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## Expanded Bases of Jurisdiction – An Examination of Tennessee's New "Long-Arm" Statute

Harry G. Nichol, Jr.

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entail proving that the donee would be granted an exempt ruling under section 501 were it to make application, then distributions more than likely can be made to such a non-exempt organization without loss of exempt status.

The practical approach, on the other hand, is to comply with the requirement and eliminate the doubts and expense inherent in attempting to outwit the system. Further, waiting and hoping that the state of the law becomes such that donors to non-exempt organizations are given affirmative favorable treatment might prove dangerous, as the Treasury has been threatening to issue an official ruling for quite some time. Such a ruling more than likely would be adverse, rather than favorable, to the interests of potential donor-organizations.

THOMAS H. BELKNAP

## Expanded Bases of Jurisdiction—An Examination of Tennessee's New "Long-Arm" Statute

### I. INTRODUCTION

A foreign corporation considering the consequences of its activity in relation to forums outside the state of its incorporation is faced with three basic legal problems. They are generally regarded as the different degrees of "doing business" for purposes of (1) qualification, (2) taxation, and (3) judicial jurisdiction. The purpose of this paper is to discuss a major recent development concerning the jurisdiction of Tennessee courts, in light of similar developments throughout the country.

Prior to the 1965 session of the Tennessee Legislature there were two statutory methods for acquiring judicial jurisdiction over foreign corporations. A foreign corporation which has registered with the Secretary of State may be served with process through its appointed agent or the Secretary of State.<sup>1</sup> A foreign corporation which has not qualified, but which is doing business in the state, can be subject to in personam jurisdiction by service of process upon an agent and notification to its home office by registered mail.<sup>2</sup> In this case a judicial consideration of the degree of intrastate activity of the

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1. TENN. CODE ANN. §§ 48-901 to -931 (1956).

2. TENN. CODE ANN. § 20-221 (1956).

defendant corporation must lead to the conclusion that it has been "doing business" within Tennessee.<sup>3</sup>

On February 23, 1965, the Tennessee Legislature enacted a "long-arm" statute<sup>4</sup> which expands the bases of judicial jurisdiction over both nonresidents and foreign corporations, and which provides additional methods for service of process on such defendants. The most important provisions of the new law are contained in the first section:

Section 1. Be it enacted . . . that persons who are non-residents of Tennessee and residents of Tennessee who are outside the State and cannot be personally served with process within the State are subject to the jurisdiction of the Courts of this State as to any action or claim for relief arising from:

- (a) The transaction of any business within the State;
- (b) Any tortious act or omission within this State;
- (c) The ownership or possession of any interest in property located within this State;
- (d) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this State at the time of contracting;
- (e) Entering into a contract for service to be rendered or for materials to be finished in this state.

"Person" as used herein shall include corporations and all other entities which would be subject to service of process if present in this State. Any such person shall be deemed to have submitted to the jurisdiction of this State who acts in the manner above described through an agent or personal representative.

## II. HISTORICAL DEVELOPMENT

It was stated at an early date in this country that a foreign corporation, being of legal creation, could not exist beyond the boundaries of the state of its incorporation.<sup>5</sup> This concept of the absence of extra-territorial existence of foreign corporations accorded with the theory that a state's in personam jurisdiction was equivalent to its physical power over the defendant. As the United States Supreme Court stated in the influential case of *Pennoyer v. Neff*: "[T]he tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligation to its citizens when exercising its conceded jurisdiction over their property within its limits."<sup>6</sup> Since a foreign corporation had no legal existence except in the state of incorporation, the courts reasoned that it could not be sued elsewhere.<sup>7</sup>

Because foreign corporations did transact business outside the

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3. TENN. CODE ANN. § 20-220 (1956).

4. Tenn. Pub. Acts 1965, ch. 67.

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

6. 95 U.S. 714, 731 (1886).

7. *St. Clair v. Cox*, 106 U.S. 350 (1882).

state of incorporation, however, the doctrine of "implied consent" to service of process was formulated as a basis for subjecting foreign corporations to suit in other states under the theory that a foreign corporation, by its activities in states which had the power to exclude it, impliedly consented to the conditions which they required as a prerequisite to doing business therein.<sup>8</sup> Another judicially evolved doctrine grounded judicial jurisdiction on a finding of sufficient activity in the forum state to justify the conclusion that the foreign corporation was "doing business" there, and, therefore, was actually "present" within that state.<sup>9</sup> The determination of the degree of business activity which would establish judicial jurisdiction on the fictional basis of corporate "consent" or "presence" has been a difficult matter for the courts,<sup>10</sup> although due process of law required more than single or isolated acts within the forum state, such as mere solicitation of business.<sup>11</sup> However, Tennessee and a number of other states have apparently considered "solicitation plus" and other rather indefinite intrastate activity sufficient for jurisdictional purposes under the statutory "doing business" standard typical of many state statutes.<sup>12</sup>

In *International Shoe Co. v. State of Washington*,<sup>13</sup> the Supreme Court devised an extended and more flexible test of "minimum contacts" as a standard for the determination of in personam jurisdiction in lieu of the sometimes perfunctory decisions that have become associated with the "implied consent" and "presence" concepts. The essence of the *International Shoe* approach is 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.<sup>14</sup>

The Court pointed out that the quality and nature of the corporation's activity in the foreign state, as well as the quantity of its acts, should be analyzed in conjunction with a weighing of the relative incon-

8. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856). However, the states had no power to exclude corporations engaged in interstate commerce. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914).

9. *Philadelphia & Reading R.R. v. McKibbin*, 243 U.S. 264 (1917); *Barrow S. S. Co. v. Kane*, 170 U.S. 100 (1897). For an analysis of the theories on which jurisdiction over foreign corporations has been based, see Fead, *Jurisdiction Over Foreign Corporations*, 24 MICH. L. REV. 633 (1926).

10. See generally 18 FLETCHER, PRIVATE CORPORATIONS § 8713 (perm. ed. rev. repl. 1955).

11. *Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907).

12. For a discussion of the "solicitation plus" rule and its application by Tennessee courts, see Gifford, *Corporations—1962 Tennessee Survey*, 16 VAND. L. REV. 685-95 (1963).

13. 326 U.S. 310 (1945).

14. *Id.* at 316.

veniences of each party to determine the fairness of defending a suit there. The "minimum contacts" principle has since been employed in other Supreme Court opinions which have reaffirmed its validity.<sup>15</sup>

Although the due process limitations imposed by the fourteenth amendment have been lessened by *International Shoe*, that opinion made it clear that state legislatures are by no means free to rewrite their own jurisdictional standards to permit an unlimited exercise of judicial jurisdiction over all forms of activity engaged in by foreign corporations.<sup>16</sup> There still exists a "grey area" of activity which must be decided on a case by case basis to determine the outer constitutional limits of the "traditional notions of fair play and substantial justice" permitted by the due process clause.

Thus, presented with an opportunity to expand their statutory standards for jurisdiction over foreign corporations, a number of states have enacted long arm statutes to replace or supplement the "doing business" terminology that had become typical of much state legislation in the field of regulation of foreign corporations. Illinois enacted the first long arm statute in 1956.<sup>17</sup> Various forms of long arm legislation have since been adopted in other states,<sup>18</sup> and in 1962, the National Conference of Commissioners on Uniform State Laws approved the Uniform Interstate and International Procedure Act,<sup>19</sup> which was recently enacted almost in its entirety by Arkansas.<sup>20</sup>

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15. In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the Supreme Court held that the issuance of a single insurance contract within California by a Texas corporation which had no offices or agents in California was a sufficient contact with that state to justify enforcement of a California *in personam* judgment against the insurer. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), permitted Ohio to exercise state jurisdiction in the presence of other minimal contacts, although the cause of action asserted against the defendant foreign corporation was unrelated to its activities within the state. However, the unlicensed foreign corporation was otherwise engaged in "continuous and systematic" activities within Ohio.

16. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That 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." 326 U.S. at 319. In *Hanson v. Denckla*, 357 U.S. 237 (1958), the Court found insufficient contacts to warrant *in personam* jurisdiction, and stated in regard to the flexible standards of the "minimum contacts" doctrine that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of the state courts." *Id.* at 251.

17. ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

18. *E.g.*, ALA. CODE ANN. tit. 7, § 199(1) (Supp. 1963); IOWA CODE ANN. § 617.3 (Supp. 1964); ME. REV. STAT. ANN. ch. 112, § 21 (Supp. 1963); MD. ANN. CODE art. 23, § 92 (1957); MINN. STAT. ANN. § 303.13(1) (Supp. 1964); OKLA. STAT. ANN. tit. 12, § 187 (Supp. 1964); VT. STAT. ANN. tit. 12, § 855 (1958); WASH. REV. CODE ANN. § 4.28.185 (1962); WIS. STAT. ANN. § 262.05 (Supp. 1965).

19. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, 9B U.L.A. (Supp. 1964).

20. ARK. STAT. ANN. §§ 27-2501 to -2507 (Supp. 1963).

Although the Tennessee long arm statute was patterned after the legislation of Illinois and other states that have adopted such laws in recent years,<sup>21</sup> its enumerated bases of jurisdiction are practically identical to five of the six subsections of the corresponding portion of the Uniform Act.<sup>22</sup>

### III. JUDICIAL JURISDICTION UNDER THE NEW LAW

All long-arm statutes are intended to expand state judicial jurisdiction over foreign corporations, but there is a decided conflict as to the extent they were designed to expand state power. In the interest of fairness to defendants, and to insure constitutional acceptability of their long arm legislation, some states have declined to assert their power to include every possible opportunity for acquiring jurisdiction.<sup>23</sup> The Tennessee statute apparently was designed to expand the jurisdiction of its courts in some areas to the limits permitted by due process, but there are other areas of activity which will be discussed that may be indicative of an exercise of legislative restraint.

It should be noted that the new act does not repeal or supersede existing legislation pertaining to the bases for subjection of nonresidents or foreign corporations to Tennessee's judicial jurisdiction. Tennessee Code Annotated section 20-220, which subjects foreign corporations to suit in Tennessee if found to be "doing business in this state,"<sup>24</sup> is therefore still valid, and the new act should be regarded as an extension of its provisions.

Further, section 5 of the new statute provides that only causes of action arising from transactions set forth in section 1 may be asserted against a defendant in an action in which jurisdiction is based upon the provisions of this law. This should foreclose the possibility of a defendant corporation being forced to defend independent causes of action that are unrelated to the activities enumerated in the five subsections of section 1. Each of these five subsections will inde-

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21. See especially ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); MICH. STAT. ANN. § 27A.711 (1962).

22. Omitted from the Tennessee Act is a provision which authorizes the exercise of jurisdiction when the tortious act or omission occurs outside the state, but the injury manifests itself within the state, provided the defendant has some other reasonable connection with the state such that minimum contacts with the forum state are assured. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(4) 9B U.L.A. (Supp. 1964). See text accompanying note 63 *infra*.

23. Compare ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956), with Wis. STAT. ANN. § 262.05 (Supp. 1965).

24. TENN. CODE ANN. § 20-220 (1956). Foreign corporations which have registered with the Secretary of State may be subjected to suit in Tennessee in accordance with TENN. CODE ANN. §§ 48-901 to -931 (1956).

pendently support jurisdiction, but, of course, this will not preclude a cause of action based on more than one subsection.

Because Tennessee courts have not yet interpreted these provisions, an analysis of the decisions of other states with similar legislation must be made in an attempt to surmise how they will be construed in this state. It should be noted, however, that there is predictable confusion in the case law as to what constitutes the outer limits of due process for purposes of the "minimum contacts" test for various types of intrastate and extrastate activity. This federal standard must first be satisfied before approaching the separate problem of whether the activity in question is encompassed by the language of the state law.

The United States Court of Appeals for the Sixth Circuit recently considered the "minimum contacts" that will subject a foreign corporation to the jurisdiction of the state of Michigan in *Velandra v. Regie Nationale Des Usines Renault*.<sup>25</sup> Defendant corporation manufactured automobiles in France and exported them to this country through its wholly owned New York subsidiary, which in turn distributed the automobiles to dealers throughout the United States through regional distributors, one of which was an Illinois corporation wholly owned by the New York subsidiary. This distributor had carried on "substantial economic activities" in Michigan, such as granting franchises to three dealers in Detroit and delivering to them the warranted automobiles it had purchased.<sup>26</sup> The plaintiffs were Michigan residents who sustained personal injuries as the result of an accident in Michigan caused by defective brakes in a car sold to them in Ohio. Products liability lawsuits were brought in a federal district court in Michigan on the basis of diversity of citizenship, and were dismissed for lack of personal jurisdiction. Employing the principle of *Erie R.R. v. Tompkins*,<sup>27</sup> the Sixth Circuit applied the law of Michigan to determine whether the district court had jurisdiction over the defendant foreign corporation, and observed that the Michigan Supreme Court had equated that state's jurisdictional standard to the "minimum contacts" limitation of *International Shoe*. After analyzing the nature of defendant's contacts with Michigan, the court concluded that even though a subsidiary corporation of the defendant had been doing business in Michigan and had distributed the French defendant's warranties with automobiles sold there, this and the evidence of the nature and volume of sales

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25. 336 F.2d 292 (6th Cir. 1964). See also *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965).

26. There was evidence that one of the three Detroit dealers had gross sales "upward" of \$100,000. *Id.* at 296.

27. 304 U.S. 64 (1938).

through the three Detroit dealers did not

establish a sufficient showing of contacts between the defendants and the State of Michigan so as to constitute the minimum contacts essential to permit the exercise of personal jurisdiction in that State over these foreign corporations under the International Shoe Company case.<sup>28</sup>

Judicial disagreement as to the limits of the Supreme Court's "minimum contacts" test is perhaps best illustrated by comparing this conclusion with that reached in the almost identical case of *Regie Nationale des Usines Renault v. Superior Court of the State of California*,<sup>29</sup> wherein the California court, which also recognized the "minimum contacts" test as that state's jurisdictional standard,<sup>30</sup> held that the defendants were amenable to substituted service of process. This result was alluded to in the Sixth Circuit decision, which even acknowledged the "somewhat analogous circumstances" of the two cases. However, the federal court relied chiefly on a "careful and discriminating analysis of the nature and quality of the defendant's contacts"<sup>31</sup> to determine "whether minimum contacts exist on the basis of the presence or sale of a product within a state,"<sup>32</sup> whereas the state court apparently placed greater emphasis on insuring that maintenance of the suit did not cause undue injury or inconvenience to California citizens such that notions of fair play and substantial justice would be offended. The California court enumerated its criteria of fair play,<sup>33</sup> and stressed the possible injustice that could have resulted from the rejection of California jurisdiction, such as the possibility that plaintiffs could conceivably have been barred from access to all American courts, thus forcing them to sue the defendant in France. The California court's reasoning is best expressed by its statement that "fairness to Regie does not entail this

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28. *Supra* note 25, at 298.

29. 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (Dist. Ct. App. 1962). See also *Rietsch v. Societe Anonyme des Automobiles Peugeot*, 45 Misc. 2d 274, 256 N.Y.S.2d 772 (Sup. Ct. 1965).

30. The California judiciary had stretched the California "doing business" statute to the point of equating state judicial jurisdictional standards under that statute to the federal constitutional limits of due process as represented by the "minimum contacts" test. *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

31. 336 F.2d at 298.

32. *Id.* at 297-98.

33. The court pointed out that in addition to such factors as the place where the tort occurs and sales and promotional contacts with the state, there were additional circumstances which, in composite, impelled subjection to jurisdiction. These were: "(a) the interest of this State in providing a forum for its residents; (b) the relative availability of evidence; (c) the relative burden of defense and prosecution in California rather than at some alternative forum; (d) the extent to which the cause of action arises out of Regie's local activities." *Regie Nationale des Usines Renault v. Superior Court*, *supra* note 29, at 704, 25 Cal. Rptr. at 531.

disadvantage to the claimants."<sup>34</sup>

Notwithstanding the more limited scope of the federal court's analysis, it is possible that Tennessee's courts will see fit to examine the ambiguous concept of "fair play and substantial justice" in relation to a judicial evaluation of the relative burdens of defense and prosecution in Tennessee and Tennessee's interest in affording the protection of its laws to those within its jurisdiction, as well as the nature and extent of the defendant foreign corporation's contacts with this state.

#### A. "The Transaction of Any Business Within the State"

Section 20-220 of the Tennessee Code permits a foreign corporation to be sued in Tennessee "so far as relates to any transaction had, in whole or in part, within this state, or any cause of action arising here," but as discussed above, this statute also requires a judicial finding that the corporation be "doing business in this state."<sup>35</sup> The Tennessee Court of Appeals recently summarized its view of this phraseology thusly:

A foreign corporation is "doing business within the state" when it transacts therein some substantial part of its ordinary business, and its operation within the state is continuous in character as distinguished from merely casual or occasional transactions.<sup>36</sup>

The new long arm statute requires only a determination that there was a business transaction in Tennessee in order that a suit may be maintained in the state; consequently, this subsection should not necessitate a "doing business" standard of activity in the traditional sense.<sup>37</sup>

Accordingly, a number of courts in other states with similar statutes have held that a single business transaction within the forum state is sufficient to satisfy both the federal requirement of due process and the state's statutory language. This view was taken in a recent interpretation of the similarly worded subsection of the New York statute,<sup>38</sup> which involved a single contract made in New York. Although the

34. *Ibid.*

35. TENN. CODE ANN. § 20-220 (1956).

36. *Fisher v. Trion, Inc.*, 49 Tenn. App. 182, 353 S.W.2d 406 (E.S. 1961), *cert. denied*, Dec. 8, 1961.

37. With regard to the identically worded subsection of the Illinois act, it was stated in *Haas v. Fancher Furniture Co.*, 156 F. Supp. 564 (N.D. Ill. 1957): "The words of subsection *a* of section 17 cannot be given a restrictive interpretation based upon the old Illinois 'doing business' cases." *Id.* at 567. It could therefore be inferred that "transaction of any business" is a broader term than "doing business," and that section 1(a) of the Tennessee statute will be more liberally interpreted than has been TENN. CODE ANN. § 20-220 (1956), notwithstanding their similarity.

38. N.Y. CIV. PRAC. LAW § 302(a)(1).

contract was breached outside that state the court found that the making of the contract, of itself, was a sufficient transaction to bring the defendant within the scope of the New York statute because "the Court considers the making of the contract in New York and the arising of a cause of action out of such contract as sufficient to validate the service of process effected herein."<sup>39</sup>

By the traditional view, which is in accord with the Tennessee cases, mere solicitation within the forum is not sufficient activity on which to ground a finding of in personam jurisdiction.<sup>40</sup> Statutes with portions similar to section 1(a), however, have been construed as permitting service of process on the basis of solicitation activities, but there are virtually identical cases which have adopted a contrary view. *Wisconsin Metal & Chemical Corp. v. DeZurik Corp.*,<sup>41</sup> involved a Minnesota corporation whose only contact with the state of Wisconsin was through an independent manufacturer's representative who solicited orders for the defendant corporation's products and forwarded them to Minnesota where they were either accepted or rejected. Application of the Wisconsin long-arm statute<sup>42</sup> to subject the defendant to Wisconsin's jurisdiction was held not to be a denial of due process of law. Conversely, the court in *Grobark v. Addo Machine Co.*,<sup>43</sup> held that a New York manufacturer did not have the minimum contacts with Illinois required for acquisition of jurisdiction in personam under the "transaction of any business" portion of the Illinois long arm statute,<sup>44</sup> even though, as in the *DeZurik* case, sales were consummated by the defendant's acceptance of orders outside the forum, and products were delivered to independent carriers for shipment to Illinois.

A possible ground for distinguishing these two cases may be the relative familiarity of the long arm concept at the time each decision was handed down; the Wisconsin case was decided in 1963, but the Illinois opinion was handed down in 1959, shortly after the passage of the first long arm statute. Justice Davis alluded to a possible reluctance to discard the restrictions of the "doing business" concept in his dissent in the *Grobark* decision:

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39. *Patrick Ellam, Inc. v. Nieves*, 41 Misc. 2d 186, 187-88, 245 N.Y.S.2d 545, 547 (Sup. Ct. 1963). The report does not indicate that any portion of the contract was to be performed within the state, as is required in an action based on section (1)(a) of the Tennessee statute.

40. *Green v. Chicago, B. & Q. Ry.*, *supra* note 11; *Banks Groc. Co. v. Kelley-Clarke Co.*, 146 Tenn. 579, 243 S.W. 879 (1922). *Cf. Trussell v. Bear Mfg. Co.*, 215 F. Supp. 802 (E.D. Tenn. 1963). See also Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925).

41. 222 F. Supp. 119 (E.D. Wis. 1963).

42. WIS. STAT. ANN. § 262.05(5) (Supp. 1965).

43. 16 Ill. 2d 426, 158 N.E.2d 73 (1959).

44. ILL. ANN. STAT. ch. 110, § 17(1)(a) (Smith-Hurd 1956).

[A]s I read the opinion in the case at bar, I cannot but believe that this court is again dealing with the early historic legalistic definition of "doing business" rather than with the concept of "minimal contacts" established in *International Shoe and McGee*.<sup>45</sup>

If the Tennessee statute is interpreted as permitting a jurisdictional finding on the basis of something less than the activity required by pre-existing legislation, the further problem is presented as to whether *every* element of the particular transaction on which the cause of action is based must have taken place in Tennessee, or whether "any transaction, in whole or in part"<sup>46</sup> will confer judicial jurisdiction. Section 5 of the statute declares the legislative intention that it "should be given a liberal construction." In giving effect to this direction, the courts may choose to emulate the observation of the Illinois Supreme Court that the similar Illinois act was intended "to assert jurisdiction over non-resident defendants to the extent permitted by the due process clause."<sup>47</sup> Even assuming that this construction is applied to section 1(a) of the Tennessee law, it could be argued that the legislators would have incorporated into that subsection the "any transaction, in whole or in part" wording of section 20-220 of the Tennessee Code, had it been intended that only a portion of the business transaction upon which jurisdiction is predicated need occur within Tennessee.<sup>48</sup> This, of course, is an exercise in construing the new law to determine its competence to encompass the defendant's intrastate activity. Assuming that only a portion of the business transaction in question is regarded as within the scope of section 1(a), and that Tennessee's jurisdictional standard is no less than that permitted by due process, the court's task will then become one of determining whether the outer bounds of due process have been exceeded under the facts of each case, contrary to "traditional notions of fair play and substantial Justice."<sup>49</sup>

#### B. "Any Tortious Act or Omission Within this State"

Even under more conservative legislation, jurisdiction has been upheld when both the tortious activity and resultant injury occurred

45. *Supra* note 43, at 441, 158 N.E.2d at 81.

46. This phrase appears in TENN. CODE ANN. § 20-220 (1956), the "doing business" statute.

47. *Nelson v. Miller*, 11 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957). See *Roy v. North Am. Newspaper Alliance, Inc.*, 205 A.2d 844 (N.H. 1964), for a similar conclusion regarding the virtually identical provision of the New Hampshire long arm statute.

48. Dean Leflar has indicated that, generally, the similar Arkansas long arm statute does not go as far as the new statutes of some other states authorize their courts to go. Leflar, *Conflict of Laws—Arkansas 1959-64*, 18 ARK. L. REV. 135, 136 (1964).

49. *International Shoe Co. v. Washington*, *supra* note 13, at 316.

within the forum state.<sup>50</sup> However, a more complex problem is presented when an act committed by the defendant outside the forum results in an injury to persons or property within the forum, or only a single isolated or incidental act takes place within the state. Under such circumstances, the court may be faced with the considerations of the limiting factor of due process as well as the task of interpreting the statute to determine whether the defendant's activity was intended by the legislature to be encompassed within the framework of the statute's language.

Because of the similar wording of the Illinois act<sup>51</sup> it might be instructive to consider the often cited case of *Gray v. American Radiator & Standard Sanitary Corp.*<sup>52</sup> An Ohio-domiciled manufacturer of safety valves sold them to another foreign corporation which installed the valves on hot water heaters that were shipped into Illinois. A heater purchased in Illinois exploded there, injuring the plaintiff. Employing the theory that the last necessary element of a tort, the injury, occurred in Illinois, the defendant was held to have committed "a tortious act within [Illinois]"<sup>53</sup> within the meaning of the Illinois statute.<sup>54</sup> Although this result was accomplished at the expense of a strained interpretation of that phrase, it was apparently within the constitutional limits of due process because of the court's recognition of the fact that the defendant sold his products in contemplation of their use in Illinois and thus could expect inconvenient consequences to arise from their use there.

New York courts have followed the reasoning of the *Gray* case in construing that portion of the New York statute which authorizes judicial jurisdiction over a non-domiciliary who "commits a tortious act within the state."<sup>55</sup> In *Feathers v. McLucas*,<sup>56</sup> plaintiffs were injured by the explosion on a New York highway of a tank used for transporting liquefied petroleum gas. Although the alleged negligent construction took place outside New York, and defendant's only

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50. *Trussell v. Bear Mfg. Co.*, *supra* note 40.

51. ILL. ANN. STAT. ch. 110, § 17(1)(b) (Smith-Hurd 1956).

52. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

53. ILL. ANN. STAT. ch. 110, § 17(1)(b) (Smith-Hurd 1956).

54. See RESTATEMENT, CONFLICT OF LAWS §§ 64, 377 (1934). The *Restatement* supports the theory that all substantive questions relating to the existence of a tort claim are governed by the local law of the "place of wrong," *i.e.*, the state where the last event necessary to make an actor liable takes place; since resulting injury follows the wrongful conduct, the state of the "last event" is where the injury occurred. This approach has been losing support in recent years in favor of the theory that the local law applicable to torts is that of the state which has the most significant relationship with the occurrence and with the parties. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft. No. 9, 1964).

55. N.Y. CIV. PRAC. LAW § 302(a)(2) (1963).

56. 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964).

connection with that state was the tortious injury, the court felt that in expanding New York's in personam jurisdiction over non-domiciliaries "the Legislature did not intend to separate foreign wrongful acts from resulting forum consequences and that the acts complained of here can be said to have been committed in this State."<sup>57</sup>

The Pennsylvania Supreme Court interpreted Pennsylvania's analogous statute more literally. In *Rufo v. Bastian-Blessing Co.*,<sup>58</sup> the plaintiff was injured in Pennsylvania by the explosion of a gas cylinder to which was attached a valve that had been manufactured and sold in Illinois by the defendant company. The court found that in the absence of any "acts" or "omissions" in Pennsylvania on the part of the defendant, the defendant could not validly be served under Pennsylvania's statutory provision for substituted service of process on foreign business corporations "in any action arising out of acts or omissions of such corporation within this Commonwealth,"<sup>59</sup> because:

[I]f the legislature meant 'right of action' or 'cause of action' it would have omitted the words 'out of acts or omissions of the corporation' and the provision would have read 'in any action arising within the Commonwealth.' . . . To hold otherwise,—i.e., that 'act' means 'injury'—is to legislate and that we cannot do. . . . Only by a distortion of the language employed by the legislature can 'acts or omissions' on the part of the foreign corporation be equated with 'where the injury arose' or 'where the right or cause of action arose.'<sup>60</sup>

In 1963, the Pennsylvania Legislature did precisely what the court suggested by omitting the words "out of acts or omissions of such corporation," and amending the statute by extending judicial jurisdiction over foreign business corporations "in any action arising within this Commonwealth."<sup>61</sup> The amended statute has been subsequently interpreted as encompassing out-of-state acts whose results are manifested within the state.<sup>62</sup>

If the Tennessee Legislature had intended its law to include a situation where the act or conduct occurs outside the state and only the

57. *Id.* at 55, 251 N.Y.S.2d at 550; *accord*, *Rietsch v. Societe Anonyme des Automobiles Peugeot*, 45 Misc. 2d 274, 256 N.Y.S.2d 772 (Sup. Ct. 1965). The minimum contacts required by due process were found to have been satisfied because the defendant had constructed for an interstate carrier an instrumentality potentially dangerous to life and property, and could therefore reasonably foresee that it might cause harm in New York.

58. 405 Pa. 12, 173 A.2d 123 (1961).

59. PA. STAT. ANN. tit. 15, § 2852-1011B. (1958).

60. *Rufo v. Bastian-Blessing Co.*, *supra* note 58, at 20-22, 173 A.2d at 127-29.

61. PA. STAT. ANN. tit. 15, § 2852-1011 B. (Supp. 1964).

62. *Inter-State Milk Producers' Co-op. v. Metropolitan Co-op. Milk Producers Bargaining Agency, Inc.*, 236 F. Supp. 558 (M.D. Pa. 1964); *Spry v. Eastern Cas & Fuel Associates*, 234 F. Supp. 580 (W.D. Pa. 1964).

injury occurs within the state, another subsection could have been added to the law similar to the provision of the Uniform Interstate and International Procedure Act which clearly encompasses activity outside the state:

- (3) causing tortious injury by an act or omission in this state;
- (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . .<sup>63</sup>

Single or occasional acts within the state will clearly constitute a basis for in personam jurisdiction under the Tennessee statute, assuming this is consistent with due process in each case. Although the nature and quality of each act must be examined on its own merits, the trend of case law has been to render nonresidents liable to suit under single act statutes.<sup>64</sup> A New York court recently upheld jurisdiction against an Illinois manufacturer in *Singer v. Walker*,<sup>65</sup> where the injury occurred in Connecticut, and it was necessary to isolate a tortious act, prior to the occurrence of the harm, as having its situs in New York. The defendant corporation had manufactured in Illinois a defective geologist's hammer labelled as "unbreakable" and shipped it to a New York dealer who had purchased it by using a catalogue which the defendant had mailed to him. The plaintiff's aunt purchased the hammer from the New York retailer and gave it to the ten year-old plaintiff, who lost an eye when the hammer broke while he was breaking rocks on a field trip in Connecticut. Although the cause of action arose in Connecticut, the court found that the defendant had committed a tortious act in New York because a continuing hazardous condition, similar to an enjoined nuisance, was created by the circulation in the New York market of "a particularly dangerous instrument because of its function and the false labelling which it bore with respect to its unbreakability."<sup>66</sup> New

63. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03(a), 9B U.L.A. (Supp. 1964). See the lower court's opinion in *Feathers v. McLucas*, 41 Misc. 2d 498, 245 N.Y.S.2d 282 (Sup. Ct.), *rev'd*, 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964). See *Hearne v. Dow-Badische Chem. Co.*, 224 F. Supp. 90, 97 (S.D. Tex. 1963), for an analysis.

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

65. 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964).

66. *Id.* at 288, 250 N.Y.S.2d at 220. The subsequent case of *Frank Angelilli Constr. Co., Inc. v. Sullivan & Son, Inc.*, 45 Misc. 2d 171, 256 N.Y.S.2d 189 (Sup. Ct. 1965), held that shipment by a nonresident corporation into New York of allegedly defective lime which caused damage to plaster walls in a building was not a "tortious act within the state" because policy considerations behind extending the field of personal jurisdiction dictate that the *Singer* holding should be limited to cases involving goods rendered inherently dangerous to person or property.

York apparently had sufficient contacts with the defendant to satisfy federal due process requirements because defendant's voluntary submission of his sales catalogue to a New York dealer, the shipment of a "dangerous" product into the state, and its circulation and sale there were indicative of the likelihood that the hammer would be acquired in New York.

C. *"The Ownership or Possession of any Interest in Property Located within this State"*

The assertion by a nonresident of any interest in local property, whether an ownership interest or something less than that, provides the contact which the legislature has considered reasonable to require him to defend actions arising out of claims regarding that property. If the ownership or possession of an interest in realty is thought of as a continuing relationship to the state, a cause of action arising out of ownership or possession would seem to be as substantial a relationship with the forum as that arising out of a single contract made within the state or the commission of an isolated tortious act.<sup>67</sup> Yet, this language encompasses not only possessory interests, but *any* interest in property. Would it be consistent with traditional notions of fair play and substantial justice to require the holder of an easement or a mortgagee to defend an action in Tennessee which arose out of such an interest in Tennessee property?

In *Wm. E. Strasser Construction Co. v. Linn*,<sup>68</sup> a building contractor sued for breach of a contract to construct an apartment building on Florida land owned by the nonresident defendants. Substituted service of process was upheld on the ground that purchase of the land and execution of the contract with the alleged intent of renting it to tenants were substantial steps toward engaging in a "business venture" under Florida law.<sup>69</sup> This cause of action would certainly appear to be one arising out of the ownership or possession of real estate situated within the state and therefore actionable under Tennessee's section 1(c), as well as the contract provision of section 1(e). Of interest is the Florida court's observation that: "We find it unnecessary to complicate this opinion by dealing into the doctrine of relative conveniences or inconveniences as between the contesting parties."<sup>70</sup> This does not seem an unfair statement in this instance, since the defendants expected to collect rents from the completed building and enjoy the profits from this operation in Florida. It is reasonable to suppose that they could have expected inconvenient consequences

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67. Note, 44 IOWA L. REV. 374, 378 (1959).

68. 97 So. 2d 458 (Fla. 1957).

69. FLA. STAT. ANN. § 47.16 (Supp. 1964).

70. 97 So. 2d at 460.

to arise from this business venture, such as appearing in Florida to defend a lawsuit arising out of the possession of Florida realty. However, such a consideration might be warranted in the analysis of a lesser property interest as a basis for jurisdiction.

*Dubin v. Philadelphia*<sup>71</sup> was an action concerning liability for injuries arising from a fall on a broken sidewalk. The nonresident defendant was mortgagee of the abutting property, but was neither an "owner" or a "tenant" under the applicable Pennsylvania statute.<sup>72</sup> Nor was she in actual possession of the premises, although she had collected rents and used them to pay city taxes and water rents in her capacity as mortgagee of the property. However, this interest in the property was held to be an active exercise of her "right to possession" as mortgagee. Equating her collection of the rent with actual physical possession of the property, the court concluded that defendant was a "user" of the property within the meaning of the Pennsylvania statute<sup>73</sup> and therefore subject to substituted service of process. Such an exercise in mental gymnastics will not be required when the Tennessee long arm statute is applied because a defendant who possesses *any* interest in Tennessee property is included within its terms. The statutory language thus embraces nonresident mortgagees and holders of easements as well as those who are legally possessed of land within the state.

Actions arising from the ownership or possession of "property located within this State" apparently includes personal as well as real property as a basis for jurisdiction. The analogous sections of the comparable Illinois,<sup>74</sup> New York,<sup>75</sup> and Interstate and International Procedure Acts<sup>76</sup> specifically apply only to interests in real property situated within the state. By way of comparison, the Michigan statute embraces actions arising out of ownership, use, or possession of "any real or tangible personal property"<sup>77</sup> situated within the state, and the Wisconsin statute specifically covers "real property," "tangible property," and "any asset or thing of value" within the state.<sup>78</sup> It would thus appear that a good argument could be made for the inclusion of claims arising from the ownership or possession of personal property within the scope of the Tennessee statute. If this view is adopted the courts could encounter some difficulties in situations

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71. 34 Pa. D. & C. 61 (Phil. County Ct. 1938).

72. PA. STAT. tit. 12, § 331 (1953).

73. *Ibid.*

74. ILL. ANN. STAT. ch. 110, § 17(1)(c) (1956).

75. N.Y. CIV. PRAC. LAW § 302(a)(3).

76. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03(a)(5), 9B U.L.A. (Supp. 1964).

77. MICH. STAT. ANN. §§ 27A.705(3), 27A.715(3), 27A.725(3), 27A.735(3) (1962).

78. WIS. STAT. ANN. § 262.05(6) (Supp. 1965).

involving stolen property, conditional sales and chattel mortgages, especially if the property is not "located within" the state at the time the action is brought.<sup>79</sup>

D. "Entering into any Contract of Insurance, Indemnity, or Guaranty Covering Any Person, Property, or Risk Located Within this State at the Time of Contracting"

The McCarran Act<sup>80</sup> states that the insurance industry is to be subject to the laws of the several states. In 1955, the Tennessee Unauthorized Insurers Process Act<sup>81</sup> was passed which constitutes the Commissioner of Insurance as attorney for service of process upon any unauthorized foreign insurer which insures or delivers contracts of insurance, solicits applications for insurance contracts, collects premiums, or transacts any other insurance business within the state.

This procedure was upheld by the Second Circuit Court of Appeals in *Shutt v. Commercial Travelers Mutual Accident Ass'n*,<sup>82</sup> an action based upon a Tennessee state court judgment. An accident insurance policy was issued to the plaintiff while he was a resident of Kentucky. He later became a resident of Tennessee where he lost his life in a fire. The defendant's only contacts with Tennessee were by means of communications through the mails and the investigation in Tennessee of claims asserted there. A balancing of the inconveniences to the respective parties disclosed a situation unduly burdensome to defendant's policyholders in that the success of such mail order insurance companies was attributable in large measure to the hardship of prosecuting small claims out of state where necessary witnesses would not likely be found. On the other hand, the defendant insurer was found to have received adequate notice and was afforded a reasonable opportunity to defend. Consequently, the Unauthorized Insurers Process Act was held not to run counter to the due process clause of the Constitution; the Supreme Court denied *certiorari*. Two Supreme Court cases<sup>83</sup> dealing with state statutes which extend state judicial jurisdiction over unlicensed mail order insurers are in accord with the result reached in *Schutt*, and are indicative that the insurance provisions of the Tennessee long arm statute should present few constitutional problems. Its utility in most cases is a matter of speculation, however, because of the overlapping coverage of the

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79. See Commissioners' Note to UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03, 9B U.L.A. (Supp. 1964).

80. 15 U.S.C. §§ 1011-15 (1952).

81. TENN. CODE ANN. §§ 56-327 to -336 (Supp. 1964).

82. 229 F.2d 158 (2d Cir.), *cert. denied*, 351 U.S. 940 (1956).

83. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950).

Tennessee Unauthorized Insurers Process Act.<sup>84</sup>

E. "Entering into a Contract for Services To Be Rendered or for Materials To Be Furnished in this State"

This provision contemplates a contract made either within or without the state, but which concerns activity to be performed within the state. A recent interpretation of the Minnesota one act statute in *Haldeman-Homme Mfg. Co. v. Texacon Industries, Inc.*<sup>85</sup> involved an action for false representations and breach of a contract for sale of part of a business in Texas to the Minnesota plaintiff. None of defendant's agents ever entered Minnesota and none of its duties under the contract were to be performed there. In upholding substituted service of process on the Texas corporation as consistent with due process of law, the federal court stressed that an eighteen thousand dollar sale had been made with the understanding that all inventory, materials, and machinery associated with the contract were to be moved by plaintiff to Minnesota. However, for the purpose of satisfying Minnesota's statutory requirement that the contract "be performed in whole or in part by either party in Minnesota,"<sup>86</sup> the court relied upon a provision in the contract that plaintiff was to furnish defendant with audits of its sales over a one year period. This requirement was deemed sufficient to satisfy the statutory provision that some portion of the contract was to be performed within Minnesota.

The wording of the Tennessee act does not specify whether the plaintiff or the nonresident defendant must perform duties under the contract in Tennessee. This is probably a superfluous consideration, however, as only the execution of a contract to be performed in Tennessee is required; it is therefore immaterial that the only duties under the agreement are to be performed in Tennessee for the defendant by the plaintiff or a third party, and that the defendant never enters the state.

The language of the contract provision authorizes actions arising from isolated bargaining transactions. The previously discussed case concerned a single contract involving only a modicum of partial performance within the forum state. Compare the result reached with that based on the following facts: A resident of Georgia signed a contract for the purchase of an automobile, although the record was not clear as to whether the defendant signed the agreement while temporarily in Texas or mailed it to Texas from Georgia.

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84. *Supra* note 79.

85. 236 F. Supp. 99 (D. Minn. 1964).

86. MINN. STAT. ANN. § 303.13(1)(3) (1961).

Plaintiff obtained judgment in a Texas court after substituted service of process was made pursuant to a Texas statute which stated that a nonresident person who enters into a contract with a resident of Texas is deemed doing business in that state.<sup>87</sup> Full faith and credit was denied the Texas judgment by the Georgia Supreme Court in *Allied Finance Co. v. Prosser*,<sup>88</sup> wherein the Texas statute was declared unconstitutional as applied to these facts. The Georgia court recognized the validity of an in personam judgment based on substituted service of process under nonresident motorist statutes and insurance statutes because of the right of the state to exercise its police power for the public safety. As to the extension of in personam jurisdiction under the stated facts, the court said it would be unthinkable that this rule should be expanded to include an individual who enters into a single transaction with no intention of doing more, as such an extension would render due process a complete nullity.

Notwithstanding the superficial appearance of divergence of judicial opinion, it is submitted that the latter case may be distinguished from the standpoint of the doctrine of forum non conveniens. Whereas the *Haldeman-Homme* case involved an eighteen thousand dollar transaction entered into at arm's length between two apparently knowledgeable business concerns, the defendant in the *Prosser* case had defaulted on a contract with an experienced party in a state far away from home. Perhaps the outcome would have been different had there been a greater indication of "substantial justice and fair play."

#### IV. SERVICE OF PROCESS

According to the requirements of due process set out in *Pennoyer v. Neff*,<sup>89</sup> personal service of process upon a nonresident or his agent had to be effected within the forum state in order to acquire in personam jurisdiction. Absent a voluntary appearance by the nonresident defendant within the jurisdiction, or his consent to substituted service outside the state, an in personam judgment against him was invalid, whether the attempted service was by publication<sup>90</sup> or by personal service outside the forum.<sup>91</sup> This concept accorded with the theory of territorial sovereignty to the effect that process from the courts of one state cannot reach beyond that state's boundaries and require persons domiciled in another state to leave and submit themselves to the judicial jurisdiction of another state. Since a corporation

87. TEX. REV. CIV. STAT. art. 2031b, §§ 3-4 (1964).

88. 103 Ga. App. 538, 119 S.E.2d 813 (1961).

89. 95 U.S. 714 (1886).

90. *McDonald v. Mabee*, 243 U.S. 90 (1916).

91. *Old Wayne Mt. Life Ass'n v. McDonough*, 204 U.S. 8 (1906).

doing business in a foreign state could be subjected to that state's jurisdiction in return for the opportunity of transacting business there, statutes requiring such corporations to consent to service of process upon an agent designated for such purpose were held to be an exercise by the state of its police power if the action arose out of the corporation's intrastate business.<sup>92</sup>

*Hess v. Pawloski*<sup>93</sup> upheld a Massachusetts statute declaring that operation of a motor vehicle on public highways was deemed the equivalent of appointment of a designated state official to accept service for a nonresident in an action arising from an accident on that state's highways. Massachusetts was held to have a right to enact legislation to promote care on the part of residents and non-residents under a valid exercise of its police powers in protecting its citizens because operation of motor vehicles was inherently dangerous to the general public. In *Henry L. Doherty & Co. v. Goodman*,<sup>94</sup> the police power of the state was held to warrant the adoption of legislation subjecting corporate securities dealers to special regulation because of the unique nature of the securities business. Subjection of nonresident motor vehicle operators and securities dealers to in personam jurisdiction was upheld because such activity is dangerous to the public, and injured residents should therefore be protected by being able to obtain valid service against such nonresidents. The provisions of the Tennessee long arm statute permitting personal service of process outside the state because of injuries to residents is but an extension of this theory to the acts of nonresidents specified in section 1.

Sections 2 and 3 of the statute are virtually identical to the provisions of the Tennessee Nonresident Motorist Statute pertaining to service of process on the Secretary of State in connection with lawsuits against nonresident motor vehicle operators involved in accidents within the state.<sup>95</sup> Service is effected by sending the original summons and a certified copy to the Secretary of State, who sends the copy by registered mail to the defendant. In short, the legislature has simply re-enacted a method for substituted service of process on nonresidents which was formerly justified as necessary to regulate the inherently dangerous activity of operating motor vehicles on Tennessee highways, and applied it to a greatly expanded scope of activities by nonresidents and foreign corporations that are capable of giving rise

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92. See Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871 (1919).

93. 274 U.S. 352 (1927).

94. 294 U.S. 623 (1935).

95. TENN. CODE ANN. §§ 20-226 to -227 (Supp. 1964).

to claims for relief on the part of Tennessee residents.<sup>96</sup>

Title 56 of the Tennessee Code Annotated, pertaining to insurance, designates the Commissioner of Insurance as the attorney of foreign insurers upon whom legal process may be served;<sup>97</sup> copies of such process are sent to the insurer via registered mail by both the Commissioner of Insurance and by the plaintiff. It is clear that the procedure for service of process authorized by the long-arm statute may be employed in lieu of service on the Commissioner of Insurance because title 56 authorizes service to be made in any other manner permitted by law.<sup>98</sup> Substituted service on the Secretary of State may therefore be more frequently used in the future in suits against foreign insurers than the method of service provided in title 56, since the plaintiff is not required by the long-arm statute to send a copy of the process to the defendant after substituted service has been made on the Secretary of State.

Of course, the conventional procedure for service of process on foreign corporations with agents found within the state is preserved. This procedure requires that process be served upon an agent of the defendant corporation within the county where suit is brought.<sup>99</sup> To help insure that the corporation has actual notice it is the duty of the clerk to also mail a copy of the process to the home office of the corporation by registered return-receipt letter. Because actual service by personal delivery upon an agent is required in addition to substituted service by registered mail, this method is more likely to afford actual notice, and should therefore be employed in favor of the procedure authorized by sections 2 and 3 of the long arm statute if a suitable agent of the defendant corporation can be found within the state.

A third method of informing the nonresident defendant of an impending action against him in Tennessee courts is by personal service outside the state; this is authorized by section 4 of the new

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96. Omitted from the final version of § 2 of the new act, however, is the provision of the corresponding portion of the nonresident motorist statute which constitutes acceptance of service of process by registered mail "by any member of the addressee's family over the age of sixteen and residing in the same dwelling with him" as a sufficient delivery to the addressee. TENN. CODE ANN. § 20-226 (Supp. 1964).

97. TENN. CODE ANN. § 56-303 (Supp. 1964), requires authorized domestic and foreign insurers to file with the Commissioner of Insurance and Banking an instrument appointing him as their attorney for purposes of service of process. TENN. CODE ANN. §§ 56-328 to -330 (Supp. 1964), pertaining to unauthorized foreign insurers, does not require the filing of a formal appointment; it also provides for personal service within the state upon an agent or representative of the insurer, provided a copy of the process is sent by registered mail to the insurer.

98. TENN. CODE ANN. § 56-332 (Supp. 1964).

99. TENN. CODE ANN. § 20-221 (1956).

long arm statute.<sup>100</sup> Since the due process requirement concerning the form of notice is that it give "reasonable assurance that the notice will be actual,"<sup>101</sup> there would seem to be little room for argument that personal delivery of a summons is the best of the three methods that have been discussed, provided service is made upon the proper officer or agent.

#### V. RETROACTIVE EFFECT

Section 5 of the Tennessee statute specifically states that causes of action arising before or after its passage from past or future transactions may be asserted against the defendant in an action in which jurisdiction over him is based upon the provisions of this law. Cases in other states have not been consistent in applying long arm legislation retroactively when there was no such language in the statute indicating an appropriate legislative intent. Courts which have viewed such laws as dealing with matters of procedure have regarded them as remedial statutes which do not disturb vested rights, but only supply a more appropriate remedy to enforce existing rights or obligations.<sup>102</sup> What is probably the minority view was adopted by a Connecticut court which applied that state's long arm statute prospectively only, for the reason that it affected a fundamental and substantive right of the defendant.<sup>103</sup> Nevertheless, the courts should encounter little difficulty in applying the Tennessee statute to either actions pending or those commenced after its enactment because of the legislative declaration that it is to operate retroactively and is in the nature of remedial legislation.

#### VI. CONCLUSION

The United States Supreme Court has altered the test for the determination of due process from the absolute requirement of physical power over foreign corporations and nonresidents to the flexible requirement of minimum contacts between the defendant

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100. "Section 4. Be it further enacted, that in addition to service of process on the Secretary of State as hereinbefore set forth, personal service of process may be made upon any party outside the state by any person over twenty-one years of age and not a party to the action. No order of court shall be required to constitute such person a proper officer to receive and execute the process. An affidavit of the person serving the process shall be filed with the clerk of the court in which the action is pending, stating the time, manner and place of service." Tenn. Pub. Acts 1965, ch. 7, § 4.

101. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

102. *Hicks v. Crane Co.*, 235 F. Supp. 609 (D. Ore. 1964); *Safeway Stores, Inc. v. Shwayder Bros. Inc.*, 384 S.W.2d 473 (Ark. 1964); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Muraco v. Ferentino*, 42 Misc. 2d 104, 247 N.Y.S.2d 598 (1964).

103. *Nevins v. Revlon, Inc.*, 23 Conn. Supp. 314, 182 A.2d 634 (Super. Ct. 1962).

and the forum state. By the enactment of a law to broaden the basis for acquisition of judicial jurisdiction over these defendants, the Tennessee Legislature has recognized that changes in interstate commerce have brought about a change in our national economy which justifies an enlargement of the scope of state judicial jurisdiction over nonresidents.

Implicit in the broadening of the foundation of Tennessee's jurisdiction is the idea that out-of-state defendants were afforded unwarranted protection under the concepts of "consent," "presence," or "doing business." Tennesseans ought to be allowed to bring their suits where the cause of action arose, where the witnesses normally reside, and where the local law applies. This is consistent with the "fair play and substantial justice" criterion enunciated in the *International Shoe* case and exemplified by the "minimum contacts" test. After all, a defendant should, in the usual case, expect his action to be tried in the jurisdiction where his voluntary acts gave rise to the dispute.

The Tennessee long arm statute will probably encompass most of the activities of nonresidents and foreign corporations that give rise to such disputes, especially in the fields of insurance and contract law. There are, however, indications of legislative restraint in regard to exercise of the legislative power to encompass virtually all business transactions and tortious acts occurring outside the state. In the interest of fairness to nonresidents as well as Tennesseans, and to assure constitutional validity in application of the new law, the legislature has probably acted wisely in declining to extend the long arm of Tennessee courts to the outermost fringes of fair play and substantial justice implicit in the due process requirement.

HARRY G. NICHOL, JR.