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PERSONAL JURISDICTION OVER NON-RESIDENTS: SOME STATUTORY DEVELOPMENTS

The essence of this note is to examine the cases involving state statutes which authorize jurisdiction over non-resident individuals and foreign corporations and give to a state court the power to enter a binding judgment against one not served with process within the state. The Virginia "Long Arm Statute"¹ which to date has not been tested by the courts provides a basis for this note. Some sections of this "Statute" will be examined in the light of case holdings and similar statutes from other jurisdictions.

Historically, suits brought by residents of one state against foreign corporations doing business in that state have seen an increasingly liberal trend develop extending the in personam jurisdiction of the state over the foreign corporation. At common law the only way to obtain in personam jurisdiction over a non-resident individual, in the absence of express consent or general appearance, was to gain personal service on him while he was in the forum state.² It was not possible to obtain in personam jurisdiction over a foreign corporation whose activities within the forum state had given rise to a cause of action, regardless of how notice was served.³ The logic offered for this conclusion was that a corporation was only a creature of legal existence, a resident only of the state in which it was created, and for these reasons could not be present within a foreign state.

To combat this corporate activity within foreign states, some states began passing statutes authorizing foreign attachment of corporations.⁴ To this end, states have enacted statutes which require a foreign corporation, before certification, to furnish the name of its registered agent to the secretary or commissioner and which allow for substitute service of process on the corporation through a public official in the event of

1. VA. CODE ANN. §§ 8-81.1-8-81.5 (1964. Supp.).

2. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Service on the individual outside the jurisdiction of the court was not sufficient to render an enforceable judgment, notwithstanding the adequacy of the notice of the hearing.

3. *Bank of Augusta v. Earle*, 13 Pet. (38 U.S.) 519 (1839).

4. R.I. Rev. Laws 162 (1882); N.Y. Rev. Stat., tit. IV, art 1 § 15-30 (1829); Md. Laws ch. 280 (1832). Pa. Laws 586 (1835-36); N.J. Acts 63 (1838-39); Mass. Acts ch. 158 (1839); Mo. Rev. Stat., art. 1, §§ 22,124 (1845); Mich. Rev. Stat. ch. 116, § 9 ff(1846); Me. Rev. Stat., ch. 76, § 5 (1847); Wis. Rev. Stat., ch. 113 § 8ff (1849).

non-compliance before conducting activities.⁵ More recently, some states have enacted statutes which specifically enumerate the activities within the state by non-residents, individuals and corporations, which will give rise to in personam jurisdiction.⁶ The import of these latter mentioned statutes is clearly directed toward the control of non-resident commercial organizations or enterprises which, for the sake of convenience, are referred to as foreign corporations, and which conduct activities within the state without first complying with the registration requirements.⁷ The philosophy underlying these statutes is the protection

5. For example, VA. CODE ANN. § 13.1-102 (1956), requires the furnishing of the name of the registered agent and the obtaining of a certificate of authority before engaging in activity. CODE § 13.1-111 (1956) and Code § 8-60 (1950) allow for substitute service.

6. See VA. CODE ANN. §§ 8-81.1-8-81.5 (1964 Supp.). § 8-81.1 defines "person" as used in the Chapter as follows:

. . . an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State.

§ 8-81-2 provides when personal jurisdiction over person may be exercised:

- (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 or things in this State;
 - (3) Causing tortious injury by any act or omission in this State;
 - (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;
 - (5) Causing injury in this State to any person by breach of warranty, expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
 - (6) Having an interest in, using, or possessing real property in this State; or
 - (7) Contracting to insure any person, property, or risk located within this State at the time of contracting.

§ 8-81.3 provides that service of process or notice may be made in the same manner as provided for elsewhere in the Code. It provides further that if the non-resident has no agent in the state then process or notice may be served on the secretary or commissioner, who is deemed the statutory agent in such cases, and how such process or notice may be made. § 8-81.4 provides for venue of the action in accordance with § 8-38, VA. CODE ANN.

7. For example, although VA. CODE ANN. § 8-81.2(a)(1) through (7) apply equally to individual non-residents as well as foreign corporations, five of the seven activities listed are exclusively commercial.

of the rights of resident consumers to have their day in court when today they must be touched by some phase of interstate commerce.⁸

In 1964 the General Assembly of Virginia enacted Chapter 4.1, "Personal Jurisdiction in Certain Actions," to Title 8 of the Virginia Code which contains five statutes relating to this controversial jurisdictional problem.⁹ Section 8-81.1 of Chapter 4.1 includes in the definition of "person" both individuals and foreign corporations. Section 8-81.2(a), the skeleton for this note, lists the activities within the state which will give rise to personal jurisdiction over the "person."¹⁰ From a reading of Section 8-81.2(a) it is obvious that the statute is intended to establish control over foreign corporations.¹¹

As early as 1918 such broad statutes and the increasingly more liberal trend in the holdings of cases dealing with this problem were attributed to social change.¹² The U.S. Supreme Court in *McGee v. International Life Insurance Co.*¹³ echoed this theory when, in discussing the trend of extending state jurisdiction, it said:

In part this [trend] is attributable to the fundamental transformation of our national economy over the years. Today, many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.¹⁴

8. *Gray v. American Radiator and Standard Sanitary Corp.* 22 Ill.2d 432, 176 N.E. 761 (1961).

9. VA. CODE ANN., *supra* note 6.

10. *Id.* Five of the seven paragraphs of § 8-81.2(a) provide the outline for this portion of the note. The cases which pertain to the particular activity mentioned in the paragraph will be examined in the order of activity that the section presents them. The subject matter of paragraph (2) of 8-81.2(a) will be included in the discussion of paragraph 8-81.2(a)(1)—Doing Business, eliminating the need to discuss paragraph (2). Likewise, paragraph (a)(4) will not be discussed as its subject matter will be encompassed in the discussion of paragraphs (a)(3)—Tortious Act and (a)(5)—Breach of Warranty.

11. *Supra* note 7.

12. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, Chap. V (1918). This chapter traces the development of jurisdictional statutes over foreign corporations in the Eighteenth Century as they became an important factor in the business communities of the several states.

13. 355 U.S. 220 (1957). This case will be discussed in detail under para. (a)(7)—Contracting to Insure.

14. *Id.* at 222.

SECTION 8-81.2(a)(1)—DOING BUSINESS

Activity has been the basis for all the statutes affecting foreign corporations and activity has provided the logic behind their enforcement.¹⁵ The early decisions extending personal jurisdiction over foreign corporations likewise were founded on the extent of the activities engaged in by the corporation within the forum state.¹⁶ It was said that the corporation must be "doing business" in the state before personal jurisdiction would lie.¹⁷ Most courts at first refused to offer definitions as to what activities would constitute "doing business." Instead, some referred to the extent of the activities as being "regular and continuous within the jurisdiction"¹⁸ or "with a fair measure of permanence and continuity."¹⁹ Others held that by conducting such activities the corporation "consented to the jurisdiction of the state court"²⁰ or by its activities the corporation was "present within the foreign jurisdiction";²¹ these are called the "consent" and "presence" theories. However, they all seemed to agree that a single or isolated transaction was not sufficient to constitute doing business,²² nor were occasional transactions over an extended period.²³ Likewise, mere solicitation without other activities was not doing business.²⁴

The court in the early Virginia decisions was not reluctant to offer definitions and tests as to what constitutes doing business. Some of these cases²⁵ were brought by the Commonwealth for violation of what is now Va. Code Ann. sec. 13.1-102, a statute requiring foreign corporations to obtain a certificate of authority before engaging in activity. Substitute service was provided for in the statute. The court said,

15. Evans, *Expanding Jurisdiction Over Foreign Corporations*, 37 CORNELL L.Q. 458, 460 (1952).

16. HENDERSON, *op. cit. supra* note 12. Henderson chronologizes the cases which affirmed the expansion of state jurisdiction over foreign corporations in the Eighteenth and early Nineteenth Centuries.

17. *St. Louis S. W. Ry. v. Alexander*, 227 U.S. 218, 226 (1912).

18. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 918 (1917).

19. *Ibid.*

20. *Lafayette Insurance Co. v. French*, 18 How. (59 U.S.) 404, 407 (1855).

21. *International Harvester v. Kentucky*, 234 U.S. 579, 589 (1914).

22. *Id.* at 584.

23. *Id.* at 586.

24. *Tauza v. Susquehanna Coal Co.*, *supra* note 18 at 266.

25. *General Railway Co. v. Commonwealth*, 118 Va. 301, 87 S.E. 598, *aff'd*, 246 U.S. 500 (1915); *Dalton Adding Machine Co. v. Commonwealth*, 118 Va. 563, 88 S.E. 167 (1915); *Ku Klux Klan v. Commonwealth*, 138 Va. 500, 122 S.E. (1924); *The Western Gas Co. v. Commonwealth*, 147 Va. 235, 136 S.E. 646 (1927).

[The] test to determine whether a foreign corporation transacts such intrastate business as can be reached by State license tax is whether its domestic business is substantial in its essence, and whether it may be reasonably separated from its interstate commerce; and the question does not depend upon a comparison of its intrastate with its interstate commerce.²⁶

The court in *Ku Klux Klan v. Commonwealth*²⁷ offered an extension of this definition when it indicated that the statute was not intended to be limited to commercial or manufacturing functions alone:

Under the Virginia Statutes the exercise of its corporate functions by any foreign corporation within this State constitutes transacting business here within the meaning of the Code . . .²⁸

The conclusion in this case is suggestive of the "minimum contacts" theory as expressed in *International Shoe Co. v. Washington*²⁹ but was decided twenty years before the *International Shoe* case.

The era of tests to determine what amounted to doing business presented many elaborate formulas,³⁰ some of which followed closely the Virginia tests just quoted.³¹ But *International Shoe* brought an end to the "doing business" concept and the narrow tests offered to determine it.³² The violation of a Washington statute³³ requiring contribu-

26. *Dalton Adding Machine Co. v. Commonwealth*, *supra* note 25 at 574. In this case the court answered affirmatively the question whether demonstrating adding machines in the state for purposes of future sales amounted to doing business.

27. *Ku Klux Klan v. Commonwealth*, *supra* note 25. This case involved solicitation of membership and sale of Klan paraphernalia in the state which, for purposes of a license tax, the Virginia Supreme Court called doing business.

28. *Id.* at 509.

29. 326 U.S. 310 (1945).

30. See, *Shambe v. Delaware & H. R. Co.*, 288 Pa. 240, 242, 135 A. 755, 757 (1927).

. . . The company must be present in the state . . . by an agent . . . duly authorized to represent it in the state . . . the business transacted therein must be by or through such agent . . . the business engaged in must be sufficient in quantity and quality . . . there must be a statute making such corporation amenable to suit.

31. See, *Eastern Livestock Co-Op. Marketing Ass'n, Inc. v. Dickenson*, 107 F.2d 117 (1939); *American Medical Ass'n v. U.S.*, 130 F.2d 233 (1942).

32. Gibson and Freeman, *Business Associations*, 50 U. VA. L. REV. 1265, 1273 (1964).

33. WASH. REV. STAT. §§ 9998-103a through 9998-123a (1941 Supp.). The specific section applicable is 9998-114c which authorizes the Commissioner to issue an order and notice of assessment of delinquent contributions with personal service of notice on the employer if found in the state; if not so found, by mailing notice to the employer by registered mail at his last known address.

tions to the state unemployment compensation fund was the basis for the litigation in *International Shoe*. The issue was whether a foreign corporation which had no registered agent in the state but which had been soliciting sales there was subject to the in personam jurisdiction of the state court.³⁴ Without mentioning "doing business" in the opinion the U.S. Supreme Court decided in favor of the State of Washington and, referring to the defendant's activities, said:

It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.³⁵

This opinion makes reference to reasonableness and the act having connection with the state. It goes on to define "reasonable" by balancing the inconveniences of both parties against the continuous activity of the corporation. The inconveniences relate to the burdens of litigation borne by both parties. Given continuous activity the court held that it is more reasonable for a corporation to defend in the state where it exercises the privilege of conducting activities and enjoys the benefits and privileges of the laws of the state than it is for the injured party to go to the corporation's state to sue when the evidence and the witnesses are already available where the cause of action arose. The benefits and privileges of the laws of the state exercised by the corporation show the connection between the defendant's acts and the state or the cause of action.³⁶ This is a negation of the "presence" theory and an affirmation of the doctrine of forum non conveniens.

Historically, defenses offered in most suits brought under jurisdictional statutes were founded on Fourteenth Amendment Due Process and

34. The defendant had no registered agent in Washington but had a team of men in the state soliciting sales for delivery from outside the state. The defendant admitted that the salesmen were temporarily in Washington but contended that it was not subject to personal jurisdiction as it was not "present" within the state. Substituted service was made by registered mail at the last known address as per the statute and the assessment was affirmed all the way to the Washington Supreme Court. 22 Wash.2d 146, 154 P.2d 801, 1945. Defendant was allowed a hearing before the U.S. Supreme Court under sec. 237 (a) Judicial Code, 28 U.S.C. sec. 344(a), assigning as error that the Washington Statutes violated the Fourteenth Amendment Due Process Clause and the Commerce Clause.

35. *International Shoe Co. v. Washington*, *supra* note 29 at 320.

36. *Id.* at 321.

unconstitutional interference with interstate commerce.³⁷ The due process argument followed the "presence" theory but *Baltimore and Ohio Railroad Co. v. Harris*³⁸ weakened this argument when it held that a corporation by its acts could be present in a foreign state. The interstate commerce argument was dispelled when it was held that jurisdictional statutes were within state police power.³⁹ From a reading of *International Shoe* it appears that the due process argument could be re-opened, but the Court anticipated that its liberal approach might bring questions of unconstitutionality and offered a definitive answer before the question could be raised.

... Due process requires only that in order to subject a defendant to a judgement in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁴⁰

The Court concluded by tying in the "reasonableness" test, the inconveniences of litigation, with due process.

The test is not merely, as has been sometimes suggested, whether the activity, which the corporation has seen, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.⁴¹

On the basis of *International Shoe* many subsequent cases have sustained state jurisdiction on the basis of less activity in the state than was previously thought sufficient.⁴² The solicitation doctrine has been reversed⁴³ and a single transaction is now sufficient contact.⁴⁴

*Travelers Health Association v. Commonwealth*⁴⁵ was the solicitation case and its decision relied heavily on *International Shoe*. There, a vio-

37. *General Railway Co. v. Commonwealth*, *supra* note 25.

38. 12 Wall. (79 U.S.) 65 (1870).

39. *International Harvester v. Kentucky*, *supra* note 20.

40. *International Shoe Co. v. Washington*, *supra* note 29 at 316.

41. *Id.* at 319.

42. Porter, *Citations and Appearance—Jurisdiction of Foreign Corporations—Single Tortious Act*, 36 TUL. L. REV. 336, n.12 (1962).

43. *Travelers Health Ass'n v. Commonwealth*, 188 Va. 877, 57 S.E.2d 263, *aff'd*, 339 U.S. 643 (1949).

44. *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

45. *Travelers Health Ass'n v. Commonwealth*, *supra* note 43.

lation of the Virginia "Blue Sky Law"⁴⁶ resulted in an order from the Corporation Commissioner instructing the defendant Association, incorporated in Nebraska, to cease and desist its mail order health insurance business in Virginia. The Association had no paid agents and its new members were obtained through the unpaid efforts of those already members who were encouraged to recommend the defendant to friends and submit their names to the home office in Omaha. On appeal before the U.S. Supreme Court, the defendant alleged that as its activities took place in Nebraska, Virginia did not have power to reach it with a cease and desist order to enforce its regulatory statute. In overruling the defendant's due process objection, the Court referred to the obsolete "consent" theory as follows:

But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state.⁴⁷

In support of this dictum the Court relied on three earlier cases. In *Osborn v. Ozlin*⁴⁸ the Court had recognized a state's interest in insurance policies protecting its residents; an interest which might give rise to repercussions beyond state lines. In *Hoppeston Canning Co. v. Cullen*⁴⁹ the Court had put emphasis on the contractual obligations in the insured's state and the state's interest in seeing that the obligations were fulfilled. In *International Shoe*⁵⁰ the Court had concluded that due process was met when the minimum contacts giving rise to jurisdiction were sufficient not to offend "traditional notions of fair play and substantial justice." The Court used these three cases to illustrate that the defendant's contacts and ties with Virginia residents, together with the state's interest, justified subjecting the defendant to the cease and desist order.

SECTION 8-81.2(a)(3)—TORTIOUS ACT

The single transaction case which relied heavily on *International Shoe*

46. VA. CODE ANN. §§ 3848(47) - 3848(66) (1942), now Code § 13.1-501 et seq. (1950). § 3848(52) of the 1942 Code was the questioned section. It authorized the commissioner to issue a cease and desist order against further violations after notice to show cause why such order should not issue. In case of absence from the state notice could be served by registered mail.

47. *Travelers Health Ass'n v. Commonwealth*, *supra* note 43 at 647.

48. 310 U.S. 53, 62 (1939).

49. 318 U.S. 313, 316 (1942).

50. 326 U.S. 310 (1945).

was *Smyth v. Twin State Improvement Corp.*,⁵¹ a tort action arising in Vermont. In that case the defendant, a Massachusetts corporation, damaged the plaintiff's house during the course of roof repairs. The incident in question was the first venture for the defendant in Vermont. The action was brought under a Vermont statute,⁵² similar to Va. Code Ann. sec. 8-81.2(a)(3), which extends jurisdiction over a foreign corporation committing a tort within the state against a state resident. The defendant requested a dismissal on the ground of lack of due process, contending that single or isolated acts are not sufficient to subject a foreign corporation to jurisdiction via the medium of substitute service. In overruling the defendant's motion, the Vermont Supreme Court narrowed the problem to two issues: (1) Has Vermont the power to subject by statute to the jurisdiction of its courts a foreign corporation which commits a single tort in whole in Vermont against a resident to actions and proceedings against it arising from and growing out of such tort? (2) Does such a statute violate due process?⁵³ In deciding the first issue in the affirmative and the second in the negative the court acknowledged that the U. S. Supreme Court has left undecided whether a single tortious act could subject a foreign corporation to a suit in a state when the cause of action arose out of that activity in the state. However, it relied on the very strong inference of single act liability as stated in *International Shoe*.

. . . The commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it . . . [while] . . . other such acts, because of the nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.⁵⁴

From this the court concluded that the cases cited⁵⁵ in *International*

51. 116 Vt. 569, 80 A.2d 664 (1951).

52. VER. STAT. § 1562 (1947). This section provides that if a foreign corporation makes a contract with a resident of Vermont, to be performed in whole or in part there, or commits a tort in whole or in part there against a resident, such acts shall be deemed doing business in Vermont by the foreign corporation and shall be deemed the equivalent of appointment of the secretary of state of Vermont as its attorney upon whom process may be served in any actions against the foreign corporation arising from such contract or tort.

53. *Smyth v. Twin State Improvement Corp.*, *supra* note 44 at 666.

54. *International Shoe Co. v. Washington*, *supra* note 29 at 318.

55. *Kane v. New Jersey*, 242 U.S. 160 (1916); *Hess v. Pawloski*, 274 U.S. 352 (1926); *Young v. Masci*, 289 U.S. 253 (1932).

Shoe "illustrate the proposition that continuous activity within the state is not necessary as a prerequisite to jurisdiction."⁵⁶

The opinion concluded by recognizing a dual trend in jurisdictional decisions. In determining the court with jurisdiction the trend is going "from the court with immediate power over the defendant to the court where both parties may most conveniently settle their dispute;" in defining due process the trend is "from emphasis on the territorial limitations of courts to emphasis on providing notice and opportunity to be heard."⁵⁷

The single tort theory of *Smyth* was relied on heavily in *Gray v. American Radiator and Standard Sanitary Corp.*,⁵⁸ an Illinois decision. Illinois has an omnibus statute⁵⁹ like Va. Code Ann. sec. 8-81.2 and similar to the Vermont statute in *Smyth*. One of the defendants was Titan Valve Manufacturing Company of Cleveland, Ohio. The plaintiff was a resident of Illinois who purchased a water heater from a distributor in Illinois. The water heater was manufactured in Pennsylvania. As a result of a faulty safety valve manufactured by defendant Titan in Ohio, but which was part of the heater, the heater exploded. The defendant contended that as it had no agents in Illinois, did not sell the heater or valve to the plaintiff and the injury complained of was defendant's only contact with the state, maintenance of a suit against it under the Illinois statute exceeds the limits of due process. The Illinois Supreme Court held that the defendant Ohio valve manufacturer was subject to the jurisdiction of Illinois as per the statute.

In support of its holding the court recognized the conflict as to where

56. *Smyth v. Twin State Improvement Corp.*, *supra* note 44 at 666.

57. *Id.* at 668.

58. 22 Ill.2d 432, 176 N.E.2d 761 (1961).

59. ILL. REV. STAT. ch. 110, § 17 (1959).

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this State;
- (b) The commission of a tortious act within this State;
- (c) The ownership, use, or possession of any real estate situated in this State;
- (d) Contracting to insure any person, property or risk located within this State at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided by the act (Section 16), with the same force and effect as though summons had been personally served within this State.

a tort takes place but relied on the majority decision that the place of the wrong is the place where the last event happened to make the actor liable.⁶⁰ It felt this was sufficient contact with the state to render the defendant subject to its jurisdiction. It applied the minimum contacts test of *International Shoe*, the single tortious act theory of *Smyth* and the modern conveniences of communication as stated in *McGee v. International Life Insurance Co.*⁶¹ From these cases, and the benefits derived from commerce, the court concluded that

[with] the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other states. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable where a cause of action arises from alleged defects in his product, to say that the use of such product in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.⁶²

SECTION 8-81.2(a)(5)—BREACH OF WARRANTY

The *Gray* case invoked tort liability for an action which is clearly a breach of implied warranty but no mention was made of warranties in the decision. An action for breach of warranty is generally considered a contract action but it originally sounded in tort and may be brought either in tort or contract.⁶³ The trend in warranty law seems to be toward extending the protection of the warranty to those who may reasonably be expected to be endangered if the object sold is defective.⁶⁴ This is in line with the trend of doing away with the privity requirement in actions brought for breach of warranty.

The interest in consumer protection calls for warranties by the maker that do run with the goods, to reach all who are likely to be hurt by the use of the unfit commodity for a purpose ordinarily to be expected.⁶⁵

60. RESTATEMENT, CONFLICT OF LAWS, § 377 (1934).

61. *McGee v. International Life Insurance Co.*, *supra* note 13.

62. *Gray v. American Radiator and Standard Sanitary Corp.*, *supra* note 8 at 766.

63. *Gile v. Kennewich Public Hospital District*, 48 Wash.2d 144, 296 P.2d 662 (1956).

64. *Williams v. Connolly*, 227 F. Supp. 539 (D. Minn. 1964).

65. 2 HARPER AND JAMES, THE LAW OF TORTS, § 28.16 (1956).

Minnesota also has an omnibus statute,⁶⁸ called the "One Act Statute," which provides for jurisdiction over a foreign corporation if its contracts with a Minnesota resident and any part of the contract is to be performed in Minnesota, or if it commits a tort in whole or in part in Minnesota against a resident. Like the other statutes here examined, substitute service is provided for. The Federal District Court in *Erwing v. Lockheed Aircraft Corp.*⁶⁷ decided that the defendant had made warranties to Northwest Airlines under the contract section of the statute when it sold Northwest aircraft engines. Further, that those warranties extended to Northwest's passengers, notwithstanding their state of residency, as the presence of passengers was anticipated.

SECTION 8-81.2(a)(6)—OWNING LAND

Historically, owning property in a state does not give that state personal power over the non-resident owner.⁶⁸ It has power only over the property which may be the subject of an action in rem. However, the Pennsylvania Supreme Court sustained personal jurisdiction under a statutory provision⁶⁹ similar to Va. Code Ann. sec. 8-81.2(a)(6) in *Rumig v. Ripley Manufacturing Corp.*,⁷⁰ although it relied to some degree on the fact that the New York defendant actively managed the property situated in Pennsylvania.⁷¹

SECTION 8-81.2(a)(7)—CONTRACTING TO INSURE

The case of *McGee v. International Life Insurance Co.*⁷² involved a

66. MINN. STAT. ANN. § 303.13 (1945). Subd. 1(3) of § 303.13 is almost identical with VER. STAT. § 1562 (1947) as discussed in note 52 *supra*.

67. 202 F.Supp. 216 (1962).

68. *Penoyer v. Neff*, *supra* note 2.

69. ACT OF 1937, P.L. 2747, 12 P.S. § 331.

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

70. 366 Pa. 393, 77 A.2d 360 (1951).

71. Stimson, *Omnibus Statutes Designed to Secure Jurisdiction Over Out-of-State Defendants*, 48 A.B.A.J. 725, 727 (1962).

72. 355 U.S. 220 (1957).

California statute⁷³ which, like Va. Code Ann. sec. 8-81.2(a)(7), extended jurisdiction over any corporation writing an insurance policy on a California resident or on any property in California regardless of how the policy was obtained. Defendant had taken over a policy on the life of a California resident from another insurance company; it had no agents in California and communicated with policyholders only by way of the mails. The U.S. Supreme Court sustained the California jurisdiction by holding that the insurance policy was sufficient contact with the state as per *International Shoe*, that California has an interest in providing a place of redress for its residents, the defendant's benefits must give rise to inconveniences and witnesses to the litigation would be in California.⁷⁴

CONCLUSION

The note has illustrated the efforts the courts and legislatures have exerted in an attempt to insure the rights of residents in the light of our everchanging economic system while still observing constitutional principles. It is clear that improved speed and convenience of transportation and communication have enabled corporations involved in interstate commerce to complete in hours business transactions which would earlier have required days. These improvements have created an alertness in the consuming public to participate in these transactions for their benefit and to look to the manufacturer or seller when the product fails to meet the standards for which it was purchased. That the manufacturer or seller is a foreign corporation not registered to do business in the consumer's state should not be a bar to the consumer's recovery in that state.

However, these attempts at protection must give rise to questions of sufficiency. Are the efforts of the courts and legislatures adequate to achieve the goals intended or is the economy changing and the population increasing too rapidly? Will the jurisdictional statutes provide the needed protection to residents or will the corporate veil remain whole in certain areas? Have the legislatures gone too far in encroaching into areas which heretofore were constitutionally sacred?

Under statutes allowing personal jurisdiction where one is doing business the *International Shoe* case has certainly liberalized the area of constitutional sanctions and the bulwarks of common law defenses for the most part no longer exist. Under the "doing business" doctrine with the "presence" theory any connection between the act and the state was of

73. ANN. CALIF. CODE, *Insurance*, §§ 1610, 1611 (1935).

74. *McGee v. International Life Insurance Co.*, *supra* note 13 at 223.

no relevance in deciding the corporation's presence within the state.⁷⁵ If, from the quantum of activities, regardless of their relation to the cause of action, the corporation could not be found then it was not present for purposes of jurisdiction.⁷⁶

Clearly, the "presence" theory does not withstand the logic of the "reasonableness" test—forum non conveniens—in making the corporation defend where it has invoked the state's benefits and privileges. This was the reason the court offered in refusing to decide on the "presence" issue as well as the "consent" theory; the former because it was a fiction and the latter because it begged to be decided.⁷⁷ The *Travelers Health Insurance* case followed in line with *International Shoe* when it applied the doctrine of forum non conveniens after receiving all the facts of the case. Since the facts were all beneficial to the defendant the Court, in upholding Virginia's Blue Sky Law, said: "The Due Process Clause does not forbid a state to protect its citizens from such injustice."⁷⁸ These holdings lead to the conclusion that statutes which permit personal jurisdiction when one is "doing business" are sufficiently broad to provide the protection intended while remaining within constitutional bounds.

The "tortious act" statutes tend to be a repetition of the "doing business" statutes as under them any contact will give rise to jurisdiction. This is best illustrated by the early "tortious act" statutes, the non-resident motor vehicle acts. These acts were founded on a "consent" theory.⁷⁹ By using the roads in the state the motorist "consented" to the jurisdiction of the state by way of substitute service on a public official. The constitutionality of these statutes has been upheld on the theory that automobiles are dangerous instrumentalities and it is within the state's police power to regulate the use of its highways. In the concept of *International Shoe* "consent" or "presence" through the use of the highway would not be necessary to satisfy due process. The single act of using the highway and a violation or accident in connection with the use would be sufficient minimum contact with the state for in personam jurisdiction. In comparison with the single tort theory, it does not appear to be any more a violation of due process to extend by statute jurisdiction over a foreign corporation for the negligent acts of its agents in conducting the corporation's business than it does to extend

75. *Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923).

76. *Ibid.*

77. *International Shoe Co. v. Washington*, *supra* note 29 at 316.

78. *Travelers Health Ass'n v. Commonwealth*, *supra* note 43 at 649.

79. *Hess v. Pawloski*, 274 U.S. 352 (1926); *Wuchter v. Pizzutti*, 276 U.S. 13 (1927); *Carroll v. Hutchinson*, 172 Va. 43, 200 S.E. 644 (1939).

jurisdiction under non-resident motorist statutes over the corporation due to its agent's negligence in driving in a foreign state. The two acts do not appear distinguishable for purposes of jurisdiction so long as the substitute service is adequate. Both statutes are aimed at the protection of residents.

Though the "tortious act" statutes are narrow they are supported by the "doing business" statutes and therefore are adequate. Paragraphs (3) and (4) of Va. Code Ann. sec. 8-81.2(a) anticipate all possibilities as paragraph (3) applies to a person causing tortious injury "in this state" and paragraph (4) applies to torts committed "outside this state" if accompanied with continuous activity.

Breach of warranty statutes are likewise limited but in light of modern trends, as well as the cases cited, they appear to be adequate and constitutionally sound. Privity of warranty is being abandoned⁸⁰ and strict liability in tort has been adopted in at least twenty jurisdictions to assist residents in warranty actions.⁸¹ That a breach of warranty, based either in contract or tort, without other activity, is sufficient contact with the state to give rise to its jurisdiction has not been decided, but a plaintiff's verdict in such a situation is reasonable in light of the *Gray* and *Ewing* cases. Paragraph (5) of Va. Code Ann. sec. 8-81.2(a) is related to Va. Code Ann. sec. 8-654.3 which abolishes the defense of lack of privity in actions brought for breach of warranty. Like paragraph (4), its constitutionality is supported in that it requires some degree of activity within the state.

Owning land as a basis for personal jurisdiction does not appear constitutionally sound. Title to the land as a contact with the state in the most liberal sense seems a fiction. However, any activity with the land such as rental, sale or building would appear to be sufficient contact.

Contracts of insurance as a basis for jurisdiction fall within the "doing business" statutes and are clearly constitutional.

There is not question that there was and is a need for jurisdictional statutes such as the ones outlined but that they are adequate to achieve the purposes intended only time and future litigation will decide.

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80. For illustrations of historical development of warranty actions not requiring privity see *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and *Goldberg v. Kollsman Instrument Co.*, 12 N.Y.S.2d 432, 191 N.E.2d 81 (1963).

81. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962); Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 449 (1964).