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# Obtaining Jurisdiction over Corporations in Virginia

Robert E. Draim
*University of Richmond*

Emily M. Trapnell
*University of Richmond*

# NOTE

## OBTAINING JURISDICTION OVER CORPORATIONS IN VIRGINIA

## I. INTRODUCTION*

A working familiarity with the jurisdictional principles and procedures involved in initiating legal proceedings against both domestic and foreign corporations is essential to the successful resolution of the issues involved in such corporate litigation. The important individual and societal interests involved in corporate litigation highlight the necessity of bringing the corporate defendant within the jurisdiction of the state's courts.

On October 1, 1977, a revised code of civil procedure became effective in Virginia. This revision, in addition to recent case law, significantly affects the means of obtaining jurisdiction over corporations.

This note will review and analyze current jurisdictional principles and procedures in three contexts: jurisdiction over domestic corporations; jurisdiction over foreign corporations; and the constitutional parameters governing the assertion of jurisdiction over foreign corporations. Due necessarily to the relative ease in obtaining jurisdiction over domestic corporations as compared with asserting jurisdiction over foreign corporate defendants, the note, after setting forth the basic procedures for the former, will place primary emphasis on the latter.

### A. POTENTIAL JURISDICTION DEFINED

The assertion of valid jurisdiction[1] over a foreign or domestic corporation

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* The student contributors are Robert E. Draim and Emily M. Trapnell.

1. Venue—the selection, in compliance with statutes, of a convenient trial court from among those empowered to decide a case—is outside the scope of the text. Nevertheless, filing an action in a court with improper venue will cause a plaintiff delay and expense; therefore, at least a short discussion of it is justified.

Jurisdiction, the principle topic of this note, should not be confused with venue, though both have to do with choosing the appropriate place for trial. Jurisdiction is the power of a court to hear and decide a cause presented to it. Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp., 145 Va. 317, 133 S.E. 812 (1926); BLACK'S LAW DICTIONARY 991 (Rev. 4th ed. 1968); F. JAMES & G. HAZARD, CIVIL PROCEDURE 601-01 (2d ed. 1977) [hereinafter cited as JAMES & HAZARD]. On the other hand, venue, presupposing jurisdiction, is a privilege of the defendant to have his cause heard in a forum which is fair and convenient relative to the other courts which have the power to hear it. Hodgson v. Doe, 203 Va. 938, 128 S.E.2d 444 (1962); Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817, 93 A.L.R.2d 1194 (1961); Tazewell County School Board v. Snead, 198 Va. 100, 92 S.E.2d 497 (1956); Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp., 145 Va. 317, 133 S.E. 812 (1926); VA. CODE ANN. §

8.01-257 (Repl. Vol. 1977); JAMES & HAZARD, *supra* at 602-04. This dissimilarity of the doctrines has various collateral results. If a court lacks jurisdiction over a matter, it should dismiss the complaint; without power, the court's judgment is void and subject to collateral attack. But if a court lacks only venue, it should transfer the proceedings to a court that has proper venue; inconvenience alone does not render a judgment void. *See* VA. CODE ANN. § 8.01-258 (Repl. Vol. 1977). Also, an appellate court may raise the question of jurisdiction for the first time on its own motion. However, if the defendant does not object quickly to the venue of the trial court, he will be deemed to have waived his privilege. Texaco Inc. v. Runyon, 207 Va. 367, 150 S.E.2d 132 (1966); Jones v. Powell, 154 Va. 96, 152 S.E. 539 (1930); Morgan v. Pennsylvania Ry., 148 Va. 272, 138 S.E. 566 (1927). In origin, jurisdiction is both constitutional (the power of the sovereign) and statutory (usually, the delegation of the power by the sovereign to its courts). While venue might be a matter of constitutional law, U.S. CONST. amend. VI; VA. CONST. art. IV, § 14, it is now primarily statutory. Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961); Solomon v. Atlantic Coast Line Ry., 187 Va. 240, 46 S.E.2d 360 (1948); Seaboard Airline Ry. v. J.E. Boder Co., 144 Va. 154, 131 S.E. 245 (1926). Thus all of these—the differing definitions, the differing effects of mistaken selection, the differing times for objecting, and the differing sources of law—serve to distinguish jurisdiction and venue, power and convenience.

In Virginia, until recently, a study of the venue statutes could be frustrating. For many years, the Virginia courts and legislature confounded the doctrines of jurisdiction and venue. *See* VA. CODE COMM'N REPORT, REVISION OF TITLE 8.1 OF THE CODE OF VIRGINIA 167 (H. Del. Doc. No. 14, 1977) [hereinafter cited as CODE COMM'N REPORT].

In one case the state supreme court held that the word "jurisdiction" was intended to mean "venue". Lucas v. Biller, 204 Va. 309, 130 S.E.2d 582 (1963). For its part, the legislature enacted "mandatory venue" provisions, which the court reasonably understood to be jurisdictional. Davis v. Marr, 200 Va. 479, 106 S.E.2d 722 (1959). Cases were conceivable in which no venue was proper.

The revisers of the new civil procedure title unriddled most of the problems. They used two sections of the CODE, VA. CODE ANN. §§ 8.01-257 & -258 (Repl. Vol. 1977), to reaffirm the distinction between jurisdiction and venue. More than that, they collected almost all the venue provisions in a single chapter, chapter five, of the revised Title 8.01. *Id.* §§ 8.01-257 to -267. Only two relevant venue statutes, as acknowledged in § 8.01-259, remain outside the chapter: venue for writs of quo warranto is controlled by § 8.01-638; and venue for injunctions is controlled by § 8.01-621. Except for these (and several other provisions irrelevant to corporate law), venue as enacted in chapter five supersedes all other venue provisions in the Virginia Code, wherever located. *Id.* § 8.01-259.

To impose order on its broad scope, chapter five subdivides venue for state claimants into preferred (Category A) venue and permissible (Category B) venue. *Id.* §§ 8.01-260 to -262. Wherever the statute setting out preferred venue applies—as in a review of administrative proceedings, § 8.01-261.1., or in an action for attachment, § 8.01-261.2.—failure to follow its terms is subject to objection. *Id.* § 8.01-261. However, preferred venue controls only limited classes of cases; proper venue for most actions against corporations, domestic or foreign, will be determined by the statute on permissible venue, § 8.01-262. Under it, venue is allowed in the places likely to be fair and convenient for trial, *e.g.*, where the defendant resides, where the defendant has a registered agent, where the defendant regularly or systematically conducts his affairs or business. *Id.* § 8.01-262.1 to .3. In any event, some venue will be found. If no other venue is proper, the Code permits bringing a suit where property can be attached, *id.* § 8.01-262.9, or as a last resort, where the plaintiff resides. *Id.* § 8.01-262.10. *See also id.* § 8.01-263 (multiple parties).

There are really two bases for objecting to the venue of a state court. The first is that the venue does not comport with the preferred-permissible statutes described in the preceding paragraph. But notwithstanding those statutes, a defendant may also object to venue for

is a dual process. The threshold determination is whether the court in which the action is initiated has subject matter jurisdiction of the case, that is, whether the court has been empowered to hear cases of the kind before it. If so empowered, the court has "potential jurisdiction"[2] of the proceeding and may adjudicate the issues involved in that proceeding after its "active jurisdiction" has been perfected.[3]

### B. Active Jurisdiction Defined

Active jurisdiction connotes the actual or constructive presence before the court of the parties and/or property involved in the litigation,[4] effected through valid service of process, and it allows the court to constitutionally determine the case.[5] If either potential or active jurisdiction is lacking, a

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"good cause", good cause including inconvenience, prejudice, or the interest of the judge. *Id.* § 8.01-264; Code Comm'n Report, *supra*, at 179. The distinction is not merely academic. If objection is based on statutory interpretation, the state supreme court can give a plenary review of the decision of the trial court. *See id.* § 8.01-258. But objections to venue for good cause are addressed to the discretion of the trial judge. *Id.* § 8.01-267, and presumably his decision is only reviewed for abuse of discretion.

If the defendant believes that either the categorical statutes or "good cause" gives him the privilege to change venue, he must file a written motion early in his responsive pleadings. *Id.* § 8.01-276. In the circuit court, he must object within twenty-one days after service of process or within whatever time the circuit court has allowed for filing responsive pleadings. *Id.* § 8.01-265. In the district court the defendant must object on or before the day of trial. *Id.* The objection is still considered timely "even if other pleadings are filed by the defendant prior to the expiration of the time for objection." *Id.* (Revisers' Note). A motion objecting to venue must state where venue would be proper. *Id.* § 8.01-276.

*See* 28 U.S.C. § 1391 (1970) for the federal venue provisions.

2. Tazewell Co. School Bd. v. Snead, 198 Va. 100, 92 S.E.2d 497 (1956); James v. Powell, 154 Va. 96, 152 S.E. 539 (1930); Nash v. Harman, 148 Va. 610, 139 S.E. 273 (1927); Morgan v. Pennsylvania Ry., 148 Va. 272, 138 S.E. 566 (1927); Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp., 145 Va. 317, 133 S.E. 812 (1926).

For purposes of this note, potential jurisdiction will be examined in light of the "power" to hear certain cases that the Virginia general district courts and circuit courts possess. *See* Va. Code Ann. § 16.1-77 (Repl. Vol. 1975) & § 17-123 (Cum. Supp. 1977). If a proceeding is brought against a domestic or foreign corporation in the Virginia state courts, the jurisdictional requirements of those courts apply. These requirements are discussed in section II *infra*, and will not be repeated in section IV *infra*, dealing with jurisdiction over foreign corporations. The emphasis in section IV *infra*, is on the assertion of jurisdiction over foreign corporations under the long-arm statute, Va. Code Ann. § 8.01-328.1 (Repl. Vol. 1977).

3. Morgan v. Pennsylvania Ry., 148 Va. 272, 138 S.E. 566 (1927). " 'Potential jurisdiction', . . . after valid service of process on the parties, gives the court 'active jurisdiction' and empowers it to hear the case and enter a valid judgment therein." *Id.* at 277, 138 S.E. at 567.

4. *Id.*; Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp., 145 Va. 317, 133 S.E. 812 (1926).

5. Minimum due process concerns require that notice and an opportunity to be heard be given to defendants. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Moore v. Smith, 177 Va. 621, 15 S.E.2d 48 (1941).

court cannot validly hear a case, and a case so heard is a nullity.[6] In essence then, potential jurisdiction refers to a court's general power to adjudicate, while active jurisdiction refers to its ability to do so in a particular case.

## II. POTENTIAL JURISDICTION OVER DOMESTIC CORPORATIONS

The requirements for the assertion of potential jurisdiction over domestic or foreign corporations[1] are identical in the state general district courts,[2] and are identical in the state circuit courts.[3] Since the provisions of each court are applicable to litigation involving either a domestic or a foreign corporation, the requirements will not be restated when the discussion turns exclusively to foreign corporations.[4]

### A. COURTS NOT OF RECORD

Courts not of record in Virginia—the general district courts for this purpose—are a legislative creation, having no inherent or constitutional jurisdiction, and thus their potential jurisdiction is strictly limited to those areas expressly granted by the General Assembly.[5] Moreover, a general

6. Addison v. Salyer, 185 Va. 644, 40 S.E.2d 260 (1946); Farant Investment Corp. v. Francis, 138 Va. 417, 122 S.E. 141 (1924).

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1. A domestic corporation created by the laws of the State of Virginia is technically either a "stock" or a "nonstock" corporation, the principal and most obvious distinction being that the former is authorized to issue stock while the latter is not. *Compare* the Virginia Stock Corporations Act, VA. CODE ANN. §§ 13.1-1 to -200 (Repl. Vol. 1973) *with* the Virginia Nonstock Corporations Act, *id.* §§ 13.1-201 to -300. Insofar as service of process is concerned, there is no real distinction between the two types, and the discussion here is applicable to both.

A foreign corporation is, of course, created by the laws of a state other than Virginia.

2. *See* VA. CODE ANN. § 16.1-77 (Repl. Vol. 1975).

3. *See id.* § 17-123 (Cum. Supp. 1977).

4. *See* sections IV & V *infra*, which concentrate primarily on obtaining jurisdiction under the long-arm statute, VA. CODE ANN. § 8.01-328.1 (Repl. Vol. 1977). It should be remembered, however, that the jurisdictional requirements (*e.g.*, amount in controversy) of the state courts are still applicable when jurisdiction is asserted under the long-arm statute against a foreign corporation, if the action is brought in state court.

5. VA. CODE ANN. § 16.1-77 (Repl. Vol. 1975). *See, e.g.*, Addison v. Salyer, 185 Va. 644, 40 S.E.2d 260 (1946), wherein dismissal of a case by a trial justice was necessitated when it became apparent that title to real property was involved in the case, there being no potential jurisdiction in that court for cases involving title to realty.

If a case is before the wrong court, or if any other requirements for potential jurisdiction are lacking, the court will dismiss the suit when the error is brought to its attention. Western Union Tel. Co. v. Pettyjohn, 88 Va. 296, 13 S.E. 431 (1891).

district court's jurisdiction is limited to the geographical territory that it serves[6] and by the amount in controversy restriction in the jurisdictional grant.[7]

Basically, the general district court enjoys exclusive original jurisdiction of personal claims[8] of up to five hundred dollars and concurrent jurisdiction with the circuit courts for claims exceeding five hundred dollars but not exceeding five thousand dollars.[9] Attachment actions where the claim does not exceed five thousand dollars are also cognizable in the general district courts.[10]

It would seem, therefore, that small claims against domestic corporations for any of the acts set out in the district courts' jurisdictional grant, assuming the territorial limitation is also met, are properly before such a tribunal. However, in light of the limited jurisdictional sphere of the general district courts, most, if not all, litigation involving corporations, both domestic and foreign, will be in the courts of record.

### B. Courts of Record

In contrast to the courts not of record, the courts of record—the circuit courts here—are given potential jurisdiction by the Virginia Constitution.[11] The constitution's grant of potential jurisdiction to the courts of record, codified by the General Assembly,[12] provides for original and general jurisdiction of "*all* cases in chancery and civil cases at law. . . ."[13] Thus, the jurisdiction of the circuit courts is limited territorially only by the boundaries of the state,[14] and not by the geographical extent of the various cir-

6. Va. Code Ann. § 16.1-77 (Repl. Vol. 1975). *See id.* § 16.1-69.6 (Cum. Supp. 1977) for a compilation of the territorial limits of all the courts not of record in the Commonwealth.

7. *Id.* § 16.1-77 (Repl. Vol. 1975).

8. *Id.* § 16.1-77 (1) "[A]ny claim to specific personal property or to any debt, fine or other money, or to damages for breach of contract or for injury done to property, real or personal, or for any injury to the person. . . ." *Id.*

9. *Id.* Attorney's fees contracted for in the instrument and interest are not considered in the jurisdictional amount.

10. *Id.* § 16.1-77(2). Interest and attorney's fees are again not considered.

11. Va. Const. art. VI, § 1.

12. Va. Code Ann. § 17-123 (Cum. Supp. 1977).

13. *Id.* [emphasis added]. There are two exceptions to this broad grant of power: the circuit courts have no potential jurisdiction in "cases at law to recover personal property or money not of greater value than one hundred dollars, exclusive of interest;" and there is no jurisdiction over cases assigned to any other tribunal. *Id. See* Va. Const. art. VI, § 1 for the jurisdiction of the Virginia Supreme Court.

14. Venue considerations, however, will affect *where* the action is brought or eventually transferred, although statewide potential jurisdiction exists. *See* section I, note 1 *supra*. *See e.g.*, Va. Code Ann. § 8.01-262.10. (Repl. Vol. 1977).

cuits.[15] There is no limitation on the amount in controversy, except as a minimum standard.[16]

In light of the general district court's limited potential jurisdiction and the statewide potential jurisdiction of the courts of record, it is clear that substantial corporate legal proceedings, when brought in Virginia state court, will be in the circuit courts. However, in order to perfect the potential jurisdiction conferred on the circuit courts and thereby constitutionally hear a case, the circuit court must have active jurisdiction in the proceeding, obtained by valid service of process.

## III. SERVICE OF PROCESS ON DOMESTIC CORPORATIONS

### A. DUE PROCESS

Assuming that there is potential jurisdiction over the domestic corporation in a particular matter, the due process safeguard of notice to the defendant must be met in order to obtain active jurisdiction.[1] This is the purpose of service of process, to inform the defendant that an action has been filed against it so that it may prepare to defend its interests.[2]

The manner of service of process is governed by statute.[3] Notice being the purpose of service of process, the Virginia Code naturally provides a rather rigid procedure to be followed in serving process, with the goal being to provide *actual notice* to the defendant. Since actual notice is the ultimate goal of service of process, process is deemed sufficient if it results in actual notice to the defendant even though it is neither served nor accepted in the manner required by statute or the Rules of the Supreme Court.[4] This is obviously an important provision which may save the action from dis-

15. *See* VA. CODE ANN. § 17-119.1:1 (Cum. Supp. 1977) for a compilation of the geographical limits of the state's judicial circuits.

16. *See id.* § 17-123.

1. Notice and an opportunity to be heard are fundamental requirements of constitutional due process. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Moore v. Smith, 177 Va. 621, 15 S.E.2d 48 (1941).

2. Fuentes v. Shevin, 407 U.S. 67 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

3. *See generally*, Recent Legislation, 12 U. RICH. L. REV. 245, 262 (1977).

4. VA. CODE ANN. § 8.01-288 (Repl. Vol. 1977). Suits for divorce or annulment are excepted from this and other provisions dealing with service of process, the procedure in such actions generally being more rigid. The special provisions on service of process in such actions are beyond the scope of this Note and will not be mentioned hereafter. However, the Reviser's Note makes it clear that § 8.01-288 is intended to apply to *all* defendants, "e.g., a corporation, not just to an individual. . . ." Reviser's Note [CODE COMM'N REPORT], *id.* § 8.01-288.

missal when the procedure for service is not followed to the letter, but it should not, of course, be relied upon in serving process.

### B. How Process May be Served Generally[5]

Title 8.01 of the Virginia Code provides for statewide service of process; that is, process issued from any court in the state may be directed to and served by the sheriff in "any county, city, or town in the Commonwealth."[6] Further, process may be served either by the sheriff within his own county or city or in any county or city contiguous thereto,[7] or by any disinterested party aged eighteen or older.[8]

Unlike the provision for service on natural persons,[9] the Code seems to allow alternate modes of service on a domestic corporation.[10] It appears that this is qualified only as to service on the registered agent.[11] This

5. The statutory provisions discussed in this section are only directory, not mandatory. This is as it must be if the savings section on service of process, discussed in text at notes 3-4 *supra*, is to have any effect.

6. Va. Code Ann. § 8.01-292 (Repl. Vol. 1977). This eliminates the necessity of plaintiffs deciding in advance where the cause of action arose when venue is based on that determination; or perhaps more accurately, it eliminates the necessity for dismissal of the action when it later appears that plaintiff's decision in this regard was incorrect.

7. *Id.* §§ 8.01-293 & -295. The latter section also provides that service is not invalid because it is not directed to an officer or if directed to an officer and subsequently executed by someone else, if it is good in other respects.

8. *Id.* § 8.01-293. There are no territorial limits within which such a person must serve the process comparable to those provided for sheriffs.

9. *Id.* § 8.01-296. This section provides for consecutive modes of service. The modes are listed in their order of preference and one is available only where service cannot be made under the preceding mode.

10. *Id.* § 8.01-299. The section allows personal service *or* substituted service. There is no express requirement that personal service be attempted before substituted service is made as there is in the section dealing with service on natural persons.

11. *Id.* § 8.01-299.2. Every domestic corporation is required to have both a registered office and a registered agent. The registered agent must be either an officer or director of the corporation, a member of the Virginia State Bar or a professional corporation and the registered office must be the business office of such agent. *See id.* §§ 13.1-9 & -209 (Cum. Supp. 1977).

Code § 8.01-299.2 directs that substituted service must be made on stock corporations "in accordance with § 13.1-11 and on nonstock corporations in accordance with § 13.1-210." These sections are identical. *See id.* §§ 13.1-11 (Repl. Vol. 1973) & 13.1-210 (Cum. Supp. 1977). The qualification is in these sections which provide that substituted service is available only where the corporation has no registered agent or "its registered agent cannot with reasonable diligence be found at the registered office. . . ." In effect, then, substituted service is available in these circumstances even where no effort has been made to serve an officer or director under the statute.

qualification is logical since usually the sole purpose of the registered agent is to receive service of process on the corporation.[12]

The Code provides that process may be served on a domestic corporation by personal or substituted service.[13]

1. *Personal Service*

Personal service may be made on any officer, director or registered agent of the corporation.[14] The names and addresses of the registered agent, directors and principal officers of the corporation must be filed with the State Corporation Commission[15] and will be provided to plaintiff upon request. These names and addresses "as last filed" are ". . . conclusive for the purposes of service of process."[16]

2. *Substituted Service*

Substituted service is made in the appropriate case by service on the clerk of the State Corporation Commission or on any of his staff who must then forward it by registered or certified mail to the corporation at its registered office.[17]

Whether process is served personally on an officer, director or the registered agent, or by substituted service at the registered office, the corporation is deemed to have received notice even though the person so notified fails to act on the notice.[18]

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12. VA. CODE ANN. §§ 13.1-11 (Repl. Vol. 1973) & 13.1-210 (Cum. Supp. 1977).

13. *Id.*, § 8.01-299 (Repl. Vol. 1977).

14. *Id.* This provision does not apply to municipal and quasi-governmental corporations which must be served in accordance with *id.* § 8.01-300 (Repl. Vol. 1977). This section specifies the officers who may be served in a particular case and provides that service is valid if a copy is left with the person in charge of the office or any officer designated. *Id.*

Also, where the plaintiff is an officer of the corporation being sued, service of process on him is insufficient to notify the corporation because of his obviously contrary interest. *See* Beck v. Semones, 145 Va. 429, 134 S.E. 677 (1926). This problem was recognized by the legislature and expressly provided for in the area of service on partnerships. VA. CODE ANN., § 8.01-304 (Repl. Vol. 1977).

15. The name of the registered agent, the address of the registered office, and the names and addresses of the initial directors must be set forth in the articles of incorporation. VA. CODE ANN. §§ 13.1-49 & -231 (Cum. Supp. 1977). Also, the name of the registered agent, the address of the registered office, and the names and addresses of the directors and principal officers must be set forth in the annual report filed with the Commissioner. *Id.* §§ 13.1-120 & -282.

16. *Id.* §§ 13.1-11 (Repl. Vol. 1973) & 13.1-210 (Cum. Supp. 1977).

17. *Id.*

18. *See, e.g.*, Danville & W.R.R. v. Brown, 90 Va. 340, 18 S.E. 278 (1893). However, if defendant fails to respond, plaintiff who seeks a default judgment in the circuit court must

### C. Service of Process on Domestic Corporations in Certain Actions

Beyond the provisions for service of process on domestic corporations generally, the requirements of service vary in certain actions which are dealt with particularly by statute.

In attachment, garnishment and execution proceedings, process may be served on *any* agent of the corporation *wherever* he may be found within the state.[19] This provides substantial protection for creditors, since it allows for service to be made in these instances much more rapidly than would normally be the case.

When a corporation is being operated by a trustee or a receiver, process may be served on that person or, if there is more than one, on either of them.[20] This is the preferred mode of service on such a corporation and only if such service may not be had may process be served by one of the generally allowable modes previously discussed.[21]

## IV. JURISDICTION OVER FOREIGN CORPORATIONS

The protection of life and property within a state's boundaries is a primary concern of state government.[1] The state's vital interest in providing a forum for actions "has necessarily expanded as its citizens have become more mobile and markets have become nationwide in scope. . . ."[2] Subjecting foreign corporations to the jurisdiction of Virginia courts, where permitted by due process considerations, enables the fulfillment of that vital interest.

### A. Personal Jurisdiciton Under the Long-Arm Statute

Personal jurisdiction over foreign corporations may be obtained by application of Virginia's "long-arm" statute.[3] The central provision for this

now provide at least three days notice by registered or certified mail to defendant at its last-known address or at the address where process was originally served. Va. Code Ann. § 8.01-427.1 (Repl. Vol. 1977).

19. Va. Code Ann. § 8.01-302 (Repl. Vol. 1977) [emphasis added].

20. *Id.* § 8.01-303.

21. *Id.*

1. Carmichael v. Snyder, 209 Va. 451, 455, 164 S.E.2d 703, 707 (1968).

2. *Id.* at 455-56, 164 S.E.2d at 707.

3. Va. Code Ann. §§ 8.01-328 to -330 (Repl. Vol. 1977), formerly *id.* §§ 8-81.2 to -81.5 (Cum. Supp. 1976). Three of the five sections which constituted Chapter 4.1 under old Title 8 have been retained verbatim in new Title 8.01. The first of the unchanged provisions is that provision defining the word "person" as used in the chapter. *Id.* § 8.01-328 (Repl. Vol. 1977), formerly *id.* § 8-81.1 (Cum. Supp. 1976). Of significance in this discussion is that such

purpose under new Title 8.01 is Code subsection 8.01-328.1.A.,[4] which authorizes the assertion of personal jurisdiction over foreign corporations for causes of action arising out of any one of several activities enumerated therein. Any one of the paragraphs of subsection (A) will provide a basis for personal jurisdiction, although in some cases more than one paragraph may apply.[5] Furthermore, it is clear that each paragraph will support a cause of action under any theory of law.[6] It must be noted that the acts listed which may result in the conferring of personal jurisdiction are acts done directly or by an agent.[7] This inclusion of the principle of agency is of course important in order that the provision apply to non-natural persons such as corporations. Each paragraph will now be considered by analyzing those cases—state and federal[8]—in which the particular paragraph was the basis for asserting personal jurisdiction over a foreign corporation.

### 1. *Transacting Any Business in the State*

Emphasizing the word *any*, the Virginia Supreme Court has held that this provision requires only a single transaction in Virginia to confer jurisdiction on its court.[9] In so ruling, the court reasoned that the purpose of

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definition includes corporations. The other two provisions retained verbatim are the former *id.* §§ 8-81.2 & -81.5 (Cum. Supp. 1976), currently *id.* §§ 8.01-328.1 & -330 (Repl. Vol. 1977), respectively. The provision concerning venue, *id.* § 8-81.4 (Cum. Supp. 1976), for cases where jurisdiction is based on the long-arm statute, has been deleted; reference should be made instead to the newly revised venue provisions. *See id.* §§ 8.01-257 to -267 (Repl. Vol. 1977). Finally, the provision dealing with service of process under the long-arm statute, *id.* § 8-81.3 (Cum. Supp. 1976), has been revised in *id.* § 8.01-329 (Repl. Vol. 1977). *See* section V *infra*.

4. VA. CODE ANN. § 8.01-328.1.A. (Repl. Vol. 1977).

5. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 222 (1962) [hereinafter cited as HANDBOOK]; *see, e.g.*, Olin Mathieson Chem. Corp. v. Molins Orgs. Ltd., 261 F. Supp. 436 (E.D. Va. 1966).

6. HANDBOOK *supra* note 5, at 222. "For example, a claim arising from 'transacting business' may sound in contract, tort, or quasi contract." *See, e.g.*, Snow v. Clark, 263 F. Supp. 66 (W.D. Va. 1967) (jurisdiction for action in tort based upon paragraph (6)).

Paragraph (7) reflects the legislative finding that a contract to insure is a sufficient ground upon which to assert jurisdiction over foreign insurance companies when the insurance contract's subject matter was in the state at the time of contracting. *See* section VI, notes 60 & 61 *infra*.

7. VA. CODE ANN. § 8.01-328.1.A. (Repl. Vol. 1977).

8. Rules 4(e) and (f) of the Federal Rules of Civil Procedure allow a party not an inhabitant of the state or found therein to be served with a summons in a federal court under the circumstances and in the manner prescribed by a state statute. FED. R. CIV. P. 4(e)&(f). *See* United States v. First Nat'l City Bank, 379 U.S. 378, 381 (1965).

9. John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 180 S.E. 2d 664 (1971). The court stated that as the provision requires only one transaction, "it is a single act statute . . . ." *Id.* at 740, 180 S.E.2d at 667. The use of the term "single act" by the court in *Kolbe* should not be confused with the common meaning of "single act" as it relates to the "tortious

the long-arm statute is to assert jurisdiction, to the extent permissible under the due process clause,[10] over nonresidents who engage in some purposeful activity[11] in this state. As a practical matter, the attorney arguing for personal jurisdiction over a foreign corporation pursuant to paragraph (1) should not limit himself to a discussion of the particular transaction from which the cause of action arose. The courts must be mindful not only of the literal application of the jurisdictional statute, but also of due process considerations.[12] Thus, a court may be influenced, as was the court in *John G. Kolbe, Inc. v. Chromodern Chair Co.*,[13] by the entire scope of the foreign corporation's contacts with the state, including unrelated transactions.[14]

To determine in any given case whether personal jurisdiction may be asserted over a foreign corporation pursuant to paragraph (1), there must be an analysis of the particular facts and circumstances involved.[15] It is

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act" provision of some state long-arm statutes. *See* notes 44 & 45 *infra*, and accompanying text.

The court in *Kolbe* held that the defendant, a California corporation, did transact business within the meaning of the statute. A manufacturer's representative was authorized to secure from the plaintiff, a Virginia corporation, a written order for the sale of chairs to be delivered directly to North Carolina from California. The defendant's regional representative had sold other Chromodern merchandise to Virginia dealers, amounting to $3,446.60 in sales, and the order involved in the *Kolbe* transaction was secured in Virginia. Despite the court's announcement that a single transaction is sufficient to confer jurisdiction, the court did not appear to base personal jurisdiction over the defendant solely upon the securing in Virginia of the written order for the *Kolbe* transaction. The court held that it would not offend traditional notions of fair play and substantial justice to require the defendant to submit to jurisdiction for the following reason: "Chromodern's actions, both in this transaction and in others shown by the evidence, delineate a pattern of activities intended to develop the Chromodern market in Virginia and to reap economic benefit therefrom." *Id.* at 741, 180 S.E.2d at 668. It has been noted that while a single transaction may constitute the basis for jurisdiction, cases so holding generally involve substantial contacts with the state asserting jurisdiction. Cornell Univ. Med. Col. v. Superior Ct. of Santa Clara, 38 Cal. App. 3d 311, 318, 113 Cal. Rptr. 291, 295 (1974).

10. U.S. CONST. amend. XIV.

11. The notion of "purposeful activity" is obviously not literally precise, as the provision of the long-arm statute dealing with breach of warranty requires only that the defendant have reasonably expected the plaintiff to use, consume, or be affected by the goods in Virginia. *See* VA. CODE ANN. § 8.01-328.1.A.5. (Repl. Vol. 1977).

12. *See generally* section VI *infra*.

13. 211 Va. 736, 180 S.E.2d 664 (1971).

14. *But see* Cornell Univ. Med. Col. v. Superior Ct. of Santa Clara, 38 Cal. App. 3d 311, 316-17, 113 Cal. Rptr. 291, 295 (1974), in which the court held that "[l]ittle emphasis or importance may reasonably be placed upon . . ." the defendant's wholly unrelated activities.

15. John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971). For other cases considering the "transacting any business" provision of Virginia's long-arm statute, Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972), *cert.*

generally held that neither the defendant nor his agent need be physically present in the state for the purpose of transacting business within the meaning of the long-arm statute.[16] Some courts have established certain rules to guide the evaluation of the particular facts in determining whether the corporation was transacting business. Under the New York long-arm statute,[17] for instance, the general rules laid down by the courts are stated as follows: "Mere execution of a contract in New York, without more, is insufficient to constitute transaction of business as is mere negotiation; negotiation or execution plus other contacts, however, may suffice."[18] The obvious danger of such a statement is that it may lose its identity as a mere guide and become instead a hard and fast rule.[19]

In general, courts have been reluctant to assert jurisdiction over nonresident buyers, as opposed to sellers, under the "transacting any business" clause of their state long-arm statutes.[20] Where jurisdiction is extended over a nonresident purchaser, that purchaser has usually "either initiated the relationship or actively participated in negotiations and plans for production. . . ."[21] Nevertheless, it is clear that purchases can constitute the basis for transacting business within a state.[22] No distinction is made in paragraph (1) between seller and purchaser, nor is any reference made to either.[23] Only by an analysis of the particular facts and circumstances of a given case can it be determined whether the foreign corporation has transacted any business in Virginia.[24]

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*denied*, 411 U.S. 966 (1973); Marston v. Gant, 351 F. Supp. 1122 (E.D. Va. 1972); V & V Mining Supply, Inc. v. Matway, 295 F. Supp. 643 (W.D. Va. 1969); Dotson v. Kwiki Systems, Inc., 281 F. Supp. 874 (W.D. Va. 1968); Olin Mathieson Chem. Corp. v. Molins Orgs., Ltd., 261 F. Supp. 436 (E.D. Va. 1966).

16. Colorado-Florida Living, Inc. v. Deltona Corp., 338 F. Supp. 880, 882 (D. Col. 1972).

17. N.Y. CIV. PRAC. LAW § 302 (McKinney 1966), *as amended*, (Cum. Supp. 1977).

18. Impex Metals Corp. v. Oremet Chem. Corp., 333 F. Supp. 771 (S.D.N.Y. 1971).

19. No such rule has been expressly established in any case considering the Virginia long-arm statute.

20. Vacu-Maid, Inc. v. Covington, 530 P.2d 137, 141 (Okla. 1974). *See, e.g.* Geneva Indus., Inc., v. Copeland Constr. Corp., 312 F. Supp. 186 (N.D. Ill. 1970); "Automatic" Sprinkler Corp. v. Seneca Foods Corp., 361 Mass. 441, 280 N.E.2d 423 (1972).

21. Vacu-Maid, Inc. v. Covington, 530 P.2d 137, 143 (Okla. 1974).

> The reason most often given for this buyer-seller distinction is that the seller is the aggressor or initiator in the forum and by selling his product in the state he receives the benefit and protection of the forum state's laws, and hopefully profits from its business therein. Further, allowing jurisdiction over "passive" buyers would tend to extinguish state lines and also to discourage out-of-state purchasers from dealing with resident sellers.

*Id.* at 141.

22. Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 841 (E.D.N.Y. 1971).

23. VA. CODE ANN. § 8.01-328.1.A.1. (Repl. Vol. 1977).

24. John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971).

Under paragraph (1), the cause of action must arise out of the foreign corporation's transacting of business;[25] it is not sufficient that the foreign corporation's transaction of business constituted merely an antecedent fact having no real relation to the plaintiff's cause of action.[26] But if the cause of action did in fact arise from the corporation's transaction of business in Virginia, "the court is not deprived of jurisdiction merely because the subject matter extends beyond the state boundaries."[27]

2. *Contracting to Supply Services or Things in the State*

Providing jurisdiction in such cases helps satisfy the state's legitimate interest in protecting the rights of its residents under contracts with nonresident corporations.[28] Paragraphs (1) and (2)[29] are obviously closely related, as both may likely apply in commercial dealings with a foreign corporation. Where, however, paragraph (2) applies to a set of facts but paragraph (1) does not, as in the case of an unexecuted contract negotiated outside Virginia and with no other related activities in the state, due process considerations may preclude the assertion of jurisdiction.[30]

It should be noted that paragraph (2) contemplates contracts to supply in Virginia.[31] Thus, if the contract with the foreign corporation calls only for the supplying of services or things outside the state, paragraph (2) simply does not apply.[32] In such a case, it may still be possible to demon-

25. VA. CODE ANN. § 8.01-328.1.A. (Repl. Vol. 1977).

26. *See, e.g.*, Krone v. AMI, Inc., 367 F. Supp. 1141 (E.D. Ark. 1973).

27. Dotson v. Kwiki Systems, Inc., 281 F. Supp. 874, 876 (W.D. Va. 1968). In *Dotson*, the plaintiff alleged that the defendant, a Missouri corporation which manufactured coin-operated car washes, had orally agreed to give plaintiffs exclusive distributorships for Virginia, West Virginia, and Kentucky. The distributorships could not be revoked without first giving the plaintiffs an opportunity to conclude the agreement in writing. The plaintiffs later discovered that other parties had been appointed as exclusive distributors in West Virginia and Kentucky, but there was nothing to indicate that their Virginia operations had been encroached upon. The defendants were nevertheless held subject to jurisdiction under the transacting business rationale.

28. Engineering Assocs. of New England v. B & L Liquidating Corp., 115 N.H. 508, 345 A.2d 900, 902 (1975).

29. VA. CODE ANN. § 8.01-328.1.A.1. & 2. (Repl. Vol. 1977).

30. *See generally* section VI *infra*. If the contract designates Virginia law as governing the contract, it may be argued that despite an absence of other actual contacts, such designation is itself a significant voluntary contact, mitigating due process concerns. *See* Uniroyal, Inc. v. Heller, 65 F.R.D. 83, 91 (S.D.N.Y. 1974), holding that although designation of New York law as governing the contract would not alone permit recourse to New York's long-arm statute, it did constitute a significant contact within the state.

31. VA. CODE ANN. § 8.01-328.1.A.1. (Repl. Vol. 1977).

32. For example, jurisdiction was based upon subsection (A)(1), but could not have been based upon subsection (A)(2), in John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736,

strate enough contacts that the foreign corporation may be deemed to have transacted business in Virginia within the meaning of paragraph (1).[33] The reason why paragraph (2) does not provide jurisdiction based on contracts to supply services or things outside the state is undoubtedly grounded upon due process considerations.[34]

Paragraph (2) of the long-arm statute should not be interpreted as conferring personal jurisdiction for a cause of action arising from a foreign corporation's contracting to *purchase*—as opposed to *supply*—services or things in this state.[35] The payment of money for goods supplied or services rendered presents the converse situation as that envisioned by paragraph (2). In *Davis H. Elliott Co. v. Caribbean Utilities Co.*,[36] for example, it was held that personal jurisdiction over a foreign corporation pursuant to paragraph (2) could not be based upon a contract cancellation agreement[37] between the parties calling for the defendant to make payment to the plaintiff by mail in Virginia.[38]

In order for jurisdiction over a foreign corporation to be obtained under paragraph (2), the cause of action must arise from the corporation's con-

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180 S.E.2d 664 (1971). The contract called for the defendants to deliver the chairs to North Carolina.

33. VA. CODE ANN. § 8.01-328.1.A.1. (Repl. Vol. 1977); *see, e.g.*, John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 180 S.E. 2d 664 (1971).

34. This provision of the long-arm statute is already of questionable constitutionality in its literal application where the nonresident's only contact with Virginia is that the Commonwealth is the contemplated situs of the contract's execution. If subsection (A)(2) included within its scope contracts to supply services or things outside this state, the provision would by its terms cover the situation in which the defendant had no actual contact with Virginia; this would clearly be violative of the due process clause. *See generally*, section VI *infra*.

35. *But see*, Note, *The Virginia "Long-Arm" Statute*, 51 VA. L. REV. 719, 740 (1965), questioning this distinction.

36. 64 F.R.D. 594 (W.D. Va. 1974).

37. Under the original contract, the plaintiff, a Virginia corporation, was to engineer, supervise, provide labor and materials for, and construct electrical transmission and distribution lines on an island in the British West Indies. After the plaintiff had begun performance, the parties agreed to terminate the contract. They entered into a contract of cancellation in Kentucky, in which it was provided that the defendant agreed to pay for the return of plaintiff's men and equipment to Virginia. The plaintiff's complaint alleged that the defendant owed a sum of money under the terms of the cancellation agreement.

38. The court distinguished this case from the case of Elefteriou v. Tanker Archontissa, 443 F.2d 185 (4th Cir. 1971), in which jurisdiction was obtained under subsection (A)(2). In *Elefteriou*, a statute of the United States required that a seaman discharged by a vessel making foreign voyages be paid his wages within certain time limits. The court in *Elliott* noted that *Elefteriou* involved a statute of the United States and a maritime sea injury, neither of which existed in *Elliott*. The implication appears to be that in such maritime cases, jurisdiction by necessity, due to the lack of an alternative forum, may justify a liberal application of a state's long-arm statute.

tracting to supply services or things in Virginia.[39] A First Circuit case,[40] construing the same provision of the Massachusetts long-arm statute,[41] illustrates the importance of this requirement. The plaintiff bought a motor scooter in Pennsylvania which was manufactured in Italy by the defendant corporation. Due to an alleged manufacturing defect, the plaintiff was injured. At the time of the injury, the defendant sold its scooters to a Massachusetts corporation under a franchise agreement. The plaintiff brought suit in Massachusetts, attempting service under that state's long-arm statute. The court held that the plaintiff's cause of action did not arise from and was not connected with any shipment into or services within Massachusetts. "It would be an unwarranted extension of the statute to include shipments elsewhere merely because, under the same contract, goods unrelated to the cause of action may have been introduced into the commonwealth."[42]

3. *Causing Tortious Injury*

Paragraphs (3) and (4)[43] distinguish the Virginia long-arm statute from the "single-act" statutes of other states.[44] The single-act statutes, which have but one "tortious act" provision, provide personal jurisdiction for a cause of action arising from the commission of a tortious act within the state.[45] These single-act statutes have been broadly construed[46] and provide a farther-reaching jurisdictional power than do paragraphs (3) and (4) of the Virginia long-arm statute. Paragraph (4) is more restrictive than paragraph (3), in order to ensure that the defendant has additional contacts with the state when the act or omission occurs outside Virginia.[47] It

39. VA. CODE ANN. § 8.01-328.1.A.2. (Repl. Vol. 1977).

40. Singer v. Piaggio & C., 420 F.2d 679 (1st Cir. 1970).

41. MASS. ANN. LAWS ch. 223A, § 3(b) (Michie/Law. Co-op 1976).

42. Singer v. Piaggio & C., 420 F.2d 679, 681 (1st Cir. 1970).

43. It should be remembered that the long-arm statute pertains to personal jurisdiction over "persons", including corporations that act through agents. Because the long-arm statute is jurisdictional and does not create any additional causes of action, there is no reason to believe that the principles of agency embodied in the statute differ from those of the common law. Thus, application of those principles to negate the existence of a master-servant relationship could result in the denial of personal jurisdiction over the corporation sought to be charged for the tort committed.

44. *See generally,* Note, *The Virginia "Long-Arm" Statute,* 51 VA. L. REV. 719, 744-51 (1965).

45. *See, e.g.,* ILL. ANN. STAT. ch. 110, § 17(1)(b) (Smith-Hurd 1965).

46. *See, e.g.,* Novel v. Garrison, 294 F. Supp. 825 (N.D. Ill. 1969).

47. It was held in St. Clair v. Righter, 250 F. Supp. 148, 152 (W.D. Va. 1966), that where the legislature has not expressly stated that the courts are not to exercise jurisdiction beyond the limits defined in the statute, the courts may exercise jurisdiction beyond the express authorization of the statute to the limits of due process. Thus, it was held in effect that the

should be noted that the added requirements are phrased in the alternative. It is enough, for example, that the foreign corporation derive substantial revenue in Virginia, without any necessity that it also regularly do or solicit business, or engage in any persistent course of conduct.[48] Furthermore, it is not necessary that these added contacts bear any relationship to the act or omission which caused the injury.[49]

The restrictive language of paragraph (4) is the same, verbatim, as that in paragraph (5) dealing with breach of warranty actions.[50] Because the tests are satisfied without any relationship to the tortious injury or to the injury by breach of warranty, the construction of the various requirements should be the same under either section.[51] For the sake of clarity, therefore, the tests will be analyzed here by reference to cases in which either paragraph (4) or paragraph (5) was at issue.

In order to satisfy the restrictive language of the two paragraphs, it is not necessary that the defendant's activity amount to "doing business" in the technical sense.[52] It has been held that a foreign corporation may be engaged in a "persistent course of conduct" by shipping its product directly to purchasers in Virginia.[53]

In determining what constitutes "substantial revenue," it is difficult to identify an absolute amount which *ipso facto* may be deemed to be substantial.[54] The test is not whether *profits* are substantial, but whether

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courts may disregard the additional requirements of subsection (A)(4) where the act or omission occurs outside the state, for the reason that the broader single-act statutes of other states are constitutionally permissible. Such reasoning clearly contravenes the legislature's intent as to when jurisdiction may be exercised in such cases. In criticism of the *St. Clair* rationale, the court in Beaty v. M.S. Steel Co., 401 F.2d 157 (4th Cir. 1968), *cert. denied,* 393 U.S. 1049 (1969), observed:

> In short, the court rendered nugatory the long-arm statute, and ignored limitations embodied in the statute, asserted jurisdiction to the full extent of the due process clause of the Fourteenth Amendment. In so doing, the District Court misconceived the role of the due process clause and misinterpreted the decisions of the Supreme Court dealing with a state's power to exercise jurisdiction over non-residents.

401 F.2d at 161.

48. *See, e.g.,* Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973).

49. HANDBOOK, *supra* note 6, at 223.

50. VA. CODE ANN. § 8.01-328.1.A.5. (Repl. Vol. 1977).

51. *See,* Note, *The Virginia "Long-Arm" Statute,* 51 VA. L. REV. 719, 752 (1965).

52. Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1, 4 (W.D. Va. 1965); HANDBOOK, *supra* note 6, at 223.

53. *See, e.g.,* Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1, 4 (W.D. Va. 1965); Jackson v. National Linen Serv. Corp., 248 F. Supp. 962, 965 (W.D. Va. 1965).

54. Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818, 822 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973). In *Ajax,* $37,000 derived from the sale of frames was held to be

revenue derived in the state is substantial; otherwise, a foreign corporation could be selling all of its goods in the state but escape the jurisdiction of the courts if the corporation happened not to profit from the sale.[55] Although a percentage of total sales may be a factor to be considered in determining whether revenue is substantial, it is not dispositive.[56] A small percentage of the sales of a corporate giant may be substantial in the absolute sense;[57] conversely, "a relatively small absolute amount might be deemed 'substantial' where it constitutes a significant percentage of a small corporation's total sales."[58] Finally, to satisfy the "substantial revenue" test, it is apparent that the revenue may be derived from a single transaction, and that the sale itself need not take place in Virginia so long as the goods are used or consumed within the state.[59]

4. *Injury from Breach of Warranty*

This provison[60] eliminates potential problems with respect to jurisdiction which might have been raised as a result of past confusion as to what type of action warranty is, in that it sounds in contract but has recovery in tort.[61]

The requirement that the manufacturer or seller "might reasonably have expected such person to use, consume, or be affected by the goods" in Virginia is worded almost identically to the foreseeability requirement of Virginia's statute[62] abolishing the defense of lack of privity in products liability actions.[63]

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"substantial revenue." *Id.* at 821. In Jackson v. National Linen Serv. Corp., 248 F. Supp. 962 (W.D. Va. 1965), a foreign corporation derived $25,000 annually from sales in Virginia for the period in question, compared with a total sales figure of between four and five million dollars; the corporation was deemed to have derived substantial revenue from the sale of its product in Virginia. *Id.* at 965.

55. McCormick v. Haley, 29 Ohio Misc. 97, 279 N.E.2d 642, 646 (1971).

56. Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818, 821-22 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973).

57. *Id.*

58. *Id.*

59. Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973). *But see* Jackson v. National Linen Serv. Corp., 248 F. Supp. 962, 963 (W.D. Va. 1965), in which the court assumed that the dollar figure used represented the foreign corporation's direct sales to Virginia customers, and did not include sales of the corporation's products which may have originally been sold to independent companies.

60. VA. CODE ANN. § 8.01-328.1.A.5. (Repl. Vol. 1977). *See generally* 22 WASH. & LEE L. REV. 152 (1965).

61. Jackson v. National Linen Serv. Corp., 248 F. Supp. 962, 964 (W.D. Va. 1965).

62. VA. CODE ANN. § 2-318 (Added Vol. 1965).

63. *See generally* Note, *The Virginia "Long-Arm Statute,* 51 VA. L. REV. 719, 752 (1965).

Paragraph (5) deals with sales of goods outside Virginia. If a foreign corporation makes the sale within Virginia, then paragraphs (1) or (2) should provide for personal jurisdiction.[64] The distinction is important because if it can be shown that the sale was in the state the requirement of paragraph (5), that there be regularity, persistent course of conduct, or substantial revenue, need not be met.[65]

5. *Relationship to Real Property*

One obvious manner in which paragraph (6)[66] applies is in causes of action arising from real estate transactions.[67] Where a contract for the sale of land is concluded, although it is wholly executory, the purchaser has an equitable interest in the land.[68] A foreign corporation with such an interest, or with a legal interest, may be subject to jurisdiction under paragraph (6) for causes of action arising out of that transaction.[69] The fact that the seller has sold the land in mitigation of damages and the nonresident buyer has been divested of his equitable interest does not deprive the court of jurisdiction.[70]

This provision of the long-arm statute may also be applied to assert jurisdiction over a foreign corporation for an action in *tort* arising out of the corporation's interest, use or possession of Virginia real estate.[71]

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64. It should again be noted that each subdivision will support a cause of action under any theory of law. *See* note 6 *supra.*

65. *See* notes 54-59 *supra,* and accompanying text for a discussion of the test of regularity, persistent course of conduct or substantial revenue.

66. VA. CODE ANN. § 8.01-328.1.A.6. (Repl. Vol. 1977). It should be noted here that the long-arm statute refers to "personal jurisdiction" and does not use the term "in personam." It could be argued that paragraph (6) includes with its scope actions *in rem.*

67. "For obvious reasons, legislative bodies and courts have thrown around transactions involving real estate a large measure of protection. The stability of such transactions is of vital concern to the state." Carmichael v. Snyder, 209 Va. 451, 456, 164 S.E.2d 703, 707 (1968).

68. Sale v. Swann, 138 Va. 198, 208, 120 S.E. 870, 873 (1924).

69. *See* Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968).

70. Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968). In so holding, the court stated as follows:

> The statute gives jurisdiction at the time of, and because of, the execution of the contract which vested in defendant an interest in land. It was then that defendant 'acted directly.' This cause of action now asserted by plaintiffs arises by virtue of an alleged breach of that contract—a contract which gave to each party certain enforceable rights, and emposed upon each certain contractual obligations.

*Id.* at 458, 164 S.E.2d at 708.

71. *See e.g.,* Snow v. Clark, 263 F. Supp. 66 (W.D. Va. 1967). In *Snow,* the defendant was held subject to personal jurisdiction under paragraph (6) for a tort action arising out of personal injuries sustained by a painter with whom the defendant had contracted to paint

Where, however, there is no connection between the cause of action and the foreign corporation's relationship to real property in the state, paragraph (6) does not apply. In *Rivera v. Pocohontas Steamship Co.*,[72] for example, the plaintiff's cause of action against a Delaware corporation was for injuries allegedly caused by the defendant's negligence and the unseaworthiness of the defendant's vessels on the high seas. It was held that the provision of Massachusetts' long-arm statute corresponding to Virginia's paragraph (6)[73] did not apply since there was no allegation or evidence that the defendant's interest in Massachusetts land was in any way related to the plaintiff's cause of action.[74]

Thus, application of the long-arm statute, including paragraph (7), is dependent upon the cause of action having arisen out of an enumerated activity. Attention is now turned to personal jurisdiction for causes of action unrelated to foreign corporations' activities within the Commonwealth.

### B. Personal Jurisdiction Beyond the Long-Arm Statute

It is not entirely clear to what extent, if any, personal jurisdiction may be obtained over a foreign corporation where the long-arm statute is for some reason inapplicable.[75] Specifically, the question remains whether jurisdiction may be asserted over foreign corporations when the cause of action is unrelated to the corporation's contacts with Virginia.

Prior to the enactment of the long-arm statute in 1964, the primary means by which personal jurisdiction was obtained over foreign corporations was by invocation of Code section 8-60.[76] This section of the Code was employed as a jurisdictional statute embodying the old "doing business" test.[77] While the "doing business" test is generally more restrictive than long-arm provisions, under certain circumstances it is less restrictive in that the cause of action need not necessarily be related to the foreign

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the exterior and interior of her Virginia house. Under such circumstances, paragraph (3) should apply in nearly every case.

72. 340 F. Supp. 1307 (D. Mass. 1971).

73. Mass. Ann. Laws ch. 223A, § 3(e) (Michie/Law. Co-op 1976).

74. Rivera v. Pocahontas Steamship Co., 340 F. Supp. 1307, 1310 (D. Mass. 1971).

75. *See* Va. Code Ann. § 8.01-328.1.B., authorizing jurisdiction over "foreign corporations which are subject to service of process pursuant to the provisions of *any other statute.*" *Id.* (emphasis added). In this regard, see Va. Code Ann. §§ 8.01-307 to -308, which provide for service of process on nonresident operators of automobiles and aircraft when such are involved in accidents within Virginia.

76. Va. Code Ann. § 8.60 (Repl. Vol. 1957) (repealed 1977).

77. *See generally* Note, *The Virginia "Long-Arm" Statute,* 52 Va. L. Rev. 719, 733 n. 81 (1965); section VI, notes 13-14 *infra,* and accompanying text.

corporation's intrastate activities.[78] When jurisdiction was grounded upon Code section 8-60, the service of process provisions of Title 13.1[79] provided the particular methods of service.

Under the long-arm statute, personal jurisdiction may be exercised only for those causes of action which arise from the corporation's commission of one of the statute's enumerated acts. This requirement is clear from the wording of Code subsection 8.01-328.1.A itself. However, subsection (B) of the long-arm statute does not limit to the long arm statute itself the methods available for obtaining jurisdiction over foreign corporations.[80]

If the two parts of subsection (B) are read together, this provision seems to refer to statutes conferring personal jurisdiction over foreign corporations where the cause of action did not arise from that corporation's intrastate activities. Subsection (B) would generally seem to permit the assertion of jurisdiction under the "doing business" line of cases decided under section 8-60 and Title 13.1 of the Code. Indeed, even after the enactment of the long-arm statute, cases were decided in which Code section 8-60 and one of the Title 13.1 service of process provisions constituted the manner in which personal jurisdiction and service of process were effected.[81] What must now be noted is that in the recent Code revision Section 8-60 was repealed.[82] It is therefore unclear whether "doing business" has been eliminated as a viable alternative jurisdictional test, or instead will exist apart from the statute under which it flourished.

### C. Jurisdiction in Actions In Rem and Quasi In Rem

Whereas actions in personam are directed against specific persons (including corporations) and seek personal judgments, actions in rem are directed "against the thing or property or status of a person and seek

78. In Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962), the court stated as follows:

> It is quite clear, however, that jurisdiction is not dependent upon the connection of the nonresident with the transaction that gives rise to the suit before the court. What the defendant may have done in the particular case is, of course, relevant upon the question of liability at the trial of the case upon the merits; and it is also relevant but not conclusive upon the question of jurisdiction. The latter must be decided after considering the sum total of the defendant's intrastate transactions.

*Id.* at 914.

79. Va. Code Ann. §§ 13.1-111, -274 (Cum. Supp. 1977); *id.* § 13.1-119 (Repl. Vol. 1973).

80. *Id.* § 8.01-328.1.B. (Repl. Vol. 1977). *See* note 75 *supra.*

81. *See, e.g.,* Goldrick v. D. M. Picton Co., 56 F.R.D. 639 (E.D. Va. 1971); Skarpelis v. M/T Arthur P., 302 F. Supp. 147 (E.D. Va. 1969).

82. The entire Title 8 was repealed and replaced by Title 8.01, in which the old § 8-60 is not included.

judgments with respect thereto as against the world."[83] The basis of in rem jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state.[84] Thus, a judgment in rem operates against the res, irrespective of who the owner is and irrespective of whether he is subject to in personam jurisdiction. The third category is that of quasi in rem jurisdiction, in which at issue are the interests of particular persons in designated property.[85] A suit to foreclose a mortgage on real or personal property, for instance, has been held to be partly in personam and partly in rem; it is in rem insofar as it seeks to seize and sell property, and it is in personam insofar as the mortgagor's debt is concerned.[86] As such, a foreclosure suit falls within the definition of a quasi in rem action.[87]

Although personal or substituted service is generally required for jurisdiction in personam, unless the defendant voluntarily submits to jurisdiction, service of process in actions in rem and quasi in rem has traditionally been more easily effected. Specifically, courts have acquired jurisdiction in actions in rem and quasi in rem by way of service by publication.[88]

## V. SERVICE OF PROCESS ON FOREIGN CORPORATIONS

Title 8.01 contains a statute which purports to list the methods by which service of process on a foreign corporation may be effected.[1] As will be seen, however, the list is not exhaustive. The methods prescribed in section 8.01-301 of the Code are presented in the alternative, which may be contrasted to the consecutive manner prescribed for service on natural persons.[2]

### A. Personal Service

If the foreign corporation is authorized to do business in Virginia,[3] per-

83. O'Hara v. Pittston Co., 186 Va. 325, 336, 42 S.E.2d 269, 275 (1947). For a discussion of the distinctions between in personam, in rem and quasi in rem actions in a procedural due process context, see Shaffer v. Heitner, 97 S. Ct. 2569 (1977). *See generally* section VI, notes 3-35 *infra*, and accompanying text.

84. Hanson v. Denckla, 357 U.S. 235, 246 (1958).

85. *Id.* at 246 n.12.

86. Hall v. Milligan, 221 Ala. 233, 128 So. 438, 439 (1930).

87. *Id.* The court in *Milligan* did not use the term quasi in rem, but rather concluded that when no personal judgment is sought, a suit for the foreclosure of a mortgage is essentially a proceeding in rem.

88. For a discussion of service by publication, see section V, notes 19-23 *infra*, and accompanying text.

1. Va. Code Ann. § 8.01-301 (Repl. Vol. 1977).

2. *See Id.* § 8.01-296.

3. *See Id.* § 13.1-106 (Cum. Supp. 1977); §§ 13.1-107 to -108 (Repl. Vol. 1973).

sonal service may be made on any officer, director, or on the corporation's registered agent, wherever they may be found within Virginia.[4] If the foreign corporation is not authorized to do business in Virginia, personal service may be made on any agent of the corporation, wherever he may be found within Virginia.[5]

### B. Substituted Service on the State Corporation Commission

An alternative method under Code section 8.01-301 for service on a foreign corporation authorized to transact business is by substituted service in accordance with Code section 13.1-111,[6] for stock corporations, or Code section 13.1-274,[7] for non-stock corporations. These two provisions of Title 13.1 are worded identically. Under each, service may be on the corporation's registered agent, or on the Clerk of the State Corporation Commission (S.C.C.) or any of his staff at his office.[8] If the latter method is employed, the clerk is to "forthwith" cause process to be sent by registered or certified mail to the foreign corporation at its registered office. In the case of withdrawal[9] of the foreign corporation from Virginia, the mailing address is to be the address shown in the corporation's statement of withdrawal.[10]

Where the foreign corporation is not authorized to do business in Virginia, substituted service may be effected in accordance with section 13.1-119 of the Code.[11] Under Code section 13.1-119, substituted service may be made on the clerk of the S.C.C. if no director, officer or agent of the corporation can be found. The clear implication is that some effort must first be made to effect personal service on unauthorized corporations before attempting substituted service on the S.C.C. This may be contrasted to

4. *Id.* § 8.01-301.1 (Repl. Vol. 1977).

5. *Id.*

6. *Id.* § 13.1-111 (Cum. Supp. 1977).

7. *Id.* § 13.1-274. This provision is identical in wording to *id.* § 13.1-111.

8. Where the process is being issued by the State Corporation Commission itself, the Clerk of the S.C.C. is not deemed a statutory agent for service. Rather, the S.C.C. is to mail process by registered or certified mail to the corporation at its registered office. *Id.* §§ 13.1-111, -274 (Cum. Supp. 1977).

9. *See id.* § 13.1-115 regarding the procedure for the withdrawal of authorized foreign corporations.

10. *Id.* §§ 13.1-111, -274.

11. *Id.* § 13.1-119 (Repl. Vol. 1973).

*See* Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962), wherein the Fourth Circuit Court of Appeals noted that it must be shown that a defendant is "doing business" in the state in order to give him notice by substituted service within the constitutional requirement of "fair play and substantial justice." *Id.* at 914, *quoting,* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See generally* section VI *infra.*

the provisions for service on authorized corporations,[12] which simply imply a choice of either method.

### C. Service under the Long-Arm Statute

Whether the foreign corporation is authorized or not, if jurisdiction is based upon the long-arm statute, service of process may be effected in accordance with section 8.01-329 of the Code.[13] This provision lists three *alternative* methods of service. First, service may be in the same manner as is provided in Chapter 8 of Title 8.01 "in any other case in which personal jurisdiction is exercised over such a nonresident party. . . ."[14] With regard to foreign corporations, this undoubtedly refers to Code section 8.01-301[15] and is intended to permit substituted service on the Clerk of the S.C.C. wherever long-arm jurisdiction may be asserted.[16] Second,

12. *Id.* §§ 13.1-111, -274 (Cum. Supp. 1977).

13. *Id.* § 8.01-329 (Repl. Vol. 1977).

14. *Id.* § 8.01-329.A.

15. *Id.* § 8.01-309.

16. "[Section] 8.01-301 effects a substantive change in former law by allowing service in the alternative [*i.e.*, at the option of the plaintiff under Title 13.1 or under the Long-Arm Statute] in cases where the prerequisites are met for long-arm jurisdiction over foreign corporations." Code Comm'n Report, *supra* section I, note 1 at 201-02.

The Revisers' Note following § 8.01-301 also states that under the now repealed § 8-81.3 service could be made on the Secretary of the Commonwealth for unauthorized foreign corporations but not for authorized foreign corporations. Under § 8-81.3 service of process could be made on the Secretary of the Commonwealth as statutory agent only if there was no other provision of the Code providing service of process over the corporation. Since §§ 13.1-111 and 13.1-274 were applicable to authorized corporations, service could never be effected against authorized foreign corporations under § 8-81.3. Code Comm'n Report, *supra* section I, note 1, at 201. The Revisers then state that since §§ 13.1-111 and 13.1-274 do not apply to unauthorized corporations, service on such corporations could be had under the former § 8-81.3. Inexplicably, § 13.1-119 is not mentioned in the Code Comm'n Report. As that section provides for substituted service of process upon the clerk of the S.C.C. for unauthorized corporations, it would appear that service on the Secretary of the Commonwealth was precluded for unauthorized as well as authorized foreign corporations under § 8-81.3.

Another unexplained omission of § 13.1-119 occurs in § 8.91-301. Section 8.01-301 incorporates the provisions for substituted service upon authorized corporations, §§ 13.1-111 and 13.1-274, but not the provision for such service on unauthorized corporations, which is § 13.1-119. As § 8.01-301 purports to be a list of methods of service upon foreign corporations, it is unfortunate that it makes such an omission. A result of that omission can be seen with respect to service of process under the long-arm statute. As discussed, service under the long-arm statute may be the same manner as is provided in Chapter 8. Since § 13.1-119 is not included by reference in Chapter 8, as are §§ 13.1-111 and 13.1-274, does this mean that there may not be service on the S.C.C. in the case of unauthorized foreign corporations? Clearly, the intention of the revisers was to provide for service on either the S.C.C. or the Secretary of State for both authorized and unauthorized foreign corporations. *See* Revisers' Note [Code Comm'n Report], Va. Code Ann. § 8.01-301 (Repl. Vol. 1977). Despite the statement by the

service may be on *any agent* of the foreign corporation in the county or city in which he resides.[17] Third, service under the long-arm statute may be on the Secretary of the Commonwealth of Virginia, who is deemed a statutory agent for service of process.[18]

### D. Service by Publication for Actions In Rem and Quasi In Rem

Service of process on a foreign corporation may also be effected by an order of publication where jurisdiction in rem or quasi in rem is authorized, regardless of whether the corporation is authorized to transact business in Virginia.[19] Under such circumstances the order of publication must be entered in accordance with Code sections 8.01-316[20] and 8.01-317.[21] It is sufficient under section 8.01-316 of the Code that the party seeking service of process by entry of an order of publication file an affidavit stating that the party to be served is a foreign corporation. The order of publication itself should conform to the requirements of Code section 8.01-317 as to what information must be included. One change in the law made by Code section 8.01-317, intended to correct the confusion under former Code section 8-72,[22] is the new requirement that the order of publication contain a specific date by which the party served must appear and defend his interests. The date stated in the order is to be no sooner than fifty days after entry of the order. The clerk of court is then required to cause copies of the order to be posted, mailed, and transmitted to the designated newspaper within ten days after the entry of the order of publication.[23]

## VI. CONSTITUTIONAL CONSIDERATIONS OF STATE COURT JURISDICTION OVER FOREIGN CORPORATIONS

Determining the constitutionality of the assertion of jurisdiction over a foreign corporation is a two-step process. First, it must be found that the cause of action is within the ambit of the state's statutes[1] making the

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Revisers that § 8.01-301 "eliminates such unnecessary intricacies," confusion and intricacies may not necessarily have been eliminated.

17. Va. Code Ann. § 8.01-329.A. (Repl. Vol. 1977).

18. *Id.* Where service is made on the Secretary pursuant to this section, the statutory requirements of *id.* § 8.01-329.B. must be observed.

19. *Id.* § 8.01-301.4. For a discussion of the constitutional implications of such service by order of publication, see section VI *infra*.

20. Va. Code Ann. § 8.01-301.4. (Repl. Vol. 1977). The provision referred to is *id.* § 8.01-316.

21. *Id.* § 8.01-301.4. The provision referred to is *id.* § 8.01-317.

22. *Id.* § 8-72 (Repl. Vol. 1957).

23. *Id.* § 8.01-317 (Repl. Vol. 1977).

1. *See* Va. Code Ann. §§ 8.01-301 to -328.1 (Repl. Vol. 1977); section IV *supra*. *See also*

defendant amenable to the service of process. Second, such assertion of jurisdiction must be consistent with requirements of due process.[2] An overview of the development of the current due process limits is a necessary prelude to an analysis of the application of those limits in the Virginia law.

## A. Historical Developments: Territorial Power to Minimum Contacts

### 1. *Personal Jurisdicton*

For a century the bulwark of American jurisdictional law was the 1877 case of *Pennoyer v. Neff*,[3] which established a strict territorial concept of state power to adjudicate.[4] *Pennoyer* raised to the level of constitutional significance the position that the exercise of judicial "power" was governed by one set of rules when the action was in personam and that another set of rules applied when the action was one in rem or quasi in rem.[5]

The most recent explanation of the concepts of in personam and in rem jurisdiction is contained in the majority opinion in the case of *Shaffer v. Heitner*[6] where the "power" concept of *Pennoyer* was finally abandoned.[7]

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction

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Cal. Code Civ. Proc. Ann. § 410.10 (Cum. Supp. 1972); Ill. Ann. Stat. ch. 110 § 17 (Cum. Supp. 1968).

2. U.S. Const. amend. XIV. The protean nature of due process demands and other constitutional limitations has resulted in a long and tangled history of jurisdictional concepts. *See, e.g.*, Hazard, *A General Theory of State Court Jurisdiction*, 1965 Sup. Ct. Rev. 241 [hereinafter cited as Hazard]; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966) [hereinafter cited as von Mehren & Trautman]; Note, *Developments in the Law, State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960) [hereinafter cited as *Developments*].

3. 95 U.S. 714 (1877).

4. *Id.* Justice Field, writing for the majority, posited that a state has plenary power over persons and property within its borders and that no state could by its laws affect or bind either persons or property not within its territory. *Id.* at 722. *See also*, Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 St. John's L. Rev. 668, 669 (1975) [hereinafter cited as Zammit].

5. 95 U.S. at 724-28, 732-35. *Pennoyer* stood for the proposition that although personal service was necessary to effect an in personam judgment against a defendant, substituted service by publication on a non-resident defendant was sufficient to obtain jurisdiction where his property within the forum was seized either as a means to satisfy a judgment or as the subject matter of the suit.

6. 97 S.Ct. 2569 (1977).

7. *See* notes 35-38 *infra*, and accompanying text. The territorial power concept authorized a state to assert jurisdiction over persons and property within its boundaries despite the lack of any relationship existing between the forum, the defendant and the litigation.

> is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.[8]

*Pennoyer*, however, despite its assumption that judicial authority could be exercised over property without at the same time being exercised over the person,[9] did establish the groundwork for two early justifications for extra-territorial assertions of in personam jurisdiction over foreign corporations.[10] Thus, under the consent rationale, by doing business in a state, a foreign corporation "consented" to suit in that forum.[11] To facilitate the institution of suit against foreign corporatons under this theory, the state requirement that the corporation appoint an agent in the state to receive service of process against the corporation was a reasonable condition upon the privilege of doing business there.[12]

A second theory justifying personal jurisdiction over foreign corporations held that, by conducting business activities within the state, a corporation was "present" there and was therefore validly within the jurisdictional power of the state's courts.[13] Presence, like consent, was a legal conclusion based on a determination that particular corporate activities within the forum state reached the level of "doing business,"[14] thus subjecting the

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8. 97 S.Ct. at 2577. In Hanson v. Denckla, 357 U.S. 235 (1958), Justice Marshall articulated the distinction between in rem and quasi in rem actions:

> A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

*Id.* at 246.

9. "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected." Tyler v. Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814, *appeal dismissed*, 179 U.S. 405 (1900). *See also*, W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 60 (1942); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 663 (1959) [hereinafter cited as Traynor]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1969).

10. 95 U.S. at 735.

11. St. Clair v. Cox, 106 U.S. 350, 356 (1882).

12. International Harvester Co. v. Kentucky, 234 U.S. 579, 587-88 (1914); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177-82 (1868).

13. *See* Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264 (1917).

14. International Harvester Co. v. Kentucky, 234 U.S. 579, 589 (1914). The Supreme Court held that "doing business" within the state was the essential requirement of jurisdiction over a foreign corporation. *Id.* at 583. But in this case, it was found that the "doing business" manifested "presence" and thus justified the assertion of jurisdiction over foreign corporation.

foreign corporation to in personam jurisdiction.

The consent and presence fictions and the difficulties with the "doing business" test[15] were replaced by a new standard in *International Shoe v. Washington*.[16] Outlining the current limits of due process for the exercise of personal jurisdiction over foreign corporations, the Court held that the defendant must "have certain minimum contacts with [the state] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[17] Thus the focus is on the nature of the defendant's relationship to the forum rather than on the "power" considerations of *Pennoyer*.[18]

A broad reading of *International Shoe* was limited, arguably, by the case of *Hanson v. Denckla*,[19] which requires a threshold determination that the defendant's activities manifest some "purposeful availment" of the privi-

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15. *See, e.g.*, St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913); Green v. Chicago, B & Q Ry., 205 U.S. 530 (1907).

16. 326 U.S. 310 (1945). The question involved was whether the courts of the state of Washington could assert personal jurisdiction over a foreign corporation whose agents were present in the state in an action to collect unemployment taxes levied on those agents' salaries.

17. *Id.* at 316.

18. With this type of focus, considerations such as the inconvenience to the defendant of defending suit in a distant forum become relevant. *Id.* at 317. *International Shoe* also made clear that a single act, by its quality and nature, might be enough to justify finding the corporation liable to suit. *Id.* at 318. Read restrictively, however, the case requires that the cause of action arise out of forum-related activities. *Id.* at 320-21.

Applying the minimum contacts test in Travelers Health Association v. Virginia, 339 U.S. 643 (1950), the Court found sufficient contacts to satisfy due process in the company's mail solicitations, its investigations within the state of benefit claims, a membership including 800 Virginia residents, and the state's interest in protecting its citizens from insurance risks. The next year, in Perkins v. Benguet Mining Company, 342 U.S. 437 (1952), the Court upheld Ohio's assertion of jurisdiction over a Philippine corporation where the cause of action was unrelated to the company's forum activity, saying that such was neither compelled nor prohibited by the due process clause but was within state legislative discretion. The case involved a stock dispute, filed by a nonresident against the Philippine corporation whose president had carried on the corporate business from Ohio during the Japanese occupation of the Islands. The case can be seen as one of jurisdiction by necessity due to the unavailability of an alternative forum but it points out the potential elasticity of the fairness test, balancing the interests of the plaintiff and the forum against the inconvenience to the defendant. *See Developments, supra* note 2, at 932.

19. 357 U.S. 235 (1958). A Florida probate court sought to assert personal jurisdiction over the trustee of a Delaware trust and *in rem* jurisdiction over the corpus of the trust. It was held that due process not only forbids the exercise of jurisdiction over the delaware trustee who had manifested no "purposeful availment" of the forum state but also forbids such an exercise of jurisdiction over the corpus of a trust located in another state, denying, in these circumstances, the fiction that personalty has its situs at the domicile of the owner. *Id.* at 249.

leges of conducting business in the forum state.[20] But in requiring only that there be "some act"[21] to show this "purposeful availment" it appears that the Court was again validating the exercise of state court jurisdiction where the cause of action does not arise out of forum-related activities.[22]

2. *In Rem and Quasi in Rem Jurisdiciton*

The erosion of *Pennoyer* principles relative to jurisdiction over persons outside a state's territory, culminating in the *International Shoe* "minimum contacts" and fairness standard did not extend to the tenet that a state had plenary power over property within its borders until the case of *Shaffer v. Heitner*,[23] decided in 1977. Prior to *Shaffer*, an owner of property, tangible or intangible, could be sued anywhere his property could be located, regardless of how fleeting the forum contact with the property.[24] The case of *Harris v. Balk*[25] established that jurisdiction was proper wherever the debtor (garnishee) of a nonresident defendant could be found, the garnishee's debt to the principal defendant being the res which could be seized to obtain jurisdiction. The actions involved actual or symbolic seizure (attachment or garnishment) of the property. The plaintiff's recovery was limited by the value of the property seized because the "power" of the state did not extend to the person of the nonresident owner.[26]

The *Pennoyer-Harris* theories have been used to obtain jurisdiction over foreign corporations by attaching debts owed them by entities servable in the forum state.[27] Under the *Pennoyer* reasoning, seizure was equated with notice and publication was deemed sufficient to satisfy due process in such proceedings rather than the personal service required for personal jurisdiction. However, *Mullane v. Central Hanover Bank & Trust Company*[28] es-

20. 357 U.S. at 253. *See also*, Note, *The Cornelison Doctrine: A New Jurisdictional Approach*, 14 SAN DIEGO L. REV. 458, 481 (1977).

21. 357 U.S. at 253.

22. *See*, Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 309 (1970).

23. 97 S.Ct. 2569 (1977).

24. Commerce clause considerations, however, exercised some control over this kind of action when the property involved was chattel in transit through the state. *See* notes 79-83 *infra*, and accompanying text. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 56 comment (a), 60 (1971).

25. 198 U.S. 215 (1905).

26. *Id. See Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725, 730-31.

27. *See* Steele v. G. D. Searle & Co., 483 F.2d 339 (5th Cir. 1973); Lefebvre-Armistead Co. v. Southern Pac. Co., 142 Va. 800, 128 S.E. 244 (1925).

28. 339 U.S. 306 (1950). The case involved a New York statute which permitted trust companies to pool small trust estates into one common fund for investment and also allowed

tablished that due process notice requirements did not depend on a mechanical classification of the action and that the type of service most reasonably calculated to give notice and opportunity to be heard to the absent property owner was necessary.[29]

In *Shaffer v. Heitner*,[30] the Court overruled the *Pennoyer-Harris* line of cases to the extent that it allowed jurisdiction based on the presence of a nonresident owner's property regardless of the relationship between the forum, the litigation and the defendant.[31] The holding has constitutionalized the application of "minimum contacts" and fairness standards to govern actions in rem as well as those in personam.[32]

*Shaffer* involved a derivative suit brought for breach of duty by a nonresident in Delaware against the directors of a Delaware-chartered corporation. The Supreme Court of Delaware affirmed the lower court's assertion of jurisdiction based on the seizure of the defendants' stock options and other stock privileges, "present" in Delaware under a statute assigning a Delaware situs to all stock of corporations chartered in the state.[33] The stock seized was unrelated to the cause of action; the corporation was headquartered and had its principal place of business elsewhere; the defendants were nonresidents and had never been present in Delaware. The Supreme Court reversed and held that such an assertion of quasi in rem

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notice of judicial settlement of fund accounts to beneficiaries by publication in a local newspaper. It was held that such notice by publication, although valid under due process requirements as to beneficiaries whose addresses were unknown, did not comport with due process as to those beneficiaries whose addresses were known. Notice by mail was found to be sufficient for the latter category of beneficiaries.

29. *Id.* at 317-19. *See also* McDonald v. Mabee, 243 U.S. 90, 92 (1917).

30. 97 S.Ct. 2569 (1977).

31. *Id.* at 2585 n. 39.

32. Lower courts have been arguing for such a change increasingly. *See, e.g.*, Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons, J., concurring); Atkinson v. Superior Court, 49 Cal.2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub nom.*, Columbia Broadcasting Sys. v. Atkinson, 357 U.S. 569 (1958). *See also,* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens,* 65 YALE L.J. 289 (1956); Hazard, *supra* note 2; von Mehren & Trautman, *supra* note 2.

"Insofar as courts remain given to asking 'Res, res—who's got the res?' they cripple their evaluation of the real factors that should determine jurisdiction." Traynor, *supra* note 9, at 663.

33. 8 DEL. C. § 169 (1974 Rev. Vol.). Another Delaware statute allowed jurisdictional sequestration, the equitable counterpart of attachment, and was used by the plaintiff to "compel the personal appearance of [the] nonresident defendant[s] to answer and defend a suit brought against [them] in a court of equity." Shaffer v. Heitner, 97 S.Ct. 2569, 2574 (1977).

jurisdiction, where the defendants had no significant contacts with the forum, was a violation of due process.[34]

The import of *International Shoe* and *Shaffer* is that the "minimun contacts" test is now required to be met for all assertions of state court jurisdiction over foreign corporations or individuals.[35] The standard can be an elastic one, stretching or contracting to meet the demands of fairness

34. It was rendered that the acceptance of a directorship in a Delaware corporation, headquartered and conducting business elsewhere, was not "purposeful availment" of the privileges and protections of the forum under the *Hanson* rationale. Also, the opinion points out that Delaware does not have a long-arm statute, nor a statute treating acceptance of a directorship as consent to the jurisdiction of the state of incorporation, so that the defendants had no reasonable expectation of being subject to the jurisdiction of Delaware courts. Shaffer v. Heitner, 97 S.Ct. 2569, 2586 (1977).

35. The effects and application of *Shaffer* principles remain to be seen. It might be said that the Court was, simply, ready to take this step and any convenient case could have provided the vehicle. Here there were clearly other avenues for disposing of the case without cutting such a broad swath. For example, the Court might have invalidated the statutory scheme which required the defendants to enter a general appearance to seek release of their property. *See* 97 S.Ct. at 2573. Such analysis is outside the scope of this Note and remains to be handled by the commentators.

Two recent lower court decisions evidence a very broad reading of *Shaffer*. In the first, Carolina Power & Light Co. v. Uranex, 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977), it was held that California could constitutionally exercise jurisdiction over a debt owed by a California company to a French company in an attachment action where the property attached served as security for a possible judgment in favor of the North Carolina plaintiff against the French company in another forum where valid in personam jurisdiction could be asserted over the defendant. The court construed *Shaffer* to allow such a limited assertion of jurisdiction where there were insufficient contacts with the forum for adjudication of the issues relating to the controversy, but sufficient contacts to justify attachment of defendant's property present in the state due to the defendant's contract obligations to a forum corporation, to secure satisfaction of any recovery from the action pending in another forum.

The second case, O'Connor v. Lee-Hy Paving Corp., 46 U.S.L.W. 2184 (E.D.N.Y. Sept. 27, 1977), involved the attachment of an insuror's obligation to defend and indemnify the nonresident defendant as the jurisdictional basis of a New York plaintiff's wrongful death claim against a Virginia resident arising from an accident in Virginia. This is known as a *Seider* action, stemming from the much-criticized case of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The *O'Connor* court acknowledged that the Virginia defendants had no minimum contacts with New York, but declared that the type of jurisdiction sought to be exercised in the significant factor in assessing whether the demands of fundamental fairness have been met.

In holding that *Shaffer* does not require dismissal of this type of action, the court apparently placed great weight on the legal relationship arising between the tortfeasors and the decedent's dependents and the plaintiff's interest in litigating in the forum of her residence. It also qualifies the use of this type of attachment of an obligation by the restrictions that such attachment is available only to forum residents and only against insurors amenable to suit in the forum state. The court also emphasized that an attachment action probably would not prejudice the defendant's right to relitigate any issues in a suit for an amount in excess of that recovered in the attachment-based action.

as gauged by the interests of the plaintiff, the defendant, and the forum, but it finally discards the territorial power notions of *Pennoyer*. Due process requires that there be some relationship between the defendant and the forum, characterized as "minimum contacts", whether the exercise of state jurisdiction is based on the state's power over his person or his property. The first step of the bipartite evaluation of the validity of state court exercises of jurisdiction, determining whether the nonresident's person or property is within the range of the state statutory scheme, has been dealt with relative to Virginia law in section IV. The second step, determining whether assertions of jurisdiction in such circumstances comport with due process and other constitutional limitations, is the subject of the following section.

## B. Minimum Contacts And Virginia Law

### 1. *Long-Arm Jurisdiction*

Prior to the enactment of the Virginia long-arm statute in 1964[36] personal jurisdiction was asserted over foreign corporations under one of several statutes found in Title 8 and Title 13.1 of the Virginia code[37] which authorized service of process on an agent or registered agent of a foreign corporation, or on the Secretary of the State Corporation Commission. The statutory scheme presented an intricate and confusing choice situation for the plaintiff's attorney seeking to get a foreign corporation into court.[38] These statutes presented no constitutional problems, since corporations authorized to do business in the state "consented" to its jurisdiction and those not authorized were deemed "present" for jurisdictional purposes when they were found to be doing business in Virginia.[39]

The Supreme Court's decision in *International Shoe* was the "green light" for state legislators to codify the requisite "minimum contacts" for valid assertions of jurisdiction over nonresidents, persons and corporations.[40] According to the Supreme Court of Virginia, the Virginia long-arm

36. Originally codified in Va. Code Ann. § 8-81.2 (Cum. Supp. 1964), now codified in *id.* § 8.01-328.1 (Repl. Vol. 1977).

37. *Id.* § 8-60 (Repl. Vol. 1957), now incorporated into and codified at *id.* § 8.01-301 (Repl. Vol. 1977); *id.* §§ 13.1-111, -274 (Cum. Supp. 1976); *id.* § 13.1-119 (Repl. Vol. 1957).

38. *See* Reviser's Note [Code Comm'n Report] Va. Code Ann. § 8.01-301 (Repl. Vol. 1977).

39. See notes 9-14 *supra*, and accompanying text.

40. *See generally*, Sutton, *Today's Long-Arm and Products Liability: A Plea for a Contemporary Notion of Fair Play and Substantial Justice*, 41 Ins. L.J. 85, 89 (1974) [hereinafter cited as Sutton]. Prior to the enactment of the Virginia long-arm statute, the courts of the Commonwealth were already using the "minimum contacts" standard of fairness in connection with Virginia service of process statutes.

statute is "a deliberate and conscious effort on the part of the General Assembly of Virginia to assert jurisdiction over nonresident defendants to the extent permissible by the Due Process Clause."[41] The statute has been further interpreted as embodying both the "minimum contacts" and the "purposeful availment" requirements.[42] The overriding concern of the drafters was that only causes of action from the acts enumerated[43] should allow personal jurisdiction. This would seem to preclude such assertions of jurisdiction as were validated in federal district court cases in which Virginia law was applied, but which arose before the long-arm statute was enacted, and which involved causes of action unrelated to the defendant's forum activities.[44] This aspect of the Virginia long-arm statute appears more restrictive than due process requires.[45]

The Virginia long-arm statute is based on section 1.03 of the Uniform Interstate and International Procedure Act[46] which forms the basis for the long-arm statutes of sixteen states.[47] Paragraphs (1) and (2) of subsection (A),[48] covering causes of action arising from the defendant's "transacting any business" or "contracting to supply services or things" in Virginia, present the most probable constitutional problems. If the transaction or the contract giving rise to the cause of action is the only contact of the defendant with the state, such a single act may not be sufficient, under constitutional scrutiny, to permit personal jurisdiction.[49] The Virginia cases show that the courts will stretch to find other forum-related activities on which to buttress the assertion of jurisdiction based on these paragraphs.[50]

Paragraphs (3) and (4)[51] of the Virginia long-arm statute give personal jurisdiction in tortious injury cases where the act causing the injury occurs in Virginia or outside Virginia if a further nexus exists between the defendant and Virginia. This is the second aspect of the Virginia long-arm

41. Carmichael v. Snyder, 209 Va. 451, 456, 164 S.E.2d 703, 707 (1968). *See* notes 42-45 *infra*, and accompanying text.

42. *See* John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va., 736, 180 S.E.2d 644 (1971).

43. VA. CODE ANN. § 8.01-328.1 (Repl. Vol. 1977).

44. *See* Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962); Silas v. Paroh Steamship Co., 175 F. Supp. 35 (E.D.Va. 1958).

45. *See* Perkins v. Benguet Mining Co., 342 U.S. 437 (1951).

46. 13 UNIFORM LAWS ANNOTATED 279, 285 (1975).

47. *See* Sutton, *supra* note 40, at 89-90 for a list of the particular states adopting the Uniform Law and generally for the other types of long-arm statutes currently in effect in 49 states.

48. VA. CODE ANN. § 8.01-328.1.A.1. & 2. (Repl. Vol. 1977).

49. International Shoe v. Washington, 326 U.S. 310, 318 (1945).

50. *See* section IV, notes 9-15 *supra*, and accompanying text.

51. VA. CODE ANN. § 8.01-328.1.a.3. & 4. (Repl. Vol. 1977).

statute which may be more restrictive than due process requires and is more restrictive than the "single act" tort clauses found in the long-arm statutes in other states.[52]

Paragraph (5)[53] relates to breach of warranty actions where the sale occurs outside Virginia. The exercise of personal jurisdiction under this paragraph requires the same substantial relationship between the defendant and the forum as does paragraph (4) and, by this incorporation of a "minimum contacts" analysis, precludes any constitutional problems. It has been held that the words "regularly", "persistent", and "substantial", found in this paragraph and paragraph (4) are *"International Shoe* due process words . . .,"[54] and place the paragraph well within due process limits. There is also included a caveat that the defendant must have been able to reasonably foresee that his product would be used in Virginia. This foreseeability requirement in the products liability area is an interpretation of the *Hanson* requirement of "purposeful availment".[55]

Paragraph (6)[56] relates to causes of action arising out of "having an interest in, using or possessing real property" in Virginia. The Supreme Court of Virginia expressed approval of this legislative enactment in a case where the interest in real property required of the defendant did not exist at the time of the suit, holding that jurisdiction under this section is grounded on the relationship between the defendant and the realty at the time the cause of action arose.[57] It appears that cases arising under this section most often present the situation of a plaintiff who was injured while on the property of a nonresident.[58]

A more difficult problem under paragraph (6) is whether the paragraph authorizes personal liability in an action which, under traditional classifi-

52. *See* HANDBOOK *supra* section IV, note 5, at 223. *See also* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The constitutionality of a single-act statute has not been considered by the Supreme Court, but the lower courts are in accord as to their constitutionality. The state's interest in affording a forum to a tortiously injured plaintiff is seen as sufficient to outweigh the defendant's inconvenience in defending in that forum. Likewise, the use of a defendant's product within the state is seen as a reasonably foreseeable result of the defendant's participation in some aspect of interstate commerce. *See also* Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal.2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

53. VA. CODE ANN. § 8.01-328.1.A.5. (Repl. Vol. 1977).

54. Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1, 4 (W.D. Va. 1965).

55. *See* Sutton, *supra* note 40, at 91. *See also* Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); Jackson v. National Linen Service Corp., 248 F. Supp. 962 (W.D. Va. 1965).

56. VA. CODE ANN. § 8.01-328.1.A.6. (Repl. Vol. 1977).

57. Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968.

58. *See, e.g.,* Snow v. Clark, 263 F. Supp. 66 (W.D. Va. 1967).

cations, is seen as an action in rem. The statute clearly authorizes personal jurisdiction based on the presence of property but it does not answer the question of whether in rem rules apply, *i.e.*, is the defendant's liability limited to the value of the property? Does it make attachment unnecessary in actions involving title to real property? The questions remain unanswered in statutory or case law and the commentators are in conflict.[59] But, under the holdings of *International Shoe* and *Shaffer*, minimum contacts analysis clearly is required and the presence of the property alone may not be sufficient to justify the assertion of jurisdiction.

The "contracting to insure" paragraph of the Virginia long-arm statute[60] is a legislative finding that such a contract is, of itself, a sufficient "minimum contact" when the insured person, property or risk was in Virginia at the time of contracting and would appear constitutionally sound under the holding of *McGee v. International Life Insurance Company*.[61]

The reach of the Virginia long-arm statute is far-ranging, even though limited somewhat by its "cause of action arising from" requirement. Prior to its enactment, foreign attachment was the traditional means for procuring jurisdiction over a foreign corporation insufficiently present to be found to be doing business.[62] Under *Pennoyer* principles, the mere presence of the nonresident's property gave the state power to adjudicate rights to the property. Under the recent *Shaffer* holding, attachment remains a method of securing jurisdiction in actions in rem or quasi in rem but is subject now to the standards of fairness and "minimum contacts."[63]

### 2. *Attachment*

The Virginia attachment statutes[64] allow attachment proceedings to be begun by any person[65] which includes both domestic and foreign corpora-

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59. *See* Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 617 n. 61 (1977); Note, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725, 740-41. *But cf.*, Note, *The Virginia "Long-Arm" Statute*, 51 VA. L. REV. 719, 753 (1965).

60. VA. CODE ANN. § 8.01-328.1.A.7. (Repl. Vol. 1977).

61. 355 U.S. 220 (1957). The case held that a single insurance contract was a sufficient minimum contact to subject the nonresident insuror to jurisdiction based on the forum state's interest in providing a forum for its citizens to enforce contracts made with nonresidents, the inconvenience to the plaintiff of having to go to the defendant's domicile for a small claim, and the availability of witnesses in the forum state. *Id.* at 223.

62. *See* Lefebvre-Armistead Co. v. Southern Pac. Co., 142 Va. 800, 128 S.E. 244 (1925).

63. *See* notes 30-35 *supra*, and accompanying text.

64. VA. CODE ANN. §§ 8.01-533, -576 (Repl. Vol. 1977).

65. *Id.* § 8.01-533.

tions.[66] The primary grounds for attachment for purposes of this discussion are that "the principal defendant or one of them, if there are more than one, be a foreign corporation . . . and have estate or have debts owing to such defendant . . . ."[67] The word 'estate'. . . shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity . . . ."[68] If the claim is for a "debt not due and payable no attachment shall be sued out when the only ground . . . is that the defendant . . . is a foreign corporation."[69] But the mere fact of being a foreign corporation is sufficient ground where the claim is for "any specific personal property, or a like claim to any debt, including rent . . . or to damages for breach of any contract, express or implied, or to damages for a wrong . . .,"[70] and the foreign corporate defendant has property or debts owed it in the city or county where the proceedings are begun.[71] Thus the attachment action is authorized under Virginia law where the only nexus between the defendant and the state is the presence of his property, an impermissible authorization under the *Shaffer* holding. The courts of the Commonwealth now are required to apply a "minimum contacts" analysis when attachment is sought on the grounds that the defendant is a foreign corporation.

The attachment remedy is used frequently to secure property to satisfy a pending claim between the plaintiff and defendant.[72] In this situation, where the defendant is already before the court, there would be no "minimum contacts" problems. Attachment is also frequently employed in cases where the attached property is the basis of the cause of action. As Justice Marshall points out in *Shaffer*, "when claims to the property itself are the source of the underlying controversy . . . it would be unusual for the State where the property is located not to have jurisdiction."[73]

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66. *See* Video Eng'r Co. v. Foto-Video Electronics, Inc., 207 Va. 1027, 154 S.E.2d 7 (1967).

67. VA. CODE ANN. § 8.01-533 (Repl. Vol. 1977).

68. *Id.* § 8.01-534. The other grounds for attachment relate to situations where there is some evidence of the debtor's intent to defraud creditors and the remedy is a security device to prevent such defrauding.

69. *Id.* § 8.01-533.

70. *Id.*

71. *Id.* § 8.01-534.

72. *See* Snow v. Clark, 263 F. Supp. 66 (W.D. Va. 1967); VA. CODE ANN. § 8.01-574 (Repl. Vol. 1977).

73. 97 S.Ct. at 2582. *Cf.*, RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 60, comments c, d; (1969). Traynor, *supra* note 9, at 672-73. For analyses of the procedural due process problems found in attachment, garnishment and detinue proceedings, see North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant, 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). *See also* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973).

Satisfying the "minimum contacts" standard of fairness most probably will create problems where attachment is sought purely as a means of gaining jurisdiction over a foreign corporate defendant not otherwise amenable to the service of process. And where "minimum contacts" exist, the defendant will most likely be amenable under the long-arm statute, reducing the utility of the attachment remedy to that of securing property to satisfy a pending claim, or to save property from destruction or removal.[74] Where the defendant can be brought in under long-arm service, that form of proceeding would logically be chosen to avoid procedural difficulties and a judgment limited by the value of the property seized.[75]

A separate problem relative to the Virginia attachment statutes is that they authorize service by order of publication where the defendant is a nonresident.[76] However, the publication statutes require the clerk to mail the notice to the defendant, satisfying the requirements of *Mullane*.[77]

### 3. *Commerce Clause*

The burden imposed on interstate commerce is another aspect to be considered in a discussion of the assertion of state court jurisdiction over foreign corporations. The commerce clause limitation focuses on the "imposition on the defendant's business insofar as it serves to impair the public interest in an open economy. . . ."[78] In a case involving a North Carolina statute which gave the state jurisdiction over foreign corporations which produced or distributed goods with the "*reasonable expectation that those goods are to be used or consumed in this State . . .*,"[79] the Fourth Circuit Court of Appeals held that to "sustain jurisdiction here would not only be offensive to the due process clause, but it would involve the danger of grave burdens and impediments to interstate commerce, if the door should be opened to similar legislation by other States."[80] The opinion

74. *See, e.g.*, Zammit, *supra* note 4, at 681.

75. "The attachment cases are appropriately limited by the minimum contacts rule to situations where either the obligation secured by the attachment arose from a transaction with local elements, in which case there is plenary jurisdiction because of minimum contacts anyway, or where plaintiff can show that attachment is probably necessary if he is to realize on his claim, in which case attachment is employed for its proper use as a security device." Hazard, *supra* note 2, at 282-83. *See also*, Comment, *Jurisdiction Over Absent Parties: Steele v. G. D. Searle & Co.*, 60 VA. L. REV. 1086, 1097 (1974).

76. VA. CODE ANN. §§ 8.01-301.4., -316, -317 (Repl. Vol. 1977).

77. 399 U.S. 306, 319 (1950). *See* note 28 *supra*, and accompanying text.

78. *Developments, supra* note 2, at 985.

79. Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502, 504 (4th Cir. 1956) (emphasis in original).

80. *Id.* at 507. *See also* Atchison, Topeka & S.F. Ry. Co. v. Wells, 265 U.S. 101 (1924);

implies that expanding jurisdictional concepts following *International Shoe* may give rise to a renewed use of the commerce clause as a limitation on state court jurisdiction. This may yet be seen in states whose long-arm statutes expressly go "to the limits of due process"[81] but the application of a meaningful "minimum contacts" test should preclude the need for courts to resurrect the commerce clause limitation.[82]

4. *Summary*

The combination of expanded in personam jurisdiction in the wake of *International Shoe* and jurisdictional attachment with quasi in rem jurisdiction, permitted a plaintiff with no relationship to the forum to obtain jurisdiction over a defendant with no relationship to the forum and made meaningless any limits on a state's power to adjudicate. *Shaffer* has ended that era and due process now requires that all assertions of jurisdiction over nonresident corporations or individuals pass muster under the "minimum contacts" standard of fairness. All traditional tests of jurisdiction are now replaced by one that balances the conflicting interests of the defendant, the plaintiff and the forum in order to reach a result consonant with fundamental fairness. The presence of a claim arising out of one of the acts enumerated in the long-arm statute, or the presence of a res owned by a nonresident, is a signal of some relationship existing between the defendant and the forum. Whether that relationship satisfies "minimum contacts" analysis is the question to be answered in every case. Where jurisdiction over a foreign corporation is sought, notwithstanding the validity of service of process or the type of action involved, the courts will now have to scrutinize the facts presented in order to ascertain whether sufficient contacts exist to allow the court to subject the defendant to its jurisdiction.

## VII. CONCLUSION

The enactment of Title 8.01 has made clearer, both substantively and organizationally, Virginia's statutory scheme relative to jurisdiction, venue and service of process. The new provisions set forth more clearly than did Title 8 the procedures and requirements for valid jurisdiction, creating a system which will save time and energy for attorneys and unnecessary costs for clients. Litigants in Virginia now should be spared frustration and

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Davis v. Farmer's Coop. Equity Co., 262 U.S. 312 (1923).

81. *See, e.g.*, CAL. CODE OF CIV. PROC. ANN. § 410.10 (Cum. Supp. 1976); R. I. GEN. LAWS ANN. § 9-5-33 (1970).

82. The opinion in *International Shoe,* however, can be seen as a validation of the commerce clause argument. 326 U.S. at 315. *See also* Wilcox v. Richmond, Fredericksburg & Potomac R. Co., 270 F. Supp. 454 (S.D.N.Y. 1967).

inequitable results by the new provisions for statewide service of process and those distinguishing jurisdiction from venue. The simplification and expansion of the means for substituted service upon the statutory agents of corporations should also facilitate obtaining valid service of process. As is true of any statutory scheme, certain provisions will raise questions requiring interpretation by the courts. In general, however, the procedures for bringing a corporation before the proper court have been made much less problematical by the revision of Virginia's code of civil procedure.