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PROCEDURAL SANCTIONS FOR NON-REGISTRATION OF FOREIGN CORPORATIONS: AN ANALYSIS OF THEIR APPLICATION TO NEGOTIABLE INSTRUMENTS

B issues a negotiable instrument to A. The instrument is transferred to C, an unregistered foreign corporation, and then to Z, who seeks recovery against B. The effect of the typical foreign corporation registration statute is to require Z to prove that he is a holder in due course or possibly to lose on a defense totally unrelated to the original transaction on which the instrument was based.

Since the last quarter of the nineteenth century, a primary sanction for non-registration of foreign corporations has been the imposition of a procedural disability which denies a corporation the right to sue in the courts of the state whose law it has so offended.¹ Despite criticism,² a majority of states³ has retained the procedural disability, and it has been recommended for future legislation by the Model Business Corporation Act.⁴ In contrast the operative characteristics of the Uniform Commercial Code articles governing negotiable instruments remove impediments to transfer, in large part by giving the holder of an instrument procedural advantages.⁵

A significant conflict between these two statutes demands examina-

1. *E.g.*, N.Y. BUS. CORP. L. § 1312 (McKinney 1963 Repl.). A few states make the contracts void; *e.g.*, ARK. STAT. ANN. § 64-1202 (1966 Repl.). Under the rule of *David Lupton & Sons Co. v. Auto. Club*, 225 U.S. 489 (1912), these statutes were not enforced in the federal courts. After *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Woods v. Interstate Realty*, 337 U.S. 535 (1949), the converse of this rule was held to govern.

2. See Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C. L. REV. 1, 733 (1969) [hereinafter Walker]; Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 IND. L.J. 358 (1958); but see, Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COL. L. REV. 117 (1963).

3. Kansas provides no sanction: KAN. GEN. STAT. ANN. § 17-501 (1963). Five jurisdictions impose only a fine: DEL. CODE ANN. tit. 8 § 378 (Supp. 1968); GA. CODE ANN. § 22-1506 (1964); KY. REV. STAT. § 271.990 (1962); P.R. LAWS ANN. tit. 14 § 2406 (1962); TENN. CODE ANN. § 48-1106 (1964 Repl.). ARK. STAT. ANN. § 64-1202 (1966 Repl.) makes a contract in violation void.

4. MODEL BUS. CORP. ACT § 117:

No foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority. Nor shall any action, suit or proceeding be maintained in any court of this State by any successor or assignee of such corporation . . . arising out of the transaction of business by such corporation. . . .

5. See UNIFORM COMMERCIAL CODE § 3-307.

tion, particularly since the contemporary justification for registration is itself subject to serious question.⁶

THE DISABILITY TO SUE AND NEGOTIABLE INSTRUMENTS

The foreign corporation's disability to sue extends to any ". . . action, suit or proceeding in any court" No statutory language exempts suits on negotiable instruments from the class of barred actions;⁸ and the courts have held uniformly that the disability extends to suits on negotiable instruments.⁹ The Uniform Commercial Code does not deal specifically with this problem. Section 3-305(2)(b), which deals with incapacity and illegality as real defenses, is accompanied by official comments indicating that this sort of question is to be left to local law.¹⁰

The incapacity and illegality referred to in section 3-305(2)(b) go to the validity of a contract itself, not to the right of a party to demand enforcement. The importance of this distinction in the registration context may be illustrated by comparing the fate of a contract under the Arkansas and Indiana foreign corporation registration statutes.¹¹ In *Pacific National Bank v. Herbreich*,¹² an Arkansas case, notes were made payable to an unregistered foreign corporation pursuant to a sale of jewelry. The note was held to be void and unenforceable even by one not in violation of the registration statute:

The effect of this [statute] is to render a transaction of this kind not merely unenforceable but void ab initio. Accordingly there can be no holder in due course here of a negotiable instrument arising out of this illegal transaction.¹³

In Arkansas the sanction for non-registration goes to the validity of the contract itself. Indiana's foreign corporation registration statute, however, goes not to the contract's validity but to the right of an aggrieved party to enter the courtroom:

6. Walker, note 2 *supra*, launched a massive attack on the registration requirement, suggested that none of the traditional justifications for registration retain any validity and concluded that all such statutes should be abandoned. See also Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 IND. L.J. 358 (1958).

7. MODEL BUSINESS CORPORATION ACT § 117.

8. Texas, however, specifically excludes holders in due course from the penalty. TEX. BUS. CORP. ACT art. 8.18 (1956).

9. *E.g.*, Allison Hill Trust Co. v. Sarandrea, 236 App. Div. 189, 258 N.Y.S. 299 (1932), *aff'd* 134 Misc. 566, 236 N.Y.S. 265 (Sup. Ct. 1929) (dealing with a bill of exchange).

10. UNIFORM COMMERCIAL CODE § 3-305, Comment 5.

11. ARK. STAT. ANN. § 64-1202 (1966 Repl.); IND. ANN. STAT. § 25-314 (Burns 1960 Repl.).

12. 240 Ark. 114, 398 S.W.2d 221 (1966).

13. *Id.* at 118, 398 S.W.2d at 223.

The penalty provision closing Indiana courts to foreign corporations violating the qualification provisions is easily avoided. It has been held repeatedly that even though the plaintiff foreign corporation violated the registration provisions in the very transaction upon which it sues, the penalty provided in Section 25-314 will not apply so as to prevent suit if the certificate of admission is secured prior to commencement of the action.¹⁴

As is the case in a majority of jurisdictions,¹⁵ Indiana's penalty for non-registration goes to enforceability, not to validity of the contract itself; and so it is not "... such ... illegality ... as renders the obligation of a party a nullity ..."¹⁶

Section 3-306 provides that those who do not have the rights of a holder in due course are subject to all defenses available on a "simple contract." The broad inclusiveness of this section's language would indicate that the disability to sue should be treated no differently than any other defense in contract. Even if the disability to sue is not a "defense," strictly construed, the same result is indicated, since the Code is generally all-inclusive in its acceptance of those limitations placed on contract rights by other areas of the law when applied to holders not in due course. The drafters of the Code indicated on this point that :

It is obvious we cannot hope to affect the gaming or usury statutes [of the states], to say nothing of all the others, and again their effect must be left to local law.¹⁷

It is apparent, then, that the non-registration of a foreign corporation is a real defense only in such states as Arkansas where the contract is void and that non-registration may constitute a defense against a holder without the rights of a holder in due course. The significance of each of these points lies, in part, in their cumulative effect. The problems raised by non-registration are resolved only in a general fashion, such as the distinction between real defenses and those on a simple contract, and, therefore, any further analysis must proceed without explicit guidance by the Code.

Under case law, the unregistered foreign corporation which holds a negotiable instrument cannot sue to enforce it,¹⁸ even if the maker knew

14. *Green v. Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117, 132 (S.D. Ind. 1962).

15. See note 3 *supra*.

16. UNIFORM COMMERCIAL CODE § 3-305(2) (b).

17. UNIFORM COMMERCIAL CODE (Tentative Draft 2, Art. III), Notes and Comments § 48 (1947).

18. See W. FLETCHER, 17 CORPORATIONS § 8536 (perm. ed. 1960). The finance company whose only business is the collection of debt is not doing business and is, ap-

that he was dealing with an unregistered corporation.¹⁹

In a majority²⁰ of jurisdictions the unregistered corporation's disability to sue extends to its assignees. A provision to this effect has been adopted by the Model Business Corporation Act.²¹ Extension of the disability to assignees is necessary to prevent avoidance of the statutes by the simple expedient of transferring the corporation's rights to another corporation or person who could bring suit. The assignor corporation, having received value for the rights, would, if not subject to the disability, suffer no economic detriment. Since the assigned contract could be enforced, the assignee would have no reason to compel his assignor to register.²²

The registration statutes which extend the disability to sue to assignees do not provide a specific exemption for the transferee of a negotiable instrument.²³ Nor does the case law construing such language provide an exemption for the transferee of a negotiable instrument. Section 3-306, by allowing all defenses available on a simple contract, makes it clear that, as to the basic effect of such defenses, the holder is in no radically different position than any other assignee. The special status of the holder and holder in due course stems not from any basic difference in characterization but from advantages given in factual situations which are specifically delineated, such as on the question of notice; and of course the holder has certain advantages in the burden of proof.

The literal application of this rationale would extend the disability to sue to all assignees, regardless of their character, and regardless of the preferences and advantages accorded to the holder and holder in due course by the Uniform Commercial Code. This radical extension has not been made. In dealing with three types of transferees—holders with notice, holders without notice but not in due course and holders in due course—the courts have sought to protect the advantages given by the

parently, therefore not subject to the disability to sue. *Central Bergin Supply Co. v. V.L. Consiglio Inc.*, 35 Misc. 2d 146, 230 N.Y.S. 2d 84 (Sup. Ct. 1961); MODEL BUSINESS CORPORATION ACT § 99(h).

19. *E.g.*, *Wisconsin Trust Co. v. Munday*, 168 Wis. 31, 168 N.W. 393 (1918); *but cf.* *Pancoast v. Travelers Co.*, 79 Ind. 172 (1881).

20. Those jurisdictions which *explicitly* limit assignee rights are: ALA. CODE tit. 10 § 21 (89) (1967 Supp.); MD. ANN. CODE art. 23 § 91, 93 (Supp. 1968); N.C. GEN. STAT. § 55-144 (1965 Repl.); N.Y. BUS. CORP. L. § 1312 (McKinney 1963); R.I. GEN. LAWS ANN. § 7-2-28 (1956); S.D. COMP. L. § 47-8-30 (1967); WIS. STAT. ANN. § 180.847 (Supp. 1969), in addition to Model Business Corporation Act jurisdictions.

21. MODEL BUSINESS CORPORATION ACT § 117.

22. *Lewis v. Club Realty Co.* 264 Mass. 588, 163 N.E. 172, 173 (1928), *construing* MASS. ANN. LAWS ch. 181, § 5 (1969), reaches the same result without an explicit statutory limitation of assignee rights.

23. *E.g.*, MODEL BUSINESS CORPORATION ACT § 117. The only exception is Texas, which excludes holders in due course; TEX. BUS. CORP. ACT art. 8.18 (1956).

law of negotiable instruments. In each case there is a different degree of success.

To prevent its avoidance, the procedural disability has been held to extend to the holder of a negotiable instrument with notice that it is the transferee of an unregistered foreign corporation.²⁴ Thus in *Southern Discount Co. v. Rose*,²⁵ the directors and officers of a corporation which had not complied with the appropriate registration statute organized a second corporation which was not subject to the disability to sue. This second corporation then took a negotiable instrument for collection from the first corporation. The court imputed the knowledge of the first company to the second and, having found notice, denied recovery for non-compliance with the registration statute.

In the case of a holder who is without notice of non-registration but does not hold in due course, there is a potential conflict between pre-Code cases and the current law. Case law does not raise this point explicitly. In *Williams v. Cheney*²⁶ an insurance company had not registered to do business in Massachusetts; accordingly, its contracts were subject to a disability to sue. In resolving the question of against whom this defense would be good, the court noted:

But it is equally clear and well settled that, if the consideration of a negotiable security is against the law, yet the security cannot be avoided on that account in the hands of a *bona fide* holder, who is not privy to the illegality of the consideration.²⁷

Assuming that good faith as used in this case is not an element totally distinct from notice of illegality, the question to be asked is the existence of notice. Similarly, in *Alliston Hill Trust Co. v. Sarandrea*,²⁸ it was held that a holder in due course could not be defeated by the non-registration of his transferor; however the court said the defense would be available against all assignees ". . . except as to negotiable paper taken in good

24. *E.g.*, *Hussey v. Rappaport*, 127 F. Supp. 144 (D.C. Minn. 1954). The *literal* language of Uniform Commercial Code § 3-304(5) suggests that the failure of a corporation to register with the appropriate secretary of state would not of itself constitute notice and thereby open an assignee to the non-registration defense: "The filing or recording of a document does not of itself constitute notice within the provisions of the Article to a person who would otherwise be a holder in due course."

The definition of notice in § 1-201(25)(c) (where from all the facts or circumstances one should have knowledge) might deal with the problem of the discount operation which consistently takes negotiable instruments from an unregistered corporation. Perhaps mere knowledge of continuous operation in one state should lead the discount company to investigate the matter.

25. 290 S.W. 861 (Tex. Civ. App. 1927), *rev'd on other grounds*, 296 S.W. 482 (Tex. 1927).

26. 69 Mass. (3 Gray) 215 (1855).

27. *Id.* at 222.

28. 236 App. Div. 189, 258 N.Y.S. 299 (1932).

faith from the corporation. . . ."²⁹ The focus of the test is not holder in due course status but the good faith of the holder. Authority on this point³⁰ dates back to Kyd's *Bills of Exchange* :

Where the original transaction, however, is not morally bad, its illegality arising only from its being prohibited by a positive statute, everything done in consequence of the prohibited act, will not of *course* be considered as void.³¹

However questionable analysis suggesting *malum in se* distinctions may be, Kyd and the pre-Code case law are consistent in their minimization of the effect of this type of sanction—the disability to sue—in the negotiable instruments context.

A contrary position, however, as to holders without notice of non-registration but not holders in due course may be based on the Code :

Unless he has the rights of a holder in due course any person takes the instrument subject to . . . (b) all defenses of any party which would be available in an action on a simple contract.³²

No reported case has specifically considered this Code provision in reference to the procedural disability for non-registration.³³ The disability is not a complete defense but only a procedural impediment which is removed if the corporation registers.³⁴ But the Code provision does indicate that a holder was not intended to be in a better position than the transferor as to the defenses assertable against him. The policy of the Code may not be violated by allowing the assertion of the procedural disability against the transferee-holder.

The position of the case law has considerable strength. Imposing the disability on holders without notice serves little function. Not having notice of non-registration, they will have no reason not to deal with the corporation. An innocent party is penalized while the corporation remains whole. Criticism should not be directed at the law of negotiable instruments, since it only mirrors in this matter the registration statute.³⁵ It is the procedural disability which needs to be clarified with respect to

29. *Id.* at 192, 258 N.Y.S. at 303.

30. See *Ayer v. Hutchins*, 4 Mass. (4 Tyng) 370 (1808); *Williams v. Cheney*, 69 Mass. (3 Gray) 215 (1855); *Halsey v. Henry Jewett Dramatic Co.*, 190 N.Y. 231, 83 N.E. 25 (1907); *Allison Hill Trust Co. v. Sarandrea*, 236 App. Div. 189, 258 N.Y.S. 299 (1932).

31. S. KYD, *Bills of Exchange* 277 (1808).

32. UNIFORM COMMERCIAL CODE § 3-306.

33. Cases in this area are quite dated; *e.g.*, *Zick v. Dick*, 1 Ind. App. 269, 27 N.E. 622 (1891).

34. *E.g.*, N.J. REV. STAT. § 14:15-4 (1939).

35. See text accompanying note 16 *supra*. It might be argued that the Code should mirror not only the statute but case law as well.

all assignees without notice.

The argument which would exempt assignees without notice because of lack of deterrent effect applies with equal force to the holder in due course. Further, to protect transferability, the law favors the holder in due course by limiting the defenses available against him and according him certain procedural advantages. The contrary position, that holders in due course should not be free of the disability to sue, was argued and rejected in *Allison Hill Trust Co. v. Sarandrea*,³⁶ where the court dealt with a statute specifically extending the disabilities imposed on foreign corporations to "assignees."³⁷ It was held that to extend this sanction to holders in due course was so drastic a disability that it would be followed only at the express command of the legislature.³⁸ Any other result would ". . . embarrass the business operation . . ." ³⁹ of those who need to discount their obligations by negotiation. This is the result reached in the great majority of cases.⁴⁰ Texas is the only state with a statutory exemption of holders in due course from the disability.⁴¹

Those jurisdictions which apply the disability to assignees without notice do so on the ground that their registration statutes make the contracts of non-complying corporations void *ab initio*,⁴² which, as noted above would make non-registration a real defense. However, it should be noted that when the legislature of Missouri modified its registration statute so that such contracts were not explicitly made void,⁴³ the courts of that state were not at all reluctant to remove the disability placed on the holder in due course.⁴⁴

The Uniform Commercial Code may dictate the same result. To the extent that a holder is a holder in due course, he takes the instrument free from ". . . (2) all defenses of any party to the instrument with whom the holder has not dealt. . . ." ⁴⁵ Under this provision, if the procedural disability is the sort of defense referred to, it is not applicable to the holder in due course. Or, if the disability is not a "defense," the Code has expressed its policy to free this type of holder from most infirmities and impediments to recovery by its explicit and limited treatment of real

36. 236 App. Div. 189, 258 N.Y.S. 299 (1932).

37. N.Y. Laws of 1923, c. 787 (Stock Corp. L. § 110).

38. See 258 N.Y.S. at 302, citing *Vallett v. Parker*, 6 Wend. 615, 622 (Sup. Ct. N.Y. 1831).

39. *Id.*

40. *E.g.*, *Credit Industrial Co. v. Happel, Inc.*, 252 Iowa 213, 106 N.W.2d 667 (1960).

41. See note 8 *supra*.

42. See note 14 *supra*.

43. Mo. Rev. Stat. § 1026 (1899), now Mo. ANN. STAT. 351:635 (1966).

44. *Salitan v. Carter, Taley & Dinwiddie*, 332 S.W.2d 11 (Mo. App. 1960).

45. UNIFORM COMMERCIAL CODE § 3-305.

defenses in section 3-305. As noted above, non-registration is not a real defense under section 3-305(2)(b), since illegality must be such as would render “. . . the obligation a nullity. . . .”⁴⁶

But the case law analysis which considers the applicability of the non-registration procedural disability in terms of the character of the holder is not adequate. Initially, in litigation, the question does not arise in those terms. The Code sets out the order of pleading and proof for recovery as follows:

After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.⁴⁷

It is only after a defense has been established, “. . . not only in the first instance but by a preponderance of the total evidence. . . .”⁴⁸ that the holder must come forward to show a taking in due course. This is the procedural advantage given by the Code to holders in order to promote negotiability.

Under section 3-307 matters pertaining to the order and burden of proof in the trial itself are spelled out in some detail. However the section may not fit the case where an infirmity is imposed for the non-registration of a foreign corporation. As a jurisdictional matter, the issue is raised by a plea in abatement.⁴⁹ It is a preliminary question of standing that arises outside of the Code provisions for order of proof in the trial on the merits. If it is readily apparent to the court that there has not been compliance with the registration statute, specific facts need not be alleged;⁵⁰ however the burden is on the defendant, and he normally must aver specific facts of non-compliance, not a conclusory allegation.⁵¹ The plaintiff, in order to proceed with the suit, must either disprove the fact averred or except himself from the penalty. The plaintiff must prove that he is a holder in due course or show that the transferor was not required to register. Allowing the non-registration defense to force proof of due course status

46. *Id.* 2 (b).

47. *Id.* § 3-307. See generally Bigham, *Presumptions and Burdens of Proof and the U.C.C.*, 21 VAND. L. REV. 177 (1968).

48. UNIFORM COMMERCIAL CODE § 3-307, Comment (2).

49. Alligator Oil Clothing Co. v. Baseel, 117 Ore. 527, 244 P. 661 (1926). It is agreed that this is a preliminary matter, although some cases have held that the proper procedure is a plea in bar. H. H. King Flour Mills Co. v. Bay City Baking Co., 240 Mich. 79, 214 N.W. 973 (1927). Indiana has required a plea in abatement. Warren Co. v. Exodus, 114 Ind. App. 563, 53 N.E.2d 546 (1944).

50. Mapel Motor Co. v. Beales, 110 N.Y.S.2d 623, 624 (County Ct. 1951).

51. Hamshire Silver Co. v. Hill, 244 S.W.2d 520, 522 (Tex. Civ. App. 1951); Proctor and Gamble Co. v. King County, 9 Wash. 2d 655, 115 P.2d 962 (1941).

is significant, since the question can be raised with such ease. Even if the defendant must go beyond averring the facts, to establish his defense all he need do is to find one endorser who should have, but has not, registered as a foreign corporation; this could probably be accomplished by a brief telephone call to the appropriate secretary of state's office.

Aside from the change in order itself, this observation raises several collateral issues. Since the Code has not dealt explicitly with preliminary matters, do the comments to section 3-307,⁵² which require a heavy burden to be upheld by the person asserting a defense, apply? Resolution of the matter may vary, in contrast to the Code's attempt at unification, from state to state with the requirements of a plea in abatement, or with general local law on preliminary matters.⁵³

HISTORIC AND CONTEMPORARY JUSTIFICATION FOR THE DISABILITY

The territorial-power concept of jurisdiction, as expressed in *Pennoyer v. Neff*,⁵⁴ provided an impetus for requiring the registration of foreign corporations. A state had jurisdiction only to the extent a corporation was "present" or consented to that jurisdiction.

The New York Civil Procedure Code of 1877, provided that service of process might be brought upon a ". . . cashier, a director, or a managing agent of the corporation *within the state*."⁵⁵ But an Indiana corporation in New York could simply withdraw its agents from New York and thereby present an almost insurmountable procedural obstacle—service of process. The remedies of litigants against foreign corporations were thwarted too easily.

As corporations increasingly became involved in multistate transactions, states began to search for devices to obtain jurisdiction over them and thereby protect the interests of their own residents as plaintiffs. To deal with the problem, legislatures required the registration of foreign corporations and designation of an agent to receive process. In effect, the foreign corporation was coerced into "consenting" to the state's

52. UNIFORM COMMERCIAL CODE § 3-307, Comment 3.

53. It is interesting to note that § 3-307 was written to overcome a similar problem in the Uniform Negotiable Instruments Law § 59. See Bigham, note 47 *supra*.

54. 95 U.S. 714, 720 (1877), *citing* D'Arcy v. Ketchum 52 U.S. (11 How.) 165 (1850):

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed assumption of power and be resisted as mere abuse.

55. N.Y. Civil Procedure Code of 1877 c. 32 at 108. At one point the problem was further compounded by the question of whether it was possible to bring service of process on a corporation's agent outside of that state which had given the corporation its legal existence. *Barnett v. Chicago and Lake Huron R.R. Co.*, 4 Hun. 114, 6 N.Y. Sup. Ct. (T.&C.) 358 (1875), *construing* N.Y. Civil Procedure Code of 1855 § 134.

jurisdiction.⁵⁶

The states uniformly imposed some sanction on the foreign corporation which failed to register. Pennsylvania went so far as to provide a criminal penalty.⁵⁷ The more usual penalty was the disability to sue.⁵⁸

Contemporary penalties vary in detail,⁵⁹ but as a basis most statutes provide the "no access to the court" procedural disability. Some variety remains, however. In Arkansas the contracts of an unregistered foreign corporation are "void *ab initio*."⁶⁰ Indiana provides a fine which may range as high as 10,000 dollars,⁶¹ although most monetary sanctions are 1,000 dollars or less.⁶²

When jurisdiction was limited by the territorial power concept, registration was defensible.⁶³ In *International Shoe Co. v. Washington*,⁶⁴ however, the Supreme Court held that the state of Washington could serve a corporation which had operated with a number of agents in the state with process outside the state. Moreover, *McGee v. International Life Insurance Co.*⁶⁵ held a single transaction to be sufficient ground on which to base service of process. The legislatures took advantage of this opportunity by passing long-arm statutes which make a single contract

56. The enactment of these statutes ranged over a considerable period of time. It is interesting to note that the statutes operated quite independently of any state policy to attract corporations, or perhaps on account of that same policy. In Delaware, response to the problem went so far as an article in the constitution of 1897: "No foreign corporation shall do any business in this state, without having an authorized agent . . . upon whom legal process may be served." DEL. CONST. art. 9 § 5 (1897).

57. Pa. Gen. State. no. 33 at 108 (1874) (thirty days imprisonment and a fine up to \$1,000).

58. For a discussion of the types of contractual penalties in force at the beginning of the twentieth century, see *Model Heating Co. v. Majority*, 25 Del. 459, 467, 81 A. 394, 397 (1911) (void, inability to sue, inability to sue until registration). The various jurisdictions also used (and continue to use) retaliatory statutes which place the same liabilities on a foreign corporation as applied to foreign corporations in its home state; e.g. *Comm'r of Ins. v. Equity Gen. Ins. Co.*, 346 Mass. 233, 191 N.E.2d 139 (1963), construing MASS. STAT. ANN. c. 175 § 159 (1959).

59. See 1 P-H CORPORATE SERVICE ¶ 958; 1 CCH CORP. L. GUIDE ¶ 1061. In Hawaii, Wisconsin and Nevada there is a disability to defend as well as to sue. HAWAII REV. STAT. § 418-10 (1969); WIS. STAT. ANN. § 180.847 (Rev. 1969); NEV. REV. STAT. § 80.210 (1967).

60. *Pac. Nat'l Bank v. Hernreich*, 240 Ark. 114, 398 S.W.2d 221 (1966), construing ARK. STAT. ANN. § 64-1202 (1966 Repl.).

61. IND. ANN. STAT. § 25-314 (Burns 1960 Repl.).

62. E.g., ARK. STAT. ANN. 64-1205 (1966 Repl.); MD. ANN. CODE art. 23 § 93 (1966). There is no evidence, in reported cases, that these fines are enforced actively. Lack of enforcement was also indicated in a survey taken in connection with Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COL. L. REV. 117 (1963).

63. E.g., *Pennoyer v. Neff*, 95 U.S. 714 (1877).

64. 326 U.S. 310 (1945).

65. 355 U.S. 220 (1957).

made or performed the basis for jurisdiction.⁶⁶ The bite of *Pennoyer v. Neff*⁶⁷ was gone.

W. Walker, in his article *Foreign Corporation Laws: The Loss of Reason*,⁶⁸ has based a broadside attack on the registration statutes on the advent of long-arm jurisdiction.⁶⁹ Walker rightly points out that the statutes were passed originally to protect litigants who sought service of process against foreign corporations. The need for such protection is dismissed after an examination of *International Shoe Co. v. Washington*⁷⁰ and the law which followed that decision. Enforcement of tax laws against the foreign corporations is not found to be benefitted, since the same or more effective results could be achieved by direct action of the taxing authority.⁷¹ Further there is a positive economic detriment in the requirement of registration.⁷² The only groups which benefit from the statutes seem to be attorneys and such organizations as the Corporation Trust Co.⁷³ The arguments for immediate repeal of the registration statutes are strong but not conclusive.

If an agent is designated by the registered foreign corporation to receive process, service is effected upon presentation of the papers. In contrast, the statutes based on *International Shoe Co. v. Washington*⁷⁴ may depend for their effectiveness on the efficiency of the secretary of state's office. Suppose a restraining order is sought against the corpora-

66. IOWA CODE ANN. § 617.3 (Supp. 1969), construed in Cedar Rapids Community School Dist. v. R. F. Ball Const. Co., 237 F. Supp. 965 (N.D. Iowa 1965).

However, in analyzing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957), it is not a simple matter to say that a lower quantum of activity is required for long-arm jurisdiction than for registration and that the registration statutes are, therefore, anachronistic. States may have the option of setting the registration quantum differently; cf. *Worcester Felt Pad Corp. v. Tucson Airport Authority*, 233 F.2d 44 (9th Cir. 1956). Compare S.D. COMP. L. § 47-8-30 (1967), where the transaction of "any business" necessitates registration, and S.D. CODE § 11.2002 (1939), where registration is required only if corporations "hold property."

Further, the contention that enactment of a long-arm statute impliedly repeals a registration statute by lowering the quantum of business required was rejected in *Walrus Mfg. Co. v. New Amsterdam Cas. Co.*, 184 F. Supp. 214 (S.D. Ill. 1960).

67. 95 U.S. 714 (1877).

68. Walker, note 2 *supra*.

69. The reason for foreign corporation laws has ceased. The troublesome panoply of applications for admission, charter copies, designated agents, contract defaults and the rest is now only a relic. . . . The error is nationwide.

Id. at 1.

70. 326 U.S. 310 (1945).

71. Walker, 743-46. The author also criticizes the use of registration as a tax device on the grounds that less contact is required constitutionally to tax than to require registration, citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (income tax) and *Miller Bros. v. Maryland*, 347 U.S. 340 (1954) (sales tax). *Id.* at 746.

72. *Id.* at 753-60.

73. *Id.* at 757.

74. 326 U.S. 310 (1945).

tion to prevent a "grave and immediate harm." Service of process can be achieved under either statute, but one depends for its efficiency on the operations of a governmental office, the other on finding a registered agent. Although it is only of occasional importance, the difference may be critical to a litigant who is presently being damaged and seeks immediate relief. In New York, service of process through the secretary of state's office may take up to thirty days.⁷⁵ And even after proof of service is filed with the clerk of the appropriate court there is a ten-day waiting period before the service of process is deemed effective.⁷⁶

Even if the Uniform Interstate and International Procedure Act,⁷⁷ relied upon by Walker as a paradigm, is in force in a particular jurisdiction, benefits remain in the registration of foreign corporation. Before service of process can take place to acquire *in personam* jurisdiction, the litigant must have some idea of whom he is going to serve. The litigant may not be seeking to find a large nationally-known corporation but a corporation about whom little is known within the litigant's own jurisdiction. Registration of the foreign corporation would provide a known agent for service of process.

Under the logic of *McGee v. International Life Insurance Co.*,⁷⁸ the connection required between a foreign corporation and the jurisdiction involved is greatly reduced. But the question is not foreclosed. However spuriously, the corporation may contest the fact that any connection existed between it and the state. The application of the long-arm statute itself may be challenged on due process grounds. These questions in almost all cases may be decided adversely to the corporation; but for the weak litigant the questions themselves may spell disaster. On the other hand, if an agent is designated to receive process, the corporation hardly can deny its existence in the state. Here the question is foreclosed by the corporation's own act. However, a greater showing of activity might be required for registration than for long-arm jurisdiction.⁷⁹

If the retention of registration can be justified on service of process grounds, there should be little objection to the implementation of other state policies through the device of registration.

"It is as important to a state to provide for the suability, the proper conduct and solvency of foreign corporations in the state as of domestic

75. N.Y. BUS. CORP. L. § 307 (McKinney 1969 Supp.).

76. *Id.*

77. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, 9B U.L.A. 307 (1966).

78. 355 U.S. 220 (1957).

79. See note 66 *supra*.

ones."⁸⁰ The regulations of the state will of course vary with its policies. There may be a requirement that books of the foreign corporation be made available to qualified persons.⁸¹ The practical importance of this sort of regulation was demonstrated *In re Jewish Consumptives' Relief Society*.⁸² There a Colorado corporation had been organized to operate a hospital in New York state. Pursuant to the registration law of New York, the corporation had filed a statement of its purposes.⁸³ Later the corporation wished to amend the provision by application to the New York courts. This action brought the attention and then intervention of the Attorney General, who objected on the grounds that the corporation was in financial difficulty in Colorado. To regulate a foreign corporation, the state must know that it is in the state and the nature of its operations. This knowledge is provided by registration and the information filed with registration.

There is, however, no unique value in the procedural disability as a sanction for non-registration. Even when service of process was a burning issue, the disability was a windfall to parties adverse to the corporation. In an action brought by the corporation, it had already subjected itself to the jurisdiction of the state for that litigation. It is apparent that the disability to sue is not of necessity tied to the need for the designation of an agent for service of process.

Elimination of the procedural disability would avoid a conflict with procedural devices in the Code which encourage transferability. An alternative to the disability to sue might be the fine, which would have the additional advantage of paying for its own administration.⁸⁴

The state may not know, however, just which corporations are violating its registration statutes. A state might solve this problem by employing the procedural disability. A private party, adverse to the corporation, could be depended upon to exercise his own rights at no cost to the state and with an immediate loss to the corporation. Further,

80. G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTION LAW* (1918). Though tangential to the scope of this paper it should be noted that there are continuing constitutional problems in the area of local regulation of foreign corporations. For the kinds of questions which may be raised see, Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 *VAND. L. REV.* 433 (1968).

81. *McCormack v. Statler Hotels Delaware Corp.*, 55 Ill. App. 2d 21, 203 N.E.2d 697 (1964).

82. *In re Jewish Consumptives' Relief Society*, 196 Misc. 579, 92 N.Y.S. 2d 673 (1949). While this was a charitable corporation, the provisions of N.Y. GEN. CORP. L. § 210 (McKinney 1943) are comparable to N.Y. BUS. CORP. L. § 1312 *et seq.* (McKinney 1963).

83. NEW YORK GEN. CORP. L. § 10 (McKinney 1943).

84. Note, *Foreign Corporations: The Interrelations of Jurisdiction and Qualification*, 38 *IND. L.J.* 358 (1958).

the corporation might be willing to run the risk of even a 10,000 dollar⁸⁵ penalty but would not jeopardize the enforceability of its contracts.

CONCLUSION

It would be presumptuous to define a specific course of action to resolve the problems suggested above. Registration of foreign corporations and the disability to sue may be anachronisms left in the wake of *International Shoe*. If, however, there is even the minimal need noted above for requiring registration after the expansion of long-arm jurisdiction, the disability to sue is a remedy which has at least enough merit to be considered in implementation of that need.

Perhaps it is the Uniform Commercial Code which is in need of revision.⁸⁶ In light of the multitude of state regulations which might have tangential effect on negotiable instruments, however, it is difficult to see how the Code could avoid the general terms of sections 3-305, 3-306 and 3-307.

The problem may be compounded by current disquiet over the status of negotiable instrument holders.⁸⁷ The non-registration defense is simple to establish. The defendant need only contact the appropriate secretary of state's office to see if any transferee has failed to comply with the registration statute. The inexpensive nature of this defense would, of course, make it attractive to the same kind of litigant as would be protected under proposed consumer credit legislation.⁸⁸

Yet it would be singularly inappropriate for the courts or legislatures to give the disability to sue a life of its own, based on consumer protection problems, independent of any justification for registration, since the disability would affect not only the consumer transaction but all negotiable paper.

85. IND. ANN. STAT. § 25-314 (Burns 1960 Repl.)

86. For contrasting views of the effectiveness of the Uniform Commercial Code in matters of procedure see Bigham, *Presumptions, Burdens of Proof and the Uniform Commercial Code*, 21 VAND. L. REV. 177 (1968) and Kinyon, *Actions on Commercial Paper: Holder's Procedural Advantages Under Article Three*, 65 MICH. L. REV. 1441 (1967).

87. *E.g.*, UNIFORM CONSUMER CREDIT CODE § 2.403 *et seq.*, which forbids the use of negotiable instruments in consumer credit transactions.

88. Reference is made here, for example, to the sales finance company in transactions which involve the small consumer, as described in B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* 7 (1965):

Such companies initially entered the consumer credit market in the second decade of the twentieth century in connection with the financing of automobile paper. Since that time they have participated in the market primarily as purchasers of credit contract negotiated initially by buyers and sellers of specific goods. Expansion of the interest of sales finance companies in consumer credit has been through the acquisition of paper favoring a variety of consumer goods and services. . . . Sales finance companies may be operated on a nation-wide basis with local offices in many states. . . .

The legislatures have, most probably by inadvertance, or as the result of a possibly anachronistic survival, provided issuers of a negotiable instrument with an inexpensive defense totally unrelated to the merits of the underlying transaction itself. Further, the order of proof established for negotiable instruments is weakened by the ease with which the defense can be raised. The significance of this result and a lack of contemporary consideration suggest the necessity for legislative re-evaluation.

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