commonwealth, who shall subsequently become a nonresident of this Commonwealth, being the operator or owner of any aircraft over or above the lands and waters of the Commonwealth of Pennsylvania, make and constitute the Secretary of the Commonwealth of Pennsylvania his, her, or their agent for the service of process in any civil suit or proceeding instituted in the courts of the Commonwealth of Pennsylvania or in the United States courts in Pennsylvania against such operator or owner of such aircraft arising out of, or by reason of, any accident or collision, occurring within or above the Commonwealth, in which such aircraft is involved.

(b) A nonresident operator, or owner, of an aircraft which is involved in an accident or collision within or above this Commonwealth, shall be deemed to have consented that
the appointment of the Secretary of the Commonwealth as his agent for the service of process, pursuant to the provisions of this section, shall be irrevocable and binding upon his personal representative, executor or administrator. Where the nonresident operator or owner of aircraft has died, prior to the commencement of an action brought pursuant to this section, service of process shall be made on the personal representative, executor or administrator of such nonresident operator or owner of aircraft in the same manner and on the same notice as is provided in the case of a nonresident operator or owner of aircraft. Where an action has been duly commenced, under the provisions of this section, by service upon a defendant who dies thereafter, if the personal representative executor or administrator of such defendant does not voluntarily become a party, he may be substituted as a party under the applicable Rules of Civil Procedure, and service of process shall be made in the same manner and on the same notice as is provided in the case of a nonresident operator or owner of aircraft.

PA. STAT. ANN. tit. 12, § 331. Actions against non-residents which involve real estate.

From and after the passage of this act, any nonresident of this Commonwealth being the owner, tenant, or user, of real estate located within the Commonwealth of Pennsylvania, and the footways and curbs adjacent thereto, or any such resident of this Commonwealth who shall subsequently become a nonresident, shall, by the ownership, possession, occupancy, control, maintenance, and use, of such real estate, footways, and curbs, make and constitute the Secretary of the Commonwealth of Pennsylvania his, her, its, or their agent for the service of process in any civil action or proceedings instituted in the courts of the Commonwealth of Pennsylvania against such owner, tenant, or user of such real estate, footways, and curbs, arising out of or by reason of any accident or injury occurring within the Commonwealth in which such real estate, footways, and curbs are involved.

§ 336. Nonresident owner or operator of vessel.

Any nonresident of this Commonwealth, being the owner or operator of any vessel, who shall accept the privilege, extended by the laws of this Commonwealth to nonresident operators and owners, of operating a vessel in the waters of this Commonwealth or of using its port facilities or ports, shall, by the operation of a vessel in the waters of this Commonwealth or of using its port facilities or ports, make and constitute the Secretary of the Commonwealth his agent for the service of process in any civil suit or proceeding instituted in the courts of the Commonwealth of Pennsylvania against such owner, tenant, or user of such vessel arising out of or by reason of, any accident or collision, occurring within the waters of the Commonwealth in which such vessel is involved.

§ 338. Nonresident seller of malt or brewed beverages.

Any nonresident person or foreign association, partnership or corporation, whose products are listed and sold through Pennsylvania Liquor Stores or who sells or distributes malt or brewed beverages in the Commonwealth or of importing distributors licensed and doing business within this Commonwealth, shall, for the privilege of having such products sold within this Commonwealth, constitute the Secretary of the Commonwealth as his agent in the Commonwealth, upon whom process may be served in the event of any litigation that might arise in Pennsylvania over the sale, use or handling of such products in the manner prescribed by the Pennsylvania Rules of Civil Procedure for service of process upon defendants who are nonresidents or who conceal their whereabouts: Provided, however, That nothing contained herein shall be applicable to or change the requirements of the act of April 12, 1951 (P.L. 90), known as the “Liquor Code”, as amended and the regulation of the Pennsylvania Liquor Control Board adopted under authority conferred by said act with respect to the service of process in proceedings instituted by the said board against non-resident persons, foreign associations, partnerships and corporations, whose products are listed and sold in Pennsylvania liquor stores and who sell malt and brewed beverages to importing distributors licensed and doing business within this Commonwealth.

PA. STAT. ANN. tit. 15, § 2011. B. Any foreign business corporation which shall have done any business in this Commonwealth, without procuring a certificate of authority to do so from the Department of State, shall be conclusively presumed to have designated the Secretary of the Commonwealth as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth. On petition, alleging conduct of business within the Commonwealth by any corporation not qualified by the Secretary of the Commonwealth or having otherwise designated him as agent for the service of process, the court of the county in which the action is instituted shall authorize service to be made upon the Secretary of the Commonwealth. Service shall be made by
the sheriff of such county, by transmitting to the Secretary of the Commonwealth, and to the defendant at his last known residence or place of business, by registered mail, return receipt requested, a copy of such process, together with a copy of the petition and order of the court, properly certified as such by the prothonotary. The return receipt by the post office department shall be evidence of service under this act. Where process is issued against any such foreign business corporation by any court of the United States empowered to issue such process under the laws of the United States, the Secretary of the Commonwealth is authorized to receive such process in the same manner as herein provided for process issued by courts of this Commonwealth. Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a foreign corporation, in any other manner now or hereafter permitted by law.

C. For the purposes of determining jurisdictions of courts within this Commonwealth, the doing by any corporation in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth for such purpose, with the intention of thereby initiating a series of such acts, shall constitute "doing business." For the purposes of this subsection the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.

D. For the purpose of determining jurisdiction of courts within this Commonwealth, inspecting, appraising and acquiring real estate and mortgages, and other liens thereon, and personal property and security interests therein, and holding, leasing away, conveying and transferring the same, as fiduciary or otherwise, or collecting debts and enforcing mortgages and rights in property securing the same by any foreign business corporation shall not constitute "doing business."

PA. STAT. ANN. tit. 40. § 1005.2 Service of process upon unauthorized insurer.

(a) Any of the following acts in this State effected by mail or otherwise by an unauthorized insurer of another state or foreign government: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein; (2) the solicitation of applications for such contracts; (3) the collection of premiums, membership fees, assessments, or other considerations, for such contracts; or (4) any other transaction of insurance business, is equivalent to and shall constitute an appointment by such insurer of the Insurance Commissioner and his successor or successors in office to be its true and lawful attorney upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

(b) Such service of process shall be made by delivering to and leaving with the Insurance Commissioner or his deputy two copies thereof and the payment to him at the time of said service the sum of two ($2) dollars. The Insurance Commissioner shall forthwith mail, by registered mail, one of the copies of such process to the defendant at its last known principal place of business and shall keep record of all process so served upon him. Such service of process is sufficient, provided notice of such service upon the Insurance Commissioner and a copy of the process are sent within ten days thereafter, by registered mail, by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business and shall keep record of all process so served upon him. 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addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith, are filed with the prothonotary or the clerk of the court in which such action is pending on or before the date the defendant is required to appear or within such further time as the court may allow.

(d) No plaintiff or complainant shall be entitled to a judgment by default or otherwise until the expiration of thirty days from date of the filing of the affidavit of compliance.

(e) Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

PA. STAT. ANN. tit. 75, § 2001. Service; Secretary of Commonwealth as agent; personal representative; party.

(a) From and after the passage of this act, any nonresident of this Commonwealth, being the operator or owner of any motor vehicle or motor boat, or being a person in whose behalf a motor vehicle or motor boat is being operated whether or not such person is the operator or owner, who shall accept the privilege extended by the laws of this Commonwealth to nonresident operators and owners of operating a motor vehicle or motor boat, or of having the same operated, within or on inland or tidal waters of the Commonwealth of Pennsylvania, or any resident of this Commonwealth, being the licensed operator or owner of any motor vehicle or motor boat under the laws of this Commonwealth, or being a person in whose behalf a motor vehicle or motor boat is being operated whether or not such person is the operator or owner, who shall subsequently become a nonresident or shall conceal his whereabouts, shall, by such acceptance or licensure, as the case may be, and by the operation of such motor vehicle or motor boat within the Commonwealth of Pennsylvania, make and constitute the Secretary of the Commonwealth of the Commonwealth of Pennsylvania his, her, or their agent for the service of process in any civil suit or proceeding instituted in the courts of the Commonwealth of Pennsylvania or in the United States District Courts of Pennsylvania against such operator or owner of such motor vehicle or motor boat or person in whose behalf such motor vehicle or motor boat is being operated whether or not such person is the operator or owner, arising out of, or by reason of, any accident or collision occurring within or on inland or tidal waters of the Commonwealth in which such motor vehicle is involved.

(b) A nonresident operator, owner, or person in whose behalf such motor vehicle or motor boat is being operated whether or not such person is the operator or owner, of a motor vehicle or motor boat which is involved in an accident or collision within or on inland or tidal waters of this Commonwealth, shall be deemed to have consented that the appointment of the Secretary of the Commonwealth as his agent for the service of process, pursuant to the provisions of this section, shall be irrevocable and binding upon his personal representative, executor or administrator. Where the nonresident motorist, owner or operator has died, prior to the commencement of an action brought pursuant to this section, or subsequent to the commencement of an action but prior to service, service of process shall be made on the personal representative, executor or administrator of such nonresident motorist, owner or operator in the same manner and on the same notice as is provided in the case of a nonresident motorist, owner or operator. Where an action has been duly commenced, under the provisions of this section, by service upon a defendant who dies thereafter, if the personal representative, executor or administrator of such defendant does not voluntarily become a party, he may be substituted as a party under the applicable Rules of Civil Procedure, and service of process shall be made in the same manner and on the same notice as is provided in the case of a nonresident motorist, owner or operator.