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COMMENTS

THE PENNSYLVANIA LONG-ARM: AN ANALYTICAL JUSTIFICATION

"The problems of notice and of jurisdiction will remain with us, so long as there is not perfect similarity and reciprocity of law among the states that, is to say, so long as we remain a federation."[1]

I. INTRODUCTION

As the epigraph suggests, there are no simple solutions to the difficulties inherent in every aspect of one state’s assertion of judicial authority over the residents[2] of another. The history of jurisdiction both in England and the United States[3] is fraught with inconsistencies. While many states have passed “long-arm” statutes,[4] in an attempt to exercise permissible jurisdiction over nonresidents, difficulties repeatedly appear. The inconsistencies among jurisdictions cause perplexing problems in deter-

1. Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 247–48. As a basis for the quoted conclusion, the author also stated:
   [T]he legal and political pluralism of the American federation is also significant. If this were legally a unitary state, the problems of notice and of territorial jurisdiction would descend to those of venue. . . . [T]he existence of coordinate tribunals of presumptively equal competence requires rules for choice of forum, and there seems nothing artificial in conceiving of them as rules of jurisdiction and in a real sense territorial.

The peculiar features of the jurisdictional problem in the United States, then, is that our national economic and social unity is conducive to the full panoply of substantive transactions found internally in a unitary state but our political plurality requires a choice of law and jurisdictional rules as among separate sovereigns. The combination would be unendurable as a practical matter but for two facts. First, there are powerful historical and cultural forces that conduce to similarity and reciprocity of state law. Second, the Full Faith and Credit Clause and the Due Process Clause embody judicially enforceable limitations on state-court authority. However interpreted from time to time, they make state-court jurisdiction a matter of American municipal law and not a species of demi-international law.

Id. at 246–47.

2. The term “resident” traditionally includes both natural persons and fictional entities such as corporations and other forms of business. The new Pennsylvania “long-arm” statute is limited in its applicability to “any nonresident . . . acting individually, under or through a fictitious business name, or through an agent, servant or employee. . . .” PA. STAT. tit. 12, § 341 (Supp. 1971).


4. See, e.g., ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); Md. ANN. CODE art. 75, § 96 (Supp. 1969); Mich. Comp. Laws Ann. §§ 600.701 to 600.735 (1968); Wis. Stat. Ann. § 262.05 (Supp. 1971). The following states are also among those that have “long-arm” statutes: Alabama, Arkansas, California, Connecticut, Florida, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Vermont, Washington, and West Virginia. Arkansas and Oklahoma have adopted the Uniform Interstate and International Procedure Act.
mining the scope of the respective statutes, as well as in the discovery of the parameters of due process.

Whenever a state enacts a "long-arm" statute, problems are inevitable, and the best that can be hoped for is that they will be minimal. By enacting the Pennsylvania "long-arm," Actions Against Nonresidents, the legislature has seemingly incorporated problems common to other jurisdictions in such a way as not only to retain these obstacles intact, but also to create new ones.

The Pennsylvania legislature has provided for the exercise of in personam jurisdiction whenever a nonresident has committed a tortious act within the Commonwealth, has done any business in the Commonwealth or, acting outside of the Commonwealth, has caused any harm within it. In interpreting the Act, Pennsylvania courts must initially determine whether to construe the statute narrowly (to avoid possible due process pitfalls generated if a liberal construction were applied) or, in the alternative, to interpret it as broadly as due process will permit (viewing each particular set of facts as a distinct situation that must be examined to determine if jurisdiction can be exercised consistent with due process).

One purpose of this Comment is to underscore some of the difficulties which will challenge the Pennsylvania courts should they choose to adopt a liberal stance. It is hoped that this exposition will enable the judiciary to understand and echo an apparent legislative intent that nonresident jurisdiction be fully expanded.

It is unfortunate that the statute, on its face, shows a marked lack of specificity; a fact which could present the courts with serious barriers to their attempts at definition. This, in conjunction with due process questions inherent in any exercise of jurisdiction by the courts of one state over the residents of another, presents two inextricable determinations which must be made. They are like Siamese twins, distinct entities, yet nonetheless inseparable. To determine whether the Act is applicable to a particular individual, the court must first decide if due process will condone this exercise of the state's jurisdictional power as to the individual in question. If the Pennsylvania courts were to narrowly construe the Act, problems would be minimal; a narrow interpretation of the statutory language necessarily implies a strict interpretation of the due process requirement as well. The language of the statute, however,

5. See p. 101 infra.
6. See p. 75 infra.

Although this two-step analysis is seemingly fundamental, it does present basic problems other than that of interpretation. State courts often merge considerations of statutory construction and due process, thus making it difficult to determine on which ground a particular case was decided. This problem is alleviated somewhat if the state legislature has drawn a line short of the full jurisdiction possible under the due process clause. Note, The Virginia "Long-Arm" Statute, 51 Va. L. Rev. 719, 731-32 (1965).
8. See p. 85 infra.
is broad, and manifests a legislative intent that it be construed consistent with an expansive view of the due process clause. It is the liberal construction of the statutory language, within the uncertain contours of due process, which will present the greatest problems to the courts. Realizing this, the present Comment offers as background the due process framework within which the courts will be required to work, and attempts to analyze the statutory language in light of factual situations which other courts have faced.

II. Due Process Background

In 1877 the United States Supreme Court, speaking through Mr. Justice Field, handed down the landmark decision of *Pennoyer v. Neff*.

In essence, the Court held that the process of a court of one state has no effect in another state, and notice sent out of state to a nonresident is insufficient to maintain personal jurisdiction over that nonresident.

It did not take long for this holding to generate confusion, and the rule soon seemed to be honored more by breach than by observance. By 1940, most states considered themselves empowered to exercise jurisdiction over residents, whether or not present in the state, and over those nonresidents, corporate or individual, found to have done business in the state.

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10. Inevitably, every writer who has considered the jurisdictional problems has included an historical development. Some of the most comprehensive include: Hazard, supra note 1; *Developments in the Law — State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960) [hereinafter cited as *Developments — Jurisdiction*]; Note, supra note 6.

11. 95 U.S. 714 (1877).

12. See Hess v. Pawloski, 274 U.S. 352, 355 (1927). *Hess* upheld as constitutional the Massachusetts nonresident motorist statute which permitted substituted service of process upon the state registrar of motor vehicles. This service, together with actual notice to the nonresident motorist, was sufficient to provide Massachusetts courts with personal jurisdiction.

13. One curious problem which developed from *Pennoyer*, not within the purview of this Comment, was the appearance of a "catch-as-catch-can" jurisdictional approach. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 306 (1956). Professor Ehrenzweig argued that prior to *Pennoyer* courts had exercised restraint in the exercise of their jurisdictional authority, but that as a result of the *Pennoyer* rule of personal service of process only within the forum state, courts began to develop a "transient rule" of jurisdiction where the defendant would be served with process in-state although his only contact therewith was the happenstance of his presence. *Id.* at 289, 306. In essence, the plaintiff would "catch" him. This basic concept of personal service within the forum gave rise, according to Professor Ehrenzweig, to the erroneous proposition later stated by Justice Holmes that the "foundation of jurisdiction is physical power." *Id.* at 296. Professor Ehrenzweig goes on to point out the weaknesses of such a doctrine. Attention is drawn to this "curious" situation at this time because it is interesting to note that it appears to be the reverse side of the coin in the consideration of jurisdictional problems. Whereas other commentators and courts were concerned with the injustices to the plaintiff resulting from the "strict" rule of personal service expressed in *Pennoyer*, Professor Ehrenzweig points out that injustices can result toward a nonresident defendant from a literal application of a "strict" rule. *Id.* at 308-09.


15. Note, supra note 6, at 723. The entire jurisdictional scheme of in personam, in rem and quasi in rem jurisdiction propounded in *Pennoyer* has been the subject of much criticism. Today, the general consensus of opinion is that these "categories"
In 1945 the Supreme Court again attempted to resolve the jurisdictional conflict by doing away with theories holding that (1) the defendant’s presence alone in the state would support jurisdiction,\(^{16}\) and (2) a defendant impliedly consents to service of process by engaging in business in the state.\(^{17}\) The “presence” and “consent” fictions had resulted from attempts to circumvent Pennoyer. In *International Shoe Co. v. Washington*,\(^{18}\) the Court stated that:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”\(^{19}\)

In determining what “minimum contacts” are necessary to justify subjecting an out-of-state corporation to suit within the forum, the Court stated that the test “cannot be simply mechanical or quantitative,” but the question of

[w]hether 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 . . . .

To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.\(^{20}\)


16. See note 13 *supra*.
17. See text accompanying notes 97 & 212 *infra*.
18. 326 U.S. 310 (1945). The issue presented in *International Shoe* was whether the state of Washington could subject a foreign corporation transacting business in Washington to the in personam jurisdiction of its courts in order to collect an unemployment tax levied upon the company’s salesmen who had been canvassing the state.
19. 326 U.S. at 316.
20. Id. at 319. Special attention should be focused on the language used by the Court. It is in this case that the problems which later developed regarding the application of a “minimum contacts” test were foreshadowed. Id. The statement regarding the “privilege of conducting activities” later raised the question as to what activities, quantitatively and qualitatively, would be sufficient to subject a defendant to the jurisdiction of the forum court.

Taken in a purely literal context, the language “exercises the privilege” could imply that before a defendant is subject to in personam jurisdiction he must have purposefully chosen to enter the state and then not only have entered the state to “enjoy the benefits and protection” of its laws, but also to have automatically sub-
After *International Shoe* it became clear that a state was no longer required to have dominion over the person for valid service of process. It was enough if the defendant had had sufficient "minimum contacts" with the forum state. Nevertheless, the question of what would suffice for "minimum contacts" remained, awaiting future determination.\(^{21}\)

Since *International Shoe*, a determination whether the "minimum contacts" test has been satisfied has only been decided twice by the Supreme Court.\(^{22}\) In the first such determination, *McGee v. International Life Insurance Co.*\(^{23}\) Mr. Justice Black, after reviewing *Pennoyer* and *International Shoe*,\(^{24}\) concluded that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."\(^{25}\) *McGee* also established the principle that courts could consider factors other than the defendant's own conduct in determining whether the due process requirement of "fundamental fairness" to the defendant had been met.\(^{26}\) It has been argued that *McGee* is a special interest exception, and the unique insuror-insuree relationship has permitted states to exert jurisdiction beyond its usual limitations.\(^{27}\) Nevertheless, its teaching has consistently been held to be one of general application.\(^{28}\) The continued vitality\(^{29}\) of the trend toward liberalization

rejected himself to the observance of the state's substantive and procedural laws. *Id.*

One author has suggested that the necessity of undertaking such a course of conduct would give rise to the application of a "reasonable foreseeability standard" to determine whether a defendant had conducted those types of activities which should subject him to the state's jurisdiction. This writer makes it clear that such a standard, though not generally applied, lends itself to relatively easy application by the courts. Note, *supra* note 6, at 725. The point to be made, however, is that when it comes down to a difficult determination of whether or not a court should be allowed to exercise its authority over a defendant, such a test will, and has, proved inadequate; a variable standard would better serve the purpose of due process.

21. See pp. 77–81 infra.
23. 355 U.S. 220 (1957). In *McGee*, the Supreme Court upheld the exercise of jurisdiction by California over a nonresident Texas insurance company based on the existence of a single insurance contract between a California resident and the defendant–company. The company had never done any other business in California.
24. 355 U.S. at 222. Mr. Justice Black stated:

Since *Pennoyer v. Neff* . . . this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations . . . [I]n *International Shoe Co. v. Washington* . . . the Court decided that "due process" requires only that in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'
25. 355 U.S. at 223.
29. *See* notes 41 to 43 and accompanying text infra.
of the requirements necessary for the exercise of jurisdiction, as expressed in *International Shoe* and *McGee*, is of special import because of the Court's holding, the following year, in *Hanson v. Denckla.* The *Hanson* Court required "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . ." The Court thus returned to the limiting proposition of *International Shoe*, highlighting only the acts of the defendant as consideration for the determination of jurisdiction. It has been said of this 5-4 decision that "... Mr. Chief Justice Warren reached [a] fair result . . . but by a line of analysis that in all charity and after mature reflection is impossible to follow, no less to relate." This decision further confused an area of the law which even at the present time needs clarification, rather than a return to a regretfully unenlightening proposition. It has been suggested that there are two plausible interpretations of *Hanson.* The first, resulting from a literal reading of the minimum contact-due process test, would require the court, in order to obtain jurisdiction over the defendant, to find some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum. Alternatively, *Hanson* could be confined to its facts and the "purposefully availing" test would be used when the defendant's only contact with the state is his transaction of business, and seemingly, when the cause of action is not related to such transaction. The adherence to the first interpretation has led to some uncomfortable contortions by some courts, and has apparently resulted in mere "lip service" adherence by others.

30. 357 U.S. 235 (1958). In *Hanson*, the Court determined that Florida could not assert personal jurisdiction over a Delaware trustee as a consequence of the probate of the settler's will in Florida. Here, the settler had moved from Pennsylvania, and the Delaware trustee's only contact with Florida was correspondence related to the trust's administration over the course of several years, a situation that was similar to the mailing of the insurance premiums in *McGee*.

31. 357 U.S. at 253.

32. Hazard, *supra* note 1, at 244. The author further stated that in its futile attempt to accommodate both *Pennoyer* and *International Shoe*, the *Hanson* Court revealed the depth of the doctrinal chasm between them. *Id.*


34. *Id.* at 412.

35. This, it is submitted, would be a logical application of the "purposefully avails" formula. If the cause of action is unrelated to the defendant's transaction of business, it is axiomatic that his contacts with the state be greater than if the cause of action had been generated as a result of such contacts.

36. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The Supreme Court of Illinois held that the defendant could reasonably have foreseen that the valves were in fact being manufactured for ultimate use in many states, and that one of these might well have been Illinois. Apparently the court felt that foreseeability was the equivalent of the defendant's "purposefully availing" himself of the benefits of the state laws. *Id.* at 442, 176 N.E.2d at 766.

37. *See* Ehlers v. United States Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d 824 (1963). The court decided that since the defendant manufactured its products for the general public and failed to show that the area of foreseeable use did not include Minnesota, the defendant-manufacturer had thus "purposefully availed" itself of the benefit of the local law. *Id.* at 61, 124 N.W.2d at 827. *See also* Andersen v. National Presto Indus., Inc., 257 Iowa 911, 135 N.W.2d 639 (1965), a decision in which the court stated that, since goods are placed in the stream of
tically, while recognizing the difficulties resulting from the language of \textit{Hanson}, it would seem that there are certain types of activities which a priori require the finding that a nonresident "purposefully availed" himself of the privilege of conducting activities within the forum state. The necessity of such an approach is clearly apparent in those situations where a nonresident, acting outside the state, commits an act which results in harm within the state. Since this tortfeasor obviously is not motivated by the benefit of the laws of the state in which the injurious consequences occur, the proper approach would be to determine whether it is reasonable to require him to defend an action based on this "minimum contact" he has had with the state. The question of whether the nonresident has "purposefully availed" himself of the benefits of his contacts should only be a secondary consideration.

The use of the alternate approach of confining \textit{Hanson} to its facts is well illustrated by the Arizona case of \textit{Phillips v. Anchor Hocking Glass Corp.} In \textit{Phillips}, the defendant's only contact with the state was the presence of a glass dish sold to the plaintiff outside of the state. The Supreme Court of Arizona stated that:

\textquote{\[F\]}air play includes a consideration of the quality, nature and extent of defendant's activity in the forum state, relative convenience of the parties . . . the benefits and protections of the laws of the forum state afforded . . . and the basic equities existing between the parties."

Finding the \textit{Hanson} case an unusual situation and of questionable value as precedent regarding the problem of personal jurisdiction over nonresident defendants, the court concluded that the "purposefully availing" test could not be construed literally, for to do so would revitalize the "implied consent" theory emasculated by \textit{International Shoe}:

\textquote{[E]}ach case must be examined to decide whether it is fair to exercise jurisdiction over the defendant. . . . A rule limiting jurisdiction to...
defendants who “purposefully” conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state.43

This possibly is the most acceptable, pragmatic and, in many ways, the most beneficial approach to the problems recreated by Hanson.44

A number of commentators have posited that the Hanson criterion — whether the defendant had “purposefully availed” himself of the benefits of the state’s laws — should not be the sole consideration in determining a state’s power to exercise jurisdiction over a nonresident. These authors have proposed in its stead a standard by which the litigant’s interests should be given the greater weight in determining whether the assertion of jurisdiction by the forum state will be fundamentally fair.45 A discussion

43. Id. It should be noted that although the court did put emphasis on foreseeability, it did so not because it felt it necessary to comply with Hanson, but rather because it believed it would be fair to require the nonresident to appear. Id. at 259, 413 P.2d at 737. See Note, supra note 33, at 415. See also Bibie v. T.D. Publishing Corp., 252 F. Supp. 185 (N.D. Cal. 1966).

44. See Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231, 235 (9th Cir. 1969) where the court, citing Phillips, stated:
We do not regard it as offensive to fair play or substantial justice or an undue burden on foreign trade to require a manufacturer to defend his product wherever he himself has placed it, either directly or through the normal distributive channels of trade.

See also Coulter v. Sears, Roebuck & Co., 426 F.2d 1315, 1318 n.13 (5th Cir. 1970) (citing Phillips with approval).


Von Mehren and Trautman propose that specific jurisdiction, jurisdiction “limited to matter out of — or intimately related to — the affiliating circumstances on which the jurisdiction claim is based, be appropriate in two classes of cases:

(1) when the traditional jurisdictional bias in favor of the defendant is not justified;

(2) when very strong consideration of convenience, relating not only to the plaintiff but also to the taking of evidence and other litigational considerations, points to a particular community.

Id. at 1144-45, 1167. They also advocate that when there is a highly localized plaintiff and convenience so requires, the plaintiff should be able to reach the defendant even though the defendant has not conducted activities in the forum state and has not anticipated that his multi-state activities might produce consequences in the plaintiff’s forum. (In Von Mehren and Trautman’s “functional analysis,” such multi-state activities are of the type that would not support the traditional jurisdictional bias for the defendant.) Thus, when there is a highly localized plaintiff, the necessity that the consequences be foreseeable is negated. Conversely, if there was a multi-state plaintiff, with a multi-state defendant, the defendant would not be subject to jurisdiction unless there were very great litigational considerations and, if there were a localized defendant, it would be required that a localized plaintiff come to him. Twerski, supra at 223-24. Twerski criticizes the Von Mehren-Trautman theory on a number of points. He feels: (1) that their approach could remove jurisdiction from constitutional control; (2) that noting defendant’s multi-state activities does not provide a functional category because it is conceivable to have a situation in which a defendant, who while technically conducting multi-state activities, is in fact involved in very limited activities, although it is possible to have a technically localized business conducting business on a broad plane; (3) that a plaintiff-oriented theory of juris-
of the merits of these theories is beyond the intended scope of this Comment, as is conjecture over the ultimate result in the evolution of the jurisdictional controversy. 46

Any attempt to propose an overall theory of jurisdiction upon which the Pennsylvania courts should interpret the "long-arm" statute would be unwarranted. Nevertheless, it is suggested that the courts should not become ensnared with interpretive problems which may in fact be only phantoms. The current trend in the law seems to be "away from intricate complexity, towards more basic considerations of fairness and reasonableness." 47 Perhaps the best approach for the judiciary to take would be to proceed on a basis similar to that expressed by Professor Currie:

diction fails to take account of the nuisance suit; and (4) that convenience should be an important consideration in the assertion of jurisdiction. Id. at 228-36.

In brief, the Seidelson thesis, according to Professor Twerski, concludes that tests which focus on the defendant's activities are inadequate, and the only apparent reason for the expansion of jurisdiction through "long-arm" legislation is convenience to the litigants. Since it is the plaintiff who has been wronged, he should have the choice of jurisdiction. Thus, the currently problematic "minimum contacts" test would mean nothing since the plaintiff's own forum will always be convenient to him. Id. at 224-28. Professor Twerski criticizes Seidelson's theory, stating that the presumptive validity of the plaintiff's claim is unfounded. He further suggests that there is a fallacy in Professor Seidelson's proposition that it is not unfair to the defendant to have him respond to the plaintiff's complaint when the defendant's product is sold within the forum state. Professor Twerski supports his position by applying Seidelson's proposal to a situation in which a small manufacturer seeks a limited multi-state market, but his goods appear in a distant market where he never intended for them to be sold. Id. at 237-39.

Professor Twerski offers a defendant-oriented counterproposal to the above theses. He believes that the "purposefully avails itself" formula of *Hanson* is a necessary condition for the assertion of jurisdiction, but it is not a necessary and sufficient condition. Id. at 241. Only after the threshold question of "purposefully availing" has been answered in the affirmative can the court look to the multiplicity of other factors. In looking at these factors, the court is not to act as an "impartial arbiter" in a balancing process but, rather, is to look at the acts through the eyes of the defendant. Id. at 241-43. In the author's opinion, it is necessary to examine the totality of the defendant's conduct in order to understand what his activity has been.

In Professor Twerski's opinion:

> overall fairness to everyone may be a desideratum of the common law but it is not the foundation of the due process clause. If we desire to engage in common law evaluation of fairness to all parties, then the due process clause ceases to be the vehicle for limiting the exercise of jurisdiction. Id. at 245.

This latter statement does propose a strong argument in favor of the traditional defendant bias. Professor Twerski argues forcefully that due process presupposes a right to be free from the power of the state in a situation in which the defendant has done nothing to subject himself to the jurisdiction of a given forum. It is no answer to the due process question that although it is unreasonable to assert jurisdiction over the defendant, it must be done because otherwise an innocent plaintiff will suffer. Id.

However, without undertaking a discussion regarding what due process requires, it is doubtful that such an idealized interpretation of due process will survive the realities faced in the courtroom.

46. See Note, supra note 15, at 1423. This author suggested that the ideal solution to the jurisdictional quagmire would be to allow nationwide service of process coupled with a mandatory change of venue statute. See also Ehrenzweig, supra note 13, at 312; Note, *Conflict of Laws — Jurisdiction — Long-Arm Statute — Commission of a Tort*, 44 Ore. L. Rev. 131, 138 (1965).

The essence of due process is that the proceedings shall be fair; whether they are fair must be a subjective judgment based on the common sense of the judge. Such judgments must be made in other areas of constitutional law, such as in determining whether a search or seizure was "unreasonable." 48

Although it might be argued that such a proposal is overly simplistic, it should be noted that attempts to provide a more definitive standard have not as yet yielded any cohesive approach. 49 At best, the tests that have been proffered thus far should only be used as considerations, and not as essential requirements. 50 Of possible assistance to the courts in such a return to the basics may be an approach of particularizing situations within the general "minimum contact" theory. 51 The goal of such particularization would be to reduce the problems arising under a "minimum contact" theory into a system of definable situations. Although this would give rise to a system with arbitrary categorical sub-systems, these sub-systems could be criticized and corrected intelligently without the use of fictions — a process more preferable than an application of the unworkable restrictive theories that have been suggested before. 52 It is impossible to devise any general formula that will produce acceptable results under every set of facts. Nevertheless, an analysis of each situation on a case by case basis, without adhering to any dogmatic jurisdictional formula, may, for the present, be the most reasonable solution to a very old problem.

III. The Pennsylvania Statute

The Pennsylvania "long-arm" statute, applicable to individuals and business entities other than corporations, 53 encompasses a broad range of activities that may subject a nonresident to the in personam jurisdiction of the Pennsylvania courts. To efficiently analyze the provisions of the Act, and determine its scope, it seems preferable to examine the various statutory sections independently. Additionally, it is hoped that by an examination of the judicial treatment accorded similar statutes of other

49. See note 45 supra.
50. See Comment, supra note 47, at 312-13.
51. Hazard, supra note 1, at 283.
52. Id. at 283 & n.149.
53. Although it is possible that the Act will be interpreted as being applicable to corporations, and it is submitted that it should be so applied, it is doubtful if it will be so held at the outset. The ambiguous language of the statute itself, coupled with the fact that the corporate "long-arm" statute was recently amended in 1968 and has apparently not been repealed by the new statute, indicates that Pennsylvania is in an anomalous situation. Presently, the Pennsylvania "long-arm" statutory scheme makes it possible to subject a nonresident individual to the jurisdiction of the Pennsylvania courts in factual situations where jurisdiction would not lie as to a foreign corporation.
jurisdictions, the Pennsylvania courts will have a current frame of reference within which to interpret their own.

A. Applicability to Individuals

Prior to the passage of the new statute,\(^{54}\) the previous Pennsylvania "long-arm" applied almost exclusively\(^ {55}\) to foreign corporations that had not registered with the Secretary of the Commonwealth.\(^ {56}\) Given this restriction, the threshold question is whether a comprehensive "long-arm" statute can apply to individuals and, if so, whether the state can assert jurisdiction in the same circumstances that it could over a foreign corporation. Although at one time state statutes limited extraterritorial jurisdiction over natural persons to those cases in which the defendant or his agent had performed within the state an act traditionally characterized as dangerous to life or property,\(^ {57}\) today it is generally held that state "long-arm" statutes apply in like fashion to individuals as well as to corporations.\(^ {58}\) The language of *International Shoe*\(^ {59}\) and *McGee*\(^ {60}\) seems to equate nonresident individuals with foreign corporations as to matters of service and, although there have been arguments to the contrary,\(^ {61}\) the weight of opinion among legal scholars is that they should be similarly treated.\(^ {62}\) It would seem entirely consistent, however, for a court to consider whether it is dealing with an individual or small business rather than a corporation; the possibility of greater hardship on the individual defendant's part is clearly a factor within the ambit of the principles of fundamental fairness.

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54. PA. STAT. tit. 12, §§ 341 to 346 (Supp. 1971).
55. See note 143 and accompanying text infra.
When enacted, the Pennsylvania Business Corporation Law was numbered from section 1 to section 12.01. Upon codification into Purdon's Pennsylvania Statutes Annotated, it was numbered from section 1001 to section 2201. All references in this Comment to the Pennsylvania Business Corporation Law will refer to the sections in Pennsylvania Statutes Annotated.
57. Developments — Jurisdiction, supra note 10, at 946.
59. 326 U.S. at 316.
60. 355 U.S. at 222-23.
62. See Smithers, *Virginia's "Long-Arm" Statute: An Argument For Constitutionality of Jurisdiction Over Nonresident Individuals*, 51 VA. L. REV. 712 (1965); Developments — Jurisdiction, supra note 10, at 948. See also Owens v. Superior Court, 52 Cal. 2d 822, 831, 345 P.2d 921, 924-25 (1959), where Justice Traynor stated:
"The rationale of the International Shoe case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over nonresident motorists make clear that the minimum contacts test for jurisdiction applies to individuals as well as foreign corporations."
Further support for this proposition may be found in the *Uniform Interstate and International Procedure Act* § 1.02.
B. Conduct Within the Scope of the Statute

Essentially, there are four distinct factual situations where the question of in personam jurisdiction arises. When the defendant has conducted continuous activities within the forum, and the action arises out of or is connected with such activities, jurisdiction clearly exists. The second instance relates to the assertion of jurisdiction where the defendant has conducted a continuous course of activity but the cause of action is disjoined from that activity. Presumably, it is these types of activities that the Pennsylvania legislature intended to cover by section 342, as defined by section 344, of the new statute. The third situation arises when there is a single or isolated act within the forum and the cause of action is related to the act. Sections 341 and 343 of the Pennsylvania statute encompass such activities. Finally, when the defendant is engaged in a single or isolated group of activities within the forum, jurisdiction probably will not lie where the cause of action is unrelated to such activities. It should be noted, however, that with the possible exception of the first situation, there is no activity covered by the statute where the courts can or should automatically assert jurisdiction. It is axiomatic that the state courts can only exercise jurisdiction to the extent that due process will allow, and thus a careful analysis of each particular case remains a prerequisite.


65. See, e.g., Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). In Perkins, the defendant corporation was forced to leave the Phillipines in World War II, and proceeded to conduct a systematic but limited number of activities in Ohio where the plaintiff brought an action for dividends and damages due to defendant's failure to issue stock certificates. Although the cause of action did not relate to the continuous activities of the corporation while in Ohio, the Court held that the quantity and nature of the defendant's actions in Ohio would sustain jurisdiction. But see Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1 (1959).


68. PA. STAT. tit. 12, §§ 341, 343 (Supp. 1971).

69. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Supreme Court stated that:

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

Id. at 317. The Court further stated that:

[The due process] clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations (citations omitted).

Id. at 319.

70. See p. 75, supra. A determination of the due process limitations presents a serious problem. In the past, the Pennsylvania courts have not asserted jurisdiction to the fullest permissible extent of the due process clause. See Rufo v. Bastian-Blessing Co., 405 Pa. 12, 173 A.2d 123 (1961).
C. Specific Statutory Provisions

1. "committed a tortious act within this Commonwealth..."

Section 341 of the new Pennsylvania statute omits the requirement that the nonresident must have been "doing business" in the Commonwealth so long as he has committed a tortious act within it. The omission of the "doing business" requirement, however, compounds the interpretive problems associated with the words "[commits] a tortious act within this Commonwealth." In Pennsylvania, the traditional "doing business" requirement has in the past been construed to require a showing of continuous activity. The exclusion of this requirement is indicative of a legislative intent that a single tortious act will be sufficient for the assertion of jurisdiction. This should not pose any difficulty, considering that many of the states that have enacted expansive "long-arm" statutes have a similar provision, and courts interpreting these statutes have upheld jurisdiction on the basis of a single tortious act.

Even though the legislature, by choosing the quoted language, has created interpretive pitfalls, they are by no means insurmountable.

71. PA. STAT. tit. 12, § 341 (Supp. 1971), provides:

From and after the passage of this act, any nonresident of this Commonwealth who, acting individually, under or through a fictitious business name, or through an agent, servant, or employee, shall have committed a tortious act within this Commonwealth, or any such individual who at the time of the commission of the tortious act within the Commonwealth was a resident of this Commonwealth who shall subsequently become a nonresident or shall conceal his whereabouts, shall be conclusively presumed to have designated and constituted the Secretary of the Commonwealth of Pennsylvania as his agent for the service of process in any civil action or proceedings instituted in the courts of the Commonwealth of Pennsylvania against such individual.


73. See note 4 supra.

74. E.g., Hutchinson v. Boyd & Sons Press Sales, Inc., 188 F. Supp. 876 (D. Minn. 1960); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); Painter v. Home Fin. Co., 245 N.C. 576, 96 S.E.2d 731 (1957). In no state listed above, is there a case where jurisdiction was denied because it was predicated on the commission of a single tortious act. See note 4 supra.

It should be noted, however, that in some states the "single tort" statutes are expressly limited to suits by resident plaintiffs. See CONN. GEN. STAT. ANN. § 33-411(c) (4) (1960); IOWA CODE ANN. § 617.3 (Supp. 1971); Md. ANN. CODE art. 23, § 92(d) (1957); MINN. STAT. ANN. § 303.13 (Supp. 1969); N.C. GEN. STAT. §§ 55-145(4) (1965).

75. One minor difficulty can be found in the language which states that a cause of action will arise as a result of a "tortious act." This language should not be misconstrued, and it should not be necessary for the plaintiff to prove that a substantive wrong has been committed. To do so would be circuitous, for the rationale behind the assertion of jurisdiction is to render the nonresident defendant subject to the power of the court in order to determine whether tortious conduct has in fact taken place. The language is merely descriptive of the type of situation where the conduct will be sufficient to predicate jurisdiction. See Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 681 (1957). The court reasoned that the commission of a "tortious act" means the commission of an act tortious if proved as alleged, not one proved to be tortious. See also Twerski, supra note 45, at 243-44; Traynor, supra note 15, at 659; Comment, In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions, 63 Mich. L. Rev. 1042-43 (1965); Note, supra note 6, at 746.
There are two possible methods of interpreting the phrase “within this Commonwealth.” The first such construction is illustrated best by the case of Gray v. American Radiator & Standard Sanitary Corp. Gray involved a tort suit instituted in Illinois by a plaintiff who was injured when a water heater exploded because of an allegedly defective valve. The principal defendant, American Radiator, which had assembled the heater in Pennsylvania, sought to implead the Ohio valve manufacturer. Even though the valve manufacturer did no business in Illinois, jurisdiction was sustained on the grounds that under these facts there was a “commission of a tortious act” within the state. In holding that the tortious act occurred in Illinois, the court, citing the Restatement of Conflict of Laws, found it to be “well established . . . that in law the place of a wrong is where the last event takes place which is necessary to render the actor liable.” Thus, the valve manufacturer had allegedly committed a tortious act within Illinois. Through this mode of analysis, it is possible for a state to exercise jurisdiction over an individual or corporation that has never been physically present in the forum state.

Most states have avoided the broad interpretation afforded the term “committed a tortious act within the state” by adopting separate provisions differentiating between conduct in the state causing tortious injury and conduct causing injury in the state by acts or omissions occurring outside of the state. Likewise, the Pennsylvania legislature has enacted two sections related to “tortious” or “harmful” conduct. To further avoid difficulties that might arise from language similar to that of the Illinois statute, the parallel phrase “committed a tortious act within this Commonwealth” should be equated, for purposes of interpretation, with the phrase “causing tortious injury by an act or omission in


78. 22 Ill. 2d at 435; 176 N.E.2d at 762-63.

79. For a more thorough discussion of Gray, see Currie, supra note 48, at 545-46.


81. See, e.g., Uniform Interstate and International Procedure Act §§ 1.03(a) (3), (a) (4).


83. In a fact situation very similar to that in Gray, the Court of Appeals of New York reached an opposite result. The court held that if the legislature intended to confer jurisdiction on the basis of injurious consequences in the forum, it would have explicitly done so. Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).
Given this limited interpretation, the Pennsylvania courts would inherit an accepted line of precedent dating back to the leading case of Smyth v. Twin State Improvement Corp., decided in 1951. In Smyth, jurisdiction was asserted by Vermont over a Massachusetts roofing company which allegedly had negligently damaged plaintiff’s roof while attempting to repair the plaintiff’s home in Vermont. Under the Vermont statute, a foreign corporation is deemed to be “doing business” if it commits a tort “in whole or in part” within the state exercising jurisdiction. The Vermont Supreme Court concluded that “[n]o sound reason appears to exist why foreign corporations [individuals] may not be held responsible in Vermont for wrongful acts done in Vermont. If a foreign corporation [individual] voluntarily elects to act here, it should be answerable here and under our laws.” Not only is such a construction of section 341 constitutionally permissible, it is practically compelled by the fact that section 343 is intended to cover those other situations where the nonresident, acting out-of-state, causes harm tortious or otherwise in the state. Further support for this proposition exists. In 1961 the Supreme Court of Pennsylvania, interpreting the since amended subsection B of section 2011 of the Business Corporation Law, held that “long-arm” jurisdiction existed if the corporation was “doing business” in Pennsylvania and the cause of action arose out of acts or omissions of the corporation within the Commonwealth. Significantly, the court found that the only act in a product liability action was that of negligent manufacture, which admittedly had not occurred “within this Commonwealth.”

84. Uniform Interstate and International Procedure Act § 1.03(a)(3) (emphasis added).
85. 116 Vt. 569, 80 A.2d 664 (1951). See also Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (the relevant statutory phrase read, “commission of a tortious act in this State”).
87. 116 Vt. at 573, 80 A.2d at 668.
88. Although the Supreme Court has not decided the question, the Court of Appeals for the Fifth Circuit has held, relying on Hess and McGee, that a nonresident corporation is subject to the jurisdiction of the court “for tortious injury arising out of activity of the nonresident within the state, even though only a single transaction was involved, and regardless of whether the activity is considered dangerous.” Elkhart Eng’r Corp. v. Werke, 343 F.2d 861, 868 (5th Cir. 1965), citing McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hess v. Pawloski, 274 U.S. 352 (1927).
91. 405 Pa. at 22, 173 A.2d at 128. The statutory requisite that the action must arise out of “acts or omissions” in Pennsylvania was later eliminated, and the only remaining question was whether the corporation was “doing business” in the Commonwealth. See Myers v. Mooney Aircraft, 429 Pa. 177, 184, 240 A.2d 505, 510 (1967). Since section 341 of the new statute omits the “doing business” requirement, it is logical to conclude that the acts or omissions must occur within the Commonwealth in order to provide the “minimum contacts” necessary for the assertion of jurisdiction. This will give rise to a special problem in the interpretation of section 343. See pp. 97 infra. In that section, both the “doing business” requirement and the requirement that the act or omission occur within Pennsylvania are absent, and it will be necessary to carefully determine what “minimum contacts” will suffice. See pp. 98–105 infra.
thus apparent that the Pennsylvania courts did not subscribe to the 1934 Restatement of Conflict of Laws provision that “the place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”

Finally, attention must be drawn to the phrase “in any civil action or proceedings instituted in the courts of the Commonwealth. . . .” Section 343 of the statute adds to this the clause “arising out of or by reason of any such conduct.” The inclusion of this phrase requires that there be a

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92. Section 377 of the 1934 Restatement has been superseded by the Second Restatement of Conflicts, section 145. The new version provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

ReSTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

In promulgating this change, the drafters of the Restatement commented that the old section 377 was changed because experience had shown that the “last event” rule does not always work well, and that situations arise where the state of the last event (the place of injury) only bears a slight relation to the occurrence and parties involved. It is submitted that the rule announced in the new draft was the basic position followed by the Pennsylvania courts. This conclusion may be inferred from the courts’ non-adherence to the old section 377.

93. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934). By avoiding the adoption of the Restatement view, the Supreme Court of Pennsylvania has precluded the difficulty of the possible misconception that a court can assert jurisdiction only if it can apply the laws of its own state. See Comment, supra note 75, at 1041-42. In explaining why the courts have become involved in this choice of law analogy, the author stated:

The statutory language that has particularly troubled the courts and led to the analogy with choice of law rules is “tort in whole or in part” and “tortious act.” The legislatures undoubtedly used these words to describe the general sweep of conduct they wanted to have adjudicated in the forum, separate provisions usually existing for actions in contract. But the legislatures had the further objective of acquiring jurisdiction over nonresident defendants who had committed single acts within the state, as opposed to the traditional, and now discarded, requirement that the defendant must have been “doing business” within the state. Since International Shoe specified that isolated acts which are unrelated to the cause of action could not serve as a basis for jurisdiction, the legislatures were compelled to ensure that the activity to which the courts directed their attention to establish jurisdiction would be associated with the cause of action for which relief was sought. In prescribing jurisdiction over actions in tort, they therefore described the significant isolated acts as those which were “tortious” or “part” of a tort.

Id. at 1041-42.

The fact that a nonresident of Pennsylvania injures a Pennsylvania resident in Ohio under circumstances that clearly call for the application of the laws of Ohio does not incapacitate the Pennsylvania courts from exercising jurisdiction. If Pennsylvania followed the Restatement rule, it would not assert jurisdiction if the “wrong” occurred in another state, even though the contacts enumerated in its “long-arm” statute existed. Cf. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Comment, supra note 63, at 346-47.

causal connection between the cause of action and the nonresident's contacts with the Commonwealth. By omitting the latter phrase from section 341, a "single act" provision, the legislature presumably intended that a cause of action would arise in "any civil action or proceedings" whether or not there existed a causal connection between the action and the single "tortious act." Such an assertion of jurisdiction will not lie. International Shoe clearly posits that the nonresident's commission of a single or isolated act within the forum is not enough to subject him to suit on a cause of action unrelated to his activities in the forum.95 Hence, the commission of a single act can not render a nonresident amenable to the "unrestricted"96 jurisdiction of the forum state.

2. "and shall have done any business in this Commonwealth. . . ."

Long before International Shoe, on the theory that the nonresident defendant had impliedly consented to suits against it, "doing business" in the state was the constitutional test to determine whether process could be served.97 The history of the term "doing business" in Pennsylvania has been turbulent and remarkably inconclusive.98 Significantly, the numerous difficulties which have plagued the exercise of jurisdiction by the courts emanate from interpretive problems faced by Pennsylvania courts over the years. While other states99 were expanding the scope of their jurisdiction by legislative enactments which often included "single act" statutes,100 the Pennsylvania courts were hampered from extending jurisdiction by a statute which retained the traditional prerequisite that the defendant be "doing business." With minor changes,101 none of which altered the requirement that the defendant be "doing business,"102 the Pennsylvania corporate "long-arm" statute remained the same from 1951103 until it was last amended in 1968.104

95. See note 69 supra.
99. See note 4 supra.
100. E.g., ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); N.Y. CIV. PRAC. § 302 (McKinney Supp. 1970).
101. See Comment, supra note 63, at 328-36; Comment, supra note 98, at 82-94.
102. Although the legislature deleted the "entry" requirement from the statute in the 1968 amendment, the first appellate court to interpret the amended subsection C seems to hold that physical "entry" by the nonresident is still necessary. DiLido Hotel v. Nettis, 215 Pa. Super. 284, 296, 257 A.2d 643, 649 (1969).
103. PA. STAT. tit. 15, § 2011 (1933).
Although section 342105 of the new statute, as defined by section 344,106 retains the "doing business" limitation,107 the apparent legislative intent of expanding state jurisdiction, as reflected in sections 341 and 343, should also be read into section 342 of the Act. Admittedly, interpretive difficulties could have been kept to a minimum if the legislature had adopted a statute similar to the Uniform Act,108 for many of the problems posed by the Act have already been treated by the courts.109 The problem thus remains to interpret sections 342 and 344 in a way that would delineate which "doing business" activities of nonresident individuals are meant to be included.

As we have seen," the traditional "doing business" position — that the nonresident must have been substantially engaged in conduct within the state before he could be subjected to the state's jurisdiction — has been discarded by sections 341 and 343. A single act by a nonresident will be sufficient for the assertion of jurisdiction by the Pennsylvania courts, if it is a "tortious act within the Commonwealth,"111 and possibly if an out-of-state act causes harm in the Commonwealth.112

a. The Shipping Clause

There is some question as to the extent of expansion provided by section 342; i.e., whether the section 344 definition of "doing business" includes the commission of a single non-tortious act within the Common-
wealth. Undoubtedly, under section 2011 B and C of the corporate “long-arm,” such a single act would not suffice. This is so despite the suggestion that under subsection C, the sentence “the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth,” could be interpreted to require only a single shipment into or through Pennsylvania for the assertion of jurisdiction. There is little doubt that if a manufacturer shipped a defective product directly into a state and an injury was caused by the defect, jurisdiction could be asserted within due process limits. However, the phrase “doing of such an act” can only relate back to the phrase immediately preceding it — “a single act . . . with the intention of thereby initiating a series of such acts.” The proposition that a single act will not be sufficient for the assertion of jurisdiction permeates the corporate “long-arm” statute. The new “long-arm” has changed this. The deletion of words “doing such an act” from the shipping clause would seem to indicate that a single shipment may be all that is needed to exercise jurisdiction. This, coupled with the addition of the clauses, “the engaging in any business or profession within this Commonwealth,” and “the ownership, use or possession of any real property situate within this Commonwealth,” indicates the legislature’s intention to specify circumstances where a single act will support jurisdiction.

The question arises, however, as to why the legislature included these clauses in light of the inclusiveness of section 343. The answer might be that in drafting the new statute with the intent of expanding jurisdiction, the legislature merely tacked on several expansive provisions.

114. See Comment, supra note 63, at 335–36.
116. For a recent interpretation of the shipping clause of the Pennsylvania corporate “long-arm” statute, see Benn v. Linden Crane Co., 326 F. Supp. 995 (E.D. Pa. 1971). The court, interpreting the “directly or indirectly” phrase of section 2011C of the Pennsylvania statute, held that:

[E]conomic and business reasons dictate that goods will pass through any number of people in a distributive chain before they reach the ultimate consumer. It is the movement of goods through this distributive chain that in this case constitutes an "indirect shipment."

Id. at 997.
117. Von Mehren, supra note 45, at 1176.
118. PA. STAT. tit. 15, § 2011C (Supp. 1970). Without specifically stating how many units of defendant’s product had been shipped into Pennsylvania, the court in a recent case held, that since the foreign defendant had reason to know that his product (a crane) would be resold for use and operation in the United States, the corporation made an “indirect shipment of goods” into Pennsylvania and was “doing business” within the definition of the Pennsylvania corporate “long-arm” statute. Benn v. Linden Crane Co., 326 F. Supp. 995 (E.D. Pa. 1971). This suggests that at least one court would interpret the corporate “long-arm” as requiring only a single act (shipment) to render a corporate defendant amenable to jurisdiction.

119. This phrase is a modification of PA. STAT. tit. 12, § 331 (1937).
With respect to one of these provisions,\footnote{121. \textit{I.e., “the engaging in any business or profession...”} PA. STAT. tit. 12, § 344 (Supp. 1971).} this would seem to be the case. However, in addition to including these provisions, the legislature deleted from the shipping clause the phrase “doing of such an act,” thus suggesting that a purpose does exist for retaining the shipping clause. It is submitted that the retention of the shipping provision is to ensure that in interpreting the “engaging in any business” provision,\footnote{122. See p. 93 infra.} the courts will not continue to conclude that the “mere shipment” of goods into the forum is insufficient contact.\footnote{123. See Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966); Wilsey v. Gavett, 49 Misc. 2d 861, 268 N.Y.S.2d 688 (Sup. Ct. 1965).} As courts in other states have done,\footnote{124. See, e.g., Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, cert. denied, 382 U.S. 905 (1965) (in addition to shipping goods into the state, the defendant solicited business by mail).} the Pennsylvania judiciary should regard the shipping of goods into the Commonwealth as a sufficient basis upon which to assert jurisdiction. The difficulty which persists with this phrase is whether the contract to ship or to “supply” goods into the forum will continue to be insufficient to establish jurisdiction, especially when the contract is entered into out-of-state. Such an interpretation would be unjustified. The legislature could have simplified matters a great deal by substituting for the shipping clause the provision modeled after the Uniform Act; \textit{i.e., “contracting to supply services or things in this state.”} \footnote{125. \textsc{Uniform Interstate and International Procedure Act} § 1.03(a) (3).} Although this clause would clearly allow the Pennsylvania courts to exercise jurisdiction when a contract involving an out-of-state defendant is breached prior to the formation of sufficient contacts that would be required under the shipping clause,\footnote{126. Such a situation could arise when a California manufacturer executes a contract to ship his product to Pennsylvania, the contract being made in California, and prior to shipment refuses to perform under its terms.} a similar result is not necessarily precluded by the absence of the word “contracting.” The assertion of jurisdiction in an executory breach situation should be possible under section 343. Unlike the Uniform Act\footnote{127. \textsc{Uniform Interstate and International Procedure Act}.} and similar statutes\footnote{128. See, e.g., MD. CODE ANN. art. 75, §§ 94 to 100 (Supp. 1969) ; N.Y. CIV. PRAC. § 302 (McKinney Supp. 1970) ; TENV. CODE ANN. §§ 20–235 to 20–240 (Supp. 1970) ; VA. CODE ANN. §§ 8–81.1 to 8.81.3 (Supp. 1971) (identical with the Uniform Act).} that require a “tortious injury,” this section provides jurisdiction when the nonresident, acting out-of-state, causes \textit{any harm} in Pennsylvania. The absence of such language within the definition of “doing business” is probably only indicative of the fact that “doing business” will require some element of “physical” contact with the forum by the nonresident.
The discussion of the shipping clause involves the consideration of only one specific category of facts which lends support to the proposition that the definition of "doing business" in Pennsylvania now encompasses situations where the nonresident has engaged solely in a single act. The most expansive supplementation of the "doing business" section is the addition of the phrase "or the engaging in any business or profession within this Commonwealth." It is difficult to comprehend why the legislature used this term in defining "doing business." Traditionally, "doing business" in Pennsylvania has been given a limited construction, but by defining "doing business" as it did, the legislature has completely altered the "doing business" requirement in Pennsylvania. For purposes of interpretation, the word "engaging" should be treated as a corollary to the word "transacting," as it appears in other "long-arm" statutes. It may be argued that the phrase "engaging in any business" connotes a more substantial course of conduct than does the word "transacting," especially in light of the fact that "engaging" also modifies "profession." To entertain such distinctions, however, invokes an unnecessary battle of semantics. In every section of the statute the legislature seems to be seeking to expand Pennsylvania jurisdiction by adopting provisions similar to those enacted by other jurisdictions. There is no reason to presume that a different course was intended in this instance.

Assuming the courts accept the proposition that the legislature intended to provide jurisdiction over any nonresident "transacting [engaging in] any business in this state," it is first necessary to define the phrase. Ample precedent exists to assist the courts in this determination. As in every other situation where the court attempts to assert jurisdiction over a nonresident, the threshold question is whether or not there are sufficient contacts. The existence or non-existence of sufficient contacts will depend upon how the Pennsylvania courts resolve the due process issue. In attempting to exemplify the factual circumstances upon which other courts have expanded jurisdiction, this Comment will not suggest what some may believe to be an "enlightened" approach, but, rather will only present several of the possible interpretations given to the "transacting any business in the state" provisions.

Without discussing the merits of the contention that "transacting [engaging in] business in the state" should include contracts made out of state for performance in the state or elsewhere, it is submitted that the legislature did not intend that this out-of-state activity be included in

129. See p. 89 supra.
130. See note 4 supra.
131. Id.
133. Currie, supra note 48, at 556-79.
the definition of "doing business." The "long-arm" statute may, com-
positely, be interpreted as providing a proposition similar to the "con-
tracting to supply goods or services in the state" section of other "long-
arm" statutes. By comparing the relationship of the "contracting" and
"doing business" sections, with the combined interpretation of "committed
a tortious act within this Commonwealth," and "acting outside of the
Commonwealth . . . [causing] any harm within this Commonwealth"
provisions, the conclusion should be reached that analogous relationships
exist. Just as section 341 was interpreted to require that the act or
omission causing tortious injury occur in the Commonwealth, the phrase
"engaging in any business or profession within this Commonwealth"
should be limited to acts or omissions occurring therein. Likewise, the
considerations of whether acting or contracting by a nonresident outside
of the state will subject him to the state's jurisdiction should be viewed in
light of section 343.134

If this interpretation is correct, it only remains necessary to determine
what in-state activities will support an assertion of jurisdiction by the
courts. Cases falling within this section generally will consist of two
main categories: (1) instances where the nonresident has entered the
forum for pecuniary gain; and (2) instances where a contract was either
made or performable within the state.135 In Patrick Ellam, Inc. v. Nieves,136
jurisdiction was found when the nonresident executed a contract in the
forum state. Jurisdiction has also been sustained in a New York case
where the only contact with the forum was the solicitation of business by
mail and the shipment into the forum of a substantial quantity of goods
ordered by a retailer, the terms of the shipment being specified f.o.b.
Illinois.137 In another case, the Court of Appeals of New York sustained
jurisdiction over a foreign corporation when: (1) negotiations took place
within the forum, although the main contract was made elsewhere; (2)

134. See p. 87 supra & p. 97 infra. Just as the occurrence of the injury
within the state will not be sufficient to constitute the commission of a tortious act
within the Commonwealth, the mere acceptance of a contract in Pennsylvania should
not constitute "engaging in any business" within Pennsylvania. Currie, supra note 48,
at 569 n.214.

135. Woods, The Uniform Long-Arm Act in Arkansas: The Far Side of Juris-

136. 41 Misc. 2d 186, 245 N.Y.S.2d 545, 547 (Sup. Ct. 1963). The finding that
the existence of a single contractual arrangement will provide jurisdiction is sup-
ported by McGee v. International Life Ins. Co., 355 U.S. 220 (1957), where the
Court stated it was sufficient for purposes of due process that "the suit was based on
a contract [a single life-insurance policy] which had substantial connection with that
State." 355 U.S. at 223. The fact that the insurance company had no other "contacts"
with the state other than the existence of a single policy will be discussed in relation
to section 343. See pp. 103-04 infra. See also U.S. v. Montreal Trust Co., 358
P.2d 239 (2d Cir.), cert. denied, 384 U.S. 919 (1966); Iroquois Gas Corp. v. Collins,
42 Misc. 2d 632, 248 N.Y.S.2d 494 (Sup. Ct. 1964); cf. Harry Winston, Inc. v. Wald-

137. Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, cert. denied,
382 U.S. 905 (1965) (plaintiff lost eyesight when "unbreakable" hammer broke).
This case is an illustration of what courts have defined "transacting business" to mean.
For the purpose of interpreting the Pennsylvania "long-arm" statute, such a case
would, it is submitted, better coincide with the assertion of jurisdiction under section
343 than it would under section 342.
there was a supplemental contract executed by the plaintiff in New York and by the defendant out-of-state; and (3) the defendant had sent service representatives to the forum to aid in the installation of the machines contracted for. Although the contract was not executed within the forum, performance was. In Kropp Forge Co. v. Jawitz, the contacts with Illinois were held sufficient where a New York defendant entered Illinois to inspect generators which he had been negotiating by mail to purchase from the Illinois firm. The situs of the agreement to enter Illinois for removal of the machines was uncertain, but the Appellate Court of Illinois had no difficulty in finding that the defendant had transacted (engaged in) business within the state.

Preliminary negotiations in the forum state resulting in the eventual out-of-state execution of a contract have provided a sufficient nexus for the exercise of jurisdiction, as apparently has the entrance into the state of an officer of a nonresident defendant solely for the purpose of executing a contract. Generally, it would appear that


139. 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962). In Forge, the court stated that the “ultimate test is the substance of the act rather than the quantity.” See also Magnaflux Corp. v. Foerster, 223 F. Supp. 552 (N.D. Ill. 1963); Wichman v. Hughes, 450 S.W.2d 294 (Ark. 1970); Crane v. Rothring, 27 Mich. App. 189, 183 N.W.2d 434 (1971).

140. National Gas Appliance Corp. v. A.B. Electrolux, 270 F.2d 472 (7th Cir. 1959). In Electrolux, the representative of a foreign corporation entered the forum state to inspect equipment and negotiate contract terms. See also Green v. Bluff Creek Oil Co., 287 F.2d 66 (5th Cir. 1961) (full faith and credit given to a judgment under the Illinois "long-arm" statute). But see Baye-Martin v. Brooks, 267 F.2d 394 (7th Cir.), cert. denied, 361 U.S. 832 (1959).

141. Steele v. DeLeeuw, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963). However, if a forum is chosen in which to execute a contract merely for the convenience of the parties, it has been suggested that such a contact, absent other connections with the forum, should not be sufficient for the assertion of jurisdiction. Note, supra note 6, at 736, citing Baughman Mfg. Co. v. Hein, 44 Ill. App. 2d 373, 194 N.E.2d 664 (1963). There are additional examples of what has been held to entail “transacting business.” For example, the filing and prosecution of a lawsuit may foreseeably constitute “transacting business.” Compare Ohio Cas. Ins. Co. v. First Nat'l Bank, 425 P.2d 934 (Okl. 1967), with Liston v. Butler, 4 Ariz. App. 460, 421 P.2d 542 (1966). Additionally, breach of warranty actions have, in the past, been instituted under “transacting business” sections. See, e.g., Lichina v. Futura, Inc., 260 F. Supp. 252 (D. Colo. 1966); Hicks v. Crane Co., 235 F. Supp. 609 (D. Ore. 1964). It would seem, however, that a warranty action would be more properly instituted under a "tortious injury" section since "[m]ost authorities treat personal injuries arising from an implied warranty as tortious in nature." Pennsalt Chem. Corp. v. Crown, Cork & Seal Co., 244 Ark. 638, 646, 426 S.W.2d 417, 422 (1968), cited in Woods, supra note 135, at 656. Virginia was sufficiently concerned as to whether a warranty action would sound in tort that it enacted a separate section pertaining to warranty actions. VA. CODE ANN. § 8-81.2(a) (5) (Supp. 1964). A characterization of whether an action will sound in tort or contract is really unnecessary for it has been correctly suggested that each provision of the Uniform Act (and by implication, all "long-arm" statutes) was intended to support a cause of action under any theory of law provided the requisite acts had taken place. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK, 222 (1962). See also Stephenson v. Duriron Co,
in order to constitute the transaction of any business, there must be a significant act within the state by the defendant or his agent which is part of the commercial transaction upon which jurisdiction is to be based, but no particular act is indispensable so long as the existing contacts cannot be characterized as "incidental activity." 142

c. The Ownership of Real Property Within the Commonwealth Clause

A final indication that the legislature intended "doing business" to include a single act is the inclusion of what was formerly a statutory exception143 to the traditional requirement that the foreign corporation engage in a "series of similar acts" within the Commonwealth, i.e., the insertion of the "ownership use or possession of any real property situate within the Commonwealth" clause. Pennsylvania originated this exception to the traditional "doing business" requirement, and all other state "single act" long-arm statutes have followed suit.144

d. Conclusion

In essence, the preceding discussion has presented some instances in which courts have exercised jurisdiction under "transacting business" statutes. No mention has been made of whether due process limitations will prevent the exercise of jurisdiction in any given set of circumstances. Such a determination should only be made by the court after having examined all of the aspects of a particular case. It is difficult to ascertain what starting point the courts should follow in this penumbral area of

401 P.2d 423 (Alas.), cert. denied, 382 U.S. 956 (1965), where the court sustained jurisdiction under a "transacting business" provision in a personal injury case.


142. Note, supra note 6, at 737.

143. Pa. Stat. tit. 12, § 331 (1953). The statute provides in pertinent part: From and after the passage of this act, any nonresident of this Commonwealth being the owner, tenant or user, of real estate located within the Commonwealth . . . shall . . . constitute the Secretary of the Commonwealth . . . his . . . agent for the service of process in any civil action or proceedings instituted in the courts . . . against such owner, tenant or user of such real estate . . . arising out of or by reason of any accident or injury occurring within the Commonwealth in which such real estate . . . [is] involved.


144. See note 4 supra. For a discussion of the treatment formerly afforded section 331 by the Supreme Court of Pennsylvania, see Comment, supra note 63, at 343-47. See also Note, supra note 15, at 1433. The author, in proposing reform for the New York "long-arm" statute, which is modeled after the Uniform Act, suggests what may be the most logical approach to any assertion of jurisdiction over nonresidents who own property, real or personal, within the forum state.

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the law. It does seem certain, however, that even under the most restrictive interpretation of Hanson v. Denckla's 145 "purposefully avails" formulation, the activities of the nonresident outlined above should be sufficient to sustain jurisdiction. When the nonresident defendant or his agent has entered the forum and performed some "significant" act in the furtherance of his business, there is little doubt that he has "purposefully availed" himself of the benefits and privileges of the laws of the Commonwealth.

The final question is whether the nonresident's "doing business" in the Commonwealth supports a cause of action unrelated to his contacts with the Commonwealth. As noted above, 146 the commission of a single tortious act or omission within the Commonwealth will not provide the Pennsylvania courts with "unrestricted" jurisdiction over a nonresident. Similarly, to engage in a single business transaction in the Commonwealth will not support a suit based on an unrelated cause of action. 147 The focus of the discussion has been a justification of why sections 342 and 344 should be interpreted as a "single act" provision. In recognizing that a single business transaction may support a cause of action arising out of such activity, it is important to remember that "doing business" has traditionally required "substantial" contacts with the state, and that a "series of similar acts" will still provide such a substantial contact. Such contacts remain necessary to support an unrelated cause of action, and it will be the task of the courts, on a case-by-case basis, 149 to determine whether these contacts exist.

3. "any nonresident . . . acting outside of the Commonwealth . . . [who] has caused any harm within this Commonwealth . . . ."

Section 343 is the most far-reaching provision of the "long-arm" statute. 150 Essentially, two distinct categories of out-of-state activities
may arise to which this section will be applicable: (1) where a nonresident manufacturer or retailer places goods in the stream of commerce which cause injury outside the nonresident's forum; and (2) where the nonresident, not having sufficient contacts with the forum to be deemed to have been “doing business” in the state, enters into a contract with a resident of the forum and through his conduct causes harm to that resident.

a. Products Liability Cases

The majority of actions that will arise under the first category will undoubtedly be products liability cases. A note of caution should be interjected at this point regarding the complexities of the problem surrounding any attempt to exercise jurisdiction over a nonresident whose product has entered a foreign forum when neither he nor his agent has "engaged in any business" there. It has been stated:

It is a common failing to overlook the problem of the small manufacturer. When social reformers speak of “manufacturers” they generally assume that all manufacturers are in the position of U.S. Steel Corporation or General Motors or Standard Oil Company of New Jersey. It may very well be (leaving out considerations of justice) that large organizations of this character can absorb or distribute an item of increased cost such as that which would result from the imposition of strict liability. But many manufacturers are in a totally different situation. Their position in the industry is vulnerable and their competitive situation delicate. It is these comparatively small manufactures who suffer when additional costs are added without regard to their situation.

In essence, the question is whether strict tort liability means strict amenable to jurisdiction.

Many states require that in order to subject a nonresident to liability in tort for the in-state harm caused by his out-of-state activities, he must have contacts with the state other than the occurrence of the injury there. Typically, these restrictive provisions provide that jurisdiction will lie

151. An example would be where the goods are transported out-of-state or where they are sold in-state and used out-of-state. Whether it is necessary that the manufacturer or retailer intended, explicitly or impliedly, that their goods be used in another state, will be a major local point of the following discussion.

152. It is submitted that this category is identical to the "contracting to supply goods or services" provision of other states' "long-arm" statutes.


154. This is, of course, a rhetorical question. It is obvious that due process will not allow such a result, at least so long as there remains numerous small manufacturers, since it is impossible to overlook the economic realities of multi-state litigation.

only if the nonresident "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 the state. It appears
that these requirements were added by the drafters of the Uniform Act
due to uncertainty regarding the vitality of the Gray decision in light of
the Hanson formulation of due process. In the interim between the completion of the Uniform Act in 1962
and the present, a number of decisions applying the Hanson "purposefully
avails" rationale have indicated that a retreat from the expansiveness of
the McGee decision to the restrictive approach expounded in Hanson
might have been unnecessary. Applied literally, Hanson could present
many problems, especially in those situations that section 343 was intended
to encompass; i.e., where the nonresident has had no actual physical contact
with the forum. Apparently attempting to circumvent the undesirable
results of a literal construction of Hanson, the courts have not been at all
reticent in providing their own interpretations of the "purposefully
avails" test.

In Rosenblatt v. American Cyanamid Co., plaintiff's employee stole
documents in New York, went to Italy, and conspired with the defendant
to sell them. The defendant went to New York, paid part of the purchase
price, and returned to Italy. In answering defendant's challenge to the
assertion of jurisdiction by New York, Justice Goldberg, realizing that
in a strict sense it was questionable whether or not the defendant had
"purposefully availed" himself of the benefits and privileges of the laws
in the forum state, stated that the Hanson language was equivalent to the
proposition that the defendant must have taken voluntary action calculated
to have an effect in the forum state. Some courts have used a reason-
able foreseeability standard to determine whether due process will allow
the assertion of jurisdiction over a nonresident who has caused injury
in-state as a result of his foreign activities. The Supreme Court of

N.E.2d 761 (1961). A case similar to Gray is Metal-Matic, Inc. v. District Court, 82
158. See p. 78 supra.
See p. 101 infra.
160. 16 N.Y.2d 706, 209 N.E.2d 554, 261 N.Y.S.2d 898, petition for stay denied
by Mr. Justice Goldberg, 86 S. Ct. 1, sustained by the full Court without opinion, 382
161. 86 S. Ct. at 4. See also Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 713 n.14
(4th Cir. 1966). But see Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251,
413 P.2d 732 (1966), where the court stated that "voluntary association" cannot be
taken literally because such an interpretation would revitalize the implied consent
theory which International Shoe destroyed.
162. See, e.g., Deveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963);
Ehlers v. United States Heating & Cooling Mfg. Corp., 267 Minn. 56, 124 N.W.2d
824 (1963); Ellis v. Newton Paper Co., 44 Misc. 2d 134, 135-36, 253 N.Y.S.2d 47, 49
(Sup. Ct. 1964).
California, in Buckeye Boiler Co. v. Superior Court,\textsuperscript{163} equated the engaging in economic activity within the state with the due process requirement of purposeful availment of the privilege of conducting activities within the state. The Court reasoned that if the manufacturer receives income from his activities, a rebuttable presumption arises that his intent was that his goods be sold or used where they were in fact so engaged, and that he had thus "purposefully availed" himself of the forum's protection. Similarly, it has been suggested that in the products liability context, the existence of the product in the forum state is a sufficient contact for the assertion of jurisdiction, since the manufacturer's economic objective is to sell his product regardless of the situs of its ultimate consumption.\textsuperscript{164}

A factual situation seemingly within the ambit of such a theory arose in Feathers v. McLucas.\textsuperscript{165} In Feathers, plaintiffs brought an action in New York to recover for injuries sustained from the explosion of a tank-truck near their home in the same state. The tank was manufactured by the defendant in Kansas under a contract with a Missouri corporation which subsequently mounted the tank on a wheelbase and sold it to a Pennsylvania corporation, an interstate carrier licensed to operate in several states including New York. Such a transaction is not unique, and presumably jurisdiction could be asserted by a court espousing any of the constructions of the "purposefully avails" formula mentioned above. Attempts to evade the limitation on the assertion of jurisdiction, when the act or omission occurs outside of the forum, are indicative of the current trend to avoid the restrictive Hanson approach to due process as promul-

\textsuperscript{163} 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1960). The court stated that the "purposefully availed" test was met whenever the purchase or use of [the manufacturer's] product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result. 71 Cal. 2d at 902, 458 P.2d at 64, 80 Cal. Rptr. at 120. The approach of the court in Buckeye has been criticized because it failed to solve the problem. The court merely substituted one step for another in a determinative process that is so complicated as to be nearly unintelligible. Comment, supra note 47, at 309.

\textsuperscript{164} Comment, supra note 75, at 1031. Considering the Supreme Court's guidelines in McGee and Hanson, the author accentuates the impracticability of expounding a general theory of what constitutes due process when faced with the practicalities of modern business. He states:

The language of McGee and Hanson, which speak of contacts emanating directly from the defendant, seems inapoposite where such intimacy is lacking. Therefore, fairness to the nonresident, within the, meaning of International Shoe, must be formulated with reference to broader considerations when the presence of the product stems from a more circuitous route than direct shipment.

It would seem consonant with fairness to subject the manufacturer to jurisdiction whenever his product gave rise to the cause of action within the forum state, even though the manufacturer has no other contact in the state.

\textit{Id.} At this point the caveat mentioned earlier should be reconsidered. See p. 98 supra. The existence of the product within the forum may be a sufficient contact for the assertion of jurisdiction, but it is doubtful in many cases that it will be a necessarily sufficient contact to satisfy the due process requirement of fundamental fairness.

\textsuperscript{165} 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), rev'd 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (1964) (on the grounds that the then existing "long-arm" statute covered only a tortious act committed in the state, making in-state injury alone insufficient).
One commentator has stated that due to the aforementioned cases, statutory restrictions should be construed liberally since there should not be serious concern as to possible due process objections. Furthermore, the draftsmen of the Uniform Act were really concerned with “some other reasonable connection between the state and the defendant” in addition to the in-state injury. Such an additional requirement would be met if the nonresident advertised, disseminated catalogues, or knowingly distributed goods in the state even though these “reasonable connections” neither reached the “doing business” level nor had a connection with the injury-producing activities. The writer apparently approves of the expansiveness of the Gray decision, and posits that the easiest provision of the statute to satisfy will be that the defendant has derived “substantial revenue from goods used or consumed or services rendered in this state.” In this respect, the author favorably mentioned a New York decision which stated that this requirement may be met by a single sale of goods from which a significant benefit is derived. Advocating this, he nonetheless concludes that such a rule is good provided that the “defendant has knowingly and deliberately made a sale of substantial economic significance into the state.” Clearly the author was, and the courts will be, inhibited from escaping the rationale of Hanson because of the restrictions of the Virginia statute and others like it.

Fortunately, the Pennsylvania courts will not be required to engage in constructive gymnastics in an interpretation of section 343. It only remains for them to determine what will constitute “substantial contacts” with the Commonwealth, a result which will depend upon the courts’ approach to the Hanson “purposefully avails” rationale. Hopefully, the courts will follow Phillips pragmatic consideration of Hanson. As noted previously, it has been asserted that the appearance of the product in the forum, without anything more, will constitute a sufficient contact. The same author suggests that Gray v. American Radiator and Standard Sanitary Corp. enlarges this proposition, contending that an inter-

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166. See text accompanying note 156 supra.
167. Note, supra note 6, at 749.
168. Id.
170. Note, supra note 6, at 744. In the single act situation, it is not necessary to take issue with the term “knowingly and deliberately” (which apparently closely approaches the “purposefully avails” formulation) since in a contract situation it would seem that it would be necessary that the nonresident know at least where the contract is to be performed, if not the actual residence of the other contracting party.
173. 357 U.S. at 252.
174. See p. 79 supra.
175. See Comment, supra note 75, at 1033 & n.20.
176. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The Illinois supreme court attempted to cover itself by asserting that “[t]he] defendant does not claim that the present use of its product in Illinois is an isolated instance. . . . [I]t is a reasonable inference
mediary’s role is unimportant since it only acts to further the manufacturer’s economic goal of having his product consumed. At the opposite end of the spectrum, the Supreme Court of Washington, interpreting a statute substantially identical to the Illinois statute, has held that when an out-of-state retailer consummates a sale in the regular course of his business and does nothing else, he has not submitted to the jurisdiction of the Washington courts. This is so even though the article sold may be instrumental in causing harm in Washington when brought there by the customer. Although the court acknowledged that a tortious consequence in Washington was tantamount to a tortious act in the state, it declared that this alone did not provide jurisdiction. Treating Hanson’s “purposefully avails” test as a threshold question, the court determined that the defendant automobile retailer had no reason to know that his sale of a car would have out-of-state consequences. “[T]he absence of a ‘purposeful act’ outweighs other factors which might warrant assumption of jurisdiction.”

The Pennsylvania courts must find a workable medium somewhere within these poles. Although it might offend “traditional notions of fair play and substantial justice” to assert jurisdiction over a localized California tire dealer who sells tires to a customer with Pennsylvania license plates on his car, the same may not be true if Macy’s Department store sold a product to a New Jersey resident and the product subsequently caused injury in New Jersey. No set formula could produce a satisfactory result in each case. There is little doubt, however, that when a state has a statute such as Pennsylvania’s, a single negligently made product which finds its way into the forum and causes injury could form the basis for a suit against the nonresident manufacturer or retailer without a violation of due process. Of course, whether this act will provide jurisdiction should only be determined after the court has examined the totality of the circumstances.

b. Out-of-State Contracts

Intimately connected with the question of whether an out-of-state act or omission that causes harm within the state can serve as a basis for

that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State.” Id. at 441–42, 176 N.E.2d at 766.

177. Comment, supra note 75, at 1033. It would appear that the very least that the Pennsylvania courts should extract from this position is the fact that the employment of an independent middleman will not defeat the assertion of jurisdiction. The holding in a Pennsylvania case that a nonresident was not “doing business” in this state if he employed an independent contractor to conduct solicitations here and had no control of his activities, must be bypassed. Miller v. Kiamesha-Concord, Inc., 420 Pa. 604, 218 A.2d 309 (1966).


jurisdiction, is the question whether an out-of-state business transaction that results in "harm" within the forum will serve as a sufficient contact for the assertion of jurisdiction by the forum state.

There are two basic instances where a contract executed out-of-state may subsequently cause harm in the state. The first would entail a situation where there is a contract to supply goods into the state and there are corollary activities of the nonresident associated with the contract. The second would depend solely on the existence of a contract, without any additional activities.

The first category seemingly overlaps the situation where the non-resident is "doing business" in the forum if he is "engaging in any business in the forum." If there is a distinction, it probably rests in the fact that in defining the phrase "transacting any business in the state," the courts have generally limited their application to situations where there has been some significant act, one approaching actual physical entry into the state by the defendant or his agent. In the out-of-state contract situation, which closely resembles the products liability actions encompassed by section 343, the courts must determine what will be a sufficient "substantial contact" upon which jurisdiction can be predicated.

One of the leading cases in this area is Grobark v. Addo Machine Co., where the court refused jurisdiction because of insufficient contacts. It would appear that the court's decision was unduly restrictive. In contrast, the court in McGee v. International Life Insurance Co. held it sufficient that the suit was based on a single life insurance contract that had substantial connection with the state. In Grobark, the New York corporation had sold $150,000 dollars worth of merchandise into Illinois over the course of three years. Surely, this is a "substantial contact" with Illinois, and even under a strict interpretation of Hanson the defendant had "purposefully availed" himself of the privileges of conducting business in the state. At the very least, jurisdiction should exist when there are transactions of such economic significance.

A more difficult problem is presented when the only contact that the nonresident has with the forum is the contract itself. Some far-reaching cases have been handed down in such a situation. In Zerbel v. H. L. Federman & Co., the Supreme Court of Wisconsin asserted jurisdiction

182. See p. 93 supra.
183. 16 Ill. 2d 426, 158 N.E.2d 73 (1959). This case was decided under a "transacting of business" statute. An Illinois distributor sued a New York manufacturer for breach of an exclusive distributing contract where allegedly the defendant gave plaintiff's customer lists to competing distributors. To support jurisdiction, the plaintiff alleged that the president of the defendant company had negotiated terms of the contract in Illinois, the contract had been completed by correspondence between New York and Illinois, and the defendant had sales in excess of $150,000 over a three-year period. Nevertheless, the Illinois supreme court refused to exercise jurisdiction over the defendant.
186. 48 Wis. 2d 54, 179 N.W.2d 872 (1970). See also Flambeau Plastics Corp. v. King Bee Mfg. Co., 24 Wis. 2d 459, 129 N.W.2d 237 (1964), where the court asserted
over a Delaware corporation, whose principal place of business was in New York, for breach of contract under which the plaintiff was to prepare a financial report of a New York company for the defendant. Here, the defendant never entered the forum, but did, in the course of his dealings with the plaintiff, have knowledge that the plaintiff's office was in Milwaukeе.\textsuperscript{187} In another case, \textit{Haldeman-Homme Manufacturing Co. v. Texacon Industries, Inc.}\textsuperscript{188} the district court exercised jurisdiction over a Texas defendant who had sold its corporate assets to a Minnesota corporation. The Minnesota buyer transported the assets to Minnesota. Although the defendant had no other connection with Minnesota, jurisdiction was maintained on the basis that the defendant knew that the assets were to be shipped to Minnesota and that payment was dependent upon the plaintiff's earnings from the operation of the business in Minnesota. Similarly, the Minnesota district court sustained jurisdiction in a case where a resident plaintiff had contracted by telephone to purchase stock from a New York securities dealer, and had mailed his check to New York as payment.\textsuperscript{189} Although there are many cases holding that jurisdiction cannot be constitutionally based upon an out-of-state contract when the defendant has performed no activities within the state,\textsuperscript{190} "it must be remembered that the proper standard to be applied under \textit{International Shoe} is fairness to the defendant, not an arbitrary requirement of physical acts within the confines of the state, and situations will frequently arise involving contracts of such economic magnitude that it would be fair to assert jurisdiction over the nonresident contracting party."\textsuperscript{191}

Again, what the Pennsylvania courts determine is necessary to satisfy the due process requirements will be decisive. In appraising the problem, the court will face the same difficulties presented in the determination of what contacts will suffice in a products liability case. Curiously, while courts have normally taken the position that fewer contacts are necessary in personal injury actions than in a commercial transaction, the Uniform

\textsuperscript{187} Defendant was not licensed to do business in Wisconsin, had never maintained any office or place of business in Wisconsin, nor held bank accounts, sold stock, owned property or merchandise in Wisconsin. It never rented or occupied any space in Wisconsin, or even listed telephone numbers or solicited sales in this state in any manner whatsoever. 48 Wis. 2d at 54, 179 N.W.2d at 874 (1970).

\textsuperscript{188} 236 F. Supp. 99 (D. Minn. 1964).

\textsuperscript{189} Paulos v. Best Sec., Inc., 260 Minn. 283, 109 N.W.2d 576 (1961). Note, however, that this is probably a special interest exception.


\textsuperscript{191} Note, \textit{supra} note 6, at 741.
Act and similar state statutes, in their respective “tortious injury” sections, provide restrictions as to what activities the nonresident must have engaged in. In contrast, such restrictions are notably absent in the “contracting to supply” provisions. Perhaps this is indicative of the proposition that in a contract, the parties know with whom they are dealing and can thus foresee where the harm will occur if the contract is breached. If foreseeability can be equated with “purposefully avails,” as has been suggested, then the problems associated with due process are minimized and the courts should more easily be able to focus on the question whether it would be unfair to require the defendant to appear in the forum. In a contract, the parties most often can foresee the harm, thus leaving little danger of the surprise that might ensue in a products liability case where a small manufacturer or retailer, with limited multi-state distribution, suddenly discovers that his product has caused an injury 3,000 miles from his place of business. If a nonresident does not want to subject himself to a suit in Pennsylvania, he need not enter into a contract to supply goods or services to Pennsylvania, or even enter into a contract with a Pennsylvania resident.

As previously mentioned, section 343 requires that for a nonresident to be subject to the jurisdiction of the Pennsylvania courts, the action must arise “out of or by reason of any such [out-of-state] conduct.” A suit cannot be brought upon an unrelated cause of action under section 343.

4. Service of Process — “When the nonresident dies prior to service of process or after commencement of the action, service shall be made on the personal representative, executor or administrator of the nonresident.”

There seems to be little doubt that if the nonresident who has caused injury in Pennsylvania in any form enumerated above should die prior to or during the course of the action brought by the injured plaintiff, the plaintiff may continue to adjudicate his claim against the nonresident’s personal representative, executor or administrator under section 345 of the statute. The Uniform Act defines the word person, for juris-

192. See note 4 supra.
193. See note 162 supra.
194. See pp. 88–89 supra.
195. PA. STAT. tit. 12, § 345 (Supp. 1971), provides:
Where, prior to the commencement of an action pursuant to any of the aforementioned provisions of this act, or subsequent to the commencement of an action but prior to service, the nonresident of this Commonwealth or the resident who shall thereafter have become nonresident of this Commonwealth, had died, service of process shall be made on the personal representative, executor or administrator of such nonresident in the same manner as is provided in the case of a nonresident. Where an action has been duly commenced, under the provisions of this section, by service upon a defendant who dies thereafter, if the personal representative, executor or administrator of such defendant does not voluntarily become a party, he may be constituted as a party under the applicable Rules of
dictional purposes, as including an individual, "his administrator, executor, or other personal representative." Courts in Illinois, New York, Tennessee, and North Carolina have determined that under the state's respective "long-arm" statutes, the personal representative of the deceased nonresident defendant may be considered a party to the action. The constitutionality of this section does not seem to be in doubt.

5. Notice

It has been said that since failure to provide proper notice will subject a judgment to collateral attack, notice is a prerequisite to jurisdiction. Although in a figurative sense this may be true, it is actually an overstatement since it has been held that due process requires that notice be reasonably calculated to afford parties interested in a judicial proceeding the opportunity to appear and be heard. Notice may be afforded a defendant in an action in personam by registered mail after service has been made upon a statutory agent. Such a method of notice, as enunciated in section 346 of the "long-arm" statute, is authorized by the Pennsylvania Rules of Civil Procedure, and has been employed in other nonresident jurisdiction statutes. The only segment of the

Civil Procedure, and service of process shall be made in the same manner as provided hereunder upon the Secretary of the Commonwealth of Pennsylvania.

196. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.01.
201. Pennsylvania has other statutory provisions, similar in form, upholding in personam jurisdiction over the representatives of a deceased, nonresident defendant. See, e.g., Pa. Stat. tit. 2, § 1410(b) (1963). For a competent analysis of the difficulties that might arise in relation to an assertion of jurisdiction over the executor or administrator of decedent's estate, see Hayden v. Wheeler, 33 Ill. 2d 110, 210 N.E.2d 495 (1965) and citations therein.
204. Pa. Stat. tit. 12, § 346 (Supp. 1971), provides:

Such process shall be served, by the officer to whom the same shall be directed, upon the Secretary of the Commonwealth of the Commonwealth of Pennsylvania, by sending by registered mail, postage prepaid, at least fifteen days before the return day of such process, a true and attested copy thereof, and by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy, with an endorsement thereon of the service upon said Secretary of the Commonwealth, addressed to such defendant at his last known address. The registered mail return receipts of the Secretary of the Commonwealth and of such defendant shall be attached to and made a part of the return of service of such process: Provided, That if the defendant refuses to accept the notice mailed, or cannot be found at his last known address, the registered mail return receipt or other evidence of such facts shall be attached to and made a part of the return, and shall constitute sufficient service under the provisions of this section.
notice provision which might produce a constitutional question with respect to the adequacy of service of process reads:

[I]f the defendant refuses to accept the notice mailed or cannot be found at his last known address, the registered mail return receipt or other evidence of such facts shall be attached to and made a part of the return and shall constitute sufficient service under the provisions of this section.208

The crucial inquiry related to the validity of section 346 is not the constitutionality of the method of service of process, but rather, whether the approved method actually does give adequate notice so that due process requirements are met. If the nonresident defendant refuses to accept notice, there is no doubt that the service, as described, will be sufficient. No matter how "reasonably calculated" efforts are to provide the defendant with the opportunity to be heard, they will fail if the defendant refuses to accept service. It would seem, however, that the fact that the defendant is deemed to have received notice, even if he cannot be found at his last known address, will present difficulties. Presumably, the legislature enacted this provision in order to prevent a nonresident from avoiding service of process by changing his residence without leaving a forwarding address. In such a situation, service should be sustained just as if he had refused to accept service. Yet situations may arise where a defendant, who is not attempting to conceal himself, cannot be found. It is questionable whether a defendant who has not attempted to conceal his whereabouts should be deemed to have received notice under this statutory scheme. Although instances may occur where this system would seem unfair, it must be remembered that Mullane v. Central Hanover Bank & Trust Co.209 only dictates that the method of service must be reasonably calculated to give notice, not that each and every defendant actually be notified. Whether the defendant is to be held to have been adequately notified is a determination only the courts can make.

D. RETROACTIVITY OF APPLICATION

Problems have arisen as to whether the provisions of "long-arm" statutes are to be applied retroactively,210 and many jurisdictions that have considered the retroactivity of jurisdictional statutes, have opposed it on the basis that the defendant could not have "consented" to be subject to the state's jurisdiction before the statute requiring such "consent" had been enacted.211 With the gradual demise of the "consent" theory of state jurisdiction,

211. See, e.g., Sanders v. Paddock, 342 Ill. App. 701, 97 N.E.2d 600 (1951).
court jurisdiction, \textsuperscript{212} the courts in recent years have been applying "long-arm" statutes retroactively. \textsuperscript{213} The Supreme Court of Pennsylvania has held that both the Business Corporation Law \textsuperscript{214} and the new "long-arm" pertaining to individuals \textsuperscript{215} are retroactive. In reaching the conclusion that the corporate "long-arm" statute of 1959 \textsuperscript{216} was procedural, the court stated that "[w]hile substantive rights are settled as of the time the cause arises, rights in procedural matters such as jurisdiction and service of process, are determined by the law in force at the time of the institution of the action." \textsuperscript{217}

The initiator of this trend was undoubtedly the Supreme Court's determination in \textit{McGee} that the California statute could be applied retroactively because it was "remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights . . . It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent." \textsuperscript{218} Following the United States Supreme Court's lead, the Supreme Court of Arkansas, in the first case decided under the Uniform Act, \textsuperscript{219} gave the statute retroactive application by viewing it as procedural rather than substantive.

\textbf{V. Conclusion}

In addition to the possible due process difficulties (which are foreseeable if the courts of the Commonwealth do in fact construe the new "long-arm" as liberally as the legislature apparently intended), a rather anomalous situation still remains with respect to the overall extent of "long-arm" jurisdiction in Pennsylvania. On its face, the "long-arm" statute pertaining to jurisdiction over individuals appears to be quite extensive, and it has been argued that it should be so interpreted. Yet, the Pennsylvania corporate "long-arm" statute, \textsuperscript{220} which has not been repealed by this enactment, has been consistently interpreted in a manner far less extensive than it is hoped the instant statute will be. The question will necessarily arise as to how the courts of the Commonwealth can assert jurisdiction over a nonresident individual when they cannot assert it over a foreign corporation. Again, the facts of the particular case in the interpretation of the statute as it pertains to individuals,

\textsuperscript{212} See p. 76 supra.
\textsuperscript{217} 409 Pa. at 350-51, 185 A.2d at 520.
\textsuperscript{218} 355 U.S. at 224.
\textsuperscript{221} Comment, \textit{supra} note 63; Comment, \textit{supra} note 98.
partnerships, and other unincorporated entities will be decisive. It would appear that a new corporate “long-arm” statute is in order. The difficulty of drafting such a new statute can be avoided, however, by the inclusion of corporations within the present statute which apparently applies only to non-corporate entities.\footnote{There appears to be no logical reason why this could not be done. The Pennsylvania statute discussed above is very similar to other state “long-arm” statutes, and these other statutes are applicable to individuals and corporations alike. See note 53 supra.}

It would appear that the mandate of the new “long-arm” statute is coextensive with that of constitutional due process. The legislature has enacted a statute which clearly is intended to extend jurisdiction to its constitutional limitations, and the courts should interpret it as expansively as the Constitution will permit. Any belief that the courts of the Commonwealth should check themselves in the exercise of jurisdiction in hope that other state courts will reciprocate toward Pennsylvania residents is unfounded; the decisions of these courts to liberally apply already expansive provisions belie such an occurrence.

Although the intention of the legislature is clear, problems will necessarily arise pertaining to the due process issue. Due process issues are not susceptible to any precise and definitive resolutions. Attempts to apply a rigid formula to determine whether a defendant is amenable to service within the limits of due process will not result in substantial justice for anyone. Justice will best be served by the Pennsylvania courts if they avoid mechanical tests and apply realistic ones, determining whether it would be unfair to assert jurisdiction over the defendant after having considered all the facts of a particular case.

\textit{Thomas B. Erekson}