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South Carolina's Uniform Commercial Code--The Demise of Its Long-Arm Provisions

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SOUTH CAROLINA'S UNIFORM COMMERCIAL CODE — THE DEMISE OF ITS LONG-ARM PROVISIONS

I. INTRODUCTION

Although a statute may very well be the "right thing" at the "right time," its appearing in the "wrong place" may still make it invalid. Such is developing to be the case with South Carolina's most recent efforts to "long-arm" *in personam* jurisdiction over nonresident individuals and corporations.

With the enactment of South Carolina's version of the Uniform Commercial Code in 1966,[1] the legislature adopted one of the most comprehensive "long-arm statutes" yet enacted by any state. Entitled "Further Remedies,"[2] its provisions appear as an eighth part of the sales article—a part not found in the Uniform Commercial Code's official version. Defining "person" to include an individual, "whether or not a citizen or domiciliary of this state," and a corporation, "whether or not organized under the laws of this state,"[3] this part grants *in personam* jurisdiction to South Carolina's courts under the following circumstances:[4]

> Personal Jurisdiction Based Upon Conduct
> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
> (a) transacting any business in this state;
> (b) contracting to supply services or things in this state;
> (c) commission of a tortious act in whole or in part in this state;
> (d) causing tortious injury or death in this state by an act or omission outside this state if he regularly does or solicits business, or engages in other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; or

1. S.C. CODE ANN. §§ 10.1-101 - 10.10-103 (Supp. 1966).
2. *Id.* §§ 10.2-801 - 10.2-809.
3. *Id.* § 10.2-801.
4. *Id.* § 10.2-803.

(e) having an interest in, using, or possessing real property in this state; or
(f) contracting to insure any person, property or risk located within this state at the time of contracting; or
(g) entry into a contract to be performed in whole or in part by either party in this state; or
(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this state and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this state, shall not be subject to the provisions of Section 10-310(3), 1962 Code of Laws.[5]

Where personal jurisdiction is given, service of process may be made outside of the state.[6]

The scope of these long-arm provisions is easily discernible. Much of the language is almost verbatim that of the Uniform Interstate Procedure Act.[7] By virtue of this act South Carolina has gone the full distance in granting in personam jurisdiction over tortfeasors and contracting parties having an absolute minimal contact with this state. In a time when a growing number of state legislatures have enacted "long-arm statutes" in order to broaden the scope of their courts' *in personam* jurisdiction over nonresidents,[8] South Carolina's statute should rank in the forefront. However, the statute's validity in part, and arguably in toto, is under constitutional fire.

Article III, Section 17 of the Constitution of South Carolina specifies that "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title."[9] The South Carolina version of the Uniform Commercial Code was enacted under the following title:

5. Which provides: "The court may change the place of trial in the following cases: . . . (3) When the convenience of witnesses and the ends of justice would be promoted by the change."

6. S.C. CODE ANN. § 10.2-804 (Supp. 1966).

7. UNIFORM INTERSTATE PROCEDURE ACT § 1.3.

8. Annot. 24 A.L.R.3d 532 (1969); annot. 23 A.L.R.3d 551 (1969).

9. S.C. CONST. art. 3, § 17.

> An Act To Be Known As The Uniform Commercial Code, Relating to Certain Commercial Transactions In Or Regarding Personal Property And Contracts And Other Documents Concerning Them, Including Sales, Commercial Paper, Bank Deposits and Collections, Letters of Credit, Bulk Transfers, Warehouse Receipts, Bills of Lading, Other Documents of Title, Investment Securities, and Secured Transactions, Including Certain Sales of Accounts, Chattel Paper, And Contract Rights, Providing for Public Notice to Third Parties in Certain Circumstances; Regulating Procedure, Evidence And Damages In Certain Court Actions Involving Such Transactions, Contracts Or Documents; To Make Uniform The Law With Respect Thereto; and Repealing Inconsistent Legislation.[10]

Successful arguments have been made to the effect that the above title did not sufficiently reflect all the long-arm provisions of South Carolina's Uniform Commercial Code so as to meet the requirements of Article III, Section 17. Noticeably in such arguments, no contention is made that a "long-arm statute" of this kind is unwise or unnecessary, or beyond the authority of the legislature. The deciding factor has been the *place* in the South Carolina Code at which it is located—a factor quite apart from the merits of such a statute and more reflective of the courts' attitude toward the manner in which it was enacted. The two most recent cases to hold certain provisions of South Carolina's "long-arm statute" inconsistent with Article III, Section 17, were decided in the Federal District Court of South Carolina, where those sections conferring jurisdiction upon the South Carolina courts based on tortious act or injury within the state were held unconstitutional.[11]

II. DUE PROCESS VIOLATED

In *McGee v. Holan Division of Ohio Brass Co.*[12] the court was faced with the question of whether a party plaintiff had acquired *in personam* jurisdiction over a nonresident corporate defendant. It has been said: "There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and to the extent to which it so chooses is a matter for the law of the state as made by its legislature."[13]

10. Act 1065, 54 Stat. 4027 (1966).

11. McGee v. Holan Div. of Ohio Brass Co., 337 F. Supp. 72 (D.S.C. 1972); Tention v. Southern Pac. R.R., 336 F. Supp. 25 (D.S.C. 1972).

12. 337 F. Supp. 72 (D.S.C. 1972).

13. Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948).

Only when a state elects to exercise jurisdiction over a foreign corporation can there be a question of whether the election violated the Due Process clause.[14] In order to resolve the question, courts must carefully examine the facts of the particular case before them.

McGee was an action for personal injuries sustained by the plaintiff when the aerial hydraulic bucket in which he was working as an electrical lineman for Sumter Builders, Inc. fell to the ground. The bucket and other equipment was purchased by Sumter Builders from defendant's plant in Georgia. The defendant was a corporation chartered and existing under the laws of New Jersey, with its principal place of business located in Ohio. Defendant's only "contact" with South Carolina was through a sales representative, living in North Carolina, who made approximately two trips per year to Sumter Builders' place of business in South Carolina. The equipment in question was not purchased directly from defendant, but rather through Graybar Electric Co., a wholly separate and distinct corporation. Deliveries of defendant's equipment to South Carolina were not made by the defendant's trucks or vehicles.

South Carolina's service of process statutes applicable to foreign corporations *not authorized* to do business in the state are predicated upon finding the corporation to be "transacting"[15] or "doing"[16] business in fact. When the facts so indicate, service of process can be made through the Secretary of State. Foreign corporations *authorized* to do business in the state must appoint an agent for service of process. Alternative service through the Secretary of State is provided in certain instances.[17]

In viewing South Carolina's service of process statutes as applied to foreign corporations, federal courts have said they "approach, if they do not reach, ultimate constitutional bounds;"[18] and, most recently, they extend "to the outer limits allowed by *International Shoe*."[19] The South Carolina Supreme Court has stated the jurisdictional test to be that the foreign

14. *Id.*
15. S.C. CODE ANN. § 10-424 (Supp. 1971).
16. *Id.* § 12-23.14.
17. *Id.* § 12-23.13.
18. Shealy v. Challenger Mfg. Co., 304 F.2d 102, 107 (4th. Cir. 1962).
19. Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 747 (4th Cir. 1971).

corporation have such contact with South Carolina, that maintenance here of an action against it *in personam* does not "offend traditional notions of fair play and substantial justice."[20] Recognizing such a principle to be "nebulous" and one to be resolved upon the facts of the particular case, suggested factors for consideration should be:

> [T]he duration and nature of the corporate activity within the state, the character of the acts giving rise to the litigation, the circumstances of their commission, and the relative inconvenience to the respective parties of a trial in the state of the forum on the one hand and in the state of the corporate domicile on the other.[21]

With little elaboration, Judge Chapman in *McGee* found the contacts of the defendant to be "so minimal that to require it to stand and defend this case in this district would be offensive to traditional notions of fair play and substantial justice."[22] Citing *Shealy v. Challenger Manufacturing Co.*[23] on which the plaintiff principally relied, Judge Chapman concluded that there the court's finding the defendant manufacturer to be "doing business" in South Carolina was primarily based on the frequent deliveries of defendant's products to South Carolina in his trucks.[24] Although the facts in *McGee* and *Shealy* are fairly analagous, the defendant's products in *McGee* were not delivered to South Carolina in defendant's trucks. On this basis Judge Chapman distinguished the two sets of jurisdictional facts. Another distinguishing feature in the facts of the two cases not mentioned in *McGee* is that in

20. Boney v. Trans-State Dredging Co., 237 S.C. 54, 61, 115 S.E.2d 508, 512 (1960) (citing International Shoe Co. v. Wash., 326 U.S. 310, 316 (1945); *accord*, Carolina Boat & Plastics Co. v. Glascoat Distribs., 249 S.C. 49, 53, 152 S.E.2d 352, 353 (1967).

21. Carolina Boat & Plastics Co. v. Glascoat Distribs., 249 S.C. 49, 53, 152 S.E.2d 352, 353-354 (1967); Boney v. Trans-State Dredging Co., 237 S.C. 54, 62, 115 S.E.2d 508, 512 (1960); *see* Shealy v. Challenger Mfg. Co., 304 F.2d 102 (4th. Cir. 1962) for a good survey of the interpretation and application of South Carolina's service of process statutes.

22. 337 F. Supp. 72, 74 (D.S.C. 1972).

23. 304 F.2d 102 (4th. Cir. 1962). This is a case involving a Tennessee manufacturer of disappearing or folding stairways, which maintained no place of business in South Carolina, but which did sell and deliver its products to a wholesaler or dealer whose principal office was in South Carolina with designated branches throughout the state. The manufacturer was held amenable to suit in South Carolina in an action for personal injuries caused by a defective stairway purchased from one of these designated branches.

24. 337 F. Supp. 72, 74 (D.S.C. 1972).

Shealy the defective product was purchased in South Carolina, whereas in *McGee,* the product ultimately causing plaintiff's personal injury was purchased in Georgia.

III. THE SIGNIFICANCE OF MCGEE

Although South Carolina's service of process statutes by which the state courts may acquire *in personam* jurisdiction over foreign corporations are construed liberally through application of *International Shoe's* "minimum contact" test, the traditional statutory possibilities for service of process on nonresident individuals is much more restrictive. Service in these cases depends on the defendant's *presence* within the state.[25] However, the confines of the applicable statute are broadened somewhat in that "presence" does not necessarily mean physical presence. "Under the statute, a defendant is present within the state when he is (1) physically present, so that personal service can be effected; or (2) has a place of residence or business within the state, in which event substituted service may be had on a person of discretion residing at the residence or an employee at the place of business."[26]

Thus, the impact of such a comprehensive "long-arm statute" as enacted in South Carolina's version of the Uniform Commercial Code—one which applies equally to both nonresident individuals and foreign corporations—becomes clear. Until its passage, a court's acquiring *in personam* jurisdiction over a nonresident individual depended on that individual's "presence" within the state. Even the broad construction of "presence" by the cases does not put that standard for service of process on nonresident individuals on comparable footing with the minimum contacts test as interpreted regarding service on foreign corporations. South Carolina's Uniform Commercial Code's long-arm provisions have the effect of leveling the standards between nonresident individuals and corporations, though the approach is different: in the case of the foreign corporation, a rather broad standard (minimum contacts) under which to work applies from the state; in the case of the nonresident individual, more specifically drawn bases for finding *in personam* jurisdiction exist (10.2-803(1)(a)-(h)), with, however, possibilities for broad application.

25. S.C. CODE ANN. § 10-438 (Supp. 1971).
26. Ballew v. Ballew, 251 S.C. 496, 499, 163 S.E.2d 622, 623-624 (1968).

Consequently, the significance of *McGee* lies more in its holding unconstitutional those provisions of the Uniform Commercial Code's "long-arm statute" relative to the commission of tortious acts or injuries within the state as a basis for *in personam* jurisdiction, than in finding insufficient contacts in the state to warrant service of process under South Carolina's "unauthorized foreign corporation doing business in the state" statute.[27] In so invalidating these long-arm provisions of the statute under an argument which casts doubt on the validity of the other long-arm provisions, the court has struck down the leveling effect such a statute would have served on service of process standards for nonresident individuals and corporations.

IV. ARTICLE III, SECTION 17 VIOLATED

The constitutional specification that "[e]very act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title"[28] has received so many and varied interpretations by the courts and law-writers, that an attempt to lay down a fixed rule by which all could be reconciled would be futile.[29] Yet the cases generally agree that its purpose is to prevent surprise or deception of the people at the hands of the legislature and, likewise, to prevent surprise or deception of the legislature at the hands of itself.[30] As expressed in one fairly recent case: "Its purpose is to prevent the General Assembly from being misled into the passage of bills containing provisions not indicated in their titles, and to apprise the people of the subject of proposed legislation and thus to give them opportunity to be heard if they so desire."[31] In deciding whether a particular statute is inconsistent with the language and purpose of Article III, Section 17, a court must weigh the abuses against which it is directed against the possibility of embarrassing or obstructing needed legislation.[32] In so doing, the constitutional provision is to be construed

27. S.C. CODE ANN. §12-23.14 (Supp. 1971).

28. S.C. CONST. art. 3, § 17.

29. Douglass v. Watson, 186 S.C. 34, 42, 195 S.E. 116, 119 (1937).

30. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1956).

31. Colonial Life & Accid. Ins. Co. v. S.C. Tax Comm'n, 233 S.C. 129, 144, 103 S.E.2d 908, 915-916 (1958).

32. Dantzler v. Callison, 230 S.C. 75, 89-90, 94 S.E.2d 177, 185 (1956); Alley v. Daniel, 153 S.C. 217, 220, 150 S.E. 691, 692 (1929).

"with great liberality"[33] and is not to be enforced in any "narrow or technical spirit."[34]

Construing Article III, Section 17, Judge Chapman in *McGee* concluded that under the title to South Carolina's version of the Uniform Commercial Code, to enact sections granting South Carolina courts *in personam* jurisdiction of nonresident defendants in connection with certain tort claims was to commit "the very evil that the framers of the South Carolina Constitution were attempting to avoid."[35] He was of the opinion that everything in the Act's title related to commercial transactions, thus no warning was provided the people of South Carolina that they were getting anything other than the national recognized Uniform Commercial Code, much less anything so "uncommercial" as provisions for jurisdiction and service in personal injury tort claims.[36] In so far as the legislature itself was concerned, Judge Chapman stated: "With such a voluminous act it is doubtful if all the members of the General Assembly realized that it contained provisions unrelated to commercial transactions."[37] Sections 10.2-803(1)(c) & (d) of South Carolina's Uniform Commercial Code, in his judgment, must be held unconstitutional.

V. PREVIOUS INTERPRETATIONS OF 10.2-803

A. *In Federal Court*

Judge Russell, formerly of the Federal District Court for the District of South Carolina, twice considered the applicability of certain sections of 10.2-803 and on both occasions sustained them. In *Deering Milliken Research Corp. v. Textured Fibres*,[38] 10.2-803(1)(g) (conferring jurisdiction over persons who enter into a contract to be performed in whole or in part by either party in South Carolina) was held constitutional despite argument that it violated Article III, Section 17. And in *Jenrette v. Seaboard Coast Line Railroad*,[39] Judge

33. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1956); Gasque v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939).

34. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1956); Alley v. Daniel, 153 S.C. 217, 150 S.E. 691 (1929).

35. 337 F. Supp. 72, 75 (D.S.C. 1972).

36. *Id.*

37. *Id.* at 76.

38. 310 F. Supp. 491 (D.S.C. 1970).

39. 308 F. Supp. 642 (D.S.C. 1969).

Russell discussed 10.2-803(1)(d) (in certain instances conferring jurisdiction over persons who cause tortious injury or death in South Carolina by an act or omission outside the state) without constitutional consideration, although he found it not to apply to the facts of that particular case. It is noteworthy, however, that after the final order in each case, Judge Russell acknowledged that the reasoning in his opinion raised questions of law on which there could be "substantial ground for difference of opinion"; he, therefore, recommended "an immediate appeal" to "materially advance the ultimate termination of the litigation," as well as any litigation which may follow.[40]

Since 10.2-803(1)(g) was held constitutional in *Deering* despite specific argument that it violated Article III, Section 17, Judge Chapman's finding in *McGee* that 10.2-803(1)(c) & (d) were unconstitutional on the same argument could not have been sustained without finding some basis for distinction. Judge Chapman found basis for distinction in that in *Deering*, the court was dealing with a service of process statute based on contract, so the constitutional test of Article III, Section 17 was met by use of the word "procedure" in the Act's title; whereas in *McGee*, the court was dealing with a service of process statute based on tort, of which no notice was conferred through the word "procedure" or any other language in the title to the Act.[41]

Gardner v. Q. H. S., Inc.[42] is another federal case in which South Carolina's long-arm provisions within the Uniform Commercial Code were mentioned. This was an action brought by apartment owners, North Carolina residents doing business as a partnership in South Carolina, against a New York manufacturer of hair curlers for property damage to the apartment complex sustained when the hair curlers allegedly caught fire. Since jurisdiction was found over the nonresident corporate defendant on the basis of its "doing business" in fact, if not authorized to do so,[43] the court did not get to consideration of plaintiff's argument for jurisdiction under the Uniform Com-

40. Deering Milliken Research Corp. v. Textured Fibres, Inc., 310 F. Supp. 491, 503 (D.S.C. 1970); Jenrette v. Seaboard Coast Line R.R., 308 F. Supp. 642, 645 (D.S.C. 1969).

41. 337 F. Supp. 72, 76 (D.S.C. 1972).

42. 304 F. Supp. 1247 (D.S.C. 1969).

43. S.C. CODE ANN. § 12-23.14 (Supp. 1971).

mercial Code.[44] In so deciding the case, the court exhibited its preference for finding jurisdiction under a statute which was "well developed" and its reluctance to base a finding for or against jurisdiction under a statute which the South Carolina Supreme Court has yet to interpret.[45]

B. In State Court

Although the highest court in South Carolina has not to date considered the constitutionality of the state's Uniform Commercial Code long-arm provisions, the question has been decided at the lower level on at least two occasions: *deLoach v. Nash*,[46] in which the commission of tortious act in whole or in part in South Carolina as a basis for exercising *in personam* jurisdiction was held to be in violation of Article III, Section 17; and, *Byrd v. Melton*,[47] in which the provision conferring *in personam* jurisdiction over persons having interest in, using, or possessing real property in South Carolina, as well as the basis for jurisdiction stemming from the commission of a tort within the state,[48] were declared by the court to be unconstitutional. Both cases were cited by Judge Chapman in *McGee*, pointing out that

> "two distinguished state trial judges, Honorable William L. Rhodes, Jr. (*deLoach*) and Honorable Francis B. Nicholson (*Byrd*), in separate orders, have held that even the most liberal construction would not include these sections under the existing title and have held that Section 10.2-803(1)(c) violates the requirements of Article III, Section 17 of the Constitution of this state."[49]

deLoach v. Nash

This was an action for personal injuries sustained by the plaintiff while shopping in a large discount store in Columbia, South Carolina. Plaintiff's cause of action was based on defendant's alleged negligent act of colliding with the plaintiff while she was a customer in the store. The defendant,a resident of Ohio, was the sole party against whom plaintiff proceeded.

Service of process was procured under the long-arm provisions of South Carolina's Uniform Commercial Code; the basis

44. *Id.* § 10.2-806.
45. 304 F. Supp. 1247, 1248 n.3 (D.S.C. 1969).
46. No. 4418 (Richland County Ct. of Com. Pleas, filed Mar. 29, 1971).
47. No. 5133 (Richland County Ct. of Com. Pleas, filed July 15, 1971).
48. S.C. CODE ANN. § 10.2-803 (1)(c) & (e) (Supp. 1966).
49. 337 F. Supp. 72, 75 (D.S.C. 1972).

for jurisdiction rested in defendant's alleged commission of a tort within the state.[50] Defendant specially appeared to move that the attempted service of the summons and complaint upon him be set aside. In argument on the motion before Judge Rhodes, defendant contended that 10.2-803(1)(c) was unconstitutional under Article III, Section 17.

After reviewing the title under which the relevant long-arm provision was enacted and generally stating the law with respect to Article III, Section 17, Judge Rhodes in his order cited two cases in which provisions, not sufficiently reflected in the title to the act under which they were enacted, were found to be unconstitutional.[51] Similarly in this case, Judge Rhodes found that there was "not the slightest inference" that the procedural provisions of the title to South Carolina's Uniform Commercial Code embraced service outside the state in a tort action when the tort sued upon is completely divorced from a commercial transaction, contract, or document.[52] He stated further:

> "The title . . . expressly limits the procedure contemplated to 'court actions involving such transactions, contracts or documents.' That the term 'such transactions' refers to commercial transactions is obvious since commercial transactions are the only transactions mentioned in the title."[53]

Judge Rhodes pointed out that the stated purposes of the act spoke only of commercial transactions.[54]

Careful to specify that he was holding 10.2-803(1)(c) *only* to be in violation with Article III, Section 17, Judge Rhodes found *Deering* not applicable since Judge Russell there considered the constitutionality of 10.2-803(1)(g), a provision relative to a contract to be performed in whole or in part by

50. S.C. CODE ANN. § 10.2-803(1)(c) (Supp. 1966).

51. Colonial Life & Accid. Ins. Co. v. S.C. Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908 (1958); Douglass v. Watson, 186 S.C. 34, 195 S.E. 116 (1937).

52. No. 4418 at 7 (Richland County Ct. of Com. Pleas, filed Mar. 29, 1971).

53. *Id.*

54. S.C. CODE ANN. § 10.1-102(2) (Supp. 1966) provides:
"Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; (c) to make uniform the law among the various jurisdictions."

either party in South Carolina, one which Judge Rhodes would agree was sufficiently reflected in the Act's title under "procedure" so as to meet the constitutional test.[55]

In response to plaintiff's argument that 10.2-715(2)(b)[56] was sufficient authorization for the legislature to adopt 10.2-803(1)(c), under which service was made, Judge Rhodes pointed out that plaintiff's cause of action was not based on breach of warranty or any other commercial transaction, but rather one founded on negligence. "The controlling factor as the court sees it is that the defendant's negligence did not arise from any commercial transaction nor did it in any way involve the transactions, contracts, or documents referred to in the title of the Act."[57]

Byrd v. Melton

Byrd was an action brought for the alleged wrongful death of a minor child who apparently drowned upon falling into a ditch in Columbia, South Carolina. Four individuals were joined as defendants based upon some interest or degree of management in the property where the child's accidental death occurred. The complaint alleged that the defendants were negligent and reckless in failing to rectify a dangerous situation when they knew or should have known that children were playing in the area, were attracted thereto, etc.

Two of the four defendants were nonresidents of South Carolina, but were served personally at their residences in their home states pursuant to the "long-arm statute" enacted as a part of South Carolina's Uniform Commercial Code: specifically under 10.2-803(1)(c) which allows the courts of South Carolina to exercise personal jurisdiction over a person as to a cause of action arising from that person's commission of a tortious act within the state, and 10.2-803(1)(e) which similarly confers such jurisdiction on persons having an interest in, using, or possessing real property in South Carolina. These two defendants appeared specially for the sole purpose

55. No. 4418 at 8 (Richland County Ct. of Com. Pleas, filed Mar. 29, 1971).

56. S.C. CODE ANN. § 10.2-715(2)(b) (Supp. 1966) provides: "(2) Consequential damages resulting from the seller's breach include . . . (b) injury to person or property proximately resulting from any breach of warranty."

57. No. 4418 at 9 (Richland County Ct. of Com. Pleas, filed Mar. 29, 1971).

of moving to set aside such attempted service of process. They argued before Judge Nicholson that the long-arm provisions according to which they were served were in violation of Article III, Section 17. Judge Nicholson agreed, holding 10.2-803(1)(c) & (e) to be unconstitutional.

Patterning his order much after that in *deLoach,* Judge Nicholson asserted that the word "procedure" and the term "such transactions" in the Act's title were only in reference to commercial transactions and clearly not indicative of procedural provisions embracing service outside the state based on the commission of a tort or the owning of real property in South Carolina.[58] The title of the Act specifically states that the Act relates to "certain commercial transactions in or regarding personal property and contracts and other documents concerning them."[59] In addition to pointing out that the Act's stated purposes spoke of only commercial transactions,[60] Judge Nicholson found nothing in the Act's title dealing with real property and quoted from Section 10.2-102: "Unless the context otherwise requires, this Article applies to transactions in goods;. . ."[61] Since *Deering* "clearly involved a commercial transaction," and *Jenrette* "held that the aforementioned Statutes (10.2-801 *et seq.*) did not factually apply," both cases were distinguished.[62]

VI. CONCLUSION

Until a decision by the South Carolina Supreme Court on the question of the constitutionality of the state's long-arm provisions enacted in its version of the Uniform Commercial Code, the "sides" as taken in the lower state courts and in the different divisions of the federal district court in South Carolina are likely to remain with two lower state court judges and one federal district court judge holding that those long-arm provisions wholly unrelated to commercial transactions (10.2-803(1)(c), (d) & (e)) are unconstitutional and one former federal district court judge who held that the long-arm pro-

58. No. 5133 at 6-7 (Richland County Ct. of Com. Pleas, filed July 15, 1971).

59. Act 1065, 54 Stat. 4027 (1966).

60. *See* note 57, *supra.*

61. S.C. CODE ANN. § 10.2-102 (Supp. 1966).

62. No. 5133 at 7-8 (Richland County Ct. of Com. Pleas, filed July 15, 1971).

vision relative to entry or performance of a contract in South Carolina as a basis for jurisdiction (10.2-803(1)(g)) is constitutional, and assuming that one of the two long-arm provisions dealing with tort (10.2-803(1)(d)) would be constitutional if applicable to the facts of a particular case.

Such diversity of opinion certainly lessens the impact of the comprehensive long-arm provisions as prescribed in the statute. To date, only one provision, that granting jurisdiction *in personam* over persons who enter into a contract to be performed in whole or in part by either party in South Carolina (10.2-803(1)(g)), would presumably be sustained over constitutional objection based on Article III, Section 17. It is not inconceivable, however, that certain other provisions of the long-arm statute, akin to commercial transactions, might withstand this constitutional challenge, but the arguments for unconstitutionality have been so basic that if these provisions are to be sustained, it is not likely to be without litigation.

So long as the question of this statute's constitutionality in unanswered by South Carolina's highest court, equalization of the standards for service of process on nonresident individuals and foreign corporations, whether desired as a matter of policy or logic, will not materialize. Significantly, the current constitutional objection to all aspects of the "long-arm statute" lies outside the realm of policy or logic. The objection, as reflected in its constitutional basis, is directed at the *place* in South Carolina's statutory law in which the statute is found—an objection that has more to do with form than substance. Notwithstanding this observation, the constitutional objection is very real when the constitution is given a literal or strict construction. Its cure however need not necessarily lie in the courts. Its cure would seemingly, more appropriately be found in the hands of the legislature which has the authority to reenact the statute's provisions as a separate piece of legislation under a title which leaves no room for constitutional question under Article III, Section 17.

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