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Service of Process on Foreign Corporations Not Admitted to do Business in the State

LEGISLATION COMMENT

SERVICE OF PROCESS ON FOREIGN CORPORATIONS NOT ADMITTED TO DO BUSINESS IN THE STATE

At one time corporations were thought to be incapable of migration beyond the borders of their state of incorporation,[1] and as a result, they could not be sued elsewhere.[2] Even during the period of adherence to this doctrine, however, courts were forced to recognize that agents of a corporation could enter other states[3] and that it was unjust to continue to follow a dogma that in many cases bestowed upon foreign corporations an exemption from liability, and in all cases worked an inconvenience upon residents of the state.[4] Registration and licensing statutes, requiring the appointment of an agent to receive service of process as a condition to entry into a state eliminated much of the inconvenience occasioned by the non-suability of a foreign corporation, but when the out-of-state corporation entered a state without first complying with its laws, the old difficulty remained.

Chapter 60 of the Acts of 1939 (Burns Supplement Title 25-316) represents the Indiana legislature's attempt to provide a means of serving process on foreign corporations which have not been formally admitted to do business in Indiana.[5] The method of the statute is to make the doing of a business act or acts within the state equivalent to the appointment of the Secretary of State as agent of the corporation to receive service in actions arising out of the business activity in the state. Chapter 60 affords a means to reach these outlaw corporations by judicial action, to (1) private persons whose claims arise out of dealings with the foreign corporation within the state, and (2) the state itself, to collect the statutory penalty for entering the state in

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1 Bank of Augusta v. Earle (1839), 13 Pet. (38 U. S.) 519, 10 L. Ed. 274; Lafayette Ins. Co. v. French (1855), 18 How. (59 U. S.) 404, 15 L. Ed. 451; Newell v. Great Western Ry. (1869), 19 Mich. 336. And see Willis, (1934), *Corporations and the United States Const.* 8 U. of Cinn. L. R. 1.

2 Peckham v. Inhabitants of North Parish (1834), 16 Pick. (Mass.) 274; M'Queen v. Middletown Manufacturing Co. (1819), 16 Johnson (N. Y.) 5; Shambe v. Delaware & H. R. Co. (1923), 288 Pa. St. 240, 135 A. 755.

3 See, Bank of Augusta v. Earle (1839), 13 Pet. (38 U. S.) 519, 10 L. Ed. 274; Lafayette Ins. Co. v. French (1855), 18 How. (59 U. S.) 404, 15 L. Ed. 451; Newell v. Great Western Ry. (1869), 19 Mich. 336.

4 See, St. Clair v. Cox (1882), 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222; Fead, *Jurisdiction over Foreign Corporations* (1926), 24 Mich. L. R. 633.

5 The provision as to admitted corporations is found in Burns Ind. Stat. Ann. (1933) § 25-313.

violation of its laws.[6] The act, if valid, will be operative in the case of foreign corporations engaging in business in the state but whose agents cannot be located, and in the case of a foreign corporation which has transacted business in the state, but has withdrawn its agents and ceased its activity by the time suit is filed.

The service of process contemplated is actual personal service, service upon an agent duly authorized to receive it being regarded as service upon the principal.[7] The agent designated is the official occupying the office of Secretary of State, not a particular individual in that office.[8]

The Jurisdictional Generality. Under the due process clause,[9] a judgment is not valid unless the defendant was subject to the jurisdiction of the court, and was given notice and an opportunity to be heard.[10] Notice is given a foreign corporation when service is had on a properly authorized agent.[11] A foreign corporation is said to be subject to jurisdiction when it has consented[12] to the exercise of jurisdiction, or when

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[6] The statutory penalty of not over $10,000, imposed by Burns Ind. Stat. (1933) § 25-314, if made collectible from these fly-by-night corporations, should prove a not inconsiderable source of revenue to the state.

[7] See, St. Clair v. Cox (1882), 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222; Hess v. Pawloski (1927), 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091. The statute is not an innovation on the matter of suits against foreign corporations where the action is in rem or quasi in rem. When the proper requisites exist, e.g., when the foreign corporation owns land in the state, constructive service is possible. Burns Ind. Ann. Stat. (1933) § 2-804. See, Caledonia Coal Co. v. Baker (1905), 196 U. S. 432, 25 S. Ct. 375, 49 L. Ed. 540.

[8] Changes in the holder of the office will be immaterial. Changes in the office whose occupier is to be the agent have been sustained. Woodward v. Mutual Res. Life Ins. Co. (1904), 178 N. Y. 485, 71 N. E. 10 (1904).

[9] Though not a citizen, a corporation is a person and within the protection of the due process clause. Santa Clara County v. Southern Pac. R. R. Co. (1886), 118 U. S. 394, 6 S. Ct. 1132.

[10] Goldey v. Morning News (1895), 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517; Scott, *Jurisdiction over Non-resident Motorists* (1926), 39 Harv. L. R. 563 at p. 568.

[11] See RESTATEMENT, CONFLICT OF LAWS (1934), § 91.

[12] If the corporation has consented to the exercise of jurisdiction, it may be sued in the state whether it is "doing business" there or not. Farmers Educational and Co-op Union v. Farmers Educ. and Co-op Union of America (Minn. 1940), 289 N. W. 884. Rest., Conflicts, § 90; See Smolik v. Phila. & Reading Coal and Iron Co. (1915), 222 Fed. 148. Consent may be given by appearing and defending the action. Fitzgerald & Mallory Constr. Co. v. Fitzgerald (1890), 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608; FLETCHER, CYCLOPEDIA CORPORATIONS (1932) § 8643. The consent contemplated here must be real, not fictional or implied (Rest., Conflicts, § 90, Comment) and when real consent is given, it extends to any cause of action whether local or transitory, if the statute will bear that interpretation. Penna. Fire Ins. Co. v. Gold Issue Mining Co. (1917), 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; Smolik v. Phila.

it is "doing business" in the state. Inasmuch as corporations which operate in Indiana in violation of entrance-requirement laws cannot in any real sense be said to have consented to being sued in local courts, it is the "doing business" basis of jurisdiction which must be considered in determining the constitutionality of the provisions of Chapter 60.[14]

ANY TRANSACTION v. DOING BUSINESS

Section 1. of the act provides that ". . . . the engaging in *any transaction* or the *doing of any business* in this state by any foreign corporation not licensed nor admitted to do business in this state * * * shall be deemed equivalent to an appointment by such foreign corporation of the secretary of state, or his successor in office, to be the true and lawful attorney and agent of such foreign corporation upon whom may be served all lawful processes, writs, notices, or orders. . . ."[15]

As indicated by the italics, Section 1 of the act provides that "any transaction" as well as "doing any business" by an unlicensed foreign corporation within the state will subject the corporation to the jurisdiction of Indiana courts. In light of the general principle that, in absence of consent, a corporation must be "doing business" in a state to be subject to the jurisdiction of its courts, and the numerous authorities to the effect that single or occasional transactions do not amount to

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and Reading Coal and Iron Co. (1915), 222 F. 148; Reynolds v. Missouri, K. & T. Ry. Co. (1912), 228 Mass. 584, 117 N. E. 913. Consent may be implied from the corporation's doing business in the state but in such case the corporation is not suable on causes of action arising outside the state. Old Wayne Life Assn. v. McDonough (1907), 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345; Morris and Co. v. Skandinavia Ins. Co. (1936), 81 F. 2d 346. But compare The Madrid [1937] P. 40, decided in 1936, *contra.*

[13] Shambe v. Delaware & H. R. Co. (1927), 288 Pa. St. 240, 135 A. 755; Rest., Conflicts, § 92; Fead, *Jurisdiction over Foreign Corporations* (1926), 24 Mich. L. R. 633; FLETCHER, § 8713; Willis CONSTITUTIONAL LAW (1936), p. 295. See cases cited in Note 38.

[14] That judgments meet the requirements of due process is accentuated by realization that normally there will be double opportunity for due process attack. In most cases it will be necessary to sue on the judgment in the corporations' home state, or in a state where the corporate property is located. A judgment lacking in due process is not entitled to full faith and credit. Lafayette Ins. Co. v. French (1855), 18 How. (59 U. S.) 404, 15 L. Ed. 451; Goldey v. Morning News (1895), 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517; Old Wayne Life Assn. v. McDonough (1907) 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345; Compagnie Du Port de Rio de Janeiro v. Mead Morrison Mfg. Co. (1927), 19 F. 2d 163. The U. S. Supreme Court has refused to permit the rendition of judgments which are enforceable in the rendering state but not elsewhere. Riverside Mills v. Menefee (1915), 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910.

[15] The italics are the writer's.

"doing business,"[16] the question squarely presented is, whether the "any transaction" provision of section 1 is unconstitutional?

To sustain the taking of jurisdiction over a corporation that has done only single or occasional acts within the state, one of two alternatives are available: (1) The cases saying that single or occasional acts are not "doing business" may be over-ruled, and the term redefined to include single acts. (2) "Doing business" may be retained in its present meaning, but its function be limited (a) to determine when a corporation is within the scope of a statute making "doing business" the sole requisite for the imposition of certain consequences other than subjection to the jurisdiction of local courts, and, (b) as one, *but not the only,* test of when it is reasonable for the jurisdiction of local courts to attach.

Alternative (2) is submitted as the most desirable course. The logic favoring its adoption is that it recognizes that many of the decisions on "doing business" are merely interpretative of statutes embodying the term,[18] and that it permits the constitutionality of attempts

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[16] Hutchison v. Chase & Gilbert (1930), 45 F. 2d 139; Whitaker v. MacFadden Publications (1939), 105 F. 2d 44; Apgar v. Altoona Glass Co. (1921), 92 N. J. Eq. 352, 113 A. 593; Shambe v. Delaware & H. R. Co. (1927), 288 Pa. St. 240, 135 A. 755; Comment 33 Yale 547 (1924); Scott, *Jurisdiction over Nonresident Motorists* (1926), 39 Harv. L. R. 563 at p. 579, note 39; FLETCHER, § 8715.

[17] See FLETCHER, § 8712. "Doing business" is used to determine whether the foreign corporation is to be denied the use of courts: Chattanooga Bldg. etc. Assn. v. Denson (1903), 189 U. S. 408, 23 S. Ct. 630, 47 L. Ed. 870; Bothwell v. Buckbee, Mears Co. (1927), 275 U. S. 274, 48 S. Ct. 124, 72 L. Ed. 277; Baden v. Washington Loan & Trust Co. (1919), 133 Md. 602, 105 A. 860; Nicolai v. Sugarman Iron & Metal Co. (1922), 23 Ariz. 230, 202 P. 1075. A foreign corporation may be doing business within a state so as to be amenable to process (jurisdiction), yet not obtain a status to be regulated by a state or to bring it within licensing requirements. Liquid Veneer Corporation v. Smuckler (1937), 90 F. 2d 196.

[18] Empire Milling & Min. Co. v. Tombstone Mill & Min. Co. (1900), 100 F. 910; Whitaker v. Macfadden Publications (1939), 105 F. 2d 44; Keokuk & Hamilton Bridge Co. v. Curtin-Howe Corp. (1937), 223 Ia. 915, 274 N. W. 78. See, St. Clair v. Cox (1882), 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222; FLETCHER, § 8762. It has been argued that the problem of "doing business" is entirely one of statutory interpretation. See, Farmers' and Merchants' Bank v. Fed. Reserve Bank (1922), 286 F. 566; Fead, *Jurisdiction over Foreign Corporations* (1926), 24 Mich. L. R. 633; Stimson, *Jurisdiction over Foreign Corporations* (1933), 18 St. Louis L. R. 195. Although it is true that jurisdiction is exerciseable only to the extent authorized by statute, Chipman v. Thomas B. Jeffrey Co. (1920), 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314; Chipman v. Thomas B. Jeffery Co. (1919), 260 F. 856 approved—withdrawal makes difference—33 Harv. L. R. 730; Thompson v. Nat'l Life Ins. Co. of U. S. A. (D. C. Mo., 1928), 28 F. 2d 877; Morris & Co. v. Skandinavia Ins. Co. (1936), 81 F. 2d

to extend the jurisdiction of state courts to be examined on the true issue—whether the extension is a reasonable exercise of the state's police power. Although it may not be reasonable in every case for a state to take jurisdiction over a foreign corporation which has done only single or occasional acts within a state, the door will be open should the circumstances of particular cases, or generally changed conditions throughout the state, make this desirable.

"Doing business" has not been uniformly regarded as the basis on which corporations are suable outside their state of origin.[19] When corporations once operated within a state but have withdrawn they have been made subject to jurisdiction under statutes providing that the agency created during the time of doing business shall remain effective for this purpose.[20] Most of these cases involve insurance com-

346, the problem is also of the constitutional validity of the statute which attempts to confer jurisdiction. Thurman v. Chicago, M. & St. P. Ry. Co. (1926), 254 Mass. 569, 151 N. E. 63, 46 A. L. R. 563; Tauza v. Susquehanna Coal Co. (1917), 220 N. Y. 259, 115 N. E. 915; FLETCHER, § 8708.

[19] The New York Courts were particularly unfavorable to the requirement. See, Grant v. Cananea Consol. Copper Co. (1907), 189 N. Y. 241, 82 N. E. 191, recognizing the Federal rule but expressing a contrary preference. One Federal District judge devoted forty-four pages to disproving "doing business" as the jurisdictional basis actually used by the Supreme Court. Cochran, J., in Farmers' and Merchants' Bank v. Fed. Reserve Bank (1922), 286 F. 566. A New Jersey Court has indicated that there may be exceptions to the requirement as to causes of action arising within the forum state. Apgar v. Altoona Glass Co. (1921), 92 N. J. Eq. 352, 113 A. 593. A Federal Master refused to quash a service on a corporation the activity of which did not meet the "doing business" test in the belief that this had been the decision of Judge L. Hand in a previous case. The case relied on was Premo Specialty Co. v. Jersey Cream Co. (1912), 200 F. 352, 118 C. C. A. 458, 43 L. R. A. (NS) 1015. Judge Hand, in reversing the master, expressly denied that that had been the decision in the earlier case. Hunan v. Northern Region Supply Corp. (1920), 262 F. 181. This is particularly interesting in that Judge Cochran, in his decision, cited above, repudiating the "doing business" concept, gives Judge Hand credit for first seeing the light. Compare the cases declaring that solicitation is not "doing business," Green v. Chicago, Burlington & Quincy Ry. (1907), 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916; Thurman v. Chicago, M. & St. P. Ry. Co. (1926), 254 Mass. 569, 151 N. E. 63, 46 A. L. R. 563, with those finding solicitation to amount to "doing business" becaus it resulted in shipments. International Harvester Co. v. Ky. (1914), 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479; La Porte Heinekamp Motor Co. v. Ford Motor Co. (1928), 24 F. 2d 861; Tanza v. Susquehanna Coal Co. (1917), 220 N. Y. 259, 115 N. E. 915. At least one writer has squarely taken the position that a single, isolated act is not enough to subject a corporation to jurisdiction. Stimson, *Jurisdiction over Foreign Corporations* (1933), 18 St. Louis L. R. 195.

[20] Mutual Life Ins. Co. v. Spratley (1899), 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569; Mutual Reserve etc. Assoc. v. Phelps (1903), 190 U. S. 147,

panies, which may be differentiated in that policies remain outstanding in the state, but unfortunately for this explanation, this has not been true in every case.[21] In many cases of this kind, suability has been limited to local causes of action,[22] due to unwillingness of courts to try foreign causes. The ignoring of the "doing business" requirement has been sought to be explained on the ground that the breach of legal duty occurred when the corporation was still "doing business,"[23] but this explanation is weakened by other decisions to the effect that the corporation must be "doing business" *at the time* service is attempted.[24]

In determining the jurisdiction of a state over foreign corporations which have done only single or isolated acts within its territory, the non-resident motorists statute cases are particularly informative. In these cases the single act of driving a car within the state by a non-resident, is sufficient to subject the non-resident to jurisdiction.[25] The validity of these statutes rest solely on the ground that such measures are reasonable for the protection and convenience of citizens of the state.[26] In the non-resident motorist cases, the foreign corporation cases are relied upon as authority[27] despite the few cases denying that

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23 S. Ct. 707, 47 L. Ed. 987; Am. Ry. Express Co. v. Royster Co. (1927), 273 U. S. 274, 47 S. Ct. 355, 71 L. Ed. 642; Washington v. Superior Court (1933), 289 U. S. 361, 53 S. Ct. 624, 77 L. Ed. 1256; Collier v. Mutual Reserve Fund Life Assn. (1902), 119 F. 617; Davis v. Kansas & Texas Coal Co., (1904), 129 F. 149; Western Grocer Co. v. N. Y. Oversea Co., Inc. (1924), 296 F. 269; Brown-Ketcham Iron Works v. Swift Co. (1913), 53 Ind. App. 530, 100 N. E. 584; Tucker v. Columbian Nat. Life Ins. Co. (1919), 232 Mass. 224, 122 N. E. 285; Frazier v. Steel & Tube of America (1926), 101 W. Va. 327, 132 S. E. 723. The statute may expressly provide for service after withdrawal, or may be judicially interpreted to this effect.

21 Am. Ry. Express Co. v. Royster Co. (1927), 273 U. S. 274, 47 S. Ct. 355, 71 L. Ed. 642; Davis v. Kansas & Texas Coal Co. (1904), 129 F. 149; Western Grocer Co. v. N. Y. Oversea Co., Inc. (1924), 296 F. 269. See, Frazier v. Steel & Tube of America (1926), 101 W. Va. 327, 132 S. E. 723.

22 Chipman v. Thos. B. Jeffery Co. (1919), 260 F. 856, aff. 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314. See Recent Cases, 33 Harv. L. R. 730.

23 See, Frazier v. Steel & Tube of America (1926), 101 W. Va. 327, 132 S. E. 723.

24 International Harvester v. Kentucky (1914), 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479; Golden, Belknap & Swartz v. Connersville Wheel Co. (1918), 252 F. 904.

25 Hess v. Pawloski (1927), 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091. Under these statutes the service is on a state official. Apparently these statutes would extend to permit suits against corporations as well as individuals.

26 Scott, *Jurisdiction over Nonresident Motorists* (1926), 39 Harv. L. R. 563.

27 Hess v. Pawloski (1927), 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091. And see Scott, *Jurisdiction over Nonresident Motorists* (1926), 39 Harv. L. R. 563.

any relationship exists.[28] Jurisdiction over non-resident motorists is a police power consideration,[29] and the great breadth of this power in the states is well recognized.[31] If the police power of a state may be exercised to regulate non-resident automobilists as a dangerous instrumentality, why may not it be exercised when foreign corporations have caused injury to citizens of the state? The answer is that it may be, and is, so exercised. But can it operate to provide jurisdiction over a corporation doing single or casual, isolated acts within the state?

Anything so fundamental as jurisdiction should not be based on a mere figure of speech.[32] Yet the term "doing business" when seen in its true chameleon character is nothing more. The question should be rested squarely on whether it is reasonable that the corporation be subjected to suit in the particular jurisdiction, in light of the facts of the particular case and the nature of the business for which the corporation is organized.[33] "Cases holding that jurisdiction was not acquired although the corporation transacted some business in the state at a time prior to service ought not to be explained on the ground

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28 Keokuk & Hamilton Bridge Co. v. Curtin-Howe Corp. (1937), 223 Ia. 915, 274 N. W. 78.

29 Culp, *Process in Actions Against Non-Res. Motorists* (1933), 32 Mich. L. R. 325.

30 Sligh v. Kirkwood (1915), 237 U. S. 52, 35 S. Ct. 501, 59 L. Ed. 835.

31 Scott, *Jurisdiction over Non-Residents Doing Business Within a State* (1919), 32 Harv. L. R. 871; Willis, *Corporations and the United States Const.* (1934), 8 U. of Cinn. L. R. 1.

32 Hutchinson v. Chase & Gilbert (1930), 45 F. 2d 139; Scott, *Jurisdiction over Nonresident Motorists* (1926), 39 Harv. L. R. 563 at p. 576.

33 Farmers' and Merchants' Bank v. Fed. Reserve Bank (1922), 286 F. 566. See, Scott, *Jurisdiction over Non-Residents Doing Business Within a State* (1919), 32 Harv. L. R. 871. This would afford a supportable basis for the early New York cases in which "doing business" was not required to support jurisdiction if a proper agent could be served. Pope v. Terre Haute Car Co. (1881), 87 N. Y. 137. An inkling that by proper enactment the legislature could provide for service on an agent of a foreign corporaton not doing business in the state is found in Caledonian Coal Co. v. Baker (1905), 196 U. S. 432, 25 S. Ct. 375, 49 L. Ed. 540. This theory of jurisdiction ties up nicely with the argument in favor of broader powers of service advanced by Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919), 28 Yale L. J. 421. Note also that the statement "An extension to a corporation of the rule stated in § 84 would expose a foreign corporation doing a single act within a state to the jurisdiction of the courts of that state as to a cause of action arising out of such act although the corporation could not be considered as doing business within the state under the rule stated in § 167, Comment a," found in Comment b, REST., CONFLICTS, § 89, does not deny that the extension is not logical or reasonable.

that the transactions were merely isolated or occasional."[34] This reasoning is strengthened by recalling that a corporation is not entitled to any protection under the privileges and immunities clause,[35] yet that an individual has this protection.[36] Does it not seem rather irrational that under the due process clause the corporation should receive the greater protection—the corporation not making itself subject to jurisdiction by committing casual acts outside its home state, while an individual may?[37]

Assuming that the real crux of the determination of jurisdiction over foreign corporations is whether the state may reasonably exert its police power to assume jurisdiction, what are we to do with those cases in which attempted service has been flatly quashed because the foreign corporation was not found to be "doing business" in the state?[38] Of what value are the dicta and expression of opinion that "doing business"

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34 Stimson, *Jurisdiction over Foreign Corporations* (1933), 18 St. Louis L. R. 195. Mr. Stimson makes this statement in connection with his argument that jurisdiction should be based on an agency theory.

35 Paul v. Virginia (1868), 8 Wall. (75 U. S.) 168, 19 L. Ed. 357; Willis, *Corporations and the United States Const.* (1934), 8 U. of Cinn. L. R. 1.

36 Flexner v. Farson (1919), 248 U. S. 289, 39 S. Ct. 97, 63 L. Ed. 250; Hess v. Pawloski (1927), 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; Culp, *Process in Actions Against Non-Res. Motorists* (1933), 32 Mich. L. R. 325.

37 "The constant tendency of judicial decision in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them." Barrow Steamship Co. v. Kane (1898), 170 U. S. 100, 106, 18 S. Ct. 526, 42 L. Ed. 964. REST., CONFLICTS, § 89, Comment b.

38 Fitzgerald & Mallory Const. Co. v. Fitzgerald (1890), 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608; Kendall v. American Automatic Loom Co. (1904), 198 U. S. 477, 25 S. Ct. 768, 49 L. Ed. 1133; Green v. Chicago, Burlington & Quincy Ry. (1907), 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916; Peterson v. Chicago, R. I. & Pac. Ry. Co. (1907), 205 U. S. 364, 27 S. Ct. 513, 51 L. Ed. 608; Herndon-Carter Co. v. James N. Norris, Son & Co. (1912), 224 U. S. 496, 32 S. Ct. 550, 56 L. Ed. 857; Phila. & Reading Ry. Co. v. McKibbin (1917), 243 U. S. 264, 37 S. Ct. 280, 61 L. Ed. 710; Rosenberg Co. v. Curtin Brown Co. (1923), 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372; Bank of America v. Whitney Bank (1923), 261 U. S. 171, 43 S. Ct. 311, 67 L. Ed. 594; Canon Manufacturing Company v. Cudahy Packing Co. (1925), 267 U. S. 333, 45 S. Ct. 250, 69 L. Ed. 634; Compagnie Du Port de Rio de Janeiro v. Mead Morrison Mfg. Co. (1927), 19 F. 2d 163; Wilhelm v. Consolidated Oil Corp. (1936), 84 F. 2d 739; Morris & Co. v. Skandinavia Ins. Co. (1936), 81 F. 2d 346; Whitaker v. Macfadden Publications (1939), 105 F. 2d 44; Roark v. American Distilling Co. (1939), 97 F. 2d 297; Truck Parts v. Briggs Clarifier Co. (1938), 25 F. Supp. 602; Mutual Reserve Fund Life Assn. v. Boyer (1900), 62 Kan. 31, 61 P. 387; Hunter v. Mutual Reserve Life Ins. Co. (1906), 184 N. Y. 136, 76 N. E. 1072, aff. 218 U. S. 573, 31 S. Ct. 127.

is an essential element to jurisdiction?[39] It is submitted that "doing business" will become a principal test of when it is reasonable to exercise jurisdiction. In other words, it is reasonable for a state to take jurisdiction over a foreign corporation when the corporation is doing business in the state; it *may* not be reasonable to do so when the corporation is not "doing business."[40] It will still be necessary for the United States Supreme Court to make the final decision as to when jurisdiction exists, and to decide each case on its particular facts. The advantage in the change in emphasis from "doing business" to "reasonableness" lies in obviating the necessity of overruling the single or occasional transaction cases, and, at least in jurisdictional cases, the reduction in number of redefinitions of "doing business."[41] "Reasonableness," in law is a more understandable concept than the technical one of "doing business," and no one will question that what is reasonable may and will change with the progress of time and the alteration of circumstance. The various theories of consent[42] or subjection[43] to jurisdiction and of presence[44] in the jurisdiction will fit into the "reasonableness" theory in the same manner, and the confusion which they inject thus may be eliminated. Most important, however, the door will be open for the courts to sustain the taking of jurisdiction over foreign corporations when they have transacted some business in the

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39 See, Barrow Steamship Co. v. Kane (1898), 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964; Hunan v. Northern Region Supply Corp. (1920), 262 F. 181; Haggin v. Comptoir D'Escompte De Paris (1889), L. R. 23 Q. B. Div. 519, 58 L. J. (Q. B.) 508; La Compagnie Generale Transatlantique v. Thomas Law & Co. (1899), A. C. 431; Logan v. Bank of Scotland (1904), 2 K. B. 495; Halsbury's *Laws of England* (2nd ed.), Vol. V, § 1510, note O; Culp, *Constitutional Problems Arising from Service of Process on Foreign Corporations* (1935), 19 Minn. L. R. 375; FLETCHER, § 8714.

40 See, Hutchinson v. Chase & Gilbert (1930), 45 F. 2d 139; Farrier, *Suits Against Foreign Corporations as a Burden on Interstate Commerce* (1933), 17 Minn. L. R. 270.

41 The difficulty and confusion that arises over the meaning of the term "doing business" is brought out in St. Louis Southern Ry. Co. of Texas v. Alexander (1912), 227 U. S. 218, 33 S. Ct. 245, 59 L. Ed. 486; REST., CONFLICTS, § 167; Comment, *Service of Process Upon Foreign Corporations* (1924), 33 Yale 547; FLETCHER, § 8711.

42 See, Morris & Co. v. Skandinavia Ins. Co. (1936), 81 F. 2d 346; Reynolds v. Missouri, K. & T. Ry. Co. (1917), 228 Mass. 584, 117 N. E. 913, aff. 255 U. S. 565, 41 S. Ct. 446, 65 L. Ed. 788 (1921).

43 See, St. Louis Southwestern Ry. Co. of Texas v. Alexander (1912), 227 U. S. 218, 33 S. Ct. 245, 59 L. Ed. 486; Apgar v. Altoona Glass Co. (1921), 92 N. J. Eq. 352, 113 A. 593; Haggin v. Comptoir D'Escompte De Paris (1889), L. R. 23 Q. B. Div. 519, 58 L. J. (Q. B.) 508.

44 See, Hutchinson v. Chase & Gilbert (1930), 45 F. 2d 139; Wilhelm v. Consolidated Oil Corp. (1936), 84 F. 2d 739.

state, but not enough to meet the "doing business" requirement. For if citizens of a state are being harmed and the state is being denied license fees and taxes by sufficient numbers of foreign corporations which occasionally operate in the state in violation of law, it may be said that to take jurisdiction over these corporations is reasonable. The determination whether such conditions exist should be left to the legislature. Chapter 60 apparently represents the assembly's decision that such conditions do exist in Indiana.

Other Limitations. It remains to be considered whether there are other limits on the exercise of jurisdiction over foreign corporations aside from the "doing business" requirement. The issue can be put in this way: are there circumstances under which the corporation has done sufficient acts within the state to give the state jurisdiction, but because of other factors, jurisdiction can not, or will not, be exercised?

Although it seems clear that a foreign corporation which does business in a state may be subjected to suit in the state even though the business done is purely inter-state,[45] if the effect of permitting suit is found by a court to be unreasonably burdensome on interstate commerce, jurisdiction may not be exercised.[46] When interstate commerce is unduly burdened is again a decision over which the Supreme Court exercises the final word. Under circumstances nearly identical[47] to those of the cases where an unreasonable burden was found, courts have declared the burden to be not unreasonable simply because the plaintiff was suing in his principal place of business,[48] or at his residence.[49] The test of reasonableness here will be that of balancing the

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[45] Shambe v. Delaware & H. R. Co. (1927), 288 Pa. St. 240, 135 A. 755; International Harvester v. Kentucky (1914), 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. In the Harvester case, the court said: "True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its courts, and may, and often do, have large properties located within the state."

[46] Davis v. Farmers Co-operative Co. (1923), 262 U. S. 312, 43 S. Ct. 556, 67 L. Ed. 996; Michigan Cent. R. Co. v. Mix (1929), 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470; Denver & R. G. W. R. Co. v. Terte (1932), 284 U. S. 284, 52 S. Ct. 152, 76 L. Ed. 295. Dicta, Interstate Amusement Co. v. Albert (1916), 239 U. S. 560, 36 S. Ct. 168, 60 L. Ed. 439.

[47] The identical nature, obviously, is not admitted by the courts.

[48] International Milling Co. v. Columbia Co. (1934), 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396.

[49] Griffin v. Seaboard Air Line Ry. Co. (1928), 28 F. 2d 998. But *cf.* Michigan Cent. R. Co. v. Mix (1929), 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470, where residence, acquired simply to maintain suit, was found unsufficient to remove the burden on interstate commerce.

inconvenience to the plaintiff against the degree of interference with interstate commerce.[50]

It must be kept in mind that the requirement as to service of process on foreign corporations is a dual one. Under the test proposed, it must be reasonable for the state to exercise jurisdiction, and service must be upon a proper agent of the company.[51] The propriety of serving a particular agent will depend largely on the mandate of the statute. It has been held in some cases that the agent served must be in the state in pursuit of a corporate function.[52] In the majority of cases, however, it is said that if the corporation is otherwise subject to suit, service upon any agent of sufficient representative capacity is valid.[53] The problem of the agent to be served does not arise under Chapter 60, of course, as the act being valid, service on the secretary of state is clearly proper.[54]

Finally, in a few cases, even though jurisdiction over a foreign corporation unquestionably exists, and although no problem of burdening interstate commerce is raised, the court may decline to hear the case presented. Most common of these cases are those involving foreign causes of action[55] or the internal affairs of corporate business.[56]

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[50] Farrier, *Suits v. Foreign Corporations as a Burden on Interstate Commerce* (1932), 17 Minn. L. R. 270, 381; Note, 42 Harv. L. R. 1062 (1929).

[51] St. Clair v. Cox (1882), 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222; Peterson v. Chicago, R. I. & Pac. Ry. Co. (1907), 205 U. S. 364, 27 S. Ct. 513, 51 L. Ed. 608; St. Louis Southwestern Ry. Co. of Texas v. Alexander (1912), 227 U. S. 218, 33 S. Ct. 245, 57 L. Ed. 486; Phila. & Reading Ry. Co. v. McKibbin (1917), 243 U. S. 264, 37 S. Ct. 280, 61 L. Ed. 710; Farmers' and Merchants' Bank v. Fed. Reserve Bank (1922), 286 F. 566.

[52] Conley v. Mathieson Alkali Works (1903), 190 U. S. 406, 23 S. Ct. 728, 47 L. Ed. 1113; Reeves v. Southern Ry. Co. (1905), 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, 2 Ann. Cas. 207.

[53] Mutual Life Ins. Co. v. Spratley (1899), 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569; Premo Specialty Co. v. Jersey Cream Co. (1912), 200 F. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015; Rush v. Foos Manufacturing Co. (1898), 20 Ind. App. 515, 51 N. E. 143; Atkinson v. U. S. Operating Co. (1915), 129 Minn. 232, 152 N. W. 410; Fuchbond v. C. & A. R. R. Co. (1889), 115 N. Y. 437, 22 N. E. 360.

[54] Quaere whether an agent of the company might also be proper to receive service. The question of how long the authority of the Secretary of State will last may arise. If the statute so provides, the agent's authority may last as long as any liability remains outstanding in the state. See, Hunter v. Mutual Reserve Life Ins. Co. (1906), 184 N. Y. 136, 76 N. E. 1072, aff. 218 U. S. 573, 31 S. Ct. 127; Frazier v. Steel & Tube of America (1926), 101 W. Va. 327, 132 S. E. 723. Compare, however, Hunter v. Mut. Reserve Life Ins. Co. (1910), 218 U. S. 573, 31 S. Ct. 127, 54 L. Ed. 1155; Morris & Co. v. Skandinavia Ins. Co. (1936), 81 F. 2d 346; FLETCHER, § 8762.

[55] See, Mutual Reserve Fund Life Assn. v. Boyer (1900), 62 Kan. 31, 61 P. 387; Newell v. Great Western Ry. (1869), 19 Mich. 336.

[56] Rogers v. Guaranty Trust Co. (1933), 288 U. S. 123, 53 S. Ct. 295, 77 L.

Directly or *Indirectly.* Section 1 of the act also provides that ". . . in any action or proceeding against such foreign corporation arising or growing out of, directly or indirectly, any act or thing done by such corporation with the State of Indiana."

This language of section 1 expressly excludes suits against foreign corporations on foreign causes of action. The only difficulty raised is that of giving a precise meaning to actions arising or growing indirectly out of acts of the corporation within the state. It is settled that suit may be maintained in the courts of a state on obligations incurred there but breached elsewhere.[57] Whether the act extends to permit consumers to sue the out of state manufacturers of goods, the goods being sold through a local retailer and other related problems can only be answered by the courts. Seemingly the language of the act would extend not only to causes of action arising out of entrance into transactions, but also to claims of performance, and other consequences.[58] Reasonable, substantial connection with the jurisdiction should be the test.[59]

Mailing of Notice. Section 1 further provides that notice of such service and a copy of the process, writ, notice or order are to be sent by registered mail with return receipt requested, to the principal office of the foreign corporation. Under section 3 of the act, if the corporation refuses delivery, or refuses to sign the return receipt notice is nevertheless effected. The secretary of state is to attach the signed receipt or refused mail to the copy of the process and mail it to the clerk of the court for filing.

These provisions are largely precautionary, but are justifiable in light of decisions under the non-resident motorist statutes. In one of these cases the statute providing for service of a state official as agent for the non-resident automobilist was held unconstitutional because it included no provision for mailing notice to the defendant, even though in the particular case, actual notice had been given.[60] Under the motorist statutes it has been held that a registered letter is not required

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Ed. 652, 89 A. L. R. 720; Farmers Educational and Co-op. Union of America, Minn. Div. v. Farmers Educ. and Co-op. Union of America (Minn. 1940), 289 N. W. 884.

[57] L. & N. R. Co. v. Chatters (1929), 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711; noted, (1930) 5 Ind. L. J. 458.

[58] See, Osborne, *Arising Out of Business Done in the State* (1923), 7 Minn. 380.

[59] Farmers' and Merchants' Bank v. Fed. Reserve Bank (1922), 286 F. 566. See Conclusion No. 6.

[60] Wuchter v. Pizzutti (1928), 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 466. And see, Consol. Flour Mills Co. v. Muegge (1928), 278 U. S. 559, 49 S. Ct. 17, 73 L. Ed. 505.

if provision for mailing is made[61] and that the letter need not be received by a defendant personally.[62] In the foreign corporation cases, however, flat rulings have been made to the effect that the statute need contain no provision for sending notice to the corporation defendant and that no notice actually need be received by the corporation.[63]

Under the non-resident motorist decisions again, the courts have been inclined to be strict in the matter of the appending and filing of the return receipt.[64] Apparently provisions for making refusal of delivery the equivalent of knowledge of contents, likewise are sustainable, if the refusal is made in an attempt to evade service.[65] Again, however, these considerations are immaterial under the decisions that mailing notice to foreign corporations is not necessary.

Venue. Section 6 of the act provides that "Any action or proceeding against any foreign corporation doing business in Indiana and not licensed nor admitted to do business in the State of Indiana may be instituted or commenced *in any county* within the State of Indiana."[66]

Domestic corporations are suable in Indiana only in counties where an office or agency is maintained, or where a person on whom service can be made resides.[67] Foreign corporations admitted to do business in Indiana are suable only in counties where corporate property, moneys, credits, or effects are located.[68] In contrast with these provisions, does section 6 involve so unreasonable a discrimination against unlicensed foreign corporations as to be an unconstitutional denial of equal protection of the laws or due process of law? In *Power Manufacturing Company v. Sanders*[69] the Supreme Court held an almost identical

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61 State v. Belden (1927), 193 Wisc. 145, 211 N. W. 916; Jones v. Paxton (1928), 27 F. 2d 364.

62 O'Tier v. Sell (1929), 235 N. Y. S. 534.

63 Washington v. Superior Court (1933), 289 U. S. 361, 53 S. Ct. 624, 77 L. Ed. 1256; State v. Superior Court of Spokane County (1932), 169 Wash. 688, 15 P. 2d 660; Silva v. Crombie & Co. (N. M. 1935), 44 P. 2d 719. See note disapproving these rulings, (1935) 49 Harv. L. R. 339. An earlier United States Supreme Court decision indicates that a foreign corporation statute is bad in not providing for giving notice to the corporation. See, Simon v. Southern Ry. (1915), 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492.

64 Syracuse Trust Co. v. Keller (1932), 35 Del. 304, 165 A. 327; Freedman v. Poirier (1929), 134 Misc. 253, 236 N. Y. S. 96, noted (1929) 39 Yale L. J. 126.

65 See, Culp, *Recent Developments in Actions Against Nonresident Motorists* (1938), 37 Mich. L. R. 58; Wax v. Van Marter (1937), 124 Pa. Super. 573, 198 A. 537, noted (1937) 85 U. Pa. L. R. 739.

66 Italics are the writer's.

67 Burns' Ann. Stats. (1933), § 2-706.

68 Burns' Ann. Stat. (1933), § 2-708.

69 (1927) 274 U. S. 490, 47 S. Ct. 678, 71 L. Ed. 1165.

provision in an Arkansas statute invalid. Previously, the court had ruled that foreign corporations could not be discriminated against as to the county in which pre-trial examinations should be conducted.[70] If these cases are still law, section 6 is invalid. In both of these cases, however, strong dissents were written by Justices Holmes and Brandeis. Whether influenced by the opinions of these men or for other reasons, in *Metropolitan Insurance Company v. Brownell*,[71] the Supreme Court, on the ground that the equal protection clause did not prevent reasonable classification,[72] refused to invalidate an Indiana statute working a discrimination against foreign insurance companies. The majority opinion, of course, distinguishes the *Power Company* case,[73] but the dissenting Justices clearly indicate that they consider the latter case overturned. In this respect, though not as to its opinion, the dissent seems most logical, but it will probably take another case squarely presenting the issue to settle the conflict decisively.

CONCLUSION. Chapter 60 of the Indiana Acts of 1939 contains two possible sources of unconstitutionality. These are: (1) It attempts to subject foreign corporations to the jurisdiction of the state courts even though the corporation's business acts within the state would not amount to "doing business." (2) It seeks to enable suit against unlicensed foreign corporations in any county of the state, which is a more severe provision than that made for suits against domestic corporations or other foreign corporations.

The seeming unconstitutionality which results from contravention of the generality that if the foreign corporation has not consented, it may be subjected to jurisdiction only if it is "doing business" in the state, should not materialize. Taking jurisdiction over corporations which have done single or occasional acts within the state is supportable as a reasonable exercise of the states' police power.

The discrimination against unlicensed and unadmitted foreign corporations on the matter of venue of suit should not result in unconstitutionality of the provision if, as is probable, former rulings of the United States Supreme Court on this matter are not overruled.

C. B. D.

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[70] Kentucky Finance Corporation v. Paramount Auto Exch. Corp. (1923), 262 U. S. 544, 43 S. Ct. 636, 67 L. Ed. 1112.

[71] (1935) 294 U. S. 580, 55 Sup. Ct. 538, 79 L. Ed. 1070.

[72] See, State v. Superior Court (1933), 289 U. S. 361, 53 S. Ct. 624, 77 L. Ed. 1256; same case (1932), 169 Wash. 688, 15 P. 2d 660. This case may very well be said to overrule the Power Manufacturing Co. case by implication, although it is not generally so regarded.

[73] Power Manufacturing Co. v. Saunders (1927), 274 U. S. 490, 47 S. Ct. 678, 71 L. Ed. 1165.