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CONSTITUTIONAL PROBLEMS ARISING FROM SERVICE OF PROCESS ON FOREIGN CORPORATIONS

BY MAURICE S. CULP*

THE problems of serving process upon foreign corporations arise out of the application and construction of statutes, existing in every state,¹ providing for such service. It is the object of this study to make a careful analysis of the statutory provisions for such service and discuss the procedural² and constitutional problems as they may arise under specific statutory provisions.

However, there are certain preliminary matters which must be settled before process may be served upon the foreign corporation. First, the foreign corporation must be "doing business" within the state before it is amenable to service of process. The determination of "doing business" is a problem of infinite variety and diffi-

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¹This article is intended to cover only personal actions brought against foreign corporations, and does not propose to discuss the problems raised by attempts to serve process upon corporations engaged in interstate commerce. On this problem see *Furst v. Brewster*, (1931) 282 U. S. 493, 51 Sup. Ct. 295, 75 L. Ed. 478. This problem has been carefully treated elsewhere. See *Farrier, Suits Against Foreign Corporations as a Burden on Interstate Commerce*, (1933) 17 MINNESOTA LAW REVIEW 381.

²A question closely related to service of process, though beyond the scope of this article, is that of venue. The chief constitutional difficulty here is whether the discrimination is a violation of the equal protection of the laws. If there is no valid basis for the discrimination, the venue statutes will fail to meet the test. See *Power Manufacturing Co. v. Saunders*, (1927) 274 U. S. 490, 47 Sup. Ct. 678, 71 L. Ed. 1165; *Dickerson C. McClung v. Pulitzer Publishing Co.*, (1919) 279 Mo. 370, 214 S. W. 193; *Dublin Mill & Elevator Co. v. Cornelius*, (Tex. Civ. App. 1928) 5 S. W. (2d) 1027; *State ex rel. Twin City and Southern Bus Co. v. District Court of Otter Tail County et al.*, (1929) 178 Minn. 19, 225 N. W. 915, noted (1929) 14 MINNESOTA LAW REVIEW 83. As to whether a refusal to grant changes of venue to corporations is a valid discrimination, see *Morrinac Veneer Co. v. McCalip*, (1922) 129 Miss. 671, 92 So. 817. Unreasonable venue provisions coupled with faulty provision for giving notice may also operate to deny due process of law. See *Jefferson Fire Insurance Co. v. Brackin*, (1913) 140 Ga. 637, 79 S. E. 467. *Hansell, The Proper Forum for Suits Against Foreign Corporations*, (1927) 27 Col. L. Rev. 12.

culty a discussion of which is beyond the scope of an article dealing with the problems of serving process on foreign corporations.³ Each case has to be considered upon its own facts, and there is no general rule by which "doing business"⁴ may be resolved in every case. The nearest approach to a general rule is the frequently quoted statement that the business transacted must in manner and extent warrant the inference that it is present with some degree of permanence and continuity.

Of like complexity but of far less serious consequences with respect to the ability to serve process are the controversies concerning the "correct" or "best" basis for a state's power over

³The cases dealing with the problem are legion. It is clear that the corporation must be doing business. *St. Clair v. Cox*, (1882) 106 U. S. 350, 359, 1 Sup. Ct. 1002, 38 L. Ed. 936; *Goldey v. Morning News*, (1895) 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Riverside and Dan River Cotton Mills v. Menefee*, (1915) 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910.

A few cases will show the diversity of fact situations presented. See *Green v. Chicago, B. & Q. Ry.*, (1907) 205 U. S. 530, 533, 27 Sup. Ct. 595, 51 L. Ed. 916; *St. Louis Southwestern Railway Co. of Texas v. Alexander*, (1913) 227 U. S. 218, 227, 33 Sup. Ct. 245, 57 L. Ed. 486; *Philadelphia & Reading Railway Co. v. McKibbin*, (1917) 243 U. S. 264, 265, 37 Sup. Ct. 280, 61 L. Ed. 710; *Cannon Manufacturing Co. v. Cudahy Packing Co.*, (1925) 267 U. S. 333, 45 Sup. Ct. 250, 69 L. Ed. 634; *Neely v. Philadelphia Inquirer Co.*, (1932) 61 App. D. C. 334, 62 F. (2d) 861; *Southeastern Distributing Co. v. Nordyke & Marmon Co.*, (1924) 159 Ga. 150, 125 S. E. 171.

There is, however, something of a general principle running through the cases, although its application to specific fact situations may be unpredictable. In *St. Louis S. W. Ry. v. Alexander*, (1913) 227 U. S. 218, 227, 33 Sup. Ct. 245, 57 L. Ed. 486, the Supreme Court summarized its method of determining the fact of "doing business:"

"We reach the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

⁴This subject has been very fully treated in legal periodicals. For some of the discussions see Osborne, *Arising Out of Business Done in the State*, (1923) 7 MINNESOTA LAW REVIEW 380; Isaacs, *An Analysis of Doing Business*, (1925) 25 Col. L. Rev. 1018; Rothschild, *Jurisdiction of Foreign Corporations in Personam*, (1930) 17 Va. L. Rev. 129, 135 ff.; Raymond, *Jurisdiction over a Foreign Corporation Doing Business within the State*, (1931) 9 Tex. L. Rev. 410, 422; Farrier, *Jurisdiction over Foreign Corporations*, (1933) 17 MINNESOTA LAW REVIEW 270; Comments and notes: (1916) 14 Mich. L. Rev. 588; (1921) 31 Yale L. J. 205; (1927) 14 Va. L. Rev. 133; (1930) 15 Iowa L. Rev. 204.

foreign corporations.⁵ These theories do not require further discussion except in so far as they may influence the decision of questions relating to the service of process upon foreign corporations. If the foreign corporation is "doing business" within the state, it is subject to the process of the state's courts regardless of the particular theory of judicial power over foreign corporations employed.

Several theories have been supported by the courts. The first and oldest was based upon the idea that a state may either exclude a foreign corporation or admit it for the purpose of transacting business therein; that in admitting a foreign corporation it may lay down the conditions of admission to which the corporation must submit before it may do business.⁶ This is the idea of "complete and arbitrary power over admission, sometimes called the "consent" theory. Equally well supported by precedent is the "presence" theory which becomes operative only when the corporation is in a position where it may be considered as present within the state.⁷ As the writers indicate, neither of these theories will explain all of the cases. Other theories have been proposed. Prominent among them is the "reasonable exercise of jurisdiction" or "submission" theory which means that a corporation by coming into a state is amenable to the reasonable police power of the state.⁸ Other theories which have been suggested are based upon

⁵The bases of "jurisdiction"—the power of a state to subject the foreign corporation to the process of its courts—have been adequately and ably discussed by other writers. See Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory*, (1917) 30 *Harv. L. Rev.* 676; Fead, *Jurisdiction over Foreign Corporations*, (1926) 24 *Mich. L. Rev.* 633; Bullington, *Jurisdiction over Foreign Corporations*, (1928) 6 *N. C. L. Rev.* 147; Rothschild, *Jurisdiction of Foreign Corporations in Personam*, (1930) 17 *Va. L. Rev.* 129; Raymond, *Jurisdiction over a Foreign Corporation Doing Business within the State*, (1931) 9 *Tex. L. Rev.* 410; Farrier, *Jurisdiction over Foreign Corporations*, (1933) 17 *MINNESOTA LAW REVIEW* 270; Stimson, *Jurisdiction over Foreign Corporations*, (1933) 18 *St. Louis L. Rev.* 195; Willis, *Corporations and the United States Constitution*, (1934) 8 *U. of Cin. L. Rev.* 1; *Comments*: (1929) 77 *U. of Pa. L. Rev.* 1010; (1931) 79 *U. of Pa. L. Rev.* 956, 1119. See Henderson, *The Position of Foreign Corporations in American Constitutional Law* 89 ff., 104 ff.

⁶See *Lafayette Ins. Co. v. French*, (1855) 18 *How. (U.S.)* 404, 15 *L. Ed.* 451; *Horn Silver Mining Co. v. New York*, (1892) 143 *U. S.* 305, 12 *Sup. Ct.* 403, 36 *L. Ed.* 164.

⁷See *Green v. Chicago, B. & Q. Ry.*, (1907) 205 *U. S.* 530, 27 *Sup. Ct.* 595, 51 *L. Ed.* 916; *St. Louis S. W. R. Co. v. Alexander*, (1913) 227 *U. S.* 218, 33 *Sup. Ct.* 245, 57 *L. Ed.* 486; *Bank of America v. Whitney Bank*, (1923) 261 *U. S.* 171, 43 *Sup. Ct.* 311, 67 *L. Ed.* 594.

⁸See *Smolik v. Philadelphia & Reading C. & I. Co.*, (D.C. N.Y. 1915) 222 *Fed.* 148; *Farmers' & Merchants' Bank v. Federal Reserve Bank*, (D. C.

the doing of an act which a state could forbid, upon propriety and convenience,⁹ and upon acts on the part of agents or servants within a state in behalf of a foreign corporation.¹⁰ In the last analysis it seems that a theory which takes into account the constitutional limitations and restraints upon the "unlimited" power of a state over a foreign corporation must be based upon broad concepts of public necessity and convenience which render the exercise of judicial authority¹¹ over a foreign corporation reasonable when its activity begins to have an important influence upon the residents, and of the theories proposed the "reasonable regulation" basis seems to be the most realistic and the best adapted to withstand continuous attack.¹²

There has been a progressive development in the enactment of statutes in the several states providing for service of process upon foreign corporations.¹³ Foreign insurance corporations have been

Ky. 1922) 286 Fed. 566, 588 ff. See Fead, *Jurisdiction over Foreign Corporations*, (1926) 24 Mich. L. Rev. 633, 636; Bowers, *Process and Service*, sec. 331.

⁹Willis, *Corporations and the U. S. Constitution*, (1934) 8 U. of Cin. L. Rev. 1, 22; Farrier, *Jurisdiction over Foreign Corporations*, (1933) 17 MINNESOTA LAW REVIEW 270, 285, 286.

¹⁰Stimson, *Jurisdiction over Foreign Corporations*, (1933) 18 St. Louis L. Rev. 195, states his theory as follows: "A foreign corporation is subject to a sovereignty's jurisdiction whenever one or more of its agents or servants, acting in its behalf, is within that sovereignty's territory."

¹¹It should be borne in mind that the courts have not made any clear pronouncement in favor of explaining state authority over foreign corporations upon the basis of ordinary legislative power. Sooner or later a clearer recognition of this fact may be forced, particularly in the case of regulation affecting corporations engaged in interstate commerce which, of course, cannot be excluded, and of federally chartered corporations which may be operating within a state but which cannot reasonably claim or be permitted immunity from local suits unless they are in the discharge of a governmental function of the federal government, in which case it is a matter for legislative determination.

¹²See Hinton, *Substituted Service on Non-Residents*, (1925) 20 Ill. L. Rev. 1, 5; Shirley, *Foreign Corporations—Service on Statutory Agent*, (1933) 11 Tex. L. Rev. 226, 232-233.

¹³Foreign Corporations generally: Alabama, Code (1928), secs. 7209, 9426; Arizona, Revised Code (1928) secs. 657, 659, 661; Arkansas, Statutes (1927 supp.) sec. 1830, 1151, 1826, 1829; California Gen. Laws 1931, Act. 686, sec. 17, California, Statutes 1933, ch. 533, sec. 405, 406; Colorado, Statutes (Courtright's Mills Annotated 1930), sec. 988; District of Columbia Code, 1929, title 24, ch. 15, sec. 373; Connecticut, General Statutes 1930, secs. 3489, 3490; Delaware Rev. Code 1915, sec. 2101a, 2101d, 2101c, 578, 605, 606, Delaware, Laws 1931, ch. 52, sec. 26, code No. 597; Florida, Gen. Laws 1927, sec. 4251, 4256, 4257, 4259; Georgia, Code (Park's annotated 1914) secs. 2258, 2261; Idaho, Code Anno. 1932, sec. 29-502; Illinois, Rev. Stat. (Cahill's 1933) ch. 32, sec. 113; Indiana, Stat. (Burns Annotated 1926) secs. 4913, 4923, 4924; Indiana, Statutes (Supp. 1929) sec. 4856.33, 4856.30 (5), (6); Iowa, Code 1931, sec. 11072, 8421 (6); Kansas, Rev. Stat. (1923), ch. 17-501, 1203, Supplement (1933) ch. 17-509, 510, ch. 60-

grouped separately from other foreign corporations and have been regulated by separate statutes,¹⁴ but the service provisions of

2519 to 2522; Kentucky, Statutes (Carroll's 1930) sec. 571; Louisiana, Gen. Statutes (Dart, 1932) secs. 1248, 1249, 1111 (e), 1250, 1251, 1252; Maine, Rev. Stat. (1930) ch. 95, sec. 19, ch. 56, sec. 106; Maryland, Code Anno. (1924) art. 23, secs. 118, 119; Massachusetts, Anno. Laws 1933, ch. 223, sec. 38, 39, ch. 181, sec. 3, 3A, 4; Michigan, Comp. Laws 1929, secs. 14094, 14095, 14097; Minnesota, Stats. (Mason's 1927) secs. 9231-3, 4, 7493; Mississippi, Code (1930) secs. 4140, 4166, 4167; Missouri, Rev. Stat. 1929, sec. 744, 4596, 4597; Montana, Rev. Codes 1929, secs. 9111, 9112, 9113, 9114, 9115, 9116; Nebraska, Comp. Stat. 1929, ch. 20-413, ch. 24-1201, 1203; Nevada, Comp. Laws 1929, secs. 8580, 8581; New Hampshire, Pub. Laws 1926, ch. 231, sec. 1, 6; New Jersey, Comp. Stat. (1910) sec. 97, 99; New Mexico Stats. 1929, ch. 32-196, 204; New York, Consol. Laws (McKinney, 1930) Bk. 22, sec. 210, 216 (e), (f), 217, 224, 225 (1, 2, 3, 4, Bk. 4, sec. 28, 145, 223, 224 (banking law)); North Carolina, Code 1931, secs. 1494, 1137; North Dakota, Comp. Laws 1913, sec. 5240; Ohio, Gen. Code (Throckmorton's 1930) secs. 179, 181, 10244, 11288; Oklahoma, Stats. 1931, secs. 126, 128, 130, 133, const. sec. 43; Oregon, Code Anno. 1930, ch. 25-1101, 1102, 1202; Pennsylvania, Stat. (Purdon's Anno. Perm. ed.) Title 15 sec. 3142; Rhode Island, Gen. Laws 1923, sec. 2092, 2094, 3530 (3), 3535; South Carolina, Code 1932, sec. 7765, sec. 434 (1); South Dakota, Comp. Laws 1929, sec. 8903 (6), 8907; Tennessee, Code 1932, secs. 4120, 4122, 4124; Texas, Complete Stat. 1928, art. 2031, 2031a, 2, 3 (d); Utah, Rev. Stat. 1933, sec. 18-8-1, sec. 82-1-12; Vermont, Pub. Laws (1933) sec. 5649 (G. L. 4996) sec. 1363 (G. L. 1740); Virginia, Code 1930, secs. 6064, 6066, 6070; Washington, Comp. Stat. 1922, sec. 3854; West Virginia, Code 1931, ch. 56, sec. 14; Wisconsin, Stats. 1931, ch. 226.02 (3-7); Wyoming, Rev. Stats. 1931, ch. 89-814, ch. 28-108, ch. 28-113.

¹⁴Foreign Insurance Companies: Alabama, Code 1928, secs. 8352, 4612; Arizona, Rev. Code 1928, sec. 1795; Arkansas, Stat. 1921, secs. 6048, 6063, 6091, 6133; Colorado, Stat. (Courtright's Mills Anno. 1930) sec. 3554; District of Columbia, Code 1929, title 5, ch. 7, sec. 172, p. 18; Connecticut, Gen. Stat. 1930, secs. 4121, 4123, 4124, 5469; Florida, Comp. Gen. Laws 1927, secs. 6198, 6267; Georgia, Civil Code (Park's 1914) sec. 2446, 2447; Idaho, Code 1932, ch. 40-608, 607; Illinois, Rev. Stat. (Cahill's 1933) ch. 73, sec. 150, 338, 426; Indiana, Stat. Anno. (Burns 1926) secs. 9133, 9134; Iowa, Code 1931, secs. 8766, 8767, 8768; Kansas, Rev. Stat. 1923, ch. 60-2523; Supp. 1933, ch. 40-218; Kentucky, Stat. (Carroll's 1930) sec. 631; Louisiana, Gen. Stat. (Dart, 1932) sec. 4018; Maine, Rev. Stat. 1930, ch. 60, secs. 118, 119; Maryland, Code Ann. 1924, art. 48A, sec. 123, sec. 28; Massachusetts, Anno. Laws 1933, ch. 175, sec. 151; Michigan, Comp. Laws 1929, sec. 3713; Mississippi, Code 1930, sec. 5165; Missouri, Rev. Stat. 1929, secs. 5894, 5897; Montana, Rev. Codes 1921, sec. 6149; Nebraska, Comp. Stat. 1929, ch. 44-207, 1214, 1623; Nevada, Comp. Laws 1929, sec. 3547; New Hampshire, Pub. Laws 1926, ch. 275, sec. 9; New Jersey, Comp. Stat., Supp. 1930, sec. 99-59; New Mexico, Stat. 1929, ch. 71-317; New York, Consol. Laws (McKinney 1933) bk. 27, sec. 30; North Carolina, Code 1931, secs. 6411, 6414, 6415; North Dakota, Comp. Laws, Supp. 1925, sec. 4881a16(c); Ohio, Gen. Code (Throckmorton's 1930) sec. 11289; Oklahoma, Stat. 1931, sec. 10475; Oregon, Code Anno. 1930, ch. 46-106; Pennsylvania, Stat. (Purdon's Perm. ed.) title 40, sec. 48; Rhode Island, Gen. Laws 1923, sec. 3775, 3776; South Carolina, Code 1932, sec. 7964; South Dakota, Comp. Laws 1929, sec. 9182; Tennessee, Code 1932, sec. 6219; Texas, Stat. 1928, art. 4763, 4764; Utah, Rev. Stat. 1933, ch. 43-5-1 (4), ch. 43-5-2; Vermont, Pub. Laws (Proposed Revision 1933) sec. 1364 (G. L. 1741), 1365 (G. L. 1742); Virginia, Code 1930, secs. 4207, 4304 (23), (24), 3845, 3846; Washington, Comp. Stat. 1922, sec. 7044; West Virginia, Code 1931, ch. 33, sec. 43; Wisconsin, Stat. 1931, ch. 201, 43, 201.38, 201.385; Wyoming, Rev. Stat. 1931, sec. 89-813.

The citations to statutes occurring in this and the preceding note cover

such statutes are not essentially different from the provisions of statutes applying to foreign corporations generally, and they will be discussed together, as far as possible, in this study. If anything the service provisions for foreign insurance corporations have been less generous than those applied to other foreign corporations.

The service provisions of these statutes may be analyzed under a few general groups: (1) persons or agencies of the foreign corporation to be served with process, (2) notice and methods of giving notice of service to the foreign corporation, (3) the scope of actions cognizable and the parties.

AGENTS SERVED

Some statutes permit service of process on the actual agent of the foreign corporation who may be either an officer or agency¹⁵ of the corporation, some require the foreign corporation to appoint a process agent,¹⁶ and there may be a requirement that such process agent be a resident of the state serving process.¹⁷ Other statutes either as a matter of course or as a condition of doing business¹⁸ within the state compel the foreign corporation to submit to service of process upon some public officer who is made a statutory agent of the foreign corporation for this definite purpose.¹⁹

the statutory materials to be discussed in this article. Hereafter, for convenience, whenever it is necessary to refer to a particular statute, the reference will be by the name of the state, not by the full citation of the statute. If there is a difference between the general service statutes and the special statutes applying to foreign insurance companies, that will be indicated by a division of the citations into two groups: foreign corporations, foreign insurance companies.

¹⁵Colorado, District of Columbia, Florida, Georgia, Kentucky, Maryland (alternative), Massachusetts, Michigan (alternative), Mississippi (alternative), Missouri, Montana, New Mexico, Ohio, Oklahoma, South Carolina, Texas, West Virginia.

Foreign Insurance Companies: Florida, Indiana, Missouri, Ohio, Wyoming.

¹⁶Arizona (agent in each county), California, Delaware, Idaho, Illinois, Indiana, Louisiana, Maryland (alternative), Michigan (alternative), Minnesota, North Carolina, Tennessee, Utah, Washington, Wyoming.

In Iowa provision is made for service upon the general agent and in Nebraska and Wyoming (alternative) upon a managing agent.

¹⁷Alabama, Maine, Nevada, New Jersey, Oregon, Rhode Island, Wisconsin. Foreign insurance companies, Michigan (alternative), District of Columbia, Georgia, Mississippi, Nevada, Oregon.

¹⁸New York, Pennsylvania.

¹⁹The secretary of state is the public officer most frequently served: Alabama (if no agent found in state), California, Connecticut, Kansas,

Since the foreign corporation is assumed to be doing business within the state so as to be amenable to service of process, our only concern in this study is whether the statutory method of giving notice is sufficient to satisfy due process.²⁰ On one theory or another the courts of a state have power to entertain certain actions against such a corporation.²¹

It should make little or no difference in the validity of service of process on either the foreign corporation or foreign insurance corporation who is named process agent to receive service of summons. The corporation by selecting the agent and designating him as its personal representative to receive service admits that

Louisiana, Michigan (alternative), Mississippi (alternative), New Hampshire, North Dakota, New York, Vermont, South Dakota, Virginia. If no agent is found or appointed, the secretary is served in Illinois, Iowa, Minnesota, Montana, Nevada, North Carolina, Ohio (as to liability already incurred), Oklahoma, Tennessee, Washington, Wisconsin. The corporation commissioner is served in Massachusetts and Oregon (if the foreign corporation does not maintain an agent). The auditor of state is served in Arkansas, Nebraska, Indiana, West Virginia. In Mississippi the clerk of the court is the officer served, and it is an alternative method in Florida.

In the case of foreign insurance companies the insurance commissioner, superintendent, or other chief insurance officer is most frequently named the statutory agent: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan (alternative), Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin. The same is true in the District of Columbia if no agent is appointed. In Indiana and Louisiana the secretary of state is served if there is no agent of the company present in the state. Several other officers are served: commissioner of finance, Idaho; bank examiner, New Mexico; director of trade and commerce, Illinois; controller, if no agent present, Nevada; corporation commission, Virginia.

²⁰No real issue can be made against the process we are discussing on the ground that it denies the equal protection of the laws. It is true that the "equal protection of the laws" clause of the fourteenth amendment applies to corporations, *Santa Clara County v. Southern Pacific Railroad Co.*, (1886) 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118, and that they are protected against unreasonable and arbitrary discriminations thereby. *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, (1923) 262 U. S. 544, 43 Sup. Ct. 639, 67 L. Ed. 1112; *Power Mfg. Co. v. Saunders*, (1927) 274 U. S. 490, 47 Sup. Ct. 678, 71 L. Ed. 1165. However, it seems that there is a reasonable ground for classification in the case of foreign corporations being served with process in a state, and that a difference in process between foreign and domestic corporations is a reasonable classification, not denying the equal protection of the laws, seems to follow from *St. Mary's Franco-American Petroleum Co. v. West Virginia*, (1906) 203 U. S. 183, 27 Sup. Ct. 132, 51 L. Ed. 144.

²¹There is, of course, the theory, not without support in the cases, that no notice is necessary since the power of a state over foreign corporations is sufficiently great to exact such a consent. This view will be criticized later in this discussion.

service upon the named agent will be sufficient, and the very designation indicates that the relationship between the two is sufficiently close that the corporation will have a reasonable probability of receiving notice of the pending action.

However, wherever statutes permit service upon any officer or agent or "true agent" of the foreign corporation, difficulties with a definition of "agent" arise. It is perhaps proper to say that service upon a corporation is constructive, at least substituted, in every case; thus it is necessary that notice be given to some representative of the corporation. It is not likely that service upon *any* employee of a foreign corporation will be sufficient. In general the agent who is served must be possessed of such authority as will justify the conclusion that his principal is, by him, within the district or state;²² he must have a truly representative character.²³ Unquestionably service upon the president,²⁴ secretary²⁵ or director²⁶ of a foreign corporation doing business within a state is sufficient. Such officers are certainly representative. Likewise, service upon the managing or general agent of a foreign corporation seems equally good because of the clear representative relationship to the foreign corporation.²⁷ Courts generally consider

²²Chase Bag Co. v. Munson Steamship Lines, (1924) 54 App. D. C. 169, 295 Fed. 90.

²³Wold v. Colt Co., (1907) 102 Minn. 386, 114 N. W. 243.

²⁴Grant v. Cananea Consolidated Copper Co., (1907) 189 N. Y. 249, 82 N. E. 191. Vice president: Consolidated Indemnity & Ins. Co. v. Alliance Casualty Co., (C.C.A. 2d Cir. 1933) 68 F. (2d) 21.

²⁵Pomeroy v. Hocking Valley Railway Co., (1916) 218 N. Y. 530, 113 N. E. 504.

²⁶Pennsylvania Lumbermen's Mutual Fire Insurance Co. v. Meyer, (1905) 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; St. Louis S. W. Ry. Co. v. Alexander, (1913) 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486.

However, where a foreign corporation is not doing business within a state, officers of the foreign corporation who go into the state do not carry their representative capacity with them so as to render the foreign corporation amenable to suit there by service upon them. Thus service on the president of a foreign corporation while temporarily within a state has been held invalid. *Goldey v. Morning News*, (1895) 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Magnolia Metal Co. v. Savannah Supply Co.*, (N.Y. County, Sup. Ct. Spec. Term 1915) 157 N. Y. S. 355, noted (1916) 16 Col. L. Rev. 422. The same rule has been applied to service upon a vice-president and a director respectively. See *Puster v. Parker Mercantile Co.*, (1905) 70 N. J. Eq. 771, 59 Atl. 232; *Riverside and Dan River Cotton Mills v. Menefee*, (1915) 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910.

²⁷*Minneapolis Threshing Machine Co. v. Ashouer*, (1910) 142 Wis. 646, 126 N. W. 113; *Tauza v. Susquehanna Coal Co.*, (1917) 220 N. Y. 259, 115 N. E. 915; *Snelling v. National Travelers Benefit Association*, (1918) 102 Kan. 227, 169 Pac. 1144; *Maichok v. Bertha-Consumers Co.*, (C.C.A. 6th Cir. 1928) 25 F. (2d) 257; *Milbank v. Standard Motor Const. Co.*, (1933) 132 Cal. App. 67, 22 P. (2d) 271; *Wilken v. Moorman Mfg. Co.*,

that the soliciting agents²⁸ and the claim adjusters²⁹ of foreign corporations are likewise of a representative character. On the other hand, service upon a mere clerk or day laborer or other unrepresentative employee would seem to be violative of principles of due process of law³⁰ since there would scarcely be any reasonable probability that the foreign corporation would have communicated to it notice of a pending action given to such a person. Service upon one who has ceased to be an agent, of course, cannot be effective.³¹ Likewise, service at an agency or place of doing business existing when a cause of action arose or at the time a contract was executed is insufficient where neither agency nor agent was being maintained there at the time of action.³² Of equal necessity is the requirement that the agent served have interests consistent with his agency; he must not be antagonistic.³³

(1931) 121 Neb. 1, 235 N. W. 671. See note, (1932) 8*Notre Dame Lawyer* 105.

In *Bentley Co. v. Chivers & Sons*, (D.C. N.Y., 1913) 215 Fed. 959, there is an excellent example of the method of determining whether an agent really has a representative capacity. Here the agent was called an "entomologist" but he had plenary power to represent the defendant with respect to important matters. He was considered to be a managing agent. See note (1914) 42 *Nat. Corp. Rep.* 679. See *United States Merchants' & Shippers' Ins. Co. v. Elder Dempster & Co., Ltd.*, (C.C.A. 2d Cir. 1932) 62 F. (2d) 59.

²⁸*American Asphalt Roof Corp. v. Shankland*, (1928) 205 Iowa 862, 219 N. W. 28; *Rishmiller v. Denver & Rio Grande Railroad Co.*, (1916) 134 Minn. 261, 159 N. W. 947; *Kirby v. Louismann-Capen Co.*, (D.C. Ky. 1914) 221 Fed. 267; *Connor v. Excess Insurance Co.*, (C.C.A. 3rd Cir. 1931) 51 F. (2d) 626. See notes (1923) 22 *Mich. L. Rev.* 77; (1922) 6 *MINNESOTA LAW REVIEW* 309.

²⁹*Commercial Mutual Accident Co. v. Davis*, (1909) 213 U. S. 245, 29 *Sup. Ct.* 445, 53 L. Ed. 782; *Cheli v. Cudahy Brothers Co.*, (1932) 260 *Mich.* 496, 245 N. W. 503.

³⁰It will be well to recall that the term due process of law has developed into two different things; one meaning has reference to substantive right and another refers to procedural fair play. In this article, the second meaning, procedural due process, will be discussed, dealing with the question whether the procedural devices set up in the statutes provide adequate notice and do not place the foreign corporation at a serious disadvantage.

³¹*People's Tobacco Co. v. American Tobacco Co.*, (1918) 246 U. S. 79, 38 *Sup. Ct.* 233, 62 L. Ed. 587; *Guthrie v. Indemnity Association*, (1899) 101 *Tenn.* 643, 49 S. W. 829; *Kulver v. Middlewest Grain Co.*, (1919) 44 N. D. 210, 173 N. W. 468.

³²*Jefferson Fire Insurance Co. v. Brackin*, (1913) 140 Ga. 637, 79 S. E. 467. Certainly due process could not be satisfied if there was no existing agent or agency at the time of service.

³³*Tortat v. Hardin Mining and Mfg. Co.*, (C.C. S.D. 1901) 111 Fed. 426. The facts of this case afford an excellent example of what should not happen. Here the resident manager in South Dakota of an Illinois corporation, in which he was a director, assigned a cause of action in his favor against the corporation to a friend for purposes of bringing suit, and summons was served upon him as manager of the corporation in the action. The court said (p. 429): "The interest of Hardin, who, as the real party in interest,

A problem somewhat related to that of serving the actual agent of the foreign corporation is that of serving a domestic, subsidiary corporation within a state as the agent of its parent, a foreign corporation. This corporate device has met with considerable success and has had an extensive use. All of the stock of the subsidiary may be owned by the foreign corporation, and they may have common officers with practically nothing to distinguish the two corporations except perhaps a separate bookkeeping device, but the courts are reluctant to look behind the separate entity of the subsidiary and to hold that it is a mere agent of the foreign corporation.³⁴ The Supreme Court has refused to recognize the identity of parent and subsidiary corporation for purposes of service of process³⁵ despite the virtual domination of the subsidiary by the parent and the complete stock ownership of the one by the other. However, some state courts³⁶ have found situations, and a lower federal court³⁷ has intimated that such situations may arise, in which they considered that the individuality of the subsidiary was controlled to such an extent that the parent corporation was

is plaintiff, was so antagonistic to his duty as an officer of the defendant company to defend the suit as to render any service upon him void." The service was quashed and set aside.

³⁴See *Cannon Manufacturing Co. v. Cudahy Co.*, (1925) 267 U. S. 333, 45 Sup. Ct. 250, 69 L. Ed. 634. Here the foreign corporation owned all the stock, dominated the subsidiary completely, exerted commercial and financial control, reaped all the profits, but the two concerns kept separate books of their transactions. The court held that the corporate separation, though probably formal, was nevertheless real, and that service upon the subsidiary did not bring the parent corporation into the local courts. *Bachler v. Maytag Co.*, (1930) 251 Mich. 439, 232 N. W. 194; *Wormser*, *Disregard of the Corporate Fiction and Allied Corporate Problems* 54ff.

Obviously, where the foreign parent corporation has its own agents in the state, the subsidiary cannot be served. *Missouri-Kansas Pipe Line Co. v. Hobgood*, (1932) 244 Ky. 570, 51 S. W. (2d) 920.

³⁵See *Peterson v. Chicago, Rock Island & Pacific Railway*, (1907) 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *People's Tobacco Company Ltd. v. American Tobacco Co.*, (1918) 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587; *Cannon Manufacturing Co. v. Cudahy Packing Co.*, (1925) 267 U. S. 333, 45 Sup. Ct. 250, 69 L. Ed. 634. See criticism of the court's action by *Philbrick*, *Jurisdiction over Foreign Corporations*, (1925) 20 Ill. L. Rev. 281, 287. On the general problem see *Ballantine*, *Separate Entity of Parent and Subsidiary Corporations*, (1925) 14 Cal. L. Rev. 12, 12-16, and cases cited in notes.

³⁶See *Buie v. Chicago, R. I. & P. Ry. Co.*, (1901) 95 Tex. 51, 65 S. W. 27 overruled by *Atchison, Topeka & Santa Fe Railway Co. v. Ben Stevens*, (1918) 109 Tex. 262, 206 S. W. 921; *State of Washington v. Superior Court*, (1927) 143 Wash. 641, 255 Pac. 1030; *Williams v. Freeport Sulphur Co.*, (Tex. Civ. App. 1930) 40 S. W. (2d) 817, note (1932) 30 Mich. L. Rev. 464.

³⁷*Industrial Research Corporation v. General Motors Corporation et al.*, (D.C. Ohio, 1928) 29 F. (2d) 623, note (1929) 42 Harv. L. Rev. 955.

the real actor within the state. What the Supreme Court will do where a state has held a subsidiary to be a proper agent for serving process upon a foreign corporation is conjectural. It is possible that specific legislation will be necessary to clarify the situation.³⁸

The determination of this question seems essentially a question of degree, and if the subsidiary is a mere dummy, dominated and controlled by a foreign corporation, there is no miscarriage of justice in permitting an action against the foreign corporation by serving the subsidiary domestic corporation. When the subsidiary is dominated and controlled in every respect by the foreign corporation, the situation is somewhat analogous to a foreign corporation doing business within a state through a general or managing agent. To permit the separate corporate entity to defeat the interests of residents of the state in such cases is to afford the foreign corporation a too easy opportunity actually to do business within a state without being amenable to the liabilities usually entailed by such activity.

NECESSITY OF NOTICE

Many state statutes provide that corporations must file a consent³⁹ to service of process upon a public officer before they may do business within the state, others provide that service be made upon the public officer if no actual agent is appointed⁴⁰ or present to receive service, and others simply stipulate that service may be made upon a designated public officer.⁴¹

³⁸Even with specific legislation there would still remain the vexing problem of whether the foreign corporation was actually doing business within the state. A state might require a foreign corporation whose stock and management control was expected to dominate the domestic corporation, as a condition for incorporating the domestic corporation, to consent that service upon the subsidiary will be sufficient to bring the foreign corporation into court. There would still be the question of the power of the state to impose such a condition, depending upon whether the foreign corporation could be said to be in any way subject to its authority. Realistically, if the foreign corporation uses the subsidiary as a device for doing business within a state, it must be doing business there, and as a condition to the doing of that business through the subsidiary, the state might exact consent to or for that matter impose liability to service upon the subsidiary corporation.

³⁹Examples: New York, Pennsylvania.

⁴⁰Examples of this type are: Alabama, California, Illinois, Iowa, North Carolina, Oklahoma, Tennessee. Some statutes, such as those in Michigan and Mississippi, provide for an alternative method upon the agent of the corporation or upon the public officer designated by statute.

⁴¹Examples may be found in Indiana, Statutes (Supp. 1929) sec. 4856.33; Massachusetts, ch. 181, sec. 3A; Washington, sec. 3854. These provisions

Certainly, regardless of consent, service upon a public officer who is required to make reasonable efforts to notify the foreign corporation satisfies due process of law.⁴² But where there is no provision for sending notice of the pending action, it may make a difference whether the foreign corporation has formally consented to service.⁴³ Then the state authorities are able to assert that the foreign corporation has given a true consent and is therefore unable to assert a violation of due process.⁴⁴

If the consent filed as a condition of doing business is bona fide and voluntary, of course, no notice of service is required

are not very general among the states, and they usually occur in the contingency when a corporation has failed to appoint an agent or has withdrawn from a state without having left an agent for receiving service of process.

The most common type of statute requires the foreign corporation, particularly foreign insurance corporations, to file a consent to service of process upon the public agent as a condition precedent to doing business within the state.

⁴²A considerable number of states require notice of substituted service of process upon the public officer to be sent to the foreign corporation: Alabama, Arkansas, California, Connecticut, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Wisconsin.

Foreign Insurance Companies: Alabama, Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin.

For a general discussion of such service, see Shirley, *Foreign Corporations—Service on Statutory Agent*, (1933) 11 *Tex. L. Rev.* 226, 227 ff.

⁴³In those cases where service after withdrawal as to causes of action growing out of business done within the state is authorized, the courts say that the consent to service is implied from entering the state and complying with the state law. But this is not true in those cases where the corporation has ceased to do business and the cause of action arises in another state. *Chipman v. Jeffrey Co.*, (1920) 251 U. S. 373, 40 Sup. Ct. 172, 64 L. Ed. 314. Does not this fact expose the error of both the consent theory and the power to exclude theory? If it is a true consent, it should make no difference where the action arose, and if there is an absolute power to exclude, then a condition of entrance requiring submission to all causes of action may be imposed.

⁴⁴Undoubtedly constitutional rights may be waived by free action or a consistent course of conduct. See *Pierce v. Somerset Railway*, (1898) 171 U. S. 641, 648, 19 Sup. Ct. 64, 43 L. Ed. 316; *Shepard v. Barron*, (1904) 194 U. S. 553, 568, 24 Sup. Ct. 737, 48 L. Ed. 1115; *Pierce Oil Corp. v. Phoenix Refining Co.*, (1922) 259 U. S. 125, 128, 42 Sup. Ct. 440, 66 L. Ed. 855. But it must be apparent that the authority of a state over foreign corporations is so powerful that the conditions which they impose are in fact compulsory, and the cases of voluntary waiver by act or conduct do not seem particularly analogous.

Then again, is there any real necessity for such an absolute authority over foreign corporations that they can be compelled to waive constitutional rights as a condition of doing business within a state?

because it has been waived.⁴⁵ But what of the statutes which provide that the foreign corporation⁴⁶ may be served with process by leaving it with a public officer, and which impose no duty upon either the officer or the plaintiff to send notice of this service?⁴⁷ Judicial authority is not conclusive upon all the problems raised by this question. It is probable that notice of service is essential in case the corporation is doing business in the state without complying with, and in open violation of, the terms of the statute, but there is reason to believe that it is not essential in the case of the foreign corporation which has attempted to comply with the terms of the statute by appointing process agents or qualifying generally to do business in the state.

The reasoning of the courts which sustain service without any provision for notice to the foreign corporation is that the foreign corporation indicates its willingness to have notice given the public officer by its failure to appoint a process agent. The California supreme court declared that the corporation is in no position to invoke the constitutional doctrine of notice since it failed to comply with the law.⁴⁸ The Oklahoma supreme court has followed the

⁴⁵See *Washington ex rel. Bond and Goodwin and Tucker, Inc. v. Superior Court*, (1933) 289 U. S. 361, 53 Sup. Ct. 624, 77 L. Ed. 1256, in which no notice of the service of process on the officer was given to the foreign corporation. There were, perhaps, mitigating circumstances in this case since service was made after the corporation had withdrawn with outstanding liabilities, and it might be expected that judicial controversies might arise out of them in which service was by statute authorized upon the secretary of state.

⁴⁶For an example see the West Virginia statute, constituting the auditor of state the attorney in fact of every insurance company for the purpose of service of process, no notice of such service being required by the statutes. West Virginia, Code 1931, ch. 33, sec. 43.

Several other states do not require notice of service upon the public officer to be sent to the foreign corporation. See Arizona, Kansas (securities), Texas, Washington, West Virginia (foreign insurance companies), Arizona, District of Columbia, Florida, Idaho, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Dakota, Vermont.

⁴⁷Such a method of service was held lacking in due process of law by the Supreme Court in the case of a non-resident (individual) motorist. *Wuchter v. Pizzutti*, (1928) 276 U. S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446. See Culp, *Process in Actions against Non-Resident Motorists*, (1934) 32 Mich. L. Rev. 325, 336-338.

⁴⁸*Olender v. Crystalline Mining Co.*, (1906) 149 Cal. 482, 86 Pac 1082. The view is that the corporation is bound to know the law, and it could have had full notice if it had appointed the required agent.

Notice to the secretary of state has been considered due process of law. In this case the theory is that the foreign corporation by entering the state is deemed to have agreed to accept service, as to actions brought against it, by service on the public officer. *Smith v. Empire State-Idaho Mining and Development Co.*, (C.C. Wash., 1904) 127 Fed. 462.

California rule.⁴⁹ But a federal district court in California refused to follow the local construction of the statute because the lack of knowledge by the corporation "shocks the conscience and demonstrates that such attempted service constitutes a want of compliance with the due process clause of the constitution."⁶⁰ Several other courts have held that service on the officer is not due process because there is no reasonable certainty that notice will actually reach the foreign corporation.⁵¹ And the Supreme Court of the United States⁵² has held that a foreign corporation which has failed to comply with the state laws and failed to appoint an agent for receiving service of process, though doing business within a state, cannot be served with process upon a public agent without some provision for sending notice of such

⁴⁹*Richardson Machinery Co. v. Scott*, (1926) 122 Okla. 125, 251 Pac. 482, note (1927) 40 Harv. L. Rev. 906, (1927) 11 MINNESOTA LAW REVIEW 559.

On account of a local rule of practice, the Supreme Court was prevented from reviewing this decision. *Richardson Machinery Co. v. Scott*, (1928) 276 U. S. 128, 132, 48 Sup. Ct. 264, 72 L. Ed. 497. Certiorari had been granted in (1927) 274 U. S. 729, 47 Sup. Ct. 587, 71 L. Ed. 1319. A default judgment had been rendered in the lower court, and the law of Oklahoma was such that the petition filed later to vacate the judgment, based on non-jurisdictional grounds, operated as a voluntary appearance. The question of the constitutionality of the service, the petition to vacate having been filed afterwards, could not be raised in the Supreme Court, though the Court had considered the constitutionality of the statute sufficiently questionable to grant a writ of certiorari.

See *Consolidated Flour Mills Co. v. Roberts*, (1927) 123 Okla. 101, 252 Pac. 29; *Consolidated Flour Mills Co. v. Muegge*, (1927) 127 Okla. 295, 260 Pac. 745, holding similarly.

⁵⁰*Knapp v. Bullock Tractor Co.*, (D.C. Cal., 1917) 242 Fed. 543, noted (1918) 27 Yale L. J. 413.

⁵¹*Cella Commission Co. v. Bohlinger*, (C.C.A. 8th Cir. 1906) 147 Fed. 419, actually the case could have been decided on the ground that there was no doing of business in the state, but the court made much of the fact that there was no provision in the statute for sending notice of the service upon the public officer to the corporation; *Southern Railway Co. v. Simon*, (C.C. La. 1910) 184 Fed. 959, later decided in the Supreme Court on another point, (1915) 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *King Tonopah Mining Co. v. Lynch*, (D.C. Nev., 1916) 232 Fed. 485; *Knapp v. Bullock Tractor Co.*, (D.C. Cal., 1927) 242 Fed. 543.

⁵²In *Consolidated Flour Mills Co. v. Muegge*, (1928) 278 U. S. 559, 49 Sup. Ct. 17, 73 L. Ed. 505, the Court, without opinion except reference to the authority of *Wuchter v. Pizzutti*, (1928) 276 U. S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446, reversed the Oklahoma court in a case by the same title, reported in (1927) 127 Okla. 295, 260 Pac. 745, which had sustained service of process under the Oklahoma Stat. 1929, sec. 5442. It seems that, unless there has been a consent by the corporation, either in writing or by a necessary series of acts, to a particular type of service, statutes which fail to make any provision for sending notice to the foreign corporation do not meet the test of due process. See note, (1933) 81 U. of Pa. L. Rev. 469.

service to the foreign corporation. It seems clear that the method of giving notice should be reasonably calculated to bring to the attention of the officers or agents of the foreign corporation the fact that the action is pending so that they may have an opportunity to make a defense.⁵³

What is the position of the foreign corporation which has complied with the state laws? Is it, equally with the corporation which has not complied with the state laws in its failure to appoint an agent, entitled to notice of service upon a public officer? The recent Washington case of *Washington ex rel. Bond & Tucker, Inc. v. Superior Court* has a definite relation to the problem. In this case the plaintiff corporation had qualified to do business in the state of Washington and had appointed a statutory agent, but it ceased to do business before this action was begun, and at the time of suit there was no process agent within the state. Under the circumstances the state law provided that the secretary of state might be the service agent. This officer was served, but the secretary made no effort to notify the foreign corporation of the service. The supreme court of Washington considered the service good and distinguished the case from others on the basis that here the foreign corporation had complied with the laws of the state and thereby consented to be bound by such laws.⁵⁴ However, the only compliance was the appointment of an agent to receive service of process, and there was at no time any formal consent to service of process upon the secretary of state. The Supreme Court of the United States,⁵⁵ on appeal, took the view that service without notice was valid in this case.⁵⁶ The Court recognized the soundness of the contention that a state may not condition entry upon the surrender of constitutional⁵⁷ rights, but

⁵³*King Tonopah Mining Co. v. Lynch*, (D.C. Nev., 1916) 232 Fed. 485. For a similar principle applied to a domestic corporation, see *Pinney v. Providence Loan and Investment Co.*, (1900) 106 Wis. 396, 82 N. W. 308.

⁵⁴*State ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court of Spokane County*, (1932) 169 Wash. 688, 15 P. (2d) 660, noted (1933) 81 U. of Pa. L. Rev. 469. In accord, *Mazzoleni v. Transamerica Corporation et al.*, (1933) 313 Pa. 317, 169 Atl. 127.

⁵⁵*Washington v. Superior Court*, (1933) 289 U. S. 361, 53 Sup. Ct. 624, 77 L. Ed. 1256.

⁵⁶The writer has elsewhere, (1934) 32 Mich. L. Rev. 939, stated that "the state under its power to exclude may impose a consent to a type of service which without the consent would be lacking in due process," relying on this case. The statement seems to be supported by language in the case (p. 364, 365), but the writer did not mean to state that this is the proper position to take as to all circumstances of service upon public officers.

⁵⁷(1933) 289 U. S. 361, 364-365, 53 Sup. Ct. 624, 77 L. Ed. 1256.

it did not believe, in this respect, that the statute so offended since it simply required the corporation to answer just claims growing out of the business formerly done within the state.⁵⁸

It may well be that the strong fact situation was a dominating factor in the trend of the decision. The corporation was no longer doing business in the state; it no longer had a process agent there, but it still had outstanding liabilities. If the Court meant to rest its decision on the ground that in this particular case, where the foreign corporation had failed to keep a process agent after having maintained one, there was no denial of due process, one may agree with the result reached. But to regard it as a precedent for the broader position that the power of a state in all situations is sufficient to impose a method of service which is fraught with possibilities of harm and injustice to a foreign corporation is to give it greater credit than is its due. As the Court⁵⁹ said, a corporation, just as an individual, by doing business in the state and qualifying therefor assents to all reasonable conditions imposed on such corporation. It is quite true that a foreign corporation may properly be required to accept service upon a public officer as a condition of doing business, and possibly a corporation waives the requirement of due process in giving notice by a genuine consent.⁶⁰ But the consent which may be implied from the appointment of a process agent or the filing of a formal consent to service upon a public officer can hardly be called a voluntary consent. And at most it is questionable whether the appointment of an agent under the terms of a statute constitutes an assent to a form of substituted process which as to a corporation doing business in the state without having

⁵⁸That the Court was minimizing the possibilities of harm and thinking of the application of its decision only to the specific situation at hand is demonstrated by the following language: "It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. . . . And for this reason a state may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission. . . . But the statute here challenged has no such operation. *It goes no farther than to require that the corporation may be made to answer just claims asserted against it according to law.* By appointing a new agent when Shaw ceased to be a resident of the state the appellant could have assured itself of notice of any action. The statute informed the company that if it elected not to appoint a successor to Shaw the secretary of state would by law become its agent for the purpose of service." (Italics by the writer.)

⁵⁹(1933) 289 U. S. 361, 364, 53 Sup. Ct. 624, 77 L. Ed. 1256. "It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the state constitutes an assent on its part to all the reasonable conditions imposed."

⁶⁰See *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, (1917) 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610.

appointed such an agent would not constitute due process of law.⁶¹

Everyone within the boundaries of a state is bound by all of its laws which it may constitutionally adopt; any consent which it may exact under its general legislative power cannot fairly be called a voluntary consent, and therefore the terms of the consent should be fair and equitable. A state cannot as a condition for doing business within its territory require citizens, including corporations of another state, to abandon constitutional rights since "the sovereign power of the state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."⁶² As indicated above this same principle applies to service of process upon a foreign corporation doing business without appointing process agents. Why should the corporation which has complied with the laws be less entitled to the constitutional guaranty of due process than the foreign corporation which has from the first done business in defiance of a state's legislation respecting service of process on foreign corporations?

The problem of notice to the foreign corporation when the state law provides the public officer shall be the service agent of the foreign corporation is not answered by the Washington decision discussed above. But its situation is quite analogous to either of the two situations discussed heretofore. Such a foreign corporation is more deserving of notice than the one which violates the state law in doing business and is equally as deserving as the foreign corporation defeated in the Washington case. Looking at it from the viewpoint of what is fair and reasonable, notice of service upon the public officer should be given to the foreign corporation. Service laws should be no more of a trap for the corporation than for the individual, and least of all should the foreign corporation which in its conduct is the least law abiding be accorded the greatest constitutional protection in the service of process.

METHODS OF GIVING NOTICE

A variety of methods of giving notice of service upon the public officer are prescribed by the several statutes: registered mail,⁶³

⁶¹*Consolidated Flour Mills Co. v. Muegge*, (1928) 278 U. S. 559, 49 Sup. Ct. 17, 73 L. Ed. 505.

⁶²*Terral v. Burke Construction Co.*, (1922) 257 U. S. 529, 42 Sup. Ct. 188, 66 L. Ed. 352.

⁶³Arkansas, California, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Montana, Nevada, New York. Foreign insurance companies:

first class mail,⁶⁴ registered return⁶⁵ receipted mail, telegraph,⁶⁶ publication.⁶⁷ Most of these methods of sending notice seem to have the necessary qualities which satisfy due process of law. There is practically no judicial authority regarding these various types of service in the corporation cases. However, there is sufficient authority in analogous cases to make it reasonably certain that most of these methods are satisfactory for giving notice to foreign corporations. Service upon a public officer required by law to send notice by mail to the foreign corporation or its officers is a mode of process reasonably⁶⁸ likely to notify the defendant.⁶⁹ Such service seems fairly calculated to give actual⁷⁰ notice, and it is a method which has probably received the approval of the Supreme Court of the United States.⁷¹ For example, the non-resident automobile statutes most frequently provide for service of notice by registered mail.⁷² Such notice has been deemed sufficient by the courts in such cases.⁷³ There should be less question about notice by registered

Alabama, Arkansas, California, Colorado, Illinois, Indiana, Iowa, Louisiana, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Texas, Utah (securities), Virginia, Washington.

⁶⁴Alabama (if no agent is present), Connecticut, Florida, Kansas, Massachusetts, Minnesota, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, Wisconsin.

Foreign insurance companies: Delaware, Kansas, Kentucky, Minnesota, Nevada, Pennsylvania, Rhode Island, South Dakota, Wisconsin.

⁶⁵Registered return receipted mail: Alabama, in the case of service upon a federally incorporated corporation without a known place of business within the state. Foreign insurance company: Tennessee.

⁶⁶Pennsylvania (attachments against foreign insurance companies).

⁶⁷Florida, Georgia, Virginia (with a copy of paper carrying publication to be sent to the post office address of defendant), West Virginia.

⁶⁸Town of Hinckley v. Kettle River R., (1897) 70 Minn. 105, 72 N. W. 835, cited as an example of a reasonable method of giving notice in *Wuchter v. Pizzutti*, (1928) 276 U. S. 13, 23, 48 Sup. Ct. 259, 72 L. Ed. 446.

⁶⁹*Wuchter v. Pizzutti*, (1928) 276 U. S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446.

⁷⁰The statute seems to afford a reasonable manner of giving notice although there is not affirmative showing that the notice mailed by the public officer was actually received. See *American Railway Express Co. v. Fleishmann Co.*, (1928) 149 Va. 200, 141 S. E. 253, error dismissed for want of a substantial question, (1928) 278 U. S. 574, 49 Sup. Ct. 94, 73 L. Ed. 514, on authority of *Wuchter v. Pizzutti*, (1928) 276 U. S. 13, 48 Sup. Ct. 259, 73 L. Ed. 446, in which the rule that the mode of service must afford a reasonable probability that notice of service will be communicated to the defendant was announced.

⁷¹(1928) 278 U. S. 574, 49 Sup. Ct. 94, 73 L. Ed. 514.

⁷²See *Culp*, *Process in Actions against Non-Resident Motorists*, (1934) 32 Mich. L. Rev. 325, 338.

⁷³See *Dwyer v. Volmar*, (1929) 105 N. J. L. 518, 156 Atl. 685; *Cohen v. Plutschak*, (D.C. N.J. 1930) 40 F. (2d) 727. Such notice certainly satisfies the test set up in *Wuchter v. Pizzutti*, (1928) 276 U. S. 13, 20, 48 Sup. Ct. 259, 261, 72 L. Ed. 446.

mail where a return receipt must be signed and returned by the defendant and filed with the papers in the case before the action may proceed and judgment be obtained.⁷⁴ Though less certain than the above mentioned methods, notice sent by ordinary mail to the actual address of the non-resident motorist has been held, with good reason, to satisfy due process of law.⁷⁵ It should be equally satisfactory for sending notice to foreign corporations.⁷⁶ The telegraph⁷⁷ has been used very little for giving notice, but it seems, equally with first class mail, to afford a reasonable probability that the foreign corporation will be informed of the service and pending action. One state has, in a limited way, provided for personal service upon the foreign corporation outside the state.⁷⁸ This method should be even better than service upon a public officer who sends notice by mail of such service.⁷⁹

There is considerable question whether service and notice by publication in personal actions against foreign corporations is consistent with the requirements of due process of law. Service by publication cannot give rise to a valid judgment against a non-resident individual who has neither been personally served within the state nor voluntarily entered an appearance.⁸⁰ The foreign corporation should be equally protected with the individual against default judgments rendered after service by publication unless the doctrine of consent which is implied from the corporation's entering and complying with the laws of a state gives license to authorize service and notice by such a method.⁸¹ It seems that other

⁷⁴See *Poti v. New England Road Machinery Co.*, (1928) 83 N. H. 232, 140 Atl. 587; *Moore v. Payne*, (D.C. La. 1929) 35 F. (2d) 232.

⁷⁵See *State ex rel. Cronkhite v. Belden*, (1927) 193 Wis. 145, 211 N. W. 916; *Schilling v. Odelbak*, (1929) 177 Minn. 90, 224 N. W. 694.

⁷⁶Note that in *American Railway Express Co. v. Fleishmann, Morris & Co.*, (1928) 149 Va. 200, 141 S. E. 253, this method of service was authorized by statute, though not passed upon by the court.

⁷⁷See note 66, supra. In the case of an attachment served upon the Pennsylvania Insurance Commissioner, it is his duty to give immediate notice of this fact by telegraph.

⁷⁸*New Jersey, Comp. Stat. 1930 supp., sec. 186-10a (12)*, with reference to the securities law when the foreign corporation cannot be served within the state.

⁷⁹Personal service on a corporate defendant outside the state has been upheld. See *Stevens, Attorney General v. Television, Inc.*, (1933) 111 N. J. Eq. 306, 162 Atl. 248, noted, (1933) 18 Corn. L. Q. 435.

⁸⁰*Pennyoy v. Neff*, (1878) 95 U. S. 714, 24 L. Ed. 565; *McDonald v. Mabee*, (1917) 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608.

⁸¹See *Washington ex rel. Bond, etc. v. Superior Court*, (1933) 289 U. S. 361, 53 Sup. Ct. 624, 77 L. Ed. 1256, discussed supra. The situation in this case was not very unreasonable, but it may be questionable whether the Supreme Court would hold that the qualification of a foreign corporation

reasonable methods of giving notice are easily available in case the foreign corporation cannot be served within the state,⁸² and that service by publication is both unreasonable and unnecessary and is inconsistent with our sense of fair play.⁸³

LIMITS OF LIABILITY TO SERVICE

A problem of some importance is how long a foreign corporation which has been doing business within a state and has withdrawn and ceased to do business may be liable to suit in the courts of that state by service of process upon its agent or a public officer designated by statute. A good many states provide by statute that the liability to such service shall continue so long as any liability or obligation incurred while doing business in the state is outstanding. Here again statutes vary, some requiring that the foreign corporation consent to service of process upon its agent or a public official so long as there shall be any liability growing out of the business outstanding, while others make direct provisions for liability to such service to continue so long as obligations growing out of the business remain unsatisfied.⁸⁴

in accordance with the statutes permitting its entry into the state constitutes an assent on its part to service by publication. It all depends upon whether such a provision is reasonable.

For service by publication on a domestic corporation, see *A. S. White & Co. v. Jordan*, (1919) 124 Va. 465, 98 S. E. 24.

⁸²It is possible that a statute such as that in Virginia (Virginia, Code 1930, sec. 6064, 6070), providing for publication and the sending of a copy of such publication to the address of the defendant, if the address is accurate and certain to be the actual address, provides sufficient notice. But then there still remains the question whether there must be an actual or statutory agent in the state upon whom the court process must be served.

⁸³A point closely related to the fairness of notice given to foreign corporations is that of continuances permitted before trial. Very few of the statutes have special provision for continuances. See Wyoming. Unless the general statutes relating to continuances apply to these actions against foreign corporations, there is considerable doubt whether this procedure affords due process and the equal protection of the laws unless the power over foreign corporations is so great that they can be compelled to forego these rights too. Where there are agents of the foreign corporation in the state and the corporation is doing business there, it presumably has an adequate opportunity to prepare a defense under the general statutes, but this would not reasonably be the case where the foreign corporation has withdrawn from the state and is sued as to some transaction occurring while it was doing business therein by service upon a public officer who owes no duty to send it any notice of the pending action.

Similar objections would apply to statutes which prescribe a limited time, possibly very short, within which the foreign corporation must file its answer in an action after service has been made upon a public officer. For such a limiting statute see California, Statutes 1933, sec. 406a.

⁸⁴See California, North Dakota, New York, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin. Foreign insurance com-

The fact that formal consent is given in some cases does not seem important; if the power is present in the first case to require a consent, it is likewise present to impose, without consent, the liability. Although some courts base the power upon consent implied from doing business within the state⁸⁵ and others upon a consideration moving from the corporation in return for the privilege of doing business, it seems preferable to base the power upon the general legislative authority of a state to protect its citizens and residents against foreign corporations.⁸⁶ Such a view has to look neither for consent nor for a consideration to sustain service; it is simply one of the various laws to which a foreign corporation is subjected when it enters the state.

The state may undoubtedly require the foreign corporation to designate a statutory service agent whose power to accept service of process shall be irrevocable as long as any liability remains outstanding and arising out of the business done within the state,⁸⁷ and impose liability, without consent, as to similar just claims.⁸⁸ On the other hand, a service agent will have no continuing power after withdrawal unless it appears from the statute that it was the legislative intent to continue liability after ceasing to do business.⁸⁹ Nor is it possible to make the liability to service of process within the state irrevocable, beyond the time in which outstanding liabilities growing out of the business done within the state have ceased

panies, see Colorado, Connecticut, Illinois, Indiana, Minnesota, Mississippi, Missouri, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin.

⁸⁵Connecticut Mutual Life Insurance Co. v. Spratley, (1899) 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

⁸⁶Brown-Ketcham Iron Works v. The George B. Swift Co., (1913) 53 Ind. App. 630, 651; American Loan & Investment Co. v. Borass, (1923) 156 Minn. 431, 434, 195 N. W. 271. In neither case was this the sole basis of enforcing power to authorize service, but it seemed to play a prominent part in the decision.

⁸⁷Collier v. Mutual Reserve Fund Life Ass'n, (C.C. Ark., 1902) 119 Fed. 617; Woodward v. Mutual Reserve Life Insurance Co., (1904) 178 N. Y. 485, 71 N. E. 10; Braunstein v. Fraternal Union of America, (1916) 133 Minn. 8, 157 N. W. 721; Kraus v. American Tobacco Co., (1925) 283 Pa. St. 146, 129 Atl. 60. See Shirley, Foreign Corporations—Service on Statutory Agents, (1933) 11 Tex. L. Rev. 226. See Wait v. Morrison, (1929) 129 Kan. 53, 281 Pac. 906, for a case construing such a statute to cover causes of action arising prior to the filing of the formal consent.

⁸⁸Connecticut Mutual Life Insurance Co. v. Spratley, (1899) 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. American Loan and Investment Co. v. Borass, (1923) 156 Minn. 431, 195 N. W. 271.

⁸⁹Forrest v. Pittsburgh Bridge Co., (C.C.A. 7th Cir. 1902) 116 Fed. 357. See Mutual Reserve Fund Life Association v. Boyer, (1900) 62 Kan. 31, 40-41, 61 Pac. 387.

to exist.⁹⁰ If the statute bears this construction, the power to receive service of process ceases with the discontinuance of doing business within the state.

There has been some question how far the foreign corporation may be made amenable to service upon a statutory agent after withdrawal from business within a state as to all transitory causes of action growing out of transactions occurring anywhere during the time the corporation was doing business within the state. It seems clear that all actions arising out of obligations incurred within the state out of the business transacted are properly begun by such service.⁹¹

We have no clear cases deciding upon the power of a state to authorize service as to causes of action unconnected with the business transacted within a state. The Supreme Court⁹² has said that a clause in a statute continuing the authority of the statutory agent "in force and irrevocable so long as any liability of said company remains outstanding in said state" did not apply to causes of action unconnected with the business done within the state, but it may be doubted whether the statute under consideration was intended to cover such causes of action.⁹³ In two other cases⁹⁴ the Supreme

⁹⁰*Friedman v. Empire Life Insurance Co.*, (C.C. Ky., 1899) 101 Fed. 535; *Swann v. Mutual Reserve Fund Life Association*, (C.C. Ky., (1900) 100 Fed. 922. See *Home Benefit Society of New York v. Muehl*, (1900) 109 Ky. 479, 59 S. W. 520.

⁹¹*Life Insurance Co. v. Spratley*, (1897) 90 Tenn. 322, 42 S. W. 145; *Fisher v. Insurance Co.*, (1904) 136 N. C. 217, 48 S. E. 667; *Groel v. United Electric Co.*, (1905) 69 N. J. Eq. 397, 60 Atl. 822; *Brown Ketcham Iron Works v. George B. Swift Co.*, (1913) 53 Ind. App. 630; *Title Guaranty & Surety Co. v. Slinker*, (1914) 42 Okla. 811, 143 Pac. 41; *Kaw Boiler Works v. Frymer*, (1924) 100 Okla. 81, 227 Pac. 453; *American Loan & Investment Co. v. Borass*, (1923) 156 Minn. 431, 195 N. W. 271; *Sydean Bros., Inc. v. Wofford*, (1932) 185 Ark. 775, 49 S. W. (2d) 363; *State v. Superior Court*, (1932) 169 Wash. 688, 15 P. (2d) 660, noted (1933) 19 Va. L. Rev. 514; *McCord Lumber Co. v. Doyle*, (C.C.A. 8th Cir. 1899) 97 Fed. 22; *Hill et al. v. Empire State-Idaho Mining & Development Co.*, (C.C. Idaho 1907) 156 Fed. 797; *Zendle v. Garfield Aniline Works, Inc.*, (D.C. N.J. 1928) 29 F. (2d) 415; *Connecticut Mutual Life Insurance Co. v. Spratley*, (1899) 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Mutual Reserve Fund Life Association v. Phelps*, (1903) 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Washington v. Superior Court*, (1933) 289 U. S. 361, 53 Sup. Ct. 624, 77 L. Ed. 1256. But the statute must definitely apply. See *Cowikee Mills v. Georgia-Alabama Power Co.*, (1927) 216 Ala. 221, 113 So. 4.

⁹²*Hunter v. Mutual Reserve Life Insurance Co.*, (1910) 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155.

⁹³*Hunter v. Mutual Reserve Life Insurance Co.*, (1910) 218 U. S. 573, 591, 31 Sup. Ct. 127, 54 L. Ed. 1155.

⁹⁴*Chipman v. Jeffery Co.*, (1920) 251 U. S. 373, 40 Sup. Ct. 172, 64 L. Ed. 314, below, (D.C. N.Y. 1919) 260 Fed. 856, noted (1920) 33 Harv. L. Rev. 730, (1920) 20 Col. L. Rev. 618; *Mitchell Furniture Co. v. Selden*

Court has refused to sanction service of process as to causes of action not arising out of the business transacted within the state, but here too there was a clear indication that the statutes purporting to authorize such service were not so construed. The Court did state that "the purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state."⁹⁵ And this should, perhaps, be the key⁹⁶ to the test of whether all transitory causes of action are cognizable under such a statutory authorization. The reason for such a provision is to protect the residents of the state against a foreign corporation, and this seems reasonable.⁹⁷ On the other hand, it seems unreasonable and unfair to permit suits on all transitory causes of action to be commenced by such service within a state after a foreign corporation has ceased to do business therein.⁹⁸

Breck Construction Co., (1921) 257 U. S. 213, 42 Sup. Ct. 84, 66 L. Ed. 201.

⁹⁵Mitchell Furniture Co. v. Selden Breck Co., (1921) U. S. 213, 215, 42 Sup. Ct. 84, 66 L. Ed. 201.

⁹⁶The Court expressed doubts as to the reason for permitting service in all transitory causes of action, and refused so to construe the state law unless it so provided either expressly or had been so interpreted in the local courts. (1921) 257 U. S. 213, 215-216, 42 Sup. Ct. 84, 66 L. Ed. 201: "Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the state court. . . . *But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the state without appointing one.* In the latter case the implication is limited to business transacted within the state. . . . Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." (Italics by the writer.)

⁹⁷Just as in the case of the non-resident individual doing business in a state the balance of convenience shifts sharply in favor of the resident plaintiff and against the non-resident defendant when all transitory actions are permitted, so in the case of the foreign corporation the inclusion of all transitory actions, regardless of origin, seems to go beyond the results which reason and public policy favor. In both cases the purpose is to provide a convenient method of protecting the rights of the residents of a state, obviating the necessity of their going to the defendant's residence or place of business to secure legal redress for transactions occurring within their home state. See Culp, *Process in Actions against Non-Residents Doing Business within a State*, (1934) 32 Mich. L. Rev. 909, 941.

⁹⁸In the case of foreign corporations, where there has been no formal consent to service of process nor any attempt to comply with the statutes respecting service of process, the power of a state is limited to serving a public officer when the cause of action arises out of the business or acts committed within the serving state. *Old Wayne Life Association v. McDonough*, (1907) 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; *Simon v. Southern Railway Co.*, (1915) 236 U. S. 115, 130-132, 35 Sup. Ct. 255,

LIMITS TO CAUSES OF ACTION

Important problems arise relative to the scope of actions maintainable against a foreign corporation while it is doing business within a state. Questions concerning the interpretation of the consent to service filed by the foreign corporation as well as the scope of actions where the foreign corporation has neither consented nor complied with the laws are involved. The foreign corporation takes the risk of any rational interpretation which may be put upon its actual consent by the courts.⁹⁹ Thus an appointment of a public officer in terms broad enough to include service in causes of action arising in other states received that construction by the Court, and the position was maintained.¹⁰⁰ In the cases where the foreign corporation is doing business without complying with the laws of the state, service of process upon a public agent will by implication be extended only to causes of action arising out of the business transacted within the State.¹⁰¹ It seems that in such cases service

261, 59 L. Ed. 492.

Are there any stronger reasons or urgent public policy why a foreign corporation which has complied with the state law, but ceased to do business in the state, should be held to a wider responsibility after its retirement than the foreign corporation which has either by design or accident failed to comply with the law at all?

⁹⁹*Pennsylvania Fire Insurance Co. v. Gold Issue Mining and Milling Co.*, (1917) 243 U. S. 93, 96, 95, 37 Sup. Ct. 344, 61 L. Ed. 610: "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was defendant's voluntary act."

"It appointed an agent in language that rationally might go that length. The language has been held to go that length, and the construction does not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assume."

¹⁰⁰(1917) 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610. Here the Fire Insurance Company obtained a license to do business in Missouri and filed with the superintendent of insurance a consent to service on that officer so long as it should have outstanding liabilities in the state. It was held that the consent covered service in an action in Missouri on a policy issued in Colorado on buildings located there.

¹⁰¹*Old Wayne Life Association v. McDonough*, (1907) 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345. In this case a Pennsylvania statute required insurance companies doing business within the state to appoint a process agent or agree that service would be made on the insurance commissioner. The commissioner was served in an action in Pennsylvania brought upon a life insurance policy issued in Indiana. The company did some business in Pennsylvania, but nothing relative to the particular policy was done in the state. The statute provided that in default of an appointment of an agent to receive service, it should be made on the insurance commissioner or on someone deputized by him to receive it. The Supreme Court held that the Pennsylvania judgment was not entitled to full faith and credit in Indiana.

The following passage from the opinion of the court is instructive (p. 21): "Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without

upon the public officer is simply an instrument of justice, and policy does not favor authorizing service except as to causes of action arising from the business transacted by the foreign corporation in the state.¹⁰²

Most of the statutes make no direct reference to the causes of action which may be brought by means of such service, some few providing that they may be brought regardless of origin,¹⁰³ others restricting their scope somewhat.¹⁰⁴ The preponderance of judicial authority is favorable to the view that all transitory causes of action may be prosecuted against a foreign corporation which

filing the written stipulation specified in its statutes. . . . It is equally true that if an insurance company of another state transacts business in Pennsylvania without complying it will be deemed to have assented to any valid terms prescribed for doing business there. . . . Such assent cannot properly be implied where it affirmatively appears that business was not transacted in Pennsylvania. . . . While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business." See *Morris & Co. v. Skandinavia Ins. Co.*, (1929) 279 U. S. 405, 49 Sup. Ct. 360, 73 L. Ed. 762; *Powell v. Home Seekers' Realty Co.*, (1928) 131 Misc. Rep. 590, 228 N. Y. S. 131.

¹⁰²*Simon v. Southern Railway Co.*, (1915) 236 U. S. 114, 130, 35 Sup. Ct. 255, 59 L. Ed. 492:

"Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such company to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agents, service, in proper cases, may be made upon an officer designated by law. . . . But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made and suits for torts, wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle . . . that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states." See *Harnischfeger Sale Corp. v. Sternberg Co., Inc.*, (1934) 179 La. 317, 154 So. 10, 12.

¹⁰³Arkansas, Connecticut, Pennsylvania, Insurance: California, Florida, Georgia.

¹⁰⁴California, North Dakota, New York, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin. Insurance: Arkansas; so long as any liability remains outstanding against the company: Colorado, Connecticut, Illinois, Indiana, Minnesota, Mississippi, Missouri, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin.

has been served by its voluntary agent within the state.¹⁰⁶ The burden of the authority opposing this position is that the corporation which is served by its voluntary agent is as much protected as the corporation which is served by means of a statutory agent, and that the basis of the power is the same in both cases.¹⁰⁶ There is much to be said for this view because the consent implied from authorizing agents to do business within the state is based upon the reasonable legislative power and probably should not be construed as would a voluntary consent.¹⁰⁷ The Supreme Court

¹⁰⁶Mooney et al v. Buford & George Manufacturing Co., (C.C.A. 7th Cir. 1896) 72 Fed. 32; Smolik v. Philadelphia & Reading Coal and Iron Co., (D.C. N.Y. 1915) 222 Fed. 148; Atchison, T. & S. F. Ry. Co. v. Weeks et al., (D.C. Tex. 1918) 248 Fed. 970; Philadelphia & Reading Coal and Iron Co. v. Keever, (C.C.A. 2d Cir. 1919) 260 Fed. 534; Rishmiller v. Denver & Rio Grande Railroad Co., (1916) 134 Minn. 261, 159 N. W. 272; Reynolds v. Missouri, Kansas and Texas Railway Co., (1917) 228 Mass. 584, 117 N. E. 913; Tauza v. Susquehanna Coal Co., (1917) 220 N. Y. 259, 115 N. E. 915; Steele v. Western Union Telegraph Co., (1934) 206 N. C. 220, 173 S. E. 583. See Osborne, Arising out of Business Done in the State, (1923) 7 MINNESOTA LAW REVIEW 380.

¹⁰⁶Fry v. Denver & R. Ry. Co., (D.C. Cal. 1915) 226 Fed. 893, 895: "While, as indicated [Old Wayne Life Ass'n v. McDonough, (1907) 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345], service in that case was had upon a designated official of the state, and not an agent of the corporation, the language employed by the court is, as suggested by counsel for the defendant, obviously as applicable to the latter case as to the former, since manifestly, under the principles announced by the court, the basis of all process on a foreign corporation is its actual or implied assent, by entering the state and doing business there, to its being served in accordance with the statute of the state, whether such service be had on an officer of the state or an agent of the corporation. In either case, such assent without the voluntary appearance of the defendant may only be implied as to process in actions founded on contracts originating within the state of service. . . .

"The effect of these principles is that it is not enough in such a case that the foreign corporation be doing business in the state where sued, but it must appear that the cause of action arose from the business done. This requisite is thus made a fact essential to confer jurisdiction of the defendant; and manifestly what must be proved in the way of substantive fact must be alleged." See Takacs v. Philadelphia & R. Ry. Co., (D.C. N.Y., 1915) 228 Fed. 728, in accord.

¹⁰⁷Although it may be inconvenient to a foreign corporation to defend all transitory causes of action in every state in which it is doing business, there is a necessary amount of inconvenience in defending suits, on transitory causes of action, brought against both individuals and corporations away from their residence or principal place of business. And as already pointed out, it has never been considered unfair and a denial of due process to sue an individual defendant wherever he may be served personally in transitory causes of action.

Perhaps, in view of the possibility of vexatious and very inconvenient suits against such foreign corporations, a discretionary, general application of the doctrine of *forum non conveniens* might provide a very satisfactory solution for the problem. See Blair, *The Doctrine of Forum Non Conveniens* in Anglo-American Law, (1929) 29 Col. L. Rev. 1; (1924) 24 Col. L. Rev. 920; (1928) 37 Yale L. J. 983; (1930) 15 MINNESOTA LAW REVIEW 83; (1932) 30 Mich. L. Rev. 610. Hansell, *The Proper Forum for Suits*

in a fairly recent decision held that it is not a violation of due process of law not to extend process to transitory causes of action arising outside of the state,¹⁰⁸ but it has never decided whether it is a violation of due process to authorize such service upon the voluntary agents of the foreign corporation doing business within the state.¹⁰⁹

The problem of serving a foreign corporation doing business within a state with process in transitory causes of action arising outside the state is not easily settled on principle. It is probably true that some inconvenience will result to a foreign corporation in having to defend causes of action from outside the state in which it is doing business. But an individual is subject to suit at his residence and wherever he may be personally served with process in all transitory causes of action. It may be highly inconvenient for him to defend actions in other states than that of his residence, but there has never been any objection on this basis alone, although there may be exceptions, as a matter of policy, where the non-resident is induced to enter the state by trick or fraud. Likewise, on principle, there is nothing inherently violative of our sense of right and justice in serving a foreign corporation doing business within a state in all transitory causes of action.

If the state statute requires the corporation doing business therein to appoint a special process agent¹¹⁰ as a condition of doing business, and the corporation does make the appointment, it would seem that the scope of actions servable upon such agent should, like the formal consent to service upon a public officer, be de-

Against Foreign Corporations, (1927) 27 Col. L. Rev. 12. For an example of a refusal to interfere in internal management of a foreign corporation, see *Rogers v. Guaranty Trust Co.*, (1933) 288 U. S. 123, 53 Sup. Ct. 295, 77 L. Ed. 652; *Wright v. Post*, (1929) 268 Mass. 126, 167 N. E. 278; *Beasley et al. v. Mutual Housing Co.*, (1930) 59 App. D. C. 245, 39 F. (2d) 290.

¹⁰⁸*Missouri Pacific Railroad Co. v. Clarendon Boat Oar Co., Inc.*, (1922) 257 U. S. 533, 42 Sup. Ct. 210, 66 L. Ed. 354.

¹⁰⁹When the action is transitory and arising outside of the state, a statute may provide for a different type of agent to be served. It may provide that an agent of a higher representative character be served than in the case of causes of action arising within the state. See *American Indemnity Co. v. Detroit Fidelity and Surety Co. et al.*, (C.C.A. 5th Cir. 1933) 63 F. (2d) 395, 397, construing the Texas statute. See also *Atchison, T. & S. F. Ry. Co. v. Weeks et al.*, (D.C. Tex., 1918) 248 Fed. 970.

¹¹⁰This is the case in several states. See Alabama, Arizona, California, Delaware, Idaho, Illinois, Indiana, Louisiana, Maryland, Maine, Michigan, Minnesota, North Carolina, Nevada, Oregon, Rhode Island, Tennessee, Utah, Washington, Wisconsin, Wyoming. Insurance Companies: District of Columbia, Florida, Georgia, Indiana, Michigan (alternative), Mississippi (alternative), Nevada, Oregon.

terminated by the reasonable and rational construction of the statute authorizing such service,¹¹¹ and similarly, if a construction is given which extends to all transitory causes of action regardless of their origin, service in all such actions upon the specially appointed process agent should be valid.¹¹²

PARTIES

Ordinarily anyone may bring an action against a foreign corporation doing business within a state; it makes little difference whether the plaintiff is a resident of the state or not. It seems probably true, as in the case of the non-resident motorist¹¹³ and the non-resident individuals doing business within a state, that the service statutes are designed primarily for the benefit of the residents of the state in which the foreign corporation is doing business,¹¹⁴ but not exclusively so, and the courts are deemed to

¹¹¹*Pennsylvania Fire Insurance Co. v. Gold Issue Mining and Milling Co.*, (1917) 243 U. S. 93, 95, 37 Sup. Ct. 344, 61 L. Ed. 610. See *Massachusetts Bonding & Insurance Co. v. Concrete Steel Bridge Co.*, (C.C.A. 4th Cir. 1930) 37 F. (2d) 695.

¹¹²In *Bagdon v. Philadelphia and Reading Coal and Iron Co.*, (1916) 217 N. Y. 432, 436, 111 N. E. 1075, Judge Cardozo, distinguishing the cases in which no agent had been designated, said that a corporation which has designated an agent may be served with process without limit as to subject-matter. "The stipulation is, therefore, a true contract. The person designated is a true agent, the consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served.' The actions in which he is to represent the corporation are not limited. The meaning must, therefore, be that the appointment is for any actions which under the laws of this state may be brought against a foreign corporation. The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person." . . .

(P. 438): "The statute makes no provision for service on a public officer if a designation is not filed; the corporation may withhold and carry on business legally; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege, it has made a voluntary appointment of an agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract. . . ."

It will be noted that this statute being construed is different from most of the state statutes providing for service on process agent, but the reasoning of the court in the first quotation should apply to them as well.

¹¹³See *Culp, Process in Actions against Non-Resident Motorists*, (1934) 32 Mich. L. Rev. 325, 347-348; *Culp, Process in Actions against Non-Residents Doing Business within a State*, (1934) 32 Mich. L. Rev. 909, 921-922.

¹¹⁴*Johnston v. Trade Insurance Co.*, (1882) 132 Mass. 432, 435; "It is also true that the main purpose of the statute is to secure to our own citizens the benefit of our laws and tribunals in regard to contracts made by foreign insurance companies who do business in this state, and it contains particular provisions which clearly indicate this general purpose. But it is true of all our statutes, applicable to our own citizens, that their primary object

be open to non-residents equally with residents.¹¹⁵ It is possible that some states may restrict the parties plaintiff by statute,¹¹⁶ but if there is no such restriction, it seems that any party plaintiff, regardless of his residence, may have process served on such foreign corporation.

GOVERNMENT CORPORATIONS

There is a question, which the Supreme Court has never considered, whether the statutes discussed in this article apply to corporations chartered by or incorporated by the federal government.¹¹⁷ Some courts take the position that the statutes apply only to those foreign corporations doing business within the state by the comity of the state, and, since the state has no power to

is the benefit of our own citizens, and the security and protection of their rights. We have, however, always extended the privileges of our laws to non-residents, and opened our courts to their litigation, if the defendant can be found here. . . ."

The court reasoned that the plaintiff could have sued a non-resident individual temporarily within the state, and it held it could not deny him a like privilege against a foreign corporation doing business in the state. See *State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge*, (1932) 331 Mo. 1015, 56 S. W. (2d) 28, 33.

See discussion in *State ex rel. Watkins v. Land and Timber Co.*, (1902) 106 La. 621, 630, 31 So. 172. Note, (1929) 38 Yale L. J. 1148.

¹¹⁵A refusal to entertain the action of a non-resident plaintiff would discriminate against this class of persons, and might raise a question whether the discrimination was forbidden by the privileges and immunities clause of article IV. Article IV, however, does not prevent reasonable discriminations. See *Canadian Northern Railway v. Eggen*, (1920) 252 U. S. 553, 560, 40 Sup. Ct. 402, 404, 64 L. Ed. 713.

¹¹⁶See South Carolina, Code 1932, sec. 826, providing that any action against a foreign corporation might be brought by any resident of the state for any cause of action, and by a plaintiff not a resident of the state, when the cause of action arises out of business in the state or the subject of the action is situated within the state. Also see New York, Corporation Law, sec. 224, 225, and *Rzeszotarski v. Cooperative Ass'n Kasa Polska*, (1931) 139 Misc. Rep. 400, 247 N. Y. S. 471, construing it.

It is possible that such a statute does not unreasonably discriminate against non-residents in the constitutional sense; it provides for the needs of all classes which really need the facilities of the local courts, and seems to make a reasonable classification.

¹¹⁷It is admittedly a question of statutory construction, trying to ascertain the legislative intent. In most cases it is doubtful whether the legislatures had such federally incorporated corporations in mind. Then it becomes a question of policy whether such statutes are to be applied to such corporations in the absence of congressional legislation.

If Congress exempts such corporations from the operation of these statutes, a distinct and new problem is presented. Under the doctrine of mutual freedom from interference by each government which exists under our dual sovereignty coupled with the paramount action of Congress within its own sphere, freedom from suit might be developed. But in the absence of such statutory exemption or a specific subjection, the question is open.

exclude the federal corporation, the provisions of the statutes do not apply to it.¹¹⁸ Such decisions proceed upon the assumption that the only basis for control over foreign corporations is the power to exclude them. But other courts have not found it necessary to say that whatever the state cannot exclude it is unable to regulate.¹¹⁹ The reasons for service over many of the federal corporations are as compelling as those for service on foreign

¹¹⁸See Van Dorn, *Government Owned Corporations*, 289-294; *Sloan Shipyards Corp. et al. v. U. S. Fleet Corp.*, (1922) 258 U. S. 549, 566 ff., 42 Sup. Ct. 386, 66 L. Ed. 762; *Leggett v. Federal Land Bank of Columbia*, (1933) 204 N. C. 151, 153, 167 S. E. 557, noted, (1933) 42 Yale L. J. 1287:

"The defendant in the instant case is a corporation created and organized under an act of the Congress of the United States, known as 'The Federal Farm Loan Act.' The validity of this act was upheld. . . . The defendant was not only created and organized under and by virtue of such act of Congress; it derives its right to own property and to do business in this state, solely from said act. It is not a foreign corporation, having property or doing business in this state, under a license, express or implied, from North Carolina. . . . For this reason the provisions of C. S. 1137, are not applicable to the defendant."

It will be noted that the language of the statute, "Every corporation having property or doing business in this State, whether incorporated under its laws or not," is broad enough to include such federal corporations. Many other statutes are phrased in similar language.

¹¹⁹Presence of the corporation has been considered sufficient to authorize service of process in other cases. See *Barrow Steamship Co. v. Kane*, (1898) 170 U. S. 100, 106, 18 Sup. Ct. 526, 42 L. Ed. 964; *International Harvester Co. v. Kentucky*, (1914) 234 U. S. 579, 588, 34 Sup. Ct. 853, 58 L. Ed. 1284; *Davis v. Farmers Co-operative Equity Co.*, (1923) 262 U. S. 312, 316, 43 Sup. Ct. 556, 67 L. Ed. 996; *Tauza v. Susquehanna Coal Co.*, (1915) 220 N. Y. 259, 268 ff., 115 N. E. 915. The same view has been expressed in a somewhat analogous situation. *State ex rel. Cronkhite v. Belden*, (1927) 193 Wis. 145, 153 ff., 211 N. W. 916.

Language applied by the Supreme Court to corporations engaged in interstate commerce might well be applied to federally chartered or incorporated private corporations. In *International Harvester Co. v. Kentucky*, (1914) 234 U. S. 479, 588, 34 Sup. Ct. 853, 58 L. Ed. 1284, Mr. Justice Day wrote: "True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state. . . . [Speaking of a prior case], "and it was recognized that the states may pass laws enforcing the rights of citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the constitution gives sole jurisdiction to Congress. . . .

(P. 589): "We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state."

corporations, and the power to regulate is a power of equal dignity with the power to exclude. If Congress has permitted such corporations to be sued locally, the matter is settled, but in the absence of Congressional action there is good reason to apply the general foreign corporation process statutes to federally incorporated corporations.¹²⁰ Of course, there is an additional difficulty presented here by the doctrine of governmental immunity to suit, and it is probable that wherever there is a reasonable chance that the federal corporation is engaged in a governmental function or in executing one of the admitted powers of the federal government, the corporation will claim immunity under such a doctrine.¹²¹ But if the federal government is increasingly to control economic life through the medium of federally organized or incorporated corporations, the reasons and policy for applying such process statutes to such federal corporations are compelling.

¹²⁰The Alabama statutes make special provisions for service upon corporations chartered federally. See Alabama, Code 1928, sec. 9430-9431. In the case of a corporation organized under the laws of the United States government, without a known place of business within the state, the clerk of court, within thirty days of service, sends to the defendant by registered mail, postage prepaid, marked for delivery only to the person to whom addressed and return receipt demanded, addressed to the clerk or register of the court in which the case is pending.

¹²¹The Supreme Court has given some indication that it will apply the ordinary rules of suability to such corporations, in the absence of congressional direction. See *Sloan Shipyards Corp. et al. v. United States Fleet Corporation*, (1922) 258 U. S. 549, 566, 42 Sup. Ct. 386, 66 L. Ed. 762: "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in the place of the sovereign as to share the immunity of the sovereign from suits otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. . . ."

(P. 567-568): "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."