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THE "LONG ARM" COMES TO MARYLAND

By BERNARD AUERBACH*

In 1964, Maryland joined the growing list of states having comprehensive "long arm" statutes which widen extensively the exercise of personal jurisdiction over defendants.[1] The provisions of the statute are based on Article I of the Uniform Interstate and International Procedure Act,[2] which in turn was based on the prior enactments of many other states, notably Illinois, Michigan and Wisconsin. There are few years that now go by without further additions to the roster of "long arm" states.[3]

Involved in this movement is more than a change in local procedural rules. Since the adoption of the 14th Amendment to the United States Constitution, the permissible scope of state judicial jurisdiction has been determined by the due process clause of that amendment. As the meaning of due process developed to permit greater exercise of jurisdiction by state courts, so did local procedural rules. In this area of the law, state legislatures, by and large, willingly followed the path first trod by the United States Supreme Court.

The direct impetus for the enactment of the various "long arm" statutes was the Supreme Court's decision in the case of *International Shoe Co. v. Washington,*[4] which contained a new formula for the constitutional testing of state judicial jurisdiction. Although prior Supreme Court decisions may have foreshadowed the result in that case, the Court's opinion was a decided departure from the previous approach to the problem and outlined the master plan for all subsequent local enactments. The nature of the change in approach becomes apparent even from a brief summary of the trend of decisions prior to as compared to developments after *International Shoe.*

DUE PROCESS PRIOR TO *International Shoe*

The restrictions of early conceptualism and the use of legal fiction and ingenious rationalization to escape those restrictions was the hall-

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1. Laws of Md., ch. 95 (1964). The relevant statutes can presently be found in MD. CODE ANN. art. 75, §§ 94–100 (Supp. 1965).

2. The UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT [hereinafter cited as UNIFORM ACT] was promulgated by the National Conference of Commissioners on Uniform State Laws in August, 1962, and was approved by the House of Delegates of the American Bar Association in February, 1963. The act and the Commissioners' Notes appear in 9B UNIFORM LAWS ANN. 74 (Supp. 1964). Up to this time, in addition to Maryland, the states of Arkansas, ARK. STAT. ANN. §§ 27-2501–2507 (Supp. 1965), and Virginia, VA. CODE ANN. § 8-81.2 (Supp. 1964) have adopted the basic provisions of the UNIFORM ACT.

3. See notes 32–37 *infra* and accompanying text.

4. 326 U.S. 310 (1945).

mark of the law of personal jurisdiction prior to *International Shoe*. "The foundation of jurisdiction is physical power," stated Justice Holmes[5] in explaining the fundamental doctrine first established in *Pennoyer v. Neff*,[6] that due process requires service of process on an individual defendant while present within the state for a valid personal judgment. A corporation does not exist outside the borders of the state of its origin, stated the Supreme Court in 1839.[7] It therefore followed that a personal judgment against a corporation could not be entered outside the state of its incorporation. The only exception to these rules was jurisdiction based on the consent of the parties.

These limitations on the jurisdictional authority of states could not long withstand the increasing mobility in business and personal affairs produced by modern civilization. The force that initially set the process of expansion in motion was the tremendous growth of the corporate form of business.

Since the assets and business of a corporation are often located outside the state of incorporation, it became necessary to widen the geographical area in which the corporation would be subject to the application of judicial authority. At the beginning, the traditional basis of consent was employed. As a condition for permission to do business within a state, the corporation was required to appoint an agent to receive process. Where the corporation did not appoint an agent, jurisdiction over its activities was justified in terms of an "implied consent". As stated by the Supreme Court in 1856, "the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them."[8] The theory of consent, however, could not provide the basis for exercising judicial authority over corporations engaged in interstate commerce which could not be excluded by any state.

It was principally Justice Brandeis who adapted the traditional "presence" theory to corporations.[9] This held that a corporation, by doing sufficient business within a state, becomes "present" there and is thus amenable to its authority. Thus a corporation could be "present" in many states at the same time.[10]

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5. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

6. 95 U.S. 714 (1877).

7. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 443 (1839).

8. Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404, 408 (1856). The fictitious nature of the "implied consent" is described by Judge Learned Hand in Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148, 151 (S.D. N.Y. 1915).

9. A good example of such formulation is Bank of America v. Whitney Central National Bank, 261 U.S. 171 (1923).

10. At this point, the Court had made a complete turnabout from the *Bank of Augusta* case, 38 U.S. (13 Pet.) 443 (1839). The presence theory was criticized by Judge Learned Hand as doing no more than posing the question to be answered, Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930). The decisions were not entirely consistent with the theory. Theoretically, if a corporation is present in a state it should be subject to the jurisdiction of that state even on a foreign cause of action. While there were some cases that did reach this result, most did not. See note 24 *infra*. Also, in theory there should be no jurisdiction over a foreign corporation that had withdrawn from the state, since it was no longer present there. This was not the result reached in State of Washington v. Superior Court, 289 U.S. 361 (1933).

This doctrine of jurisdiction was generally formulated as the "doing business" theory. The Supreme Court soon found itself investigating the extent of the business done by a corporation within a state in order to justify giving that state authority to decide controversies arising within its confines. If it were found that the general activity of the corporation in the state fell below the "doing business" line or for some other reason the corporation was technically not doing business in the state, the plaintiff was forced to pursue his remedy in another state having no connection with the particular cause of action. The standard of "doing business" was not met by a single or isolated transaction.[11] Even continuous activity by agents of the corporation who solicited offers subject to acceptance by the company outside the state was not "doing business".[12] It was only solicitation plus some additional activities, such as collection of money, which was held sufficient to constitute "doing business".[13]

There was a parallel development in the doctrines of jurisdiction over natural persons. Although many states had claimed the authority to hear and decide claims against their own domiciliaries, it was not until 1940 that the Supreme Court finally upheld such authority.[14] The opinion of the court did not stray too far from the traditional power concept of jurisdiction announcing that, "the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."[15]

For many years a state could not assert its judicial authority to decide claims on the basis of activities of non-domiciliaries within the territory of the state. It had been held that the privileges and immunities clause of the Constitution[16] safeguards the right of citizens of one state "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise, ..."[17] Lacking the power to exclude, it was reasoned, a state lacked the power to subject a non-domiciliary to its legal processes, unless he was served with process while present in the state.[18]

Modern developments in transportation and communication forced a change in legal theory. At first, it was the advent of the automobile. Victims of injuries caused by non-resident motorists found themselves forced by the old doctrines of jurisdiction to assert their claims in

11. See Isaacs, *An Analysis of Doing Business,* 25 COLUM. L. REV. 1018, 1028–29 (1925).

12. People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Green v. Chicago, B.&Q. Ry., 205 U.S. 530 (1907). There were state court decisions that held that continuous and substantial solicitation over a long period of time did constitute "doing business". American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28 (1928); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

13. St. Louis S.W. Ry. Co. v. Alexander, 227 U.S. 218 (1913).

14. Milliken v. Meyer, 311 U.S. 457 (1940).

15. *Id.* at 463.

16. U.S. CONST. art. IV, § 2.

17. Corfield v. Coryell, 6 Fed. Cas. 546, 551–52 (No. 3,230) (C.C. E.D. Pa. 1823).

18. Flexner v. Farson, 248 U.S. 289 (1919).

foreign forums, which had no connection with the events of the case, where witnesses were not available and which might have to apply foreign substantive law. In the famous case of *Hess v. Pawloski*,[19] involving a non-resident motorist, the Supreme Court upheld the authority of the state where the automobile accident occurred to take jurisdiction over the case. The Court based its decision on a modified form of the "power to exclude". Since automobiles were dangerous instruments, the state had "power to regulate" the use of its highways. It could, therefore, require a non-resident formally to appoint an agent to receive process before using its highways. The state, therefore, has the "power to exclude" until this is done. Since the state has this power, it can provide that the use of its highways is the equivalent of such appointment.

Eight years later, in the case of *Doherty & Co. v. Goodman*,[20] the Supreme Court forgot about the "power to exclude" and referred only to the "power to regulate". In that case, the claim was against a foreign individual engaged in the business of selling corporate securities. The Supreme Court upheld the authority of a state to decide controversies growing out of the business done there. This authority was justified by the fact that the business of selling securities is subject to "special regulation" by the state.

DUE PROCESS AFTER *International Shoe*

It was in 1945 that the Supreme Court discarded the old shibboleths and adopted a more rational approach to the entire problem. In an opinion by Chief Justice Stone which was to become a landmark in the field of jurisdiction, new policies were set forth. The criteria to determine the authority of a state, stated the Court, "cannot be simply mechanical or quantitative".[21] It is sufficient if a defendant "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ".[22] The test is "the quality and nature of the activity in relation to the fair and orderly administration of the laws".[23]

In this latter phrase, Justice Stone pointed out the basic objectives inherent in a rational approach to the problem of jurisdiction. The choice of forum must be "fair" so that the participants can satisfy their legitimate needs in presenting their claims and "orderly" in allocating competence among the various states in a manner which will protect the legitimate interests of each state.

The *International Shoe* case dealt with a Delaware corporation whose home office was in St. Louis, Missouri, and which maintained a group of salesmen in the state of Washington. These salesmen took orders from retailers which were accepted in the corporation's home

19. 274 U.S. 352 (1927).
20. 294 U.S. 623 (1935).
21. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
22. *Id.* at 316.
23. *Id.* at 319.

office, the merchandise thereafter being shipped f.o.b. from St. Louis to the purchasers in Washington. The corporation was sued by the state of Washington for unpaid contributions to the state unemployment compensation fund. Service of process was made on one of the salesmen, who had not been authorized by his employer to receive process, and by registered mail to the home office.

In essence, the Court's reasoning in upholding the jurisdiction of the state of Washington over the International Shoe Company was that it would be unfair to one who has a cause of action based on activities within a state to be compelled to go outside the state to make his claim. On the other hand, it would not be unfair to compel the foreign corporation to defend the case in the state in view of its contacts there. In addition, trial at the place of the events giving rise to the cause of action would promote the interests of orderly judicial administration in view of the location of the evidence there and the fact that its substantive law is applicable to the case.

Two problems other than the one directly involved in *International Shoe* were also discussed in the Court's opinion. One was the question of subjecting a foreign corporation to suit on a cause of action not related to its activities in the state. On this problem, the Court merely referred to past decisions. The Court stated that while there were holdings that even continuous activity within the state is not enough to subject the foreign corporation to that state's jurisdiction as to suits unrelated to the activity,[24] there had been other cases where "the continuous corporate operations within a state were thought so substantial and of such a nature" as to justify jurisdiction.[25]

Specific application of this analysis was made in *Perkins v. Benguet Consolidated Mining Co.*[26] In that case, the defendant was a Philippine corporation whose mining operations in the Philippines were halted during the Japanese occupation. During this time, the president, who was also the general manager of the corporation, returned to his home in Ohio where he supervised the operations of the company, maintaining there all office files, bank accounts, correspondence, etc. The plaintiff sued in Ohio for accrued dividends and damages for failure to deliver stock. The transactions were not related to any events that took place in Ohio. Nonetheless, the Court held that the corporation's activity in Ohio "was sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action against a foreign corporation where the cause of action arose from activities entirely distinct from its activities in Ohio."[27]

The second situation referred to by the Court in its opinion was the commission by the defendant of a single or isolated act in a state.

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24. Cases reaching this result were People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Simon v. Southern Ry. Co., 236 U.S. 115 (1915); Green v. Chicago, B.&Q. Ry., 205 U.S. 530 (1907); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907).

25. 326 U.S. at 318. The cases cited were Missouri, K.&T. Ry. Co. v. Reynolds, 255 U.S. 565 (1920) and Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

26. 342 U.S. 437 (1952).

27. *Id.* at 447 (emphasis original).

Where this is the case, it would be unreasonable to subject a defendant to suit on a foreign cause of action. But there were single or occasional acts which, "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit"[28] on causes of action arising from those acts.

The leading case dealing with jurisdiction based on a "single act" is *McGee v. International Life Ins. Co.*[29] In that case, a California resident had purchased a life insurance policy from an Arizona corporation. The defendant corporation, whose principal place of business was in Texas, had thereafter assumed the obligations of the Arizona corporation. For about two years, the Texas insurance company had serviced the policy by mail. The company had no office or agent in California nor had any connection with California except for this insurance policy. Upon the death of the insured, the company refused to pay on the policy. The state of California claimed the right to take jurisdiction over the controversy.

The approach of the Court was to weigh the interests of the state of California and of the immediate participants. It arrived at the conclusion that the balance of interests was in favor of permitting California to exercise judicial authority over the case. The state of California, stated the Court, "has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims".[30] The controversy was based on a contract which had "substantial connection"[31] with California and in which state the crucial witnesses were found. The plaintiff would be at a severe disadvantage if she had to go to Texas to assert her claim and possibly was not able to afford the cost of bringing an action in Texas. It is true that the defendant may find it inconvenient to defend the suit in California, but its business is conducted across state lines. Modern transportation and communication facilities permit a business organization to take part in litigation in the places where it engages in economic activity.

The Supreme Court has not dealt with the problem of jurisdiction over natural persons arising from acts within the state since the *Doherty* case in 1935. However, the doctrines of the *International Shoe* case should be applicable to individuals as well as corporations. The rationale in *McGee* would be the same whether the defendant was operating in the corporate form or not. Thus, in place of two lines of cases, each with its own fictions and technicalities, we now have a single line of decisions based on a rule of reason.

Since the *International Shoe* case, there has been a growing movement by the states to enact "long arm" or "single act" statutes asserting

28. 326 U.S. at 318. One of the circumstances which was subsequently held to be a decisive factor in determining jurisdiction in such cases was whether "the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). An act committed in a state without such purposefulness will, therefore, not provide the basis for jurisdiction.

29. 355 U.S. 220 (1957).

30. *Id.* at 223.

31. *Ibid.*

jurisdiction on the basis of acts within the state.[32] As of 1960, the *Harvard Law Review* in its survey of developments in the field of state court jurisdiction listed eight such states.[33] Three of those states applied their statutes to individuals as well as corporations.[34] The 1962 *Annual Survey of American Law* lists eight additional states having expanded jurisdictional statutes.[35] The 1963 survey added two more[36], and four were added in the 1964 survey.[37]

The development described has been directed towards the placing of judicial authority in states where both parties may conveniently present their claims and where the forum is directly concerned with the events of the case. However, it is still possible under the old doctrines to have a case tried in a particular state for the sole reason that the defendant, if an individual, was served with a summons while temporarily there; or if a corporation, that it was organized under the laws of that state even though all of its operations are conducted elsewhere. Resistance to the exercise of jurisdiction in these situations led to the formulation by the courts of the doctrine of forum non conveniens. Under this doctrine, a court may exercise its discretion to dismiss a case, although jurisdiction otherwise exists, if that court is an inappropriate or inconvenient forum, *e.g.*, where neither the parties nor the events giving rise to the dispute have a substantial relation to that state. The United States Supreme Court upheld the doctrine against attack based on the privileges and immunities clause of the United States Constitution, which, it was claimed, guaranteed access to the courts of a state to citizens of other states, by finding that the discrimination admittedly practiced was based on residence and not citizenship.[38]

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32. For a general description of this trend see Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); Note, *Jurisdiction — Basis and Range of Process — Recent Developments — Since Pennoyer v. Neff*, 49 MICH. L. REV. 881 (1951); Note, *Single Act Statutes and Jurisdiction Over Foreign Corporations*, 43 VA. L. REV. 1105 (1957).

33. Note, *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 1003 n.604 (1960). The states listed, with their statutory references, are ILL. REV. STAT. ch. 110, § 17(1)(b) (1959); ME. LAWS ch. 317 (1959); MINN. STAT. ANN. § 303.13 (1947); N.C. GEN. STAT. §§ 55-145 (Supp. 1959); VT. STAT. tit. 9, ch. 72, § 1562 (1947); W. VA. CODE ANN. § 3083 (1961); WISC. STAT. ANN. § 262.05 (1957). Maryland was also listed on the basis of MD. CODE ANN. art. 23, § 92(d) (1957). On this section of the Maryland Code, see notes 72-80 *infra* and accompanying text.

34. These were Illinois, Maine and Wisconsin.

35. 1962 ANN. SURVEY AM. L. 45. These were: ARK. STAT. ANN. § 27-339 (1962); COLO. REV. STAT. ANN. § 31-35-19 (Supp. 1961); CONN. GEN. STAT. REV. § 33-519 (1960); IOWA CODE ANN. § 617.3 (1950); MICH. STAT. ANN. §§ 27A.701-.735 (Temporary volume 1962); N.M. STAT. ANN. § 21-3-16 (Supp. 1965); N.Y. CIVIL PRACTICE LAW AND RULES 302; TEXAS REV. CIV. STAT. ANN. art. 2031(b) (Supp. 1963).

36. 1963 ANN. SURVEY AM. L. 58. ARIZONA R. CIV. P. 4(e)(2) (1956) and MONTANA REV. CODE ANN. § 93-2702-2, Rule 4B(1) (Supp. 1965).

37. 1964 ANN. SURVEY AM. L. 71. KANSAS STAT. ANN. § 60-308 (1964); Mo. REV. STATS. §§ 351.630(2)-(5), 355, 375(2)-(5) (1949); S.D. CODE § 11.2002 (1939); WASH. REV. CODE § 4.28.185 (1962).

38. Douglas v. New York, N.H.&H. Ry. Co., 279 U.S. 377 (1929). The Court argued that since citizenship and residence were not completely identical, a state could discriminate on the basis of residence, although it could not discriminate on the basis of citizenship. This reasoning hardly meets the problem since residence and citizenship are usually co-extensive. It has been suggested that the Constitution

The negative aspects of forum non conveniens bear a striking similarity to the positive requirements of *International Shoe*. The Supreme Court in *Gulf Oil Corp. v. Gilbert*[39] divided the factors to be considered in applying the doctrine of forum non conveniens into two categories, "the private interest of the litigant" and "factors of public interest". In the first category fall considerations of access to sources of proof, availability of witnesses and enforceability of any judgment obtained. The second category is described as including such matters as the promotion of better administration of the courts; the benefits of having the litigation in the place which has a close relation to the controversy in the public view of those outsiders who may be affected by the outcome; and the additional benefit of having the case in the forum whose own law will govern. This similarity between the two doctrines has led to the prediction that the future may see their amalgamation to result in nationwide jurisdictions based on fair notice limited by the principles of *"forum conveniens"*.[40]

THE LAW IN MARYLAND PRIOR TO 1964

Judicial jurisdiction in Maryland prior to the 1964 "long arm" statute, by and large, followed the same pattern as the due process decisions of the United States Supreme Court before the *International Shoe* case. A few provisions of Maryland law did go beyond the stated limits of due process as then laid down, but even these were placed with the pre-*International Shoe* framework and were largely ineffective. The older enactments are still valid, since the 1964 act does not replace them but is supplementary thereto.[41]

The basic element in this framework is the separate treatment of individuals and corporations producing two distinct lines of statutory and case law. As with constitutional decisions, the basic rule in Maryland with regard to individuals was the requirement of personal service within the state,[42] while the most fundamental jurisdictional authority over corporations was that over corporations organized under Maryland law.[43]

Expansion of the bases for jurisdiction came by way of statutory enactment. The oldest of these statutes is the one asserting jurisdiction over foreign corporations doing business in Maryland.[44] The present

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protects only unreasonable discrimination against the non-citizen, and forum non conveniens is a reasonable discrimination. Note, *Developments in the Law, supra* note 33, at 1010 n.656.

39. 330 U.S. 501 (1947).

40. EHRENZWEIG, CONFLICT OF LAWS 79 (1962).

41. MD. CODE ANN. art. 75, § 99 (Supp. 1965).

42. MD. R.P. 104(b).

43. MD. CODE ANN. art. 23, § 94 *et seq.* (1957). Included under this provision are unincorporated associations and joint stock companies formed under Maryland law.

44. One of the early cases applying this type of statute is Cromwell v. Royal Can. Ins. Co., 49 Md. 366 (1878). The specific enactment in question was the Act of 1868, ch. 471, § 211.

statute, which is found in article 23, §§ 92(a) & (b) of the Maryland Code, is as follows:

> (a) *Causes of action which subject corporations to suit by resident* — Every foreign corporation doing intrastate or interstate or foreign business in this State shall be subject to suit in the State by a resident of this State or a person who has a usual place of business in this State, (1) on any cause of action arising out of such business, and (2) on any cause of action arising outside of this State.
>
> (b) *Causes of action which subject corporations to suit by nonresident*—Every foreign corporation doing intrastate or interstate or foreign business in this State shall be subject to suit in this State by a nonresident of this State, (1) on any cause of action arising out of such business, and (2) provided that the bringing of such suit in this State is not an undue burden upon the defendant or upon interstate or foreign commerce, on any cause of action, arising outside of this State.

Whether or not a foreign corporation has qualified to do business in the state is of no import. So long as it does business here, it is subject to suit on a cause of action arising from such business and, with certain qualifications as to a non-resident plaintiff, on a cause of action arising outside the state. These provisions raise two important questions:

1) What actually constitutes "doing business" under the statute?

2) When a corporation does business in the state, may it constitutionally be subject to suit on a foreign cause of action?[45]

WHAT IS "DOING BUSINESS" UNDER ARTICLE 23, §§ 92(a) & (b)?

In *Henry R. Jahn & Son, Inc. v. Superior Court*,[46] Justice Traynor of the California Supreme Court stated:

> The statute authorizes service of process on foreign corporations that are "doing business in this State". That term is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. . . ."

45. For an earlier discussion of these questions see Reiblich, *Jurisdiction of Maryland Courts over Foreign Corporations Under the Act of 1937*, 3 MD. L. REV. 35, 37–54 (1938).

46. 49 Cal. 2d 855, 323 P.2d 437 (1958).

> Whatever limitation it imposes is equivalent to that of the due process clause.[47]

He justified his decision by reasoning that "doing business was adopted as a test not for immunity but for jurisdiction, consonant with the then tenor of the due process clause. . . . As these concepts became more flexible . . . the wording of the 1872 statute yielded a correspondingly flexible meaning."[48] Other states, taking a contrary view, have held that "doing business" under their statutes retains the same meaning as it had prior to the *International Shoe* decision.[49]

What position Maryland takes on this question has recently been the subject of a highly interesting discussion in the federal courts. *Gkiafis v. Steamship Yiosonas*[50] was a suit by a seaman for injuries sustained aboard a vessel in Baltimore harbor. The defendant was a Panamanian corporation. During a period of approximately nine years, the vessel had called at the port of Baltimore for short periods of time on six occasions. The defendant argued that it was not subject to Maryland jurisdiction since it was not "doing business" in Maryland. Judge Watkins in the District Court[51] agreed with the defendant. He held that although under the *International Shoe* decision, a single act in a state could be the basis for jurisdiction over a foreign corporation, the Maryland statute requires "doing business" which connotes regularity and continuity in the activities. Although in 1937 the word "regularly", which modified "doing business", had been dropped from the statute,[52] there was no intent to eliminate this requirement from the law, since it was constitutionally required at that time.[53] Since the visits of the defendant's vessel to Maryland involved isolated transactions and were neither regular nor continuous, the defendant was not subject to Maryland jurisdiction.

The Fourth Circuit Court of Appeals, in an opinion by Judge Sobeloff,[54] disagreed and concluded that Maryland should be classified among those states which take the view that "the legislature intended to adopt a flexible measure that would be as expansive and dynamic as the due process clause of the Fourteenth Amendment will reasonably

47. 323 P.2d at 439.

48. Traynor, *Is this Conflict Really Necessary?* 37 TEXAS L. REV. 657, 658–59 (1959). Decisions reaching the same conclusions are Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962); Sanders Assoc., Inc. v. Galion Iron Works & Mfg. Co., 304 F.2d 915 (1st Cir. 1962); Superior Distributing Corp. v. Hargrove, 312 P.2d 893 (Okla. 1957); Enco, Inc. v. F. C. Russell Co., 210 Ore. 324, 311 P.2d 737 (1957).

49. Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233 (5th Cir. 1953); Petroleum Financial Corp. v. Stone, 111 F. Supp. 351 (S.D. N.Y. 1953); McGriff v. Charles Antell, Inc., 123 Utah 166, 256 P.2d 703 (1953).

50. 221 F. Supp. 253 (D. Md. 1963), *rev'd*, 342 F.2d 546 (4th Cir. 1965), noted in 25 MD. L. REV. 361 (1965).

51. 221 F. Supp. at 259–60.

52. Laws of Md. ch. 504, §§ 118(a) and (b) (1937).

53. Earlier Maryland cases reflecting this requirement and holding that a single or isolated transaction is not "doing business" are Carter v. Reardon-Smith Line, 148 Md. 545, 129 Atl. 839 (1925); Baden v. Washington Loan & Trust Co., 133 Md. 602, 105 Atl. 860 (1919); Crook v. Girard Iron Co., 87 Md. 138, 39 Atl. 94 (1898).

54. 342 F.2d 546 (4th Cir. 1965).

permit".[55] The opinion emphasized that in eliminating the word "regularly" from the statute in 1937, the "General Assembly was releasing the standard from the moorings of its specific wording and casting it adrift on the tide of constitutional due process".[56] Finding that the facts of the case fell within the constitutionally permissible limits of due process, the court held the defendant to be subject to Maryland jurisdiction.[57]

The last word on this question can only be given by the Maryland Court of Appeals. The decision of that body is binding not only as to state court jurisdiction but, according to almost all authorities, also affects federal court jurisdiction in diversity of citizenship cases.[58] Subsequent to the Fourth Circuit Court of Appeals' decision in the *Gkiafis* case, the Maryland Court of Appeals decided a case involving the interpretation of "doing business". *Gilliam v. Moog Industries, Inc.* [59] was a suit for breach of a contract of employment under which the plaintiff was employed as district manager of an area that included Maryland. The defendant was a manufacturer of auto replacement parts which it sold to distributors, two of which were located in Maryland. The plaintiff, together with an assistant, had promoted the sale of defendant's products in Maryland by calling on the warehouse distributors, jobbers and customers of jobbers, and conducting demonstrations of the products. The court denied jurisdiction over the defendant on the ground that the activities added up to nothing more than solicitation of business, which did not amount to "doing business".

In response to the plaintiff's argument that the 1964 "long arm" statute would uphold jurisdiction, the court stated that although the purpose of the *new* statute was to provide the maximum constitutional scope to Maryland jurisdiction and that the defendant might be subject to Maryland jurisdiction under the new statute, it would not decide that question since it had not been presented properly to the lower court. Had the court decided that question, it seems likely that it would have found jurisdiction to exist, since the facts of the *Gilliam* case are similar to those of the *International Shoe* case. The Maryland Court of Appeals can hardly be said to have equated the "doing busi-

55. *Id.* at 550.

56. *Id.* at 552.

57. The sweeping nature of the opinion is somewhat reduced by the court's recognition that art. 23, § 88(b), which states that a foreign corporation shall not be considered to be doing intrastate business if it is engaged in "conducting an isolated transaction not in the course of a number of transactions of like nature", may modify the jurisdictional standard of §§ 92(a) & (b), *id.* at 553 n.10. Judge Watkins had argued that if an isolated intrastate transaction does not constitute the doing of intrastate business, it logically follows that an isolated interstate or foreign transaction cannot subject a foreign corporation to Maryland jurisdiction under the statute. The Fourth Circuit Court of Appeals met this argument by holding that under the facts of the *Gkiafis* case, the vessel had been engaged in "the course of a number of transactions of like nature" in its series of visits to the state.

58. Holding that, unless otherwise provided, amenability to jurisdiction in a diversity case in the federal courts is no broader than amenability to jurisdiction in the state courts of the forum state are Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963); Jennings v. McCall Corp., 320 F.2d 64 (8th Cir. 1963); Walker v. General Features Corp., 319 F.2d 583 (10th Cir. 1963); Smartt v. Coca-Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963).

59. 239 Md. 107, 210 A.2d 390 (1965).

ness" statute with the limits of due process. As shown by the *Gilliam* case, the rule that continuous solicitation of orders by an agent for goods to be shipped into the state to the purchaser is not sufficient to constitute doing business, continued to be applied after *International Shoe* as prior thereto.[60]

In 1953,[61] the Maryland Court of Appeals described the pattern of activities by which a foreign corporation might exploit a market in the state without being subject to the state's jurisdiction in the following manner:

> A foreign corporation which has its principal business in another state, sells its products to distributors outside of that state and the products are shipped f.o.b. with drafts attached. A district superintendent is employed whose territory includes foreign states. He visits distributors and dealers and advises them how to sell the products, how to keep up their stock of goods, and selects new dealers subject to the approval of the company. All contracts are executed by an officer of the corporation outside of the foreign state, the district superintendent having no authority to finally ratify any contracts.[62]

Operating to ameliorate the unfairness in this situation was the availability of the rule that if there is "solicitation plus" rather than "mere solicitation", there is "doing business" in the state. Since the *International Shoe* decision, some courts have found the "plus" factor even in those activities which seem to be part of the solicitation effort itself.[63] In Maryland the following have been found to be sufficient for the "plus" factor: the demonstrating of the product followed by the acceptance by the sales representatives of certain orders without factory approval, plus the inspection of the jobs in which the product was used to enable the corporation to issue a bond guaranteeing the work;[64] the maintenance by the corporation of an inventory of its products within the state for more convenient shipment to its distributors;[65] the conducting of research and field tests of its products in actual use in the state.[66]

A second type of case in which "doing business" was found to exist occurred where the foreign corporation was represented in the state by what appeared to be an independent contractor, but because of the extensive control over the representative of the corporation, the relationship was characterized as being that of principal and agent.

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60. Other cases applying this rule are Chesapeake Supply & Equipment Co. v. Manitowoc, 232 Md. 555, 194 A.2d 624 (1963); G.E.M., Inc. v. Plough, Inc., 228 Md. 484, 180 A.2d 478 (1961); Feldman v. Thew Shovel Co., 214 Md. 387, 135 A.2d 428 (1957).

61. Thomas v. Hudson Sales Corp., 204 Md. 450, 105 A.2d 225 (1953).

62. *Id.* at 458, 105 A.2d at 228.

63. See Fiore v. Family Pub. Serv., Inc., 157 F. Supp. 572 (E.D. Mo. 1957); Prime Mfg. Co. v. Kelly, 3 Wisc. 2d 156, 87 N.W.2d 788 (1958).

64. Wm. Barnes Hall, Inc. v. Flintkote Co., 139 F. Supp. 32 (D. Md. 1956).

65. Becker v. General Motors Corp., 167 F. Supp. 164 (D. Md. 1958).

66. White v. Caterpillar Tractor Co., 235 Md. 368, 201 A.2d 856 (1964).

The court disregarded the form for the substance to find the local distributor to be in effect a branch office of the foreign corporation.[67]

These cases can only be understood as laying down the same basic requirements for doing business after *International Shoe* as before. It would not be unreasonable to conclude that in post-*International Shoe* cases, in view of the new constitutional principles, the court was somewhat more amenable to finding the "plus" factor in solicitation cases or in finding sufficient control over a local distributor to subject a foreign corporation to Maryland jurisdiction. The expansion of Maryland jurisdiction over foreign corporations was not, in any case, a wide one and hardly to the permissible constitutional limits. In view of the enactment of the 1964 "long arm" statute, the question at this time is an academic one and further clarification by the Court of Appeals would seem to be largely superfluous.

MAY A CORPORATION DOING BUSINESS IN MARYLAND CONSTITUTIONALLY BE SUBJECTED TO A SUIT IN MARYLAND ON A FOREIGN CAUSE OF ACTION?

When a corporation has actually appointed an agent for service of process and expressly consented to suit in a state, a cause of action unrelated to that state may be brought if the statute so provides.[68] However, the decisions in the *International Shoe* and *Perkins* cases clearly indicate that where there is no actual appointment of an agent, the answer to this question depends upon the specific facts of each case.[69] Jurisdiction is to be determined on the basis of the substance and nature of the actual operations of the particular corporation within the state. The ultimate question is whether it is reasonable, in view of those operations, to subject the corporation to a local suit on a foreign cause of action. The approach which took it for granted that the provisions of § 92 as to causes of action arising outside of the state was valid in all cases[70] is, therefore, subject to reappraisal.

In this respect, the *International Shoe* case has served to limit claims to judicial jurisdiction. The old concept of corporate "presence" in the state, at least in theory, could make no distinction as to where the cause of action arose.[71] On the other hand, under the *International Shoe* approach of fairness to the defendant, although a foreign corporation may be carrying on sufficient activities within a state to make it fair to be subjected to suit on a cause of action connected with those

67. Kahn v. Maico Co., 216 F.2d 233 (4th Cir. 1954); La Porte Heinekamp Motor Co. v. Ford Motor Co., 24 F.2d 861 (D. Md. 1928); White v. Caterpillar Tractor Co., *supra* note 66; Thomas v. Hudson Sales Co., 204 Md. 450, 105 A.2d 225 (1953); State v. Penn. Steel Co., 123 Md. 212, 91 Atl. 136 (1914).

68. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917). See Atlantic Coast Line Ry. Co. v. J. B. Hunt & Sons, Inc., 260 N.C. 717, 133 S.E.2d 644, 647 (1963).

69. See notes 24–27 *supra* and accompanying text.

70. See, *e.g.*, Hagerstown Brewing Co. v. Gates, 117 Md. 348, 83 Atl. 570 (1912). Some recent cases still take the position that a foreign corporation is subject to jurisdiction on a foreign cause of action if it is doing business in the state. See, *e.g.*, Atchison, T.&S.F. Ry. Co. v. Ortiz, 50 Tenn. App. 317, 361 S.W.2d 113 (1962); Kirkland v. Atchison, T.&S.F. Ry. Co., 114 Ga. App. 200, 121 S.E.2d 411 (1961). In neither of these cases is the problem presented by the *Perkins* case even discussed.

71. See note 10 *supra*.

activities, it could validly claim inconvenience in having to defend a suit whose underlying events took place a great distance away.

If the principal place of business or the home office of the corporation were located in the state, the argument of inconvenience would carry little weight. Aside from this situation, the activities of the corporation in the state would have to be of an exceptional nature to satisfy the fairness approach as to a foreign cause of action. It would seem that the requirement of § 92(b), that a non-resident of Maryland may sue a foreign corporation on a cause of action arising outside the state "provided that the bringing of such suit in this state is not an undue burden upon the defendant," is now a constitutional requirement in all cases and therefore limits the resident plaintiff as well as the non-resident plaintiff.

THE MARYLAND "SHORT ARM" — SECTION 92(d)

In 1937, the Maryland legislature established what was undoubtedly, at that time, a pioneering breakthrough in the field of judicial jurisdiction.[72] A contemporary article termed the section, a "new and unique provision of the law".[73] The customary doing business sections were supplemented by an additional provision which stated that:

> [E]very foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business within the State on any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State.[74]

Application of this section proved to be less successful and less far-reaching than was probably anticipated by its sponsors. At the outset, the statute eliminates from its provisions plaintiffs who are non-residents or who do not have a usual place of business in Maryland. Thus, it could not be used by a foreign seaman injured in the port of Baltimore,[75] nor even by a resident of Maryland who sought to obtain jurisdiction by attaching the claim of a non-resident defendant against a foreign corporation.[76]

Conferring jurisdiction on Maryland courts "on any cause of action arising out of a contract made within this state" permitted easy circumvention by foreign corporations which could manipulate the place of the final act in the process of negotiations. Thus, a foreign manufacturer which regularly sells its products in Maryland through a local distributor to local purchasers, by making its purchase orders subject to acceptance or rejection at the home office, would not be

72. Laws of Md. ch. 504, § 118(d) (1937).
73. Reiblich, *supra* note 45, at 67.
74. MD. CODE ANN. art. 23, § 92(d) (1957).
75. Gkiafis v. Steamship Yiosonas, 221 F. Supp. 253 (D. Md. 1963), *rev'd*, 342 F.2d 546 (4th Cir. 1965).
76. Thomas v. Hudson Sales Corp., 204 Md. 450, 105 A.2d 225 (1953). *Cf.* Cole v. Randall Park Holding Co., 201 Md. 616, 95 A.2d 272 (1953).

subject to Maryland jurisdiction, even though all the events leading to the agreement took place in Maryland, since the acceptance of the order is "the last act that made the transaction a binding contract".[77]

The case cited for successful use of this provision is *Compania de Astral, S.A. v. Boston Metals Co.*[78] This case, which was decided after *International Shoe,* made clear that the provisions of section 92(d) could not be constitutionally applied to all cases indiscriminately even though falling within the literal wording of the section. The court stated that the validity of the application of the section must be determined by "the extent that it is a reasonable exercise of the state's regulatory control under all the facts involved."[79]

Ironically, the defendant, which was a Panamanian corporation engaged in exporting bananas from Ecuador to various countries, had no contacts with Maryland other than the contract which was the subject of the suit. In upholding jurisdiction, the court emphasized the fact that in addition to the making of the contract in Maryland, the negotiations leading up to the contract were carried on here.

The only case where jurisdiction has been found to exist on the basis of "liability incurred for acts done within this state" is *Johns v. Bay State Abrasive Products Co.*[80] There, injury was alleged to have been caused by the combined operation of a grinding machine manufactured by a Texas corporation and an abrasive wheel manufactured by a Massachusetts corporation, both purchased from a local distributor. Each corporation had a sales representative who regularly spent part of his time in Maryland promoting sales. The representative of the Texas corporation had recommended the purchase of these two items for the particular job. The court found jurisdiction to exist over this corporation on the basis of a tort occurring in Maryland, *i.e.,* the misrepresentation as to the safety of the recommended tools used in combination with each other. Noting the continuous activity of the representative in Maryland, the court found there was more than a single isolated transaction and for this reason, the application of the statute did not violate due process.

JURISDICTION OVER NON-RESIDENT INDIVIDUALS — Article 75, § 78

In 1955, the Maryland legislature enacted the following provision,[81] at present found in art. 75, § 78 of the Maryland Code:

> Any nonresident, person, firm, partnership, general or limited, not qualified under the laws of this State as to doing business herein, who shall do any business or perform any character of

77. Chesapeake Supply & Equipment Co. v. Manitowoc, 232 Md. 555, 567, 194 A.2d 624, 630 (1963). Note the similarity to the method of operation which circumvented jurisdiction based on "doing business" in the state. See notes 60 and 61 *supra* and accompanying text.

78. 205 Md. 237, 107 A.2d 357 (1954).

79. *Id.* at 256, 107 A.2d at 365. See Maryland National Bank v. Shaffer Stores Co., 240 F. Supp. 777 (D. Md. 1965).

80. 89 F. Supp. 654 (D. Md. 1950).

81. Laws of Md. ch. 297 (1955).

> work or service in this State, shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the Secretary of State to be the true and lawful attorney or agent of such nonresident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or services, or as an incident thereto by any such nonresident, or his, its or their agent, servant or employee.

Two aspects of the section reveal the influence of *International Shoe*. The first concerns the type of activity which is made the basis for jurisdiction. The *Hess* and *Doherty* decisions which were the last Supreme Court pronouncements directly involving non-resident individuals dealt with exceptional situations — the use of motor vehicles and the sale of corporate securities.[82] The statute, however, follows the logic of *International Shoe,* which is applied to individuals as well as corporations and covers the normal type of activity as well as the exceptional. A second aspect of the enactment revealing the influence of the new approach to jurisdiction of *International Shoe* involves the extent of the activity necessary for jurisdiction. Non-resident individuals made subject to Maryland jurisdiction are those "who shall do any business or perform any character of work or service in this state". Less than the traditional "doing business" seems to be contemplated. Supporting this conclusion is the limitation that the cause of action must arise out of the acts performed within the state.

Too few cases have been decided under this section to provide any clear interpretation of the exact scope of the activities falling within its purview.[83] The enactment of the 1964 "long arm" statute, which makes unlikely future use of this section, probably prevents further case law development on this question. In view of the subsequent legislation, the 1955 act may be viewed as a stop-gap measure pending the assertion of judicial jurisdiction to the full extent constitutionally permitted.

MISCELLANEOUS STATUTES

Prior to the 1964 act, various other statutes had been enacted in response to the due process decisions of the Supreme Court. The enact-

82. See notes 19 and 20 *supra* and accompanying text.

83. In Baltimore Lumber Co. v. Marcus, 208 F. Supp. 852 (D. Md. 1962), the court found the defendant, a Pennsylvania citizen, subject to Maryland jurisdiction where he had been in the state soliciting contracts for garage constructions, had managed the affairs of the business in the state for about a week and had made a personal undertaking guaranteeing payment for supplies.

The reference in the statute to those "not qualified under the laws of this state as to doing business herein" has led one court to conclude that it covers only those non-resident individuals who are required to qualify or obtain a license to do business in Maryland but fail to do so. Harris v. Craig, 145 The Daily Record (Baltimore) 128, p. 5 (Super. Ct. of Baltimore City, Dec. 3, 1960). Taking the more logical point of view that the statute applies to all non-residents who do not qualify and thus have not appointed an agent to receive process, whether or not qualification is required, are the *Baltimore Lumber* case and Maternity Trousseau, Inc. v. Maternity Mart of Baltimore, Inc., 196 F. Supp. 456 (D. Md. 1961).

ment in 1929 of a statute asserting jurisdiction over non-resident motorists[84] can be traced back to the *Hess* decision of 1927.[85] This was later followed by acts covering non-resident aviators and users of waterways.[86]

The provisions of the Maryland Securities Act[87] under which jurisdiction is obtained in a civil suit on the basis of prohibited conduct involving the offer or sale of securities in the state complies with the decision in the *Doherty* case of 1935.[88] The concept of judicial jurisdiction based on conduct subject to special regulation would also seem to cover real estate sales; hence the requirement that non-residents who apply for a license to "engage in or carry on the business of or act in the capacity of a real estate broker or real estate salesman within this state" must file an irrevocable consent to the jurisdiction of the Maryland courts.[89]

Subjecting a foreign electrical corporation which constructs or operates electric transmission or distribution lines in the state to local jurisdiction[90] would not seem to go beyond the pre-*International Shoe* concept of "doing business". Chronologically, the assertion of this jurisdiction in Maryland[91] antedates the *International Shoe* case by four years.

A particular area which was affected by the *International Shoe* decision is that of jurisdiction over foreign insurance companies which fail to qualify to engage in the insurance business in the state.[92] The Unauthorized Insurers Process Act, enacted in 1949,[93] provides for jurisdiction over foreign insurers on the basis of "(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, . . ."[94] which is effected by mail or otherwise in any action by or on behalf of an insured or beneficiary arising out of any of such contracts of insurance.

In the one decision which has touched on this provision, it was noted that "the activities listed . . . are referred to as 'transaction of insurance business', not as 'doing business' within the state. 'Transaction of business' has a broader meaning than 'doing business'."[95] Coinciden-

84. MD. CODE ANN. art. 66½, § 115 (1957). For a history of this statute, see Hunt v. Tague, 205 Md. 369, 109 A.2d 80 (1954).
85. *Supra* note 19.
86. MD. CODE ANN. art. 75, §§ 76, 77 (1957).
87. MD. CODE ANN. art. 32A, §§ 38(g) & (h) (Supp. 1965).
88. *Supra* note 20.
89. MD. CODE ANN. art. 56, §§ 217(a), 219(d) (1957).
90. MD. CODE ANN. art. 23, § 406 (1957).
91. Laws of Md. ch. 907, § 487 (1941).
92. Jurisdiction over foreign companies which do qualify is covered by MD. CODE ANN. art. 48A, § 57 (1957) (foreign insurers) and art. 48A, § 347 (fraternal benefit societies).
93. Laws of Md. ch. 450 (1949). The act was first promulgated by the Commissioners on Uniform State Laws in 1938. 9C UNIFORM LAWS ANN. 306 (1957).
94. MD. CODE ANN. art. 48A, § 204 (1959).
95. Rosenberg v. Andrew Weir Ins. Co., 154 F. Supp. 6, 10 (D. Md. 1957). See notes 122–43 *infra* and accompanying text concerning the phrase "transaction of business" under the 1964 "long arm" statute. A decision which limits somewhat the

tally, almost at the same time that this statement was made, the United States Supreme Court was deciding the *McGee* case[96] upholding the constitutionality of the California Unauthorized Insurers Process Act[97], which is almost identical to the Maryland act.

THE 1964 "LONG ARM" STATUTE

The statute is comprised of 7 sections.[98] The first three lay down the expanded grounds for jurisdiction.[99] Two give general directions for rules as to service of process.[100] One codifies the doctrine of forum non conveniens,[101] and one makes clear that all other existing bases for jurisdiction are unaffected.[102]

It is the first three sections of the act (sections 94-96) dealing with the bases for judicial jurisdiction to which the balance of this article will be devoted. Section 94 identifies the defendants made subject to the provisions of the act. Section 95 identifies those defendants who are subject to Maryland jurisdiction as to any cause of action, including those arising from out-of-state transactions. Section 96 enumerates various activities within or connected with the state on the basis of which Maryland courts have jurisdiction over causes of action arising out of those activities.

It should be noted at the outset that while analysis of the statute entails a dual focus — first, that of statutory interpretation and second, that of constitutional regulation — the two will be found to be very closely interrelated. Legislative purpose, to a large degree, was the expansion of judicial jurisdiction up to but not beyond the outermost limits permitted by the Supreme Court's due process decisions. Consideration of the constitutional question in each situation is, therefore, essential not only for its own purpose, but also as an important factor in statutory interpretation.

SECTION 94 — DEFENDANTS MADE SUBJECT TO THE ACT

The scope of the statute as to those defendants made subject to its provisions is an all-inclusive one. A "person" over whom the courts are to obtain personal jurisdiction under the act is defined as "an individual or 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."[103]

scope of the Unauthorized Insurers Process Act is Wash. v. Western Empire Life Ins. Co., 298 F.2d 374 (8th Cir. 1962), which held that an insurance company is not subject to the provisions of the act where it has no knowledge of its agents act in selling the policy sued on, and the agent had no actual authority to sell the policy to a resident of that state.

96. *Supra* note 29.
97. CAL. INS. CODE §§ 1610–20.
98. MD. CODE ANN. art. 75, §§ 94–100 (Supp. 1965).
99. MD. CODE ANN. art. 75, §§ 94–96 (Supp. 1965).
100. MD. CODE ANN. art. 75, §§ 97, 100 (Supp. 1965).
101. MD. CODE ANN. art. 75, § 98 (Supp. 1965).
102. MD. CODE ANN. art. 75, § 99 (Supp. 1965).
103. MD. CODE ANN. art. 75, § 94 (Supp. 1965).

The rationale of *International Shoe,* that jurisdictional principles are basically the same for all defendants, individuals, corporations and unincorporated associations, where the latter is subject to suit as an entity, is apparent.

An interesting question raised by this section is the status in Maryland of a partnership as a defendant. The common law rule is that an action against a partnership could not be brought against the firm alone, but all partners composing the firm were to be named as defendants.[104] It has been stated that this is also the present rule in Maryland.[105] On the other hand, the query has been raised whether a partnership may be considered an "unincorporated association" under article 23, § 138 of the Code which permits suit against an association in the group name.[106] The definition of person in section 94 as including a "partnership, association, or any other legal or commercial entity" may strengthen the claim that a partnership may now be sued as an entity in the partnership name as an alternative to suing all the members of the partnership.

The inclusion in the section of the personal representative of an individual allows the acquisition of jurisdiction when the acts of a deceased or an incompetent provide the basis for jurisdiction.[107]

SECTION 95 — DEFENDANT SUBJECT TO JURISDICTION AS TO ANY CAUSE OF ACTION

By virtue of section 95, "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in this State as to any cause of action."[108] The rationale of this section is the notion that it is fair and reasonable for a state to assert jurisdiction over a defendant having a close and enduring relationship with it as to any cause of action. In the case of an individual, this requirement is fulfilled if he is either domiciled or has his principal place of business in the state. A corporation or other association, which has its *raison d'etre* in its commercial activities, is made subject to such over-all jurisdiction if it is organized under the laws of the state or has its principal place of business in the state.

As previously pointed out, jurisdiction as to any cause of action over an individual based on his domicile clearly satisfies the requirements of due process.[109] This is also true of jurisdiction based on

104. SHIPMAN, COMMON LAW PLEADING 466 (3d ed. 1923).

105. 1 POE, PLEADING AND PRACTICE § 385B (5th ed. 1925); 17 MD. LAW ENCY. *Partnership* § 151 (1961).

106. 1 SYKES and TABOR, MD. LAW ENCY. *Procedural Forms* § 316 (1964). This was the decision reached in Feldman Insurance Agency v. B&F Transportation, Inc., 145 The Daily Record (Baltimore) 13, p. 2 (Circuit Ct. for Prince George's County, July 16, 1960).

107. See Commissioners' Note to § 1.01 of the UNIFORM ACT. The Commissioners' Notes to the UNIFORM ACT provide much useful information as to the point of view of the original authors of the ACT. The text and notes to Article I of the UNIFORM ACT are found in 9B UNIFORM LAWS ANN. 76–82 (1964 Supp.). See note 2 *supra.*

108. MD. CODE ANN. art. 75, § 95 (Supp. 1965).

109. See notes 14–15 *supra* and accompanying text.

organization under the laws of the state or based on having a principal place of business in the state.[110] Such jurisdiction over an individual is a new concept introduced into Maryland law by the 1964 act. Prior thereto, the only relationship which provided the basis for jurisdiction was the unhappy one of being the recipient, while within the territory of the state, of service of process.[111] A domestic corporation or unincorporated association is, under prior statute, subject to the jurisdiction of the Maryland courts as to any cause of action.[112] In this respect, the 1964 act does not introduce anything new. However, the provision concerning a foreign corporation or association having its principal place of business in the state provides some interesting comparisons with prior law — specifically, article 23, §§ 92(a) & (b).[113]

The 1964 act requires a closer bond between the defendant and the state than article 23 as a basis for local jurisdiction over a foreign cause of action.[114] For the constitutionally dubious justification based on "doing business" of article 23, it substitutes the "principal place of business." Once that closer bond exists, it does not set up any limitations on suit by a non-resident plaintiff, in contrast to article 23. A plaintiff suing a foreign corporation or association having its principal place of business in Maryland on a foreign cause of action would therefore find the procedures under the 1964 act safer and probably more convenient.[115] The act would exclude only the unusual case of a plaintiff who brings a foreign cause of action against a foreign corporation or association having its principal place of business outside the state, and who seeks to argue that other contacts of the defendant with the state are "so substantial and of such a nature" as to justify local jurisdiction, with the result that article 23 would be the only basis for attempting suit.

SECTION 96 — BASES FOR JURISDICTION OVER CAUSES OF ACTION ARISING FROM ACTIVITIES WITHIN OR CONNECTED WITH THE STATE

The greatest reach of the "long arm" is that of section 96. Section 96(a) provides that:

> (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's
>
> (1) transacting any business in this State;
>
> (2) contracting to supply services in this State;

110. See notes 24–27 *supra* and accompanying text.
111. See note 42 *supra*.
112. See note 43 *supra*.
113. See notes 68–71 *supra* and accompanying text.
114. Section 95 also covers suits based on Maryland transactions. However, since in almost all cases, these would fall under section 96, the fact that defendant has his principal place of business in Maryland or is a Maryland domiciliary is not the decisive factor.
115. Under art. 75, § 100, MD. CODE ANN. (Supp. 1965), the Court of Appeals is authorized to establish new rules for service of process on defendants made subject to Maryland jurisdiction by the 1964 act.

(3) causing tortious injury in this State by an act or omission in this State;

(4) causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State;

(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.[116]

Section 96(b) makes clear that the cause of action must arise from the enumerated activities.[117]

Some of the categories in 96(a) seem to overlap, and there are undoubtedly many situations which would fall under more than one heading. Where this occurs, each subdivision would be sufficient independently of the others to support Maryland jurisdiction.

(1) *"Transacting Any Business In This State"*

This subdivision is derived from the statute of Illinois,[118] and the courts of that state have contributed most to the interpretation of its language.[119] The basic question which has arisen is what kind of activity amounts to the "transaction of business." It is clear that the intent of the statute is to require considerably less than what is required under the "doing business" test.[120] At the same time, there is a limit here as well, and not every act in the state will satisfy the requirement of "transacting business". In view of the purpose of the statute, the key to statutory interpretation is found in the constitutional principles of due process.

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116. MD. CODE ANN. art. 75, § 96(a) (Supp. 1965).

117. Due to an oversight when passed in 1964, § 96(b) read, "When jurisdiction over a person is based solely upon this section. . . ." This was corrected in 1965 to read, "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." Laws of Md. ch. 749 (1965). For a good example of the application of this requirement see Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964).

118. ILL. STAT. ANN. ch. 110, § 17(1)(a) (1956). See Commissioners' Note to § 1.03(a)(1) of the UNIFORM ACT.

119. See generally Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts,* 50 NW. U.L. REV. 599, 607–09 (1955–56); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 533, 560–79 (1963).

120. "The words of subsection (a) of Section 17 cannot be given a restrictive interpretation based upon the old Illinois 'doing business' cases. The subsection speaks of 'transaction of any business within this state' not of 'doing business' here." Haas v. Fancher Furniture Co., 156 F. Supp. 564, 567 (N.D. Ill. 1957). See Rosenberg v. Andrew Weir Ins. Co., 154 F. Supp. 6 (D. Md. 1957). *But see* Bay Aviation Services Co. v. District Court, 149 Colo. 542, 370 P.2d 752 (1962), where the new language was given as restricted a meaning as the old "doing business" statute.

Comparison with the "doing business" test shows two areas of expansion of jurisdiction. One is the solicitation situation, the other, the isolated transaction in the state. Solicitation without any "plus" factor, insufficient under the "doing business" test, was the actual situation in *International Shoe*. There, the Supreme Court found jurisdiction to exist on the basis of solicitation alone and pointed out that the solicitations "were systematic and continuous throughout the years in question."[121] Cases under the Illinois statute have found no difficulty in classifying such activity as "transaction of business".[122] The isolated act presents more difficulties than continuous solicitation. The *International Shoe* decision distinguished between "single or occasional" acts on the basis of their "nature and quality".[123] The *McGee* case illustrates an isolated transaction held sufficient to confer jurisdiction. The assertion of jurisdiction on the basis of a single transaction is not new to Maryland. Article 23, § 92(d) asserts jurisdiction against foreign corporations arising out of a contract made in the state. The "transaction of business" concept, however, extends such jurisdiction considerably.

Aside from applying to individuals as well as corporations, this concept is characterized by a flexibility absent from jurisdiction based on the making of a contract.[124] In *Natural Gas Appliance Corp. v. AB Electrolux*,[125] the court did not concern itself with the place of the making of the contract out of which the suit arose, but held that jurisdiction existed since the contract "was the culmination of negotiations, conferences, contracts and meetings between the agents of plaintiff and defendant. A substantial part thereof occurred in the State of Illinois."[126] A contract negotiated in whole or in part in Maryland but "made" elsewhere would therefore amount to the "transacting of business" in Maryland. But in *Kaye-Martin v. Brooks*,[127] a suit for breach of contract for sale of stock, the same court denied jurisdiction where a contract was negotiated in Illinois, the Illinois meeting of the parties having been arranged for convenience because the defendant seller happened to be attending a convention there.

121. 326 U.S. at 320.

122. See Haas v. Fancher Furniture Co., 156 F. Supp. 564 (N.D. Ill. 1957).

123. 326 U.S. at 318.

124. Jurisdiction based on "transaction of business" is technically broad enough to cover tort as well as contract cases. See Commissioners' Note to § 1.03 of UNIFORM ACT. However, in view of the subsequent categories specifically dealing with tort actions, the typical case under this category is a contract action.

125. 270 F.2d 472 (7th Cir. 1959).

126. *Id.* at 475. Among other cases finding "transaction of business" in the state on the basis of an isolated transaction are: Berk v. Gordon Johnson Co., 212 F. Supp. 365 (E.D. Mich. 1962) (solicitation by defendant's salesmen of the contract, installation of the equipment and inspection of the subsequent complaint in Michigan); Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962) (visit of defendant to Illinois to inspect the equipment to be purchased by him, the preliminary negotiations and final acceptance being made by correspondence from defendant in N.Y. to plaintiff in Illinois); Berlemann v. Superior Distributing Co., 17 Ill. App. 2d 522, 151 N.E.2d 116 (1958) (solicitation by defendant's representative of a purchase order for vending machines while agreeing to find locations for the machines and to train plaintiff to service and maintain them in Illinois); Nixon v. Cohn, 62 Wash. 2d 987, 385 P.2d 305 (1963) (visit by defendant's representatives in connection with the sale, installation and maintenance of the machine).

127. 267 F.2d 394 (7th Cir. 1959).

In that case, "transaction of business" literally took place in Illinois. However, the accidental "nature and quality" of the transaction was not such as to justify Illinois jurisdiction. The scope of the statute was seen as limited by the principle of *Hanson v. Denckla,*[128] that "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 protection of its laws".[129] The same result would logically follow even if the actual execution of the contract took place at the chance meeting in the state.

The case of *Conn v. Whitmore*[130] suggests another important limitation on "transaction of business" jurisdiction. There, the Utah Supreme Court refused to give full faith and credit to an Illinois judgment based on the following facts: Plaintiff, in the business of selling horses in Illinois, mailed to defendant, in Utah, a mimeographed sheet listing the horses for sale. Defendant requested a friend in Illinois to look at the horses. The report was favorable. Defendant then mailed a letter to plaintiff containing part payment and stating that he would purchase the horses. He sent an employee who picked up the horses in Illinois and delivered a check for the balance of the purchase price. When defendant stopped payment on the check, plaintiff sued and obtained a judgment in Illinois for the balance of the purchase price. As one of the grounds for its decision, the Utah court held that even if there was a "transaction of business" in Illinois, jurisdiction over the defendant in this situation offends the "traditional notions of fair play and substantial justice" required by *International Shoe.* The events which took place in Illinois were not fortuitous or accidental. Yet, as far as the defendant was concerned, there was no voluntary or purposeful entry into the state. Business was transacted there because that was where the plaintiff was located. An Illinois forum would, under the circumstances, be unfair and inconvenient to the defendant. Since it was the plaintiff who initiated the offer for business in Utah, it would not be unfair to require him to sue there.

In the *Kaye-Martin* and *Conn* cases, jurisdiction was denied even though the defendant or his agent had engaged in some activity while physically within the state, since the location of the activity was not the result of a purposeful choice exercised by the defendant. In *Saletko v. Willeys Motors, Inc.,*[131] a contract had been negotiated by mail and telephone between the plaintiff in Illinois and the defendant in Ohio. The Illinois Appellate Court, basing its decision on *Grobart v. Addo Machine Co., Inc.,*[132] a decision of the Illinois Supreme Court, held that there was no transaction of business in Illinois, in spite of the fact that it was the defendant who had taken the initiative in contacting the plaintiff in Illinois. This was justified on the basis that "the performance of jurisdictional acts, by defendant or its agents while physically present in Illinois, is essential for submission to the juris-

128. 357 U.S. 235 (1958).
129. *Id.* at 253. See Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction,* 44 IOWA L. REV. 249, 260 (1959).
130. 9 Utah 2d 250, 342 P.2d 871 (1959).
131. 36 Ill. App. 2d 7, 183 N.E.2d 569 (1962).
132. 16 Ill. 2d 426, 158 N.E.2d 73 (1959).

diction of the courts of this state under section 17(1)(a)."[133] Thus, while fortuitous physical presence in the state is insufficient to give jurisdiction, physical absence from the state is a sufficient ground to deny jurisdiction even though there are other substantial and purposeful contacts with the state.

The argument has been made[134] that the conclusion of the *Saletko* case is no longer the law in Illinois, since in *Gray v. American Radiator & Standard Sanitary Corp.*,[135] decided after *Grobart,* the Illinois Supreme Court held that there could be the commission of a tortious act within that state even though the defendant had never physically been in the state. It is argued that if a tortious act can be committed in the state even though the defendant is not there, business can also be transacted in the state in the same way.[136]

Whether or not this contention is valid with regard to Illinois, analysis of the Maryland statute leads to a contrary conclusion. Subdivisions (2) and (4) of the Maryland statute specifically define the circumstances under which a defendant, who is physically outside the state, is subject to Maryland jurisdiction. These subdivisions do not have their counterparts in the Illinois statute. The inclusion of an absent defendant within the "transaction of business" category, reasonable in Illinois in view of the otherwise existing gap in the statute, is inconsistent with the overall structure of the Maryland act. This analysis suggests a further limitation on jurisdiction based on this subdivision of the 1964 act — that there must be an act by the defendant or his agent while present within the state to constitute "transaction of business in the state".

(2) *Contracting To Supply Services In This State*

This subsection authorizes jurisdiction over a defendant who has never been in the state. Jurisdiction is asserted on the basis of a contractual obligation to perform certain acts in the state. Does the due process clause permit a state to take jurisdiction over a cause of action arising out of a particular transaction where, although the transaction in its totality has some contact with the state, the defendant at all times has acted outside the state?

Nowhere in the *International Shoe* opinion is there any discussion of this question. The *McGee* case does have relevance to this inquiry. There, the defendant insurance company serviced an insurance policy of a California resident at all times through the mails. No agent of the company was ever physically present in California. Yet, the company was held subject to California jurisdiction as to a cause of action arising out of the policy, since "the suit was based on a *contract*

133. 183 N.E.2d at 571. *Accord,* Tyee Construction Co. v. Dulien Steel Prod., Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963).

134. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 533, 566–79 (1963).

135. 22 Ill. 2d 432, 176 N.E.2d 761 (1961); see notes 154–55 *infra* and accompanying text.

136. W. Va. jurisdiction was upheld where a contract resulted from an offer made by the defendant in Ohio and accepted by the plaintiff in W. Va. during a telephone conversation. State *ex rel.* Coral Pools, Inc. v. Knapp, 131 S.E.2d 81 (W. Va. 1963).

which had substantial connection"[137] with California. The scope of the *McGee* decision is, however, thrown into question by a statement in the *Hanson* case that *McGee* concerned "an activity that the state treats as exceptional and subject to special regulation,"[138] thus intimating that *McGee,* especially where it breaks totally new ground, may be limited to exceptional cases.[139]

Decisions in the lower courts are conflicting. One of the earliest statutes of this type is that of North Carolina. That statute provides for North Carolina jurisdiction over foreign corporations based on "the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed. . . ."[140] In *Erlanger Mills v. Cohoes Fibre Mills,*[141] the Fourth Circuit Court of Appeals held the statute unconstitutional in a suit based on a claim of defective merchandise shipped from New York to North Carolina. The court stated that the *International Shoe* decision does not "sustain jurisdiction in the North Carolina courts, where the only contact has been a single interstate shipment into North Carolina."[142] The same result was reached by the Supreme Court of North Carolina the following year.[143] A subsequent North Carolina case did hold the statute constitutional.[144] However, in that case, the defendant's total operation in the state was continuous and extensive.

Gray v. American Radiator & Sanitary Corp.[145] is authority for the validity of this provision. There the defendant, an Ohio manufacturer, sold a safety valve to a firm which, in Pennsylvania, attached it to a waterheater which was then sold in Illinois. The plaintiff was an Illinois resident who was injured in an explosion of the heater. The Supreme Court of Illinois upheld jurisdiction over the Ohio defendant, arguing as to the constitutional question that:

> Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State. . . . [If] a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.[146]

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137. 355 U.S. at 223 (emphasis added).
138. Hanson v. Denckla, 357 U.S. 235, at 252–53 (1958).
139. This was the view of the court in Trippe Mfg. Co. v. Spencer Gifts, Inc., 270 F.2d 821, 822 (7th Cir. 1959).
140. N.C. GEN. STAT. § 55–145(3) (1960).
141. 239 F.2d 502 (4th Cir. 1956), noted in 14 MD. L. REV. 140 (1957).
142. *Id.* at 507.
143. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957), which cited with approval the *Erlanger Mills* case. *Accord,* Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965); Pendzimas v. Eastern Metal Products Corp., 218 F. Supp. 524 (D. Minn. 1961); Chassis-Trak, Inc. v. Federated Purchaser, Inc., 179 F. Supp. 780 (D. N.J. 1960).
144. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959).
145. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
146. 176 N.E.2d at 766.

If jurisdiction is constitutional when someone other than the defendant ships a product into the state, a fortiori, it is constitutional when the defendant himself does so.

Suppose in these cases, the defendant had the merchandise delivered by its own agent? Jurisdiction would be justified on the basis of an act committed within the state. Why should shipment by means of an independent carrier change this result? In both situations the defendant has purposefully, to obtain a profit, entered into a transaction having the same substantial effects within the state. It does not seem unjust to require him to defend a claim arising from those effects in the courts of that state.[147]

It should already have been observed that the reported cases concern merchandise shipped into the state. The Uniform Act asserts jurisdiction on the basis of a claim arising from the defendant's "contracting to supply services or things in this state".[148] Curiously, the Maryland statute omits the important words "or things" and applies only to "services". The thought may have been that in the case of services, which would presumably be performed in the state by the defendant or his agents, there is a closer contact with the state than the shipment of merchandise into the state through a carrier. But it is not the services which are the basis for jurisdiction, but the "contracting to supply services". Jurisdiction for defective services performed in the state can rest on subsection (1) or (3). Since it is the contractual relationship which is the basis for jurisdiction, there is no logical distinction between services and things.

Because of the omission, the Maryland resident who is injured by defective merchandise shipped into the state by a foreign manufacturer or who suffers damages because of the failure of such manufacturer to carry out his contractual obligations may be deprived of the opportunity of using a local forum. The only type of action which this subsection would add to Maryland jurisdiction is one for failure to supply promised services. The result of the failure to follow the language of the Uniform Act in this subsection has been to cut down the reach of the "long arm" to a fraction of its potential.

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147. See Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 246, 261–62 (1959). Decisions upholding jurisdiction on this basis are Wisconsin Metal & Chemical Corp. v. DeZurik Corp., 222 F. Supp. 119 (E.D. Wisc. 1963); Hearne v. Dow-Badische Chemical Co., 224 F. Supp. 90 (S.D. Tex. 1963); S. Howes Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954). In Davis v. St. Paul Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961), jurisdiction over a non-resident automobile owner who never entered the state was upheld on the ground that she permitted her car to be driven into the state where the accident occurred. While Sobeloff, J., in the *Davis* case distinguishes the same court's decision in *Erlanger Mills* by placing the social importance of providing a remedy against injuries from automobile accidents in a "higher order" than the *Erlanger Mills* situation, the *Davis* case does assert jurisdiction over a non-resident defendant who was never physically in the state on the basis of a single event within the state with which the defendant has substantial contacts.

148. In the *Erlanger Mills* case, Sobeloff, J., was apprehensive that allowing jurisdiction in that case would also permit jurisdiction in Pennsylvania over a California retailer who sold defective tires in California to a Pennsylvania tourist who was injured in Pennsylvania, 239 F.2d 502, 507. Even accepting that jurisdiction over the California retailer in that case would be unreasonable, the requirement under the UNIFORM ACT of an obligation of the defendant directly related to the forum state puts that situation outside the scope of the statute.

(3) *Causing Tortious Injury In this State By An Act Or Omission In This State*

In its decision in the *McGee* case,[149] the United States Supreme Court cited with approval the decision in *Smyth v. Twin State Improvement Corp.*[150] In that case, suit was brought in Vermont against a Massachusetts corporation engaged in the roofing business, alleging that in re-roofing the plaintiff's house in Vermont, the defendant had negligently caused a leak in the roof. This job was the defendant's only activity in Vermont. The Vermont statute provided for jurisdiction over a foreign corporation which "commits a tort in whole or in part" in Vermont.[151]

In holding that jurisdiction over the defendant did not violate due process, the Vermont Supreme Court emphasized three aspects in the situation. First, the defendant, who came into Vermont in pursuit of its business activities and had the protection of the laws of that state, could not reasonably argue unfairness in having to litigate there a claim arising out of its activities in the state. Second, to require a local resident to sue in a foreign state on a tort committed where he lives is unfair to him and might prevent suit altogether. Third, because of the availability of witnesses and the applicability of its substantive law,[152] "the court of the locus is normally the forum of convenience for the settlement of the dispute."[153]

The same conclusion was reached by the Illinois Supreme Court in *Nelson v. Miller*[154] under a statutory provision based on "the commission of a tortious act within the state". The tortious act in that case was committed by the defendant's employee, delivering a stove by truck from Wisconsin to Illinois, who injured the plaintiff while unloading the stove from the truck. The court observed that while motor vehicle accidents were more common, "[t]he rational basis of the decisions upholding the non-resident motorist statutes is broad enough to include the cases in which the non-resident defendant causes injury without the intervention of any particular instrumentality".[155]

The Maryland statute, consonant with the fact situations in the *Smyth* and *Nelson* cases, requires that both the act and the injury occur in the state. On the other hand, the Uniform Act provides for jurisdiction over a cause of action arising from events "causing tortious injury by an act or omission in this state". Thus, it applies when the act or omission occurs in the state even though the injury occurs elsewhere.[156]

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149. 355 U.S. 220 at 223 n.2 (1957).
150. 116 Vt. 568, 80 A.2d 664 (1951).
151. VT. STAT. tit. 9 ch. 72, § 1562 (1947).
152. See RESTATEMENT, CONFLICT OF LAWS § 378 (1934); RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).
153. 80 A.2d at 668.
154. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
155. 143 N.E.2d at 679. Olberding v. Illinois Central R. Co., Inc., 346 U.S. 338 (1953), made clear that jurisdiction over a non-resident motorist is not based on consent arising from the power to exclude from the state's highways but on legitimate state interest and fairness to the defendant.
156. Commissioners' Note to Section 1.03(a)(3) of the UNIFORM ACT.

From the defendant's standpoint, it should make little difference where the injury occurs. Jurisdiction is imposed on him by cases such as *Smyth* and *Nelson* because the defendant voluntarily engaged in certain conduct in the state. As to which is the "forum of convenience" from the point of view of judicial administration where the act and the injury occur in different states, there is not much to choose between the two. The evidence as to defendant's liability is focused on the place of the act, which also has an interest in regulating tortious conduct and promoting safety within its boundaries. The evidence as to damages is most closely related to the place of injury. That place, which is presumably where plaintiff lives, also is vitally concerned with assuring adequate compensation. Even if the plaintiff could bring suit at the place of injury, the Uniform Act provides him with an additional choice of forum.

The corresponding provision of the Maryland act, however, denies a Maryland forum to a person who is injured elsewhere, normally a non-resident of Maryland, even where the negligent act was committed in Maryland. However, the same non-resident could sue in Maryland if injured in the state. Jurisdiction is made to depend on the place where the injury occurs, which often may be entirely fortuitous. Constitutionally, there would seem to be sufficient "minimum contacts" with the state to validate jurisdiction solely on the place of the act.[157]

Article 23, § 93(d) may be regarded as a predecessor of this subsection of the 1964 act in its provision for jurisdiction based on "liability incurred for acts done within this state". The 1964 act expands jurisdiction by including individuals as well as corporate defendants and by including non-resident plaintiffs as well as resident plaintiffs who are injured in the state. Where a non-resident is injured in Maryland, local interest encompasses not only the regulation of defendant's conduct but also the assurance of adequate compensation for the injury in order to protect local creditors who have extended services to the injured person. To the defendant, it can make no difference whether the injured person is a resident or a non-resident. Under the Maryland Non-Resident Motorist Statute,[158] non-resident motorists have been subject to Maryland jurisdiction even if the injured person is also a non-resident.[159]

As noted earlier,[160] the *Johns* case, in applying article 23, § 99(d) to a tort committed in the state, emphasized that the defendant's activities there were carried on regularly and continuously within the state and that there was more than a single isolated event. The 1964 act provides for jurisdiction on the basis of a single tort.

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157. The possibility of applying subsection (1) — "transacting any business in this state" to obtain jurisdiction on the basis of a tortious act by the defendant in the state should not be overlooked. See note 124 *supra*.

158. MD. CODE ANN. art. 66½, § 115 (1957).

159. Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945). But jurisdiction exists over a non-resident owner or operator of aircraft or watercraft only if the injury is to the person or property of a Maryland resident. MD. CODE ANN. art. 75, §§ 76, 77 (1957).

160. *Supra* note 80 and accompanying text.

(4) *Causing Tortious Injury In This State By An Act Or Omission Outside The State*

This subsection is similar to subsection (2) in that it authorizes jurisdiction over a defendant who has not performed any act within the state. Under Subsection (2), jurisdiction is based on the defendant's undertaking and subsequent failure to make proper performance in the state. The plaintiff's claim and the jurisdictional basis thus arise out of the same events. Subsection (4), on the other hand, does not require that the defendant's injury-causing conduct be directly linked to Maryland. A manufacturer who produces an article negligently outside the state will be subject to Maryland jurisdiction even if he played no part in having the article brought into the state. The basis for jurisdiction is that the injury took place in the state and that the over-all relationship of the defendant with the state is a substantial one.

In *Mann v. Equitable Gas Co.*,[161] the plaintiff was injured in West Virginia as a result of an explosion of a gas pipeline. He sued the manufacturer of the pipe, a Texas corporation, which had sold the pipe to the gas company which used it in West Virginia. The plaintiff's argument for West Virginia jurisdiction over the defendant rested on an allegation that the defendant "manufactured gas pipe which it sold throughout the country."[162] The court found that there was insufficient minimum contact shown between the defendant and West Virginia to justify jurisdiction over the defendant.[163]

In the *Gray* case, discussed above,[164] the defendant sold a product outside the state, which later found its way into Illinois where the injury occurred. There, too, the plaintiff did not specifically indicate what, if any, other business the defendant had conducted in Illinois. Yet, the court found Illinois jurisdiction to exist. Its major focus was on the question of the "convenient forum", observing that "the trend in defining due process of law is away from the emphasis on territorial limitations . . . toward the court in which both parties can most conveniently settle their dispute."[165] Illinois jurisdiction satisfied this requirement since the injury took place there to a local resident, the law of Illinois was applicable and the witnesses as to injury and damages were in Illinois. The "minimum contacts" were present, since it was a reasonable inference in view of the "growing interdependence of business enterprises" that the defendant's product was

161. 209 F. Supp. 571, 573 (N.D. W. Va. 1962).

162. *Id.* at 573. There was no showing as to where the pipe was actually delivered to the gas company.

163. In O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 194 A.2d 568 (1963), the same result was reached on an allegation that the commodity was "placed-in the stream of commerce." *Cf.* Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961).

164. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). See notes 145–46 *supra* and accompanying text.

165. 176 N.E.2d at 765.

substantially used in Illinois. The court concluded that "the use of such products in the ordinary course of commerce is sufficient contact with this state to justify a requirement that he defend here."[166]

The opinion of the Supreme Court of Minnesota in *Atkins v. Jones and Laughlin Steel Corp.*[167] goes further than the *Gray* case. In that case, the plaintiff, a truck driver, was injured while unloading the defendant's product in the state. In finding that it had jurisdiction over the defendant, the court emphasized the "convenient forum" provided by jurisdiction at the place of the injury and noted the general objective of the single act statute, which was "to permit a Minnesota citizen injured here by the wrongful act of a foreign corporation to seek recompense therefor in our courts."[168] The court also found a sufficient "minimum contact" between the defendant and the state with the argument that "defendant was subject to the jurisdiction of our courts, since the last event essential to its tort liability — the injury of plaintiff — occurred here."[169] One could defend the decision in the *Atkins* case by pointing out that even if the defendant has no other contact with a state except that of causing an injury there, as between that defendant who is in business for gain, and an innocent plaintiff, the defendant should travel to litigate rather than the plaintiff. One could also place on the scales in favor of jurisdiction in the state of the injury the interest of that state in having its resident receive compensation, the presence of local witnesses, etc. Constitutionally, however, these arguments squarely come up against the requirement of the *Hanson* case that there must be a voluntary and purposeful contact between the defendant and the forum state.[170]

It is unnecessary to pursue this inquiry any further with reference to the Uniform Act, which is more restrictive than the *Gray* case. The Uniform Act lays down certain objective requirements for jurisdiction which show a substantial relation between the defendant and the forum state. Instead of the inference made by the court in the *Gray* case, the plaintiff would have to prove that these are satisfied in order successfully to claim jurisdiction over the defendant.

The first requirement relates to activities within the state. The defendant is subject to jurisdiction where an injury occurs in the

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166. 176 N.E.2d at 766. *Accord,* Ehlers v. U.S. Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963); Nixon v. Cohn, 62 Wash. 2d 987, 385 P.2d 305 (1963).

167. 258 Minn. 571, 104 N.W.2d 888 (1960).

168. 104 N.W.2d at 894.

169. 104 N.W.2d at 893. *Accord,* Hutchinson v. Boyd & Sons Press Sales, Inc., 188 F. Supp. 876 (D. Minn. 1960).

170. See Judge Clark's analysis of the implication of the *Hanson* case in Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963). He concludes that there is jurisdiction over a non-resident tortfeasor only where he could know that his act would have consequences in the state. Thus, where negligently manufactured equipment is sold in state *X* to the plaintiff who later moves to state *Y* where the plaintiff is injured, state *Y* will not have jurisdiction over the manufacturer. In the *Atkins* case, the court could have based its decision on the contacts which existed between the defendant and Minnesota. The merchandise was shipped by the defendant to Minnesota and there was evidence that the defendant had sold its products there over a long period of time.

state because of a tortious act committed outside the state if he is regularly doing business or engaging in any other persistent course of conduct in the state. Decisions which provide the authority for this formulation include such patterns of conduct as direct solicitation by sales representatives in the state,[171] the sending of price lists to customers through the mails,[172] general mail advertising combined with advertising in periodicals circulated in the state,[173] participation with the locally franchised dealer in promoting sales,[174] and the presence in the state of service and maintenance representatives.[175] The provision is put in flexible terms, and it is certainly not necessary that the activity amount to the "doing of business."

The second requirement concerns contact with the state rather than activities within it. Sufficient contact exists according to the Maryland statute if the defendant "derives substantial revenue from food or services used or consumed in this state." A defendant who neither makes solicitations nor engages in any other form of activity in Maryland might still be subject to Maryland jurisdiction, even though his negligence occurred outside the state and the injury causing item is brought into the state by an independent distributor. There would be jurisdiction over such a defendant if he earns substantial revenue from the sales of his product in Maryland. What is "substantial" would depend upon the facts of each case.[176]

The Uniform Act applies to "goods used or consumed or services rendered" in the state. The Maryland statute applies only to "food or

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171. Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963); Jenkins v. Dell Publishing Co., 130 F. Supp. 104 (W.D. Pa. 1955); Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959); Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963). *Cf.* Sonnier v. Time, Inc., 172 F. Supp. 576 (W.D. La. 1959).

172. Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); Adamek v. Michigan Door Co., 260 Minn. 54, 108 N.W.2d 607 (1961); Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

173. Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 211, 325 P.2d 21 (1958).

174. Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959).

175. Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216 (D. Minn. 1962).

176. In Velandra v. Regie Nationale Des Usiness Renault, 336 F.2d 292 (6th Cir. 1964), defendant was a French corporation which negligently manufactured an automobile in France causing injury in Michigan. Evidence was produced that there were three dealers who sold the defendant's automobiles in Detroit, one of whom had gross sales of "upwards" of $100,000. The court denied jurisdiction on the basis of the following factors: the number and value of sales within the state, their ratio to the total market for like or similar products within the state, the quantity or value of the defendant's production, the percentage of total output sold within the state and the nature of the product.

In a case against the same defendant in California with essentially the same facts, jurisdiction was found to exist, the court pointing out that an opposite result would confine the plaintiff to the courts of France. Regie Nationale Des Usines Renault v. Superior Court, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962). In Chovan v. E. I. Dupont De Nemours & Co., 217 F. Supp. 808 (E.D. Mich. 1963), the court held jurisdiction to exist on the basis of the use in Michigan of the defendant's products in 1957 and 1958 to the extent of fifteen million feet of fuse of the value of approximately $130,000. The *Chovan* case thus considered only the number and value of sales within the state. Under the approach of the *Velandra* case, it is possible for a large manufacturer operating through independent distributors over a wide area to be subject to suit only in the state of incorporation or where it has its principal place of business.

services used or consumed" in the state. The Maryland provision excludes all types of manufactured or processed items, other than food, which may find their way into and cause injury in the state, either as originally produced or as component parts of other items.

If a manufacturer derives substantial revenue from the Maryland consumer, he is aware that his product is widely distributed in the state. Under these circumstances, it does not seem unfair to require him to defend the suit of a Maryland consumer in a Maryland court, whether the injury was caused by defective food, services or any other item. Under the provision as enacted in Maryland, if the *Gray* case had been decided in a Maryland court, even if the plaintiff were able to prove that the product, a safety valve, was substantially used in Maryland, he could not obtain redress in its courts.

(5) *Having An Interest In, Using Or Possessing Real Property In This State.*

The forerunner of this subdivision was a statute enacted in Pennsylvania in 1937,[177] which provided that any non-resident "being the owner, tenant, or user, of real estate" located in Pennsylvania "shall, by the ownership, possession, occupancy, control, maintenance, and use, of such real estate" be subject to judicial jurisdiction in Pennsylvania as to any action arising out of any "accident or injury" in which such real estate is involved.[178]

In the early case of *Dubin v. City of Philadelphia*,[179] the constitutionality of the statute was upheld. The court asserted, on the basis of the *Hess* case, that:

> [I]t is just as important that non-resident owners of Philadelphia real estate should keep their property in such shape as not to injure our citizens as it is that non-resident owners of cars should drive about our streets with equal care. It is only a short step beyond this to assert that defendants in both classes of cases should be answerable in this forum.[180]

Although it has been contended that owning or possessing realty in the state is a sufficient continuous relationship to it to justify jurisdiction over a defendant even as to a cause of action not related to the property,[181] the Maryland statute following the Pennsylvania precedent,

177. Act of July 2, 1937, P.L. 2747, § 1. PA. STAT. ANN. tit. 12, § 331 (1953).

178. The two clauses in the Pennsylvania statute defining the defendant's relation to the property have caused confusion. Although the second clause was probably intended as only illustrative of who is an "owner, tenant, or user", some Pennsylvania cases have required the defendant to fit into at least one of the six categories of the second clause. See Note, *Ownership, Possession or Use of Property As a Basis of In Personam Jurisdiction*, 44 IOWA L. REV. 374, 379 (1959). The Maryland statute does not have the dual requirement but contains only the equivalent of the first clause.

179. 34 Pa. D.&C. 61 (1938).

180. *Id.* at 64.

181. Note, *Ownership, Possession or Use of Property As a Basis of In Personam Jurisdiction, supra* note 178, at 377–78.

as also the similar Illinois and New York statutes,[182] limits jurisdiction to causes of action having a connection with the property. The relationship of the defendant to the property required by the statute has been the subject of some decisions under the Pennsylvania act. The *Dubin* case held that a "mortgagee in possession" who collects rents and leases the property is a "user" of the property. A contractor who constructs a building on another's premises was also held to be a "user" of the real estate.[183] A non-resident trustee who administers the property as part of the corpus of his trust is an "owner".[184] Under the Illinois statute which requires "ownership, use or possession" of real estate, the contention that a tenant for less than 5 years did not meet these requirements was rejected in spite of the argument that an interest in land for a term of years is regarded as personal property for other purposes.[185] The reference in the Maryland statute to a defendant "having an interest" in real property is a more inclusive requirement and provides the flexibility needed to cover these and similar situations.

On the question of the time when the relation of the defendant with the property should exist, it was held that a sale of property after the cause of action arose does not defeat jurisdiction even if the sale was completed before process was served.[186] On the other hand, where an owner of land creates a hazardous condition on the land but sells it before the damage occurs, he is not included within the statute, since he does not have any relation to the property when the cause of action, *i.e.*, the damaging injury, arises.[187]

The Maryland act goes beyond the Pennsylvania statute in that the property interest is a sufficient basis for jurisdiction on any cause of action related to the property, not only "accident or injury". A cause of action arising out of a contract made outside of Maryland between non-residents of Maryland would be subject to Maryland jurisdiction if the contract concerned property in the state and the defendant had the required interest in the property. The interest of the state where the property is located would seem to be sufficient to justify its assertion of jurisdiction.

(6) *Contracting To Insure Any Person, Property Or Risk Located Within This State At The Time Of Contracting.*

This provision duplicates to a great extent the Unauthorized Insurers Process Act enacted in Maryland in 1949.[188] The Commis-

182. ILL. STAT. ANN. ch. 110, § 17(1)(c) (1956); N.Y. CIVIL PRACTICE LAW AND RULES § 302(a)(3). In Shouse v. Wagner, 84 Pa. D.&C. 82, 100 P.L.J. 337 (1953), plaintiff's automobile which was in defendant's garage was stolen and then damaged. It was held that the cause of action did not arise out of defendant's use, ownership or possession of the real estate.

183. Chong v. Faull, 88 Pa. D.&C. 557 (1954).

184. Jamison v. United Cigar Whelan Stores, 68 Pa. D.&C. 121 (1950).

185. Porter v. Nahas, 35 Ill. App. 2d 360, 182 N.E.2d 915 (1962).

186. Gearhart v. Pulakos, 207 F. Supp. 369 (W.D. Pa. 1962).

187. Murphy v. Indovina, 384 Pa. 26, 119 A.2d 258 (1956).

188. See notes 92–97 *supra* and accompanying text.

sioner's note to the Uniform Act takes the position that where a state deals with this question as part of its overall regulatory scheme for insurance, it may not be necessary to enact this portion of the "long arm" statute.[189] In observing that many states have "similar and more explicit provisions" in their insurance laws, the note was, in all likelihood, referring to the Unauthorized Insurers Process Act.

However, the 1964 statute, even in its brevity, has a wider sweep than the 1949 act. The latter provides for jurisdiction over foreign insurance companies in actions concerning policies issued to residents of the state or to corporations authorized to do business in the state. The former asserts jurisdiction where the policy insures any "person, property or risk" located in the state. A policy entered into outside the state with a non-resident of the state covering property in the state would be included under the 1964 statute, though not under the 1949 act.[190] It is true that the 1949 act also covers "any other transaction of insurance business" in the state. But it is doubtful that this phrase covers an insurance contract entered into outside the state by non-residents.

A specification of this subdivision is that the person, property or risk insured be located in the state at the time that the policy is procured. It may be that constitutionally this limitation is not essential. In *Clay v. Sun Ins. Office, Ltd.*,[191] the United States Supreme Court upheld the application of Florida law to govern an insurance policy issued to an Illinois resident who later moved to Florida and brought the insured property with him to Florida where the loss occurred. The court emphasized that an insurance policy is an "ambulatory contract" and that the interest of Florida was neither slight nor casual. Though it was applied to a choice of law problem, the same reasoning should be sufficient to upheld judicial jurisdiction.

The converse of the *Clay* situation does present a constitutional problem under the 1964 statute. Where the plaintiff or his property is located in Maryland at the time the policy is procured but afterwards moves from the state, the statute would give jurisdiction to the Maryland courts. It is doubtful that the requisite Maryland interest still exists at this point to satisfy due process. The solution here would lie in the application of the forum non conveniens provision of the statute.

CONCLUSION

The enactment of the "long arm" statute in 1964 was an important step forward in assuring Maryland jurisdiction over cases having substantial Maryland interest. The Maryland resident who has a cause of action against a foreign individual or corporation arising out of events occurring in Maryland is given greater access to the Mary-

189. Commissioners' note to § 1.03(a)(6) of the UNIFORM ACT.

190. See Humble Oil & Refining Co. v. M/V John E. Coon, 207 F. Supp. 45 (E.D. La. 1962), which upheld the constitutionality of this type of provision.

191. 377 U.S. 179 (1964).

land courts and need not make his claim away from home. The plaintiff who has a cause of action against a defendant whose major overall contacts are with Maryland is provided the reasonable alternative of suing in Maryland. Under the statute, litigation is conducted in a forum which is convenient to the plaintiff, fair to the defendant and promotes orderly judicial administration.

This writer believes that the Uniform Act, which, in some instances, does not go as far as some states have gone, reasonably applies contemporary jurisdictional principles and reflects the "fair play and substantial justice" required by the *International Shoe* case. In those areas where the Maryland statute is less inclusive than the Uniform Act, the Maryland resident is being shortchanged. These, however, comprise only a few instances in a fairly large statutory scheme. The statute as a whole succeeds in providing the courts of Maryland with a rational opproach to judicial jurisdiction to replace the technicalities and fictions of the past.