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SERVICE OF PROCESS UPON FOREIGN CORPORATIONS
— CONSTITUTIONAL LIMITATIONS IMPOSED BY JUDICIAL CONSTRUCTION OF THE DUE PROCESS CLAUSES

M. C. EULETTE

THE fact that the Constitution of the United States was crystallized into words and adopted in written form, has had a significant influence upon the evolution and development of the law in this country. A greater flexibility and a more facile adaptability to a progressively changing civilization might derive from an unwritten corpus of constitutional law. It was a daring and dangerous act for the founding fathers, fifteen decades ago, to formulate into words the pattern for this nation's political, economic and social structure and future development. By that act, they cast the die by which, had they been imbued with less

1 Dimock, Modern Politics and Administration (American Book Company, Chicago, 1937) 168: "In a system which assumes that a written constitution is supreme, the separation-of-powers doctrine takes on a significance not found in countries where legislative finality is definitely established. In constitutional theory, all three departments in the United States are equal and independent. Each operates in its own bailiwick. The Constitution coalesces their work."

2 Stuart Chase, The Tyranny of Words (Harcourt, Brace and Company, New York, 1938) 316: "From the semantic point of view, we cannot expect the meaning of written constitutions to survive extensive changes in culture. Unless the words are given new concepts in the light of new conditions, they will be used blindly, rigidly, and will weaken the power of governments to govern. This is one reason why the unwritten British constitution provides a more flexible and practical instrument than the American." But see Zechariah Chafee, Jr., "The Disorderly Conduct of Words," 41 Col. L. Rev. 381 at 403: "$\ldots$ it is not correct to say, with Stuart Chase, that 'we cannot expect the meaning of written constitutions to survive extensive changes in culture.' Of course a clause acquires new significations as external conditions alter and many cases are decided. It becomes applicable to more tangible objects or to fewer. It grows like a human being, or like a university, which has a continuous life although older professors and students are gradually replaced by younger men."
vision, the future legal relations, rights and duties of the people of the United States might have been rigidly molded to conform to primitive regulations, every vestige of the practical utility of which had long since disappeared. By that act, also, they restricted the means for legal recognition and acceptance of the fact that, by cultural and industrial progress, verbal symbols and their meaning continually shift. Judicial construction of particular words was, and is, the only method of reflecting and adequately coping with the changing context of the situation. Only through the exercise of discretion could judges prevent that drastic distortion of justice which would result if a rigid interpretation of the words and symbols of the Constitution were alone applied to the complexities of the modern, commercial world.

Inspired, as they might not otherwise have been, by the

3 Chase, op. cit. 314: "The Constitution as conceived by its framers was no narrow bill of particulars, but a broad instrument to give the newly created Federal Government power to deal with a serious crisis, and to lead the nation forward along mercantilist lines. The founders wrote no intricate body of rules, no involved code, no inflexible corpus of constitutional law."

4 E. Parmalee Prentice, "Congress, and the Regulation of Corporations," 19 Harv. L. Rev. 168 at 169 (1905): "Unfortunately there seems to be a growing . . . belief that the Constitution is not in all respects adequate to existing conditions, and that new powers should be assumed by and supported in the federal government. The statement of this proposition is probably its best answer, for there is no general desire to question the supremacy of the Constitution, either directly or by constructions which are recognized as unsound." See also Arthur W. Machen, Jr., "The Elasticity of the Constitution," 14 Harv. L. Rev. 200 (1900), and Dimock, op. cit. 161: "To some people, a written constitution suggests the idea of something finished. It symbolizes the truth revealed at a given time and place and remaining all-sufficient for an indefinite period thereafter . . . Government is a response to social needs which change with invention and human contrivance."

5 Dimock, op. cit. 165: "Constitutions are not self-executing or self-interpreting. Irrespective of whether or not there may be a transcendental law, substantive law requires instrumentation. This means that ultimately some person or agency must be supreme . . . When citizens disagree and interfere with the work and peace of society, public authority steps in and adjusts the controversy. Likewise, the departments of government sometimes disagree as to the interpretation of the Constitution. Some one of them, therefore, must have the power to decide. In Great Britain, Parliament is the agency which decides; the legislature is supreme. In the United States the highest court of each governmental jurisdiction decides; the judiciary is supreme. The Constitution is what those who interpret it say it is."

6 Dimock, op. cit. 162: "... not the least part of the change due to construction has been by 'judicial legislation.' The application of old rules to new cases gradually changes the law. This process is most pronounced in the field of constitutional law, where rules are not so complete and where dynamic forces
responsibility thus placed upon them by a written constitution, the members of the judiciary have consistently and wisely divested that instrument of any cloak of false sanctity. Realistically they have searched for the essential "meaning" and connotation of the words as they were used by the founders, in the light of their historical context. The compelling principle which they have invariably discovered is a standard of reasonableness, which, when employed as a guide, leads toward the fairest and most equitable resolution of legal difficulties. This standard they have used in the dissemination of justice to the litigants before them, interpreting "the law" and the Constitution in the light of current concepts, current mores, and current business methods.

Nowhere is this procedure more vividly illustrated than in the decisions involving "due process." For example,

impinge most sharply. Judges engage in policy formation as well as in its enforcement.

7 Louis Prashker, "Service of Summons on Non-Resident Natural Persons Doing Business in New York," 15 St. John's L. Rev. 1 at 20 (1940): "Jurisdictional concepts are not sacrosanct. They are subject to the give-and-take of the progressive development of societal relations."

8 Chafee, Jr., op. cit. 402: "Here again the problem is far less simple than these writers make out. No doubt we are forced to broaden our conception of the 'meaning' of a word, when we are dealing with language which is applied many years after it was originally written. Those who used the word knew of definite persons or things which fell within its terms. Many of these tangible realities have long since disappeared. Others have come into existence of which the writers never thought."

9 Jay Leo Rothschild, "Jurisdiction of Foreign Corporations in Personam," 17 Va. L. Rev. 129 (1930). Hutchinson v. Chase & Gilbert, 45 F. (2d) at 139 (1930). The jurisdictional concepts are not sacrosanct. They are subject to the give-and-take of the progressive development of societal relations.

10 Roger S. Foster, "Place of Trial in Civil Actions," 43 Harv. L. Rev. 1217 (1930), and note in 28 Calif. L. Rev. 227 (1940).

11 Dimock, op. cit. 181-2: "The due-process provisions are the most important ones in the federal Constitution. They have made the judiciary a policy-making agency of enormous influence. They have made judicial supremacy the most important constitutional principle. They have radically changed the Constitution of 1789 . . . Today the highest court's leading cases deal with economic and social questions, as a direct consequence of the importance which has been given these two provisions, neither of which was in the original Constitution." Thomas M. Cooley, A Treatise on the Constitutional Limitations (Little, Brown & Co., Boston, Mass., 1927, 8th Ed.) II, 741: "Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." See also Pinney v. Providence Loan & Invest. Co., 106 Wis. 396, 82 N.W. 308, 80 Am. St. Rep. 41, 50 L. R. A. 577 (1900); Moyer v. Bucks, 2 Ind. App. 571, 28 N.E. 992, 16 L. R. A. 231 (1891); Raher v. Raher, 150 Iowa 511, 129 N.W. 494, 35 L. R. A. (N.S.) 292 (1911); Roberts v. Roberts, 135 Minn. 397, 161 N.W. 148, L. R. A. 1917C 1140 (1917); People v. O'Brien, 111 N.Y. 1, 18 N.E. 692,
when, in the Fifth and Fourteenth Amendments to the Constitu-
tion, the founders used the word "person" they undoubtedly meant a "natural" or human individual such as "John Jones." He and his wife and children were to be guaranteed "due process." In determining in the nine-
teenth century the extent to which the eighteenth century
denotation of "person" might be expanded, the court looked
back into history, first to ascertain the "objects" to which
that word "person" probably referred in 1789 when the Bill
of Rights was adopted, and second, to determine whether
or not it was then contemplated that to such word should in-
sure a long continued application. Finding that such "ob-
ject" was the human individual and being satisfied that
such continued application was contemplated, the court
looked out upon the then contemporary world and deter-
mined that, with the advent of the industrial era, the word
"person" had acquired a new content. Acts were being
performed and obligations were being incurred by,
and rights were being granted to groups, organizations and
"creatures" other than human individuals. Among these
other bodies were corporations, state-created entities, the
numerical ascendancy of which was becoming increasingly
apparent. The courts were importuned to adjust the

2 L. R. A. 255 (1888); Kuntz v. Sumption, 117 Ind. 1, 19 N.E. 474, 2 L. R. A. 655
(1889); Re Gannon, 16 R. I. 537, 18 A. 159, 5 L. R. A. 359 (1889); Ulman v. Balti-
more, 72 Md. 587, 20 A. 141, 11 L. R. A. 224 (1890); Gilman v. Tucker, 128 N.Y.
190, 28 N.E. 1040, 13 L. R. A. 304 (1891); Pearson v. Yewdall, 95 U.S. 294, 24
L. Ed. 436 (1877).

12 See note 18 post.
13 Chafee, Jr., op. cit. 403-4: "The problem of long-enduring words extends far
beyond constitutions. Even if courts could disregard constitutional phrases limit-
ing the national government at the risk of disrupting the federal system, they
would not be equally free to reject the responsibility of interpreting words in old
statutes . . . and old contracts and deeds . . . Nor is it always sufficient to
determine what objects the words were applied to at the time they were written.
. . . When those who used words contemplated their long continued application,
these words must eventually acquire a new content. . ."
14 Chafee, Jr., op. cit. 387: "... words are very imperfect means of com-
munication. A word doesn't stay put. It wabbles and slides around." See also
15 Elliott E. Cheatham, et al, Cases and Materials on Conflict of Laws (The
Foundation Press, Inc., Chicago, 1941), 1103.
16 Hugh Evander Willis, Constitutional Law of the United States (The Principia
Press, Bloomington, Ind., 1936), 858: "Enough figures have been given to show
how completely our economic life has become dominated by corporations. Cor-
porations have now gathered property under their system. Corporations control
The legal relations of corporations, whose representatives urged that such relations were protected by the constitutional safeguards contained in the Fifth and Fourteenth Amendments. As early as 1838, it was held that the property and franchises of an incorporated university were property entitled to the same protection under the “due process” clause as property of human individuals. 17

Since, by judicial construction, a corporation is now conceded to be a “person” for purposes of protection under the “due process” clauses of the Constitution, the manner of affording such protection is the next paramount concern. The consideration here devoted to this issue is strictly limited to the constitutional limitations required by the “due

The application of these principles has resulted in holding that corporations are entitled to “equal protection,” Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928), but has not been extended to hold that the corporation is such a “citizen” as to fall within the operation of the “privileges and immunities” clause of the Fourteenth Amendment, Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908).
process” clause as it relates to the service of process in suits against private corporations not incorporated in a state in which the suit is instituted. This necessarily includes a discussion of the bases relied upon by the courts as a justification for assuming jurisdiction over such a foreign corporation, as well as the manner in which the foreign corporation may be brought within the effective operation of the power implicit in the ability to exercise such jurisdiction, and some of the collateral elements which influence the courts in their decisions, including the place where the cause of action arose, the influence of the commerce clause, and the effect of non-compliance with various statutes. It is not proposed to discuss fully the exact requirements of “due process,” nor to compass the element essential to procedural “due process” comprising a reasonably fair and impartial hearing, nor even to touch upon any part of the field of exclusively substantive “due pro-


19 Pinney v. Providence Loan & Invest. Co., 106 Wis. 396, 82 N.W. 308, 80 Am. St. Rep. 41, 50 L. R. A. 577 (1900); Steele v. Western Union Tel. Co., 206 N. C. 220, 173 S. E. 583, 96 A. L. R. 361 (1934); Phillips Petroleum Co. v. Smith, 177 Okla. 539, 61 P. (2d) 184, 107 A. L. R. 858 (1939); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437 (1939). In the last mentioned case it was stated: “When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law. The corporate device is one form of associated enterprise, and what the law in effect has done is to enforce rights and duties appropriate for collective activity (citing cases). It has done so largely by assimilating corporations to natural persons. The long, tortuous evolution of the methods whereby foreign corporations gained access to courts or could be brought there, is the history of judicial groping for a reconciliation between the practical position achieved by the corporation in society and a natural desire to confine the powers of these artificial creations.” See also, note in 19 CHICAGO-KENT LAW REVIEW 135 (1940).

20 On this point see Cooley, op. cit. II, 740 et seq., and note 11 ante.

21 See Lasere v. Rochereau, 84 U. S. 437, 21 L. Ed. 694 (1873); Orchard v.
cess.” The following investigation will exclude as far as possible discrimination between tort actions and suits based on contract and between the types of action commonly known as actions in rem, actions quasi-in-rem and actions in personam but will treat only the latter, the former being governed by well-established rules largely reflected in statutes which have received well-defined construction. The subject matter necessarily precludes by its definition a consideration of questions relating to actions instituted by foreign corporations.

The initial pertinent consideration revolves about the question of whether or not under the circumstances the particular court has or may obtain jurisdiction over the foreign corporation. The bases relied upon by the courts as a justification for assuming jurisdiction in any case are well-known and limited in number. The roster usually includes such concepts as domicile, citizenship or nationality, presence, consent, appearance, and the doing of any act. The

22 Farmers’ & Merchants’ Bank v. Federal Reserve Bank, 286 F. 566 (1922), and cases cited therein.
24 On this point see 17 Bost. L. Rev. 639 (1937).
25 Maurice S. Culp, “Constitutional Problems Arising from Service of Process on Foreign Corporations,” 19 Minn. L. Rev. 375 (1935); Thompson, op. cit. III, 927, and V, 1534, 1559; Willis, op. cit. 864. A note in 79 U. of Pa. L. Rev. 956 at 971 (1930) states: “The formula to be sought in each case is one which affords protection without molestation to the foreign corporation, and protection without prejudice to the residents of states in which the corporation does business. The incidents themselves have neither been definite nor constant. Such uncertainty is undesirable; social expediency is of itself too vague a guide for either the pretermination or adjudication of cases involving the nation’s business and its preeminent mechanism for the transaction of such business. It is probable, however, that the next two decades will see the formulation into crystallized rules of the principles governing the jurisdiction of the state over foreign corporations doing business within its borders.”
27 Goodrich, op. cit. 155.
28 Goodrich, op. cit. 155, and see notes 58-9 post.
29 Goodrich, op. cit. 155; Michigan Trust Co. v. Ferry, 228 U. S. 346, 33 S. Ct. 550, 57 L. Ed. 867 (1913); and see notes 49 to 56, inclusive, post.
30 See case cited note 29, ante, and see also note 65 post.
31 Goodrich, op. cit. 155, and see notes 75 to 88, inclusive, post.
peculiar nature of the corporation raises the question of whether or not any of the foregoing customary bases would be sufficiently relevant to endow the court with jurisdiction. Historically, the answer to this proposition was a categorical negative. The so-called "territorial" or "restrictive" theory, upon which was found such negative reply was a logical outgrowth of the commercial and industrial situation as it existed early in the history of this nation. However, the salient features of the civilization of that era have long since been outmoded.

At the height of the Civil War, President Lincoln, in an

32 Thompson, op. cit. V, 1537-8 and cases there cited; Henderson, op. cit. 164-9; Joseph Henry Beale, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 193 (1913); William F. Cahill, "Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory," 30 Harv. L. Rev. 676 (1917); Bryant Smith, "Legal Personality," 37 Yale L. J. 283 (1928); Paul E. Farrier, "Jurisdiction over Foreign Corporations," 17 Minn. L. Rev. 270 (1933). In addition see notes 17-8 and note 25, ante, and also see note 40 post.


34 A note in 79 U. of Pa. L. Rev. 956 at 957 (1931) states: "This geographical theory of the nonexistence of a corporation in foreign states, known in international law as the restrictive theory because it tends to restrict and confine corporations to the state of origin, has remained unshaken in our law for a hundred years; even today courts declare that a corporation exists only within the territorial limits of the state whose law gave it birth." See also John P. Bullington, "Jurisdiction over Foreign Corporations," 6 N. C. L. Rev. 147 (1927), and notes in 40 Col. L. Rev. 1210 (1940) and 36 Yale L. J. 692 (1927). Textual discussion may be found in Goodrich, op. cit. 173-9; George Wilfred Stumberg, Principles of Conflict of Laws (The Foundation Press, Chicago, 1937) particularly 82, note 67; and Joseph C. France, Principles of Corporation Law (Baltimore, Md., 1914, 2d Ed.) 347.

35 Willis, op. cit., 864, states: "This position was a twofold result of the doctrine of jurisdiction and of the concept of a corporation. The original Anglo-American notion of jurisdiction was that of the physical power which the court had, if need be, to lay the defendant by the heels. This required actual physical presence. The original notion of a corporation was that it was a metaphysical entity and could have legal existence only within the state of its creation. Hence, it could not be physically present in any other state so as to give such state jurisdiction over it." See also Maxwell E. Fead, "Jurisdiction over Foreign Corporations," 24 Mich. L. Rev. 633 (1926), and Jay Leo Rothschild, "Jurisdiction of Foreign Corporations in Personam," 17 Va. L. Rev. 129 (1930). The latter, at 144, states: "Fundamentally, all of the rules with respect to service of process upon non-residents are steeped in the political and economic setting from which they emerge; and it is to be expected, therefore, that that which was simple in origin, when business conditions were less complex, should become difficult of application when business conditions became more entangled."

36 In a note in 79 U. of Pa. L. Rev. 956 at 957 (1931) the author states: "While courts have consistently confirmed the doctrine that a corporation, being a mere creature of the law that clothed it with legal personality, has no existence where its creative law is without effect, they have with equal unanimity sanctioned and even protected its practical, if not theoretical, existence outside the boundaries of
address to Congress, said: "The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew. We must disenthrall ourselves. . . ." The expansion of industrial activities made necessary the increased use of the corporation as an instrumentality for extending the individual's influence beyond the realm in which his physical activities could be carried on. The occasion was, indeed, " piled high with difficulty." The courts thought anew and acted anew and proceeded to "disenthrall" themselves from the accustomed concept of corporations. The patent inequity of permitting a corporation to engage in commerce within the foreign state while being sheltered by an immunity to suit, and of forcing an individual resident of one state who acquired a grievance against a corporation doing business within his state to travel to the state of its creation in order to have redress demanded attention. The court recognized that the quiet days of home industry, and the quiet ways

the state of origin. The explanation of the divergence here between fact and theory is a century of economic and social progress; and the history of the law of foreign corporations is a restatement of continued evasion and circumvention through a fictional technique, of the traditional doctrine enunciated by Taney." See also G. W. C. Ross, "The Shifting Basis of Jurisdiction," 17 Minn. L. Rev. 146 (1933). The annotator in 23 L. R. A. 490 (1894), in commenting on Foster v. Charles Betcher Lumber Co., 5 S. D. 57, 58 N.W. 9 (1894), states that the early doctrine precluding the service of process upon a corporation outside the state of its creation "was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked . . . To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein." See also Frazier v. Steel & Tube Co. of America, 101 W. Va. 327, 132 S. E. 723, 45 A. L. R. 1442 (1926); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L.Ed. 569 (1899); Foster v. Charles Betcher Lumber Co., 5 S. D. 57, 58 N.W. 9, 23 L. R. A. 490 (1894); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437 (1939).
which they permitted, belonged to the historical past and, in the light of the then current context of the situation of national life, searched for precept and precedent which might with propriety be applied to the revolutionized commercial world in which the corporation was assuming larger and larger proportions.  

As the first step in this arduous process, they "lifted the corporate veil." They beheld an aggregation of individuals and came to the conclusion that the corporation was in fact identical with its stockholders. By syllogistic reasoning, they propounded the tenet that since the corporation was its stockholders and since the stockholders could "migrate," so, therefore, could the corporation migrate, at least to the extent that the court might rationally fashion some link between its legitimate exercise of power and this invisible, incorporeal "scintilla" of a being which had been clothed with the capacity to migrate into the territory over which the court might extend its jurisdictional power.

The courts looked once more at the corporation and its

39 Joseph Henry Beale, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 193 (1913). The author of a note in 9 Tex. L. Rev. 410 at 422 (1931) states: "The varying boundaries of our economic and political frontiers have in the past necessitated continuous changes in our jurisdictional concepts of the extraterritorial status of foreign corporations. Any immediate stabilization of those frontiers is improbable. Hence it is submitted that the absence of any definite rule is not deplorable, but rather, fortunate. The question of jurisdiction over foreign corporations has been and, it is believed, is being decided, within certain broad boundaries, by a judicious use of judicial discretion, not uninfluenced by the reasonableness of its exercise in each particular case."

40 Edward S. Stimson, "Jurisdiction over Foreign Corporations," 18 St. Louis L. Rev. 195 (1932); George C. Holt, The Concurrent Jurisdiction of the Federal and State Courts (Baker, Voorhis & Co., New York, 1888) 110-1 and cases there cited. He states: "... the Supreme Court modified it (the view "that all the members of the corporation should be citizens of the State which created it") by establishing a fiction that the members of a corporation are presumed by law to be citizens of the State which created the corporation. The statement of the rule by the Supreme Court is that a suit by or against a corporation in its corporate name may be presumed to be a suit by or against citizens of the State which created the corporate body. ..." Henderson, op. cit. 164, states: "A business firm is incorporated, and accorded legal personality, merely because that is, juristically, the most satisfactory way of achieving a desired result ... The vice of Marshall's theory of corporation law lay rather in its tendency to overlook the fact that this invisible, law-created entity is devised for the purpose of protecting the interests of a very tangible and 'real' group of men with tangible common property and common interests. It is this group that is generally the fact of primary importance; the legal entity is no more than a means to an end. ..."

41 Even though a judgment rendered in a state court without personal service
legal relations with other entities in its environment. They looked to the State itself and determined that the State, in the exercise of its police power, could legally exclude foreign corporations from the prosecution of their business activities within its territorial boundaries. As a logical consequence it was held to be constitutional for the State to enact legislation restricting the circumstances in which it would countenance the transaction by the corporation of business within its boundaries. The only limitation placed upon the

on the defendant may be good in that state, nevertheless, it may be void everywhere else: Goldey v. Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517 (1895); Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964 (1898); Grover and Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. Ed. 670 (1890); The Lafayette Ins. Co. v. French, 18 How. (U.S.) 404, 15 L. Ed. 461 (1866). Thus, notwithstanding the fact that a court may find some means of obtaining and exercising jurisdiction over a foreign corporation, the resulting judgment may be binding in the “local” sense only, and not in the “international” sense. It may not be entitled to full faith and credit in the courts of a sister state: Wetmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745 (1907); Valley v. Northern F. & M. Ins. Co., 254 U. S. 348, 41 S. Ct. 116, 65 L. Ed. 297 (1920); United States ex rel. Rauch v. Davis, 8 F. (2d) 907 (1923); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437 (1939); Hunau v. Northern Region Supply Corp., 262 F. 181 (1920). See also Willis, “Corporations and the United States Constitution,” 8 U. of Cinn. L. Rev. 1 (1934); comments in 77 U. of Pa. L. Rev. 1010 (1929) and 79 U. of Pa. L. Rev. 956 (1931); Willis, op. cit. 688; and Goodrich, op. cit. 155.


43 See cases listed in note 42, ante, and Hooper v. California, 135 U. S. 646, 15 S. Ct. 207, 39 L. Ed. 297 (1895); Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 S. Ct. 518, 44 L. Ed. 657 (1900); Chicago & N. W. R. Co. v. Whitton, 13 Wall. (U.S.) 270, 20 L. Ed. 571 (1872); Mutual Reserve Fund Life Assco. v. Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. Ed. 887 (1903); American R. Exp. Co. v. Royster Guano Co., 273 U. S. 274, 47 S. Ct. 355, 71 L. Ed. 642 (1927); Neirbo Co. v. Bethlehem Ship-
ability of the state to impose such conditions precedent was that the same should be reasonable and should not effect a denial to the corporation of any of the rights guaranteed to it as a "person" by the Constitution of the United States. A foreign corporation thereafter desiring to do business within such state could receive the latter's license to do so by complying with the provisions specified in the statute prescribing the terms upon which such permission would be granted. A large number of statutes thus enacted outlined the method by which and the causes for which foreign corporations might be subjected to the jurisdiction of the courts of the state in question. A voluntary compliance with the


[45] In State ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U. S. 361 at 364, 53 S. Ct. 624, 77 L. Ed. 1258 at 1259 (1933) it was stated: "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." See also The Lafayette Ins. Co. v. French, 18 How. (U.S.) 404, 15 L. Ed. 451 (1856); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610 (1917), and Thompson, op. cit. V, 1537.

[46] Maurice S. Culp, "Constitutional Problems Arising from Service of Process on
provisions of such statutes was construed to be an express 
assent by the corporation (1) to be bound by the state’s 
“will” so manifested, (2) to comply with the terms of the 
statute, and (3) to subject itself, in the manner stipulated, to 
the court’s jurisdiction. This consent was deemed a suf-
ficient basis for the exercise of such jurisdiction.

If, notwithstanding the enactment of such statutes and 
the consequent imposition of such conditions, the corporation 
operated in a foreign state without specifically conforming 
to the procedure set forth by the state legislature, then such 
operation automatically subjected it to the terms established 
by the state. An implied consent to the exercise of jurisdic-
tion by the courts of that state would then be imputed to 
the corporation in its “personified” capacity.

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47 Culp, id., at 391 states: “Everyone within the boundaries of a state is bound by
all 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.”
See cases listed in note 42, ante, and Connecticut Mutual Life Ins. Co. v. Spratley,
172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569 (1899); Commercial Mut. Accident Co.
Co., 279 Mich. 145, 271 N.W. 712 (1937); Baltimore and Ohio R. Co. v. Koontz,
104 U. S. 5, 26 L. Ed. 643 (1881); O’Donnell v. Slade, 5 F. Supp. 265 (1933);
Frazier v. Steel & Tube Co. of America, 101 W. Va. 327, 132 S.E. 723, 45 A. L. R.
207, 70 L. R. A. 513 (1905). See also William J. Kinnally, “What Constitutes Doing
Business by a Foreign Corporation?” 15 Ind. L. J. 520 (1940).

48 Morris & Co. v. Skandinavia Ins. Co., 27 F. (2d) 329 (1928), affirmed in
279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762 (1929); Barnes v. Wilson, 40 F. Supp.
689 (1941); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917). See also

49 Old Wayne Mutual Life Ins. Asso. v. McDonough, 204 U. S. 8, 27 S. Ct. 236,
L. Ed. 492 (1915); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19
S. Ct. 308, 43 L. Ed. 569 (1899); Chicago & N. W. R. Co. v. Whilton, 13 Wall. (U.S.)
270, 20 L. Ed. 571 (1872); Merchants Heat & Light Co. v. Clow, 204 U. S. 286,
27 S. Ct. 285, 51 L. Ed. 488 (1907), where it was said: “It is tacitly conceded that
the provision as to service does not apply unless the foreign corporation was
doing business in the state. If it was, then, under the decisions of this court, it
would be taken to have assented to the condition upon which alone it lawfully
could transact such business there.”; Westinghouse Electric & Mfg. Co. v. Troell,
Co., 48 F. 202 (1891); Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 260 P.
745 (1927); Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 422,
111 N.E. 1075, L. R. A. 1916F 407 (1916); Smolik v. Philadelphia & Reading Coal
396, 82 N.W. 308, 80 Am. St. Rep. 41, 50 L. R. A. 577 (1900); Reeves v. Southern
Ry. Co., 121 Ga. 561, 49 S.E. 674, 70 L. R. A. 513 (1905); State ex rel. Taylor
consent would, as the express consent did, form the basis for the exercise of the court's jurisdiction. Here, then, was a liaison of great utility to the courts in effecting a remedy for the situation which had threatened to produce inequities in legal relations between parties and to throw an unreasonable burden upon the citizens of the court's own domestic state by the previous requirement that such citizens sue the offending corporation only in the state of the latter's creation.

The test of the real validity of a theory of jurisdiction is its universal applicability. Difficulties were encountered in an attempt to apply the "consent" doctrine to all situations involving suits against foreign corporations. In cases where the state in question had not enacted any statutes in this connection, it might have been anticipated that conflicts would ensue as, in fact, they have. A conflict in this respect, however, did not seriously jeopardize the theory of jurisdiction, because it could be, and in some cases was, rationalized by holding that the state had power to impose conditions, that the imposition of reasonable conditions was therefore presumed and that consent, either express or implied, could be established in the same manner as that employed in the case of states which had enacted statutes.


50 See note 99 post.  

52 Thompson, op. cit. V, 1535 and 1555-7. See also notes 102, and 104 post.  
53 Lipe v. Carolina C. & O. R. Co., 123 S. C. 515, 116 S.E. 101, 30 A. L. R. 248 (1923). The annotator defines as a basis of jurisdiction the implied consent raised by the doing business either because of a specific statute or by judicial construction or by reason of an imputation of liability to suit in consideration of the protection afforded by the foreign state. See also note in 79 U. of Pa. L. Rev. 966 at 967 (1931) where the author states: "Yet the theory (of consent) is untenable. Frequently such consent, either subjectively or objectively, does not exist, yet jurisdiction has been assumed and sustained. For example, the lack of statutory provision authorizing the suit will not defeat such assumption of jurisdiction, although it is difficult to understand how the corporation can consent to a statutory condition of admission where there is no statute."
A mortal blow was dealt to the consent theory, however, when an attempt was made to apply it to the following two situations: first, where the corporation expressly refused to comply with or be bound by the conditions imposed by the state, and second, where the corporation involved was one engaged solely in interstate commerce, by reason of which the state was without power to exclude it from carrying on its interstate business within the state territorial boundaries. In the former circumstance, any fiction of "consent" was directly repudiated. In the latter instance, the major premise upon which the consent doctrine was founded, namely the right of exclusion, never existed. In either event, the structure of the consent theory perforce collapsed.

Upon the defection of the "consent" doctrine, another search was instituted, and the courts once more focused their inquiring attention upon the nature of the corporation, its composition, and its now well-recognized capacity to migrate. This time, instead of looking to the state, they scrutinized the nature of their own jurisdiction and broke it down into its component parts. At the root they found the venerable postulate that "jurisdiction is physical power." Essential to the exercise of physical power over natural persons is the physical presence of the latter. The incorporeal corporation cannot realistically be "present" in the physical sense any-

54 Goodrich, op. cit. 173-4, particularly note 168.
55 International Text-Book Co. v. Pigg, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458 (1922); Sansbury v. Schwartz, 41 F. Supp. 302 (1941); Esperti v. Cardinale Trucking Corp., 31 N. Y. S. (2d) 253 (1941); Costello v. Lee, 43 F. Supp. 947 (1941); Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N.E. 915 (1917). See also notes 89-90 post. Willis, op. cit. 865, states: "Since the state had the power to keep a foreign corporation out of the state, it could, as a condition of allowing it to come into the state, require it to consent to the appointment of an agent for the service of process, etc., but when the jurisdiction was upheld against a corporation which was engaged only in interstate commerce, which the state could not keep out, the consent theory broke down (citing International Harvester Co. of America v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 [1914].)" See also Restatement of Conflict of Laws, § 92, comment c.
56 Willis, op. cit. 866, states: "The adoption of the presence theory did not, however, mean the discarding of the consent theory."
where but its "members" can. Hence, the presence of the "members" or agents who carry on its corporate activities has been construed to be the presence of the corporation, the two classes of persons being in point of fact identical. Therefore, in order to conjoin the corporation and the exercise of the court's jurisdiction, it has been held to be sufficient if the former be "present" within that region in which the latter may be effectively exercised.

This doctrine, like the "consent" doctrine, also failed to be susceptible of universal application as exemplified by actions permitted against foreign corporations after their dissolution or after their withdrawal from the state of suit.


60 See notes 115-9, inclusive, post.

61 See notes 115-9, inclusive, post, and also State ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, 269 U. S. 361, 53 S. Ct. 624, 77 L. Ed. 1256, 89
The numerous instances in which jurisdiction has been exercised under such circumstances, though the corporation is not even theoretically present, precludes an acceptance of this concept as the basis upon which jurisdiction may be founded.\(^6\)

A great many other theories concerning the basis of jurisdiction over foreign corporations have been promulgated, more or less local and sporadic in their application, and more or less consistently adhered to by the courts of their inception. Among these are included the following:

1. Waiver by the corporation of its potential plea of "no jurisdiction" may be accomplished in any one of several ways. Such waiver would not confer jurisdiction upon the courts but the courts would be assumed to possess jurisdiction to entertain actions against foreign corporations subject to the personal privileges of the latter to be immunized therefrom.\(^6\) This personal privilege could be waived by qualification to do business under the statutory requirements of the particular state,\(^6\) by appearance in the suit,\(^6\) or by other acts calculated to waive and construed as waiving such privilege.\(^6\)

2. The state possesses a police power which may be exer-

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\(^{62}\) See cases listed in note 61, ante, and in notes 115-9, inclusive, post.


cised by imposing conditions upon the transaction of business by foreign corporations within its borders. The corporation may also be construed to submit to such conditions in a manner similar to that previously considered in connection with the "consent" doctrine.

3. The state has the power to exclude foreign corporations from its territory. If it does not so exclude them, but rather consents to permit them to transact business within the state, then, as a consideration for the granting of such consent, the corporation subjects itself or is construed to have subjected itself to the jurisdiction of the courts of that state.

4. As a matter of propriety and for the convenience of its own citizens, the state can require the compliance with reasonable conditions precedent to the transacting of business by a foreign corporation within the state. Such corporation must then accede to the imposition of and must comply with such conditions.

5. The corporation entering another state, and carrying on

60 S. Ct. 215, 84 L. Ed. 537 (1940); Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853 (1878); Baltimore and Ohio R. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354 (1871); Baltimore and Ohio R. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643 (1881). See also Restatement of Law of Conflict of Laws, § 91.


69 See note 42 ante.


71 Hinton, "Substituted Service on Nonresidents," 20 Ill. L. Rev. 1 (1925), and note in 11 Tex. L. Rev. 226 (1933). See also Willis, op. cit. 386.

business there under and by virtue of the pertinent laws of that state, establishes a domicile there which forms the basis of jurisdiction of the courts of that state in actions against such corporation.\textsuperscript{73}

6. It is reasonable for a foreign corporation which is doing business within another state to be subject to suit therein.\textsuperscript{74}

A doctrine which has, in comparatively recent years, found wide favor in view of the changes in commercial life wrought by the advent of the industrial era and machine age, and one which is based upon a sound and logical foundation is that jurisdiction may be exercised on the basis of the performance by the defendant foreign corporation of some act or acts within the state.\textsuperscript{75} Under a similar theory


\textsuperscript{74} Culp, id. at 378, states: "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 authority 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." For a judicial expression of the same view, see Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566 at 588 (1922), where the court states: "The existence of jurisdiction . . . depends upon whether, in view of the ultimate facts thereof, the exercise of jurisdiction would be reasonable. If it is . . . reasonable . . . it (jurisdiction) exists. If, on the other hand, it is not reasonable, it does not exist." See also Roger S. Foster, "Place of Trial in Civil Actions," 43 Harv. L. Rev. 1217 (1930), and note in 28 Calif. L. Rev. 227 (1940).

applicable to individuals, there is a substantial body of authority which holds that residents of another state who have driven their cars upon the highways of the state of the forum, causing some damage or injury thereby, are liable therefor and may be brought within the jurisdiction of the court by the service of process upon some state official named in statutes relating thereto. Jurisdiction in these cases is based upon statutes which provide that the foreign motorist, by the very act of entering upon and using the highways of the state, is construed as having appointed the secretary of state, or other state official, as his agent for the service of process. Such statutes have been held to be a constitutional exercise by the state of its police power in furnishing protection to its citizens against the consequences of the use of a dangerous instrumentality. Upon the same reasoning, foreign corporations engaged in the insurance business and foreign stockbrokers have been held subject to the jurisdiction of the courts of the state in which they have transacted business. The same doctrine has been extended to render effective the exercise of jurisdiction by the courts of a state

76 Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). Goodrich, op. cit. 166, says: "It is not accurate to speak of this as jurisdiction based on consent. It may be doubtful if the visitor even knows of the provision, much less consents to it. It must be said that when one commits acts (at least some kinds of acts) in a state, it lies within the power of that state to make him amenable to its courts in litigation arising from those acts. The foreign corporation cases, later discussed, furnish an analogy here." See also Wuchter v. Pizzutti, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A. L. R. 1230 (1929); Morris v. Argocollier Truck Line, 39 F. Supp. 602 (1941); Wood v. Wm. B. Reilly & Co., 40 F. Supp. 507 (1941).


78 See cases cited note 76, ante.

79 Henry L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935); Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573 (1923). Goodrich, op. cit. 168, says: "The Supreme Court in the Hess v. Pawloski case stressed the dangerous character of motor vehicles; in Doherty & Co. v. Goodman, Justice McReynolds said: 'Iowa treats the business of dealing in corporate securities as exceptional, and subjects it to special regulation.' Perhaps this is our clue. Both the sale of securities and the operation of motor vehicles are fraught with danger and economic harm to the general public. For that reason they are held subject to regulation by the states. By holding such acts to create jurisdiction for suits arising therefrom in the state where the acts are committed the courts are merely affording a further protection to the injured. Whether this is the line on which the decisions will eventually crystallize is as yet unpredictable."
over all corporations entering and doing business therein. It is not that the corporation is "present" or has "consented" to be brought within the realm of the court's jurisdiction, but the theory is based upon the hypothesis that, by the performance of the act itself, the corporation has subjected itself to that jurisdiction. Courts recognizing the concept of jurisdiction over foreign corporations based upon the performance of an act or of "doing business," uniformly hold that such "doing" of business in the state of suit is an absolute essential to competent jurisdiction and the pronouncement of binding judg-

80 Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711 (1929); Fitzgerald and Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608 (1890); Goldey v. Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517 (1899); Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964 (1898); Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. Ed. 987 (1903); Meyer v. Pennsylvania Lumbermen's Mut. Fire Ins. Co., 108 F. 169 (1901); Darling Stores Corp. v. Young Realty Co., 121 F. (2d) 112 (1941); Reeves v. Southern Ry. Co., 121 Ga. 561, 49 S.E. 674, 70 L. R. A. 513 (1905); Steele v. Western Union Tel. Co., 206 N. C. 220, 173 S.E. 583, 96 A. L. R. 361 (1934); Atkinson v. United States Operating Co., 129 Minn. 232, 152 N.W. 410, L. R. A. 1916E 241 (1915); Kinsey v. American Ore Corp., 158 S.W. (2d) 32 (Ark., 1942). The annotator in 89 A. L. R. 653 (1933) distinguishes between non-resident motorists and foreign corporations along three lines: (1) the State may exclude the latter; (2) the foreign corporation having qualified to do business, is governed by the rules and regulations of the state department, and is therefore in a better position to know the service provisions of venue statutes; and (3) the corporation may avoid the effect of the statutes by appointing its own agent for service. In 79 U. of Pa. L. Rev. 956 at 1126 appears the statement that: "At one time it was believed that the ownership of a substantial amount of permanent property within the state constituted an absolute prerequisite to inclusion within the meaning of the Amendment . . . But more recent cases have discarded the rule . . . . In Kentucky Finance Corporation v. Paramount Automobile Exchange Corporation, [262 U. S. 544, 43 S. Ct. 638, 67 L. Ed. 1112] decided in 1923, a foreign corporation coming into the state to replevy an automobile but not otherwise owning property or doing business was held to be a person within the jurisdiction; and three years later the applicability of the amendment was similarly sustained in Hanover Fire Insurance Company v. Harding [272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372] where the corporation's only asset within the state was good will." See also Helen W. Munsert, "Doing Business in a State for the Purpose of Service of Process on a Foreign Corporation," 13 CHICAGO-KENT REVIEW 328 (1935), and notes in 19 CHICAGO-KENT LAW REVIEW 135 (1940) and 24 CORN. L. Q. 266 (1939).

81 Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 260 P. 745 (1927); Hinchcliffe Motors, Inc. v. Willys-Overland Motors, Inc., 30 F. Supp. 580 (1939); Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148 (1915). Goodrich, op. cit. 177, states: "If a foreign corporation voluntarily does business within the state it is bound by reasonable regulations of that business imposed by the state, not because it is found there, not because it has consented to those regulations, but because it is reasonable and just to subject the corporation to those regulations as though it had consented."
ments. Conflict does occur, however, in their decisions relative to the quantum of "doing business" required to support adequately the exercise of that jurisdiction. With scarcely a deviation the courts agree that the requisite amount cannot be arbitrarily designated or defined in advance, but is strictly a question of fact to be decided after a consideration of all circumstances peculiar to a particular case.

Some of the determinative factors considered by the courts in assessing the varying factual situa-

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82 Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 37 S. Ct. 280, 61 L. Ed. 710 (1917); International Harvester Co. of America v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1914); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569 (1899); Southern Pacific Co. v. Denton, 146 U. S. 292, 13 S. Ct. 44, 36 L. Ed. 942 (1892); Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964 (1898); St. Clair v. Cox, 108 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1892); Fitzgerald and Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608 (1890); Merchant's Heat & Light Co. v. Clow, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488 (1907); Chipman v. Thos. B. Jeffrey Co., 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314 (1920); Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 27 S. Ct. 513, 51 L. Ed. 841 (1907); Hutchinson v. Chase & Gilbert, 45 F. (2d) 139 (1930); Creager v. P. F. Collier & Son Co., 36 F. (2d) 783 (1929); Zendle v. Garfield Airline Works, Inc., 29 F. (2d) 415 (1928); Central Grain & Stock Exch. v. Board of Trade, 125 F. 463 (1903). In Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566 (1922) at 595, in commenting on the case of Lafayette Ins. Co. v. French, the court said: "There is nothing in the case that suggests the idea that in such cases, if process has been served on an authorized agent, it is essential also to jurisdiction that the corporation be doing business in the state."

83 Davis v. Farmers' Co-op. Equity Co., 262 U. S. 312, 43 S. Ct. 556, 67 L. Ed. 996 (1923). Austin Gavin, "Doing Business as Applied to Foreign Corporations," 11 Temp. L. Q. 46 at 60 (1936), states: "Isolated or casual transactions accompanied by no intent of continuity are not 'doing business' unless they constitute the sole reason for organizing the corporation. For state regulation to apply the foreign corporation must carry out a substantial part of its corporate purpose . . . therefore the collection of debts, the taking of security, the maintenance of a bank account, the sale of its own stock and an action at law do not of themselves constitute a doing of business. For the same reason acts relating solely to the management or control of the internal affairs of the corporation, such as the holding of corporate meetings or the transfer of stock do not bring the corporation within the state. But the contrary is true of the maintenance within the state of the executive offices. Nor does the ownership of stock of a corporation acting within Pennsylvania constitute the doing of business unless the subsidiary corporation acts in the capacity of agent. The ownership of real property, however, has such an effect. The ownership of personal property alone is not sufficient unless the corporation thereby carries out its corporate purposes . . . Orders for goods outside . . . are within the protection of the commerce clause. But if the goods are within the state when sold the states regulations apply provided the sale is made on behalf of the foreign corporation." See also Osborne, "Arising out of Business Done in the State," 7 Minn. L. Rev. 380 (1923); Isaacs, "An Analysis of Doing Business," 25 Col. L. Rev. 1018 (1925) and notes in 14 Mich. L. Rev. 588 (1916); 31 Yale L. J. 205 (1921); 14 Va. L. Rev. 133 (1927); 15 Iowa L. Rev. 204 (1930); 29 Col. L. Rev. 187 (1929) and 28 Calif. L. Rev. 227 (1940).
tions are: the place of residence of the plaintiff, the place where the cause of action arose, whether or not the foreign corporation has complied with the pertinent state statutes, the time when the necessary transacting of business occurred, whether or not the corporation had withdrawn from the state or had been dissolved prior to the date of suit, and the court in which the action is instituted, whether federal or state. The quantum of business required may, and very often expressly does, vary with any change in any one or more of the foregoing so that it may be said that a mutual dependence exists between the designation of a particular amount of "doing business" and those factors, which are hereinafter discussed.

The nature of the transactions considered essential to bestow jurisdiction upon the courts is directly influenced, also, by the purpose of the litigation, which may be classified, for the purposes of this discussion, into three principal categories: (1) suits involving the necessity of qualifying to do business under the state statutes; (2) actions based upon the imposition of state taxes; and (3) questions concerning the proper venue when a foreign corporation is a party defendant, that is, the amenability of the foreign corporation to the service of process within the state. The quantum of business required diminishes progressively in the order in which those categories are designated.

84 Isadore M. Kanevsky, "Corporations—What constitutes 'Transacting Business' in Wisconsin by a Foreign Corporation," 1941 Wis. L. Rev. 380 (1941), and note in 10 Jour. of Air Law 430 (1939).


Closely related to the question of the quantum of "doing business" required is the distinction between the transaction of interstate business and that of intrastate character. The exercise of jurisdiction over foreign corporations engaged in interstate business is far more strictly limited than it is with respect to foreign corporations engaged in intrastate business, and may require either a greater amount of business or transactions of a more specific character. Where interstate business is involved, the protection of the commerce clause may be invoked. Frequently, therefore, courts may not constitutionally take jurisdiction in suits against foreign interstate corporations by reason of the imposition thereby of undue burdens upon interstate commerce. A survey of


the pertinent cases discloses that the doctrine that, in order to subject a foreign corporation to the jurisdiction of the courts of a state, it must be "doing business" therein, is the one more universally followed by the courts than is the case of any of the others hereinbefore analyzed.

Since it has now been established that a corporation may be subject to the jurisdiction of the courts of a state other than that of its creation on one or more of the theories hereinabove delineated, it becomes appropriate to consider the manner in which the foreign corporation may be brought within the effective operation of the court's power. As the predominant modern theory is that such jurisdiction is founded on the doing of business, the methods of bringing the corporation within such jurisdiction will be discussed primarily in the light of that doctrine, although, more frequently than not, the principles involved are equally applicable when considered against the background of any of the other bases. As an inherent part of, or at least closely related to, this requirement, is the further essential that effective service of process must be had upon some agent of the corporation who stands in a representative relation to the corporation.91

The procedural element of due process required at this juncture comprises an adequate notice to the corporation of the pendency of litigation against it, served upon such person and in such manner as is reasonably calculated to "reach the corporation."92


91 Atchison, T. & S. F. Ry. Co. v. Weeks, 254 F. 513 (1918); Sasnett v. Iowa State Traveling Men's Ass'n, 90 F. (2d) 514 (1937). See also notes 92, 101, and 104 post and Simkins, op. cit. 223-35.

92 In Wuchter v. Pizzutti, 276 U. S. 13 at 24, 48 S. Ct. 259, 72 L. Ed. 446 at 451 (1928), the court expressed the opinion that there was: "... a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice. . . ."
A majority of the states have enacted statutes specifying the method by which legal process may be served upon foreign corporations. The provisions of these statutes are as varied as the number of states. They may, however, be divided into the following types:

1. Those requiring the formal appointment of a process agent, who would presumably be selected because of his relationship to the corporation by reason of his serving as an employee, as officer, or in some other similar capacity.

2. Those directing service on the "actual" agent of the corporation in the state. Under this type of statute, it is contemplated that the recipient of process shall be such a representative of the corporation as is authorized to transact, and who is in fact transacting, the business of the corporation within the state. He may be an officer, "managing agent," or other employee vested with a representative character. His capacity to be served inures by reason of his relation to the corporation and not as a result of any formal appointment as process agent.

3. Those requiring service on some public or state of-

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65 Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566 (1922).


67 Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566 (1922);
ficial. This category includes both (a) statutes stipulating that such appointment will be implied by a failure on the part of the corporation to designate its own agent; and (b) those requiring the appointment of the state official in any event.

The purpose of such statutes, as has been expressly stated, is to accomplish the service of process upon a foreign corporation in such manner as is competent to bring that corporation within the jurisdiction of the courts. To achieve that aim, the essential requirement is that service shall be had upon such representative in such a manner and with such adequate safeguards that it will be reasonably certain that the notice will, in fact, come to the attention of those individuals responsible for and controlling the management of the corporation. Without that, the protection guaranteed by "due process" would scarcely be effectuated.

Under statutes requiring the appointment of an "actual"
or representative agent of the corporation, little difficulty is encountered. Manifestly, when such appointment is made, the corporation is expressing its "consent" to the jurisdiction of the courts of the foreign state and may be construed as accepting, by its voluntary compliance with the statutes, the state's conditional offer to permit the corporation to do business within its territory. Accordingly, service thus consummated is operative to vest the courts with competent jurisdiction. Even though the corporation fails to designate such corporate process agent, and the statute does not stipulate that a state official shall be construed to be appointed by such failure of designation, service upon an undesignated corporate agent has been held valid.\textsuperscript{102} The question of what agent may, in such instances, be effectively served with process is largely determined by the terms of the existing statute. Thus some statutes authorize service upon the "managing agent."\textsuperscript{103} In the absence of such provision, it is generally deemed requisite that service be made on some agent or representative of the corporation who would, in all reasonable probability, apprise the corporation of the service of such process,\textsuperscript{104} though it has been held that the corpora-

of a foreign corporation will be sufficient . . . Unquestionably service upon the president, secretary, or director 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. Courts generally consider that the soliciting agents and the claim adjusters 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 law 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." But see Atchison, T. & S. F. Ry. Co. v. Weeks, 248 F. 970 at 980 (1918): "... it may fairly be presumed that such agent would notify the governing body of the corporation of any service of citation upon him. No such presumption may be indulged in cases where there is substituted service upon an official of the state and not upon an agent of the corporation."

\textsuperscript{102} St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882); Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148 (1915), and cases listed in note 96 ante.

\textsuperscript{103} Mauser v. Union Pac. R. Co., 243 F. 274 (1917); Cohen v. American Window Glass Co., 41 F. Supp. 48 (1941). See also note in 8 Notre Dame Law. 105 (1932).

\textsuperscript{104} Lafayette Ins. Co. v. French, 18 How. (U.S.) 404, 15 L. Ed. 451 (1856); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569 (1899); St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 33 S. Ct. 243, 57 L. Ed. 466 (1913); St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882);
tion, upon failure to comply, is estopped to deny the authority of the agent actually served. Competent service may likewise be had upon a subsidiary corporation when it is apparent that the subsidiary in reality represents the foreign corporation.

The statutes of many states require the foreign corporation to submit to service of process on some state or public official. Some legislatures specify that the appointment of the state official shall take place in the first instance, while others stipulate that a corporate process agent shall be appointed and, in case of failure to comply, direct that service upon the state official shall be deemed service upon the corporation. Under the first type, the principal problems arise over the question of whether or not the statute directs the public official to send notice of such service to the corporation itself. If the statute contains a provision for such notice, then the only question is whether or not such provision is reasonable. If, however, the statute contains no such provision, its constitutionality under the "due process" clause is questionable. Some courts have upheld service...
in such cases where the corporation has expressly consented to the exercise of jurisdiction by the court,\textsuperscript{112} while others have held such service constitutional in the event the actual custom of the state official was to forward notice to the corporation.\textsuperscript{113} Statutes of the second type provide that, upon the failure of the corporation to designate a corporate process agent, service may then be had upon a state officer. The position of the non-complying corporation is not favorable thereunder, since such corporation may be estopped to deny that the public official was authorized to receive process on its behalf. Under such circumstances, the essentials required to assure compliance with the constitutional guaranty of due process may not be as stringently construed.\textsuperscript{114} Decisions made in this connection are dependent not only upon the wording of the statutes but also upon the prior construction thereof by the courts of the state, and are invariably conditioned upon the state of facts involved in the particular action being litigated.

Among the factors of greatest consequence is the status of the foreign corporation in the state of suit at the moment when the purported service occurs. The weight of authority is that the prior dissolution of a corporation or its withdrawal from the state, executed in some other manner, will not, ipso facto, immunize the corporation from actions brought against it in the state from which it has so withdrawn.\textsuperscript{115} Many legislatures have, however, enacted stat-

\begin{itemize}
  \item \textsuperscript{112} See note 109 ante.
  \item \textsuperscript{113} Wuchter v. Pizzutti, 276 U. S. 13 at 27, 48 S. Ct. 259, 72 L. Ed. 446 at 453 (1928), Justice Brandeis, dissenting, stated: "... the objection is not lack of jurisdiction, but denial of due process because the statute did not require the secretary to notify the non-resident defendant. Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual knowledge and the opportunity to defend. The cases cited by the court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seems hardly reconcilable with a long line of authorities."
  \item \textsuperscript{115} Old Wayne Mutual Life Ins. Asso. v. McDonough, 204 U. S. 8, 27 S. Ct. 236,
utes specifying the length of time after withdrawal during which the corporation may be sued. Even in the absence of statute, courts have exercised jurisdiction over suits involving foreign corporations no longer doing business within the territorial boundaries of the state. Here, again,

51 L. Ed. 345 (1907); Simon v. Southern R. Co., 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492 (1915); Chipman v. Thos. B. Jeffrey Co., 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314 (1920); Mitchell Furniture Co. v. Selden Breck Const. Co., 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201 (1921); Darling Stores Corp. v. Young Realty Co., 121 F. (2d) 112 (1941); Maitland v. C. D. Mallory & Co., 40 F. Supp. 522 (1941); Yoder v. Nu-Enamel Corp., -Neb.-, 300 N.W. 840 (1941); Frazier v. Steel & Tube Co. of America, 101 W. Va. 327, 132 S. E. 723, 45 A.L.R. 1442 (1926). The annotator in 45 A. L. R. 1447 states: "... if a statute requires ... that it shall designate an agent in the state on whom process may be served in actions against it, the withdrawal of the corporation from the state does not revoke the authority of the agent to receive service in an action on a liability arising in the state out of business done by the foreign corporation therein. The application of this rule is not affected by the form of the statute as requiring the designation of a private agent or of a state official ... It seems to be the rule in at least two jurisdictions (Louisiana and Montana) that where a foreign corporation has ceased to do business within a state the revocation of the authority of its agent designated for the service of process is effective, although the liability of the corporation was incurred while it was doing business in the state."


117 In Germania Ins. Co. v. Ashby, 112 Ky. 303, 65 S.W. 611, 99 Am. St. Rep. 295 (1901), the court said: "There is no provision in the law limiting this consent to such time as the insurance company shall do business in this state. The object and purpose of the statute ... was to provide a mode of service to citizens who should desire to sue upon contracts of the insurance company, rather than compel them to go to the state of the corporation for redress. If this consent is to be withdrawn as soon as the company withdraws, the provision ... would be a useless provision ... We conclude, therefore ... that it is intended that the consent to service on the insurance commissioner is not limited to the time when the company is soliciting business here, but extends to all business that it may do while here. As long as a policy issued is in force, or loss thereunder remains unsatisfied, this consent to service ... is binding." See also Billmyer Lumber Co. v. Merchants' Coal Co., 66 W. Va. 696, 66 S.E. 1073, 26 L. R. A. (N.S.) 1101 (1910); Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. Ed. 987 (1903); Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573, 31 S. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N.S.) 698 (1910); Frazier v. Steel & Tube Co. of America, 101 W. Va. 327, 132 S. E. 723, 45 A. L. R. 1442 (1926). But see Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 295 P. 745 (1927); Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 S. Ct. 728, 47 L. Ed. 1113 (1903); Goldey v. Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517 (1895); St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222 (1882).
the propriety of service is intimately related to the capacity of the agent served to receive process on behalf of the foreign corporation.\textsuperscript{118} The question turns upon the express provisions and court interpretation of the statute, if any, or, in the absence of statute, the reasonableness of construing service upon the agent selected as service upon the corporation.\textsuperscript{119}

The principles underlying the competency of courts to exercise jurisdiction over foreign corporations, and the rather arbitrary limitations imposed by the necessity of complying with due process requirements, have been canvassed and scrutinized with particular reference to state court actions. The majority of these concepts and rules are equally pertinent in the sphere of federal jurisdiction. Territorial jurisdiction of the Federal Courts, however, is further restricted by the provisions of Section 51 of the Judicial Code.\textsuperscript{120}

A corporation is construed to be a "person," an "inhabitant," and a "citizen" within the meaning of this section, but for purposes of jurisdiction of the courts of the United States, it is such for the state of its creation alone.\textsuperscript{121} There-

\textsuperscript{118} See cases listed in note 115 ante.


\textsuperscript{120} 28 U. S. C. A. § 112: "... no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." See also Allen J. Levin, "Federal Venue in Actions Against Corporations," 15 Temp. L. Q. 92 (1940).

\textsuperscript{121} Rose, Jurisdiction and Procedure of the Federal Courts (Matthew Bender & Co., Albany, N. Y., 1922, 2d Ed.) 244, states: "A corporation is a resident or inhabitant of the State by which it is incorporated; if that State is divided into more than one district, it is an inhabitant of the district in which its general business is carried on, and in which it has its headquarters and general offices. It cannot be said to be an inhabitant of the other Federal districts, although it may operate a line of railroad through them and maintain therein freight and ticket offices and stations." See also Galveston, H. & S. A. R. Co. v. Gonzales,
before a federal court action should be brought against it exclusively in the district comprising the place of its incorporation, 122 excepting only when the plaintiff is a citizen of another state and sues the foreign corporation on the basis of diversity of citizenship in the district of the plaintiff's residence. 123

This section does not confer jurisdiction upon, nor place restrictions upon the jurisdiction already vested in, the federal courts. It limits the question to one of venue and confers upon the individual litigant the personal privilege of immunity from suit in any federal court other than those designated. 124 Since the protection afforded by this section of the code is a personal privilege, it may be waived, 125 and one of the methods of perfecting such waiver is, of course, by voluntary appearance in the action. 126 Moreover, according to the great weight of authority, a foreign corporation effectively waives the privilege thus conferred upon it by "do-

151 U. S. 496, 14 S. Ct. 401, 38 L. Ed. 248 (1894); Seaboard Rice Mill Co. v. Chicago, R. I. & P. R. Co., 270 U. S. 363, 46 S. Ct. 247, 70 L. Ed. 633 (1926); St. Louis and San Francisco R. Co. v. McBride, 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659 (1891); Re Keasbey & Mattison Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402 (1895); Southern Pacific Co. v. Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942 (1892). But see Sansbury v. Schwartz, 41 F. Supp. 302 at 303 (1941), where the court stated: "It would appear from the terms of the Act in question that such motor carriers are treated as if physically present in each of the States through which they are licensed to operate, and, although they may not have physical property and station agents at all times within each jurisdiction, they are, for the purpose of answering process of the courts of such jurisdiction, legally to be found therein and inhabitants thereof."


123 Rose, op. cit. 247, states: "Where jurisdiction is exclusively based on diverse citizenship a corporation incorporated by one State may be sued in the district of another State in which the plaintiff resides, provided service of process can be secured upon it in the latter district; which is possible when the corporation carries on business therein."


125 Maitland v. C. D. Mallory & Co., 40 F. Supp. 522 (1941). But see also Beneficial Industrial Loan Corp. v. Kline, 41 F. Supp. 854 (1941), where it was held that a defendant's waiver of proper venue which entitled him to be sued in district of his residence does not constitute a "waiver" by codefendant of his right to be sued in district of his residence.

126 Simkins, op. cit. 104. But see Rose, op. cit. 246, that the objection to jurisdiction is not waived by filing a demurrer for the special and single purpose of objecting to the jurisdiction nor by answering to the merits upon that demurrer being overruled.
ing business" in another state,\(^{127}\) though the waiver so accomplished is commonly held to be limited in scope to suits by residents of the state in which it is transacting its business.\(^{128}\)

As a general rule, in the absence of a voluntary appearance by the corporation, several conditions must concur before the federal courts will exercise jurisdiction over a foreign corporation in a state other than that in which it was created. Thus it must appear, as a matter of fact, that the corporation is transacting business in the state or district in which the suit is brought;\(^{129}\) that such business is transacted or managed by some officer or agent appointed by and representing the corporation in the state of suit;\(^{130}\) and it has even been held that it must appear that there is in existence some local law making the foreign corporation amenable to suits in that state as a condition of its permission to do business therein.\(^{131}\) When there is a local statute, the federal courts generally follow such local statute as to the method prescribed.\(^{132}\) However, it has been held that if the corporation is not "doing business" in the foreign state, legal service cannot be had even though the state law might


\(^{130}\) Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711 (1929).

\(^{131}\) Thompson, op. cit. V, 1556 et seq. But see also Simkins, op. cit. 105.

authorize it.133 The problem involving the requisite quantum of "doing business," the sufficiency of the service made, the adequacy of the representative capacity of the agent served, and other like questions are decided by federal courts in the same manner and with similar results as they are decided by state courts.

The exploration, to this point, has covered an investigation of principles applicable to litigation involving causes of action which accrued to the plaintiff by reason of business transacted or damage inflicted within the state. The cases are in conflict on the question of whether or not those same principles apply to suits involving subject matter entirely foreign to the state. As a general rule, whether or not the courts will exercise jurisdiction over suits upon causes of action not growing out of business done within the state, may be resolved only by ascertaining the breadth of the interpretation given by the courts to the state statutes, or by using the doctrine under which the court is deemed to have jurisdiction over the foreign corporation in any event, or by investigating the method, statutory or otherwise, by which the corporation may be brought within the effective operation of such jurisdiction.134

The decisions indicate a tendency to hold that if the cor-

133 Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. Ed. 1122 (1903); Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964 (1898).

134 See cases listed in note 94 ante. Goodrich, op. cit. 174, states: "Whether the jurisdiction extends to suits upon all causes of action or only to those growing out of business done within the state is a question to be determined by ascertaining how broadly the consent given is to be interpreted. The interpretation of the consent given is a matter for the state courts, subject to the limitation, of course, that the interpretation be not unreasonable. In the absence of a construction by the state courts, the federal courts tend to construe the consent narrowly." In 19 Minn. L. Rev. 375 at 396 (1935) appears the statement: "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 Court (Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573, 31 S. Ct. 127, 54 L. Ed. 1155 [1910]) has said that a clause in a statute continuing the authority of the statutory agent . . . 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. In two other cases (Chipman v. Jeffrey Co., 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314 (1920); Mitchell Furniture Co. v. Selden Breck Const. Co., 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201 [1921]) the Supreme 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."
poration itself appoints a corporate service agent the court’s jurisdiction may extend to foreign causes of action;\textsuperscript{135} but, in the absence of such appointment, if the process is served upon an undesignated agent of the corporation, jurisdiction may be exercised only with respect to causes of action arising out of business done in the state.\textsuperscript{136} Such is also the case where the statute provides for service upon a state officer in the absence of appointment of a corporate agent,\textsuperscript{137} though where the corporation has appointed a public official as statutory service agent, suits are permitted upon foreign causes of action so long as such interpretation has some logical basis, the corporation being bound at its peril to abide by any rational construction placed on the statute.\textsuperscript{138}

The scope of valid statutory service may, of course, be enlarged, either expressly or by local judicial construction,


\textsuperscript{136} Goodrich, op. cit. 177, states: “In the Old Wayne and Simon cases the Supreme Court decided that a foreign corporation was liable to suit in a state only upon causes of action arising out of the business there done. Service in both these cases was made upon a public official of the state. In the Tauza case, Mr. Justice Cardozo, then Associate Judge of the New York Court of Appeals, held that a foreign corporation was subject to suit in New York upon a cause of action totally independent of the business carried on there. In that case, however, service was made upon the resident agent of the corporation, and on that the ground the Supreme Court decisions were distinguished.” See also Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 S. Ct. 445, 53 L. Ed. 782 (1909); Henry L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935); Steele v. Western Union Tele. Co., 206 N. C. 220, 173 S. E. 583, 96 A. L. R. 361 (1934).


to embrace foreign causes of action in certain specified instances and in the presence of particular combinations of factual circumstances. Thus the decision of the court may be influenced not only by the capacity and status of the agent served, but also by such factors as whether the defendant owns property within the state or district; whether interstate commerce would be unduly burdened; whether the court itself would be unreasonably burdened; whether the quantum of business transacted by the defendant is construed to be adequate to support such exercise of jurisdiction; whether the cause of action is entirely foreign or in some way related to the business of the corporation within the sphere of the court's potential jurisdiction; whether the defendant is "doing business" in the state or jurisdiction at the moment of suit, and a myriad other pertinent circumstances, immediate or remote in effect.

Another factor of consequence is the residence of the plaintiff. It has been held that, in instances where such suit is not contrary to the laws or the policy of the state of the forum, a non-resident plaintiff may be permitted to maintain an action against the foreign corporation.\(^ {139} \) This circumstance is considered not only in connection with cases involving foreign causes of action,\(^ {140} \) but also in those relating to the burdening of interstate commerce,\(^ {141} \) the with-


drawal of the corporation from the state prior to suit, the quantum of business required, and also the competency of jurisdiction in federal cases. Apparently conflicting decisions are rarely distinguished solely on the basis of the residence or domicile of the plaintiff. Nevertheless, in conjunction with other factual elements, it is frequently revealed as a significant ingredient of the completed judicial opinion.

The foregoing survey, though not completely comprehensive in scope, presents an analysis of the current status of authority sufficiently panoramic in nature to provide a background upon which those problems engendering the greatest conflict may be silhouetted. The possibility of the exercise, by both state and federal courts, of competent jurisdiction over foreign corporations being now firmly established, three major inquiries develop, namely: (1) why may such jurisdiction be exercised? (2) how may it be exercised? and (3) when will it be exercised?

The first inquiry is resolved with ease where the state legislature has enacted an enabling statute expressly providing that foreign corporations shall be subject to the jurisdiction of the state courts. Here again, however, there exist three problems. They are: (1) the inherent constitutionality of the particular statute; (2) whether or not the courts of other states will extend full faith and credit to decisions reached by the courts of the forum; and (3) whether the federal courts, sitting in those states, will follow the procedure stipulated in the statute and elect to take jurisdiction in like manner. These points having been discussed hereinabove, it is not proposed to consider them again at this time.

In the absence of statute, other bases have been employed as foundations upon which to erect the structure of the courts' jurisdiction. These have been enumerated and described somewhat minutely. Recapitulating briefly, they involve:

1. Consent, either express, as by qualification to trans-

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143 See note 83 ante.
144 See notes 121-3 ante.
145 See cases cited in note 140 ante.
act business in the state in accordance with the state statutes, by appointment of a process agent, or otherwise; or implied, as a consequence of some voluntary act on the part of the corporation, such as "entering" the state and "doing business" therein, or, more rarely, acquiring and owning property therein, or some other overt act. Consent could be implied because the state was imbued with the power to exclude foreign corporations entirely from its borders, and hence could impose such terms as were deemed desirable as conditions precedent to its admission, so long as there was no violation of those constitutional rights possessed by corporations in their capacity as persons within the meaning of the due process clauses. If, therefore, the corporation came within the boundaries of the state, it was conceived to have done so with knowledge of and assent to those conditions. The defects of this theory were illustrated by its inapplicability to two situations: first, instances in which the corporation has expressly refused to submit to the exercise of jurisdiction over it; and second, cases involving foreign corporations engaged in interstate commerce, which the state had no power to exclude.

2. Presence, which permits the assumption of jurisdiction over foreign corporations present within the territory over which the courts' power extends. By those same acts, or similar ones, from which the courts had previously deduced a consent to be sued, the courts can now discover the "presence" of the corporation. The two situations which the consent theory fails to meet are thus resolved with ease; but a new hazard confronts the court seeking to exercise jurisdiction over a foreign corporation, which has withdrawn entirely from the state, a difficulty which cannot be reconciled on the basis of any concept of "presence."

3. A coterie of doctrines, promulgated and used rather sporadically and more or less locally, including the theories of waiver, submission to conditions stipulated pursuant to the states' police power, consideration for the privilege of doing business within the state, propriety and convenience, domicile, and others.

4. Doing business, the ascendant doctrine increasingly preponderant with the growth of the industrial era, by which
foreign corporations, transacting a sufficient quantum of business within the sphere of the courts' potential jurisdiction, thereby render themselves amenable to service of process. Each theory has its contemporary proponents, yet there are implicit in each not only qualities of great merit but also characteristics incapacitating it from universal application.

The second inquiry—how may jurisdiction be exercised—involves the protective guaranty of the due process clauses. A corporation, in its anthropomorphic incarnation as the requisite type of "person," is entitled to adequate notice prior to any judicial determination of its legal rights, obligations, and liabilities. It is inherently impossible for process to be served, within territorial boundaries, upon the foreign corporation itself. Therefore some method of substituted service becomes essential. The nature of the method employed is commonly directed by statutes which may be implemented or amplified by judicial interpretation and local custom. Regardless of the presence or absence of such statutes, the composite weight of authority is that the recipient of this necessarily constructive service must be an agent whose capacity in relation to the foreign corporation is sufficiently intimate or representative to warrant the assumption that process served upon such agent would, in all reasonable probability, be transmitted either to the corporation itself or to those representatives thereof who would be charged with the responsibility for maintaining its defense. The process agent so served may be one specifically designated by the corporation for that purpose, being either a state official or one selected solely by virtue of his relation to the corporation; or he may be vested by indirection with authority to receive process, his warrant therefor being derived either from the fact that he is the actual, albeit undesignated, representative of the corporation within the area, or from a statute stipulating that the current incumbent of a particular state office shall be deemed to be such agent. Various ramifications of this subject have been previously indicated.

The third inquiry—when will such jurisdiction be exercised—involves use of the standard of "reasonableness." Of
such apparent consequence to the result of judicial determination is this standard, that increasing attention is being paid to it. Among those according recognition thereto is Judge Cochran of the District Court for the Eastern District of Kentucky, who, in 1922, incorporated into his opinion, in the case of Farmers' & Merchants' Bank v. Federal Reserve Bank, a remarkable treatise upon the subject of jurisdiction over foreign corporations. He arrived at the conclusion that the existence of jurisdiction in a case of this kind depends upon whether, in view of the ultimate facts thereof, the existence of jurisdiction would be reasonable. He also stated: “If its exercise would be reasonable, jurisdiction exists. If, on the other hand, it would not, jurisdiction does not exist.” He would limit the potential bases of jurisdiction over foreign corporations to this one factor. It is submitted, however, that the adoption of this standard as the actual foundation of jurisdiction and making it the criterion for determining whether or not the court may hear and decide a case, does not permit the establishment of adequate safeguards for arriving at that determination in the first instance. It is hardly competent to decide the initial jurisdictional question upon the basis of the result which will ensue after full hearing of the particular case. Furthermore, he would identify the third major inquiry with the first. The two are fundamentally distinct and should not be confused.

Just as the reasons for exercising jurisdiction over natural persons are varied, so, also, may there be several bases for acquiring jurisdiction over foreign corporations,

146 Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602 at 617, 19 S. Ct. 308, 43 L. Ed. 569 at 574 (1899), states: “If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient.” See also Stumberg, op. cit. 86, and articles in 79 U. of Pa. L. Rev. 566 (1931); 43 Harv. L. Rev. 1217 (1930); 24 Mich. L. Rev. 633 (1926); and 17 Bost. U. L. Rev. 639 (1937).

147 286 F. 566 (1922).

148 286 F. 566 at 588.

149 Haffer, in 17 Bost. U. L. Rev. 639 at 668 (1937), states: “The only hope for, and indication of a changing basis of jurisdiction, where convenience and justice may serve as a primary jural incentive for exercising jurisdiction rest strangely enough not in cases of service on foreign corporations but in recent cases dealing with service on individuals. The recent cases of Hess v. Pawloski, and Doherty & Co. v. Goodman indicate this trend.”
any one of which may be valid, depending upon the factual situations existing in each case. For example, in the case of Old Wayne Mutual Life Association v. McDonough,\textsuperscript{150} the court refused to entertain jurisdiction on the basis that due process had been violated because: (1) process had been served upon a state official without the actual consent by the corporation to be so notified; (2) there was no provision in the statute requiring such state official to notify the corporation of the litigation pending against it; and (3) the cause of action arose outside the state of suit. Although presumably the original court could, and did, acquire jurisdiction over the defendant corporation, nevertheless its decision was not granted full faith and credit because it was construed to be a violation of defendant’s constitutional rights and “unreasonable” for the original court to exercise its jurisdiction. Despite this, other decisions have approved similar service on a state official,\textsuperscript{151} have approved statutes similarly silent on the question of notice,\textsuperscript{152} and have permitted cases involving subject matter foreign to the state of suit.\textsuperscript{153} In those cases there was no question of the acquisition by the court of jurisdiction over the defendant. Various concepts were adopted as vesting the court with jurisdiction in the several cases. The distinction was drawn at the point of determining whether or not to exercise the jurisdiction unequivocally possessed in the first instance.\textsuperscript{154}

\textsuperscript{150} 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345 (1907).
\textsuperscript{154} Foster, in 43 Harv. L. Rev. 1217 at 1229, states: “Once a defendant is sub-
From this consideration of the constitutional limitations imposed by the due process clauses as they relate to the service of process in suits against foreign corporations it is concluded:

(1) That the assumption of jurisdiction over such foreign corporations may be justified upon any one or more of the several bases indicated, depending upon the circumstances present in each case. The courts are not and should not be restricted to any one basis exclusive of all others.

(2) The foreign corporation may be brought within the effective operation of such jurisdiction by substituted service, in the state of suit, upon an agent, either actual or statutory, provided that either the corporation has expressly consented to be served in that manner, or the agent is so representative in character that it is reasonable to assume that notice will be communicated to the corporation. These methods are not arbitrarily exclusive, but other reasonable means may be employed, so long as due process requirements are not violated.

(3) That jurisdiction, once acquired, will be exercised only when it is reasonable to do so, i.e. when it is not unreasonable in the sense that it is violative of due process. There is, then, an additional line of investigation to be pursued before the final determination is achieved, assuming that the court has competent jurisdiction and that the method of serving process on the corporation was constitutional, namely: whether or not the court should elect to exercise its jurisdiction over the particular action then before it. It is at this point that the question of reasonableness becomes pertinent and decisive.

(4) The concepts concerning the bases for acquiring jurisdiction have increased in number and will doubtless continue to do so. The methods by which foreign corpora-

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[155] In Hunau v. Northern Region Supply Corporation, 262 F. 181 at 182 (1920), the court said: "The theory upon which rests the right to sue a foreign corporation is in flux, and much may depend in the end upon what view becomes dominant."
tions are rendered amenable to suit are numerous, as has been demonstrated, and, on the basis of past experience, clearly other means will arise by statutory enactment and judicial decision. As has been said: "Due process of law, like equity, is capable of infinite expansion."¹⁵⁶

¹⁵⁶ Dimock, op. cit. 183.