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# FOREIGN CORPORATION LAWS: THE LOSS OF REASON†

WILLIAM LAURENS WALKER\*

*The author says that foreign corporation statutes were originally intended to solve service of process problems that no longer exist, and that the principle of conditional entry which sustained the statutes, is today largely discredited. He asks: "Should these troublesome regulatory schemes now be enforced by the courts or conceded further life by the legislatures?"*

[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it.

1 W. Blackstone, *Commentaries* \*61.

## INTRODUCTION

The reason for foreign corporation laws has ceased. The troublesome qualification panoply of applications for admission, charter copies, designated agents, contract defaults and the rest is now only a relic. The search by practitioners and scholars for the chameleonic condition of doing business is today more futile than ever before.

The error is nationwide. All states have general statutes, typically major subparts of corporation codes, establishing terms and conditions upon which corporations chartered by other states will be allowed to carry on local business activities. The primary purpose of these fifty acts was to solve problems created in the last century by a Federal Constitutional requirement that original legal process be served within the territorial boundaries of forum states. The conceptual basis of the laws was also a product of an unusual nineteenth century development—the principle that states can admit out-of-state corporations upon condition because, it was said, they can exclude them entirely.

The original Constitutional problems are gone and the operating

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† This is the first of two articles by the author on this topic to appear in Volume 47. Special thanks are due Professor Detlev F. Vagts of the Harvard Law School for his comments and encouragement.

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principle of the laws is largely discredited. Yet this scheme surprisingly not only survives, but as a result of recent corporation law revisions, has been considerably complicated and extended.

## I. DEVELOPMENT OF FOREIGN CORPORATION LAWS

The premise that foreign corporation laws were passed in response to particular problems and were structured by a particular principle can be tested by comparing the development and content of the problems and principle with the development and content of the laws. Significant chronological and substantive correlation is evidence that the premise is correct.

### A. Territorial Idea of Law

Both the purpose and structure of foreign corporation laws grew from the idea that law is limited by sovereign boundaries. The evolution, acceptance, and eventual decline of this idea forms a historical pattern much the same as that traced by the spread of foreign corporation acts.<sup>1</sup>

The seven northern provinces of the Netherlands formed a federal union in 1579 after a successful revolt against Spanish rule.<sup>2</sup> But the alliance did little to dampen the independence of each province and the jealous protection of local rights. This spirit and a growing commerce with foreign nations led to the promotion of a distinctly territorial notion of law.<sup>3</sup> Chief among those responding to the needs of that time and place was Ulrich Huber, professor of law at the University of Franeker. In his treatise *De Conflictu Legum Diversarum in Diversis Imperiis*, Huber asserted more effectively than any earlier scholar that law is limited by sovereign boundaries. He began his brief treatise by stating a maxim which has had enduring influence:

- (1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.<sup>4</sup>

<sup>1</sup> See generally A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 59-76 (1965) [hereinafter cited as VON MEHREN & TRAUTMAN].

<sup>2</sup> 16 *ENCYCLOPEDIA BRITANNICA* 266 (1968).

<sup>3</sup> Lorenzen, *Huber's De Conflictu Legum*, 13 *ILL. L. REV.* 375, 377 (1919); see Yntema, *The Historic Bases of Private International Law*, 2 *AM. J. COMP. L.* 297 (1953).

<sup>4</sup> Lorenzen, *supra* note 3, at 403. The translation follows U. HUBER, *PRAELECTIONUM JURIS CIVILIS TOMI TRES* (2d ed. 1707). The language quoted in the text is followed by two additional maxims:

- (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof. . . .  
 (3) Sovereigns will so act by way of comity that rights acquired within

Joseph Story fixed Huber's idea in American jurisprudence by incorporating it in his 1834 treatise, *Commentaries on the Conflict of Laws*. He wrote in the introduction "that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country."<sup>5</sup> Huber's notions were readily accepted elsewhere. In *Rose v. Himely*<sup>6</sup> Chief Justice Marshall said, "[T]he legislation of every country is territorial . . . ."<sup>7</sup> Nearly a century later Justice Holmes in *American Banana Co. v. United Fruit Co.*<sup>8</sup> considered "startling"<sup>9</sup> the assertion that a treble damage action under the Sherman Act could be maintained by an Alabama corporation against a New Jersey corporation where the acts complained of occurred outside the United States. Joseph H. Beale, in his treatise<sup>10</sup> dedicated to Justice Story, wrote as late as 1935 that "the law of a state prevails throughout its boundaries and, generally speaking, not outside them."<sup>11</sup>

The doctrine was seriously questioned a number of years before publication of Professor Beale's treatise. In 1924 Walter Wheeler Cook consisely stated the critics' case:

My conclusion then is, that while, so long as we have the territorial organization of modern political society, the law of a given state or country can be *enforced* only within its territorial limits . . . this does not mean that the law of that state or country cannot, except in certain exceptional cases, affect the legal relations of persons outside its limits. As we have seen, "law" is not a material phenomenon which spreads out like a light wave until it reaches the territorial boundary and then stops.<sup>12</sup>

Professor Cook was joined by his Yale colleague, Ernest G. Lorenzen, who wrote on the centennial of Justice Story's *Commentaries*:

Serious issue may be taken with Story's territorial theory of Anglo-American law. The assertion that "no state or nation can by its own

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the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

*Id.*

<sup>5</sup> J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 7 (1st ed. 1834).

<sup>6</sup> 8 U.S. (4 Cranch) 241 (1808).

<sup>7</sup> *Id.* at 279.

<sup>8</sup> 213 U.S. 347 (1909).

<sup>9</sup> *Id.* at 355.

<sup>10</sup> J. BEALE, *CONFLICT OF LAWS* (1935).

<sup>11</sup> 1 *Id.* at 308.

<sup>12</sup> Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 484 (1924) (citation omitted).

laws directly affect or bind . . . persons not resident therein" is, to say the least, misleading . . .<sup>13</sup>

The Cook-Lorenzen analysis, which has never been seriously challenged,<sup>14</sup> eventually influenced the courts<sup>15</sup> and led to significant changes in judicial notions about the territorial reach of law. One result has been an erosion of both the purpose<sup>16</sup> and the conceptual foundation<sup>17</sup> of foreign corporation statutes.

### B. Requirement of Service of Original Process Within Forum Jurisdictions

In the last years of the eighteenth century, the courts of this country took up the task of elaborating the recently established federal mechanism. Questions developed concerning the effect of state action beyond territorial boundaries, and courts very early considered the effect of delivery of process outside forum states.

#### 1. Early Nineteenth Century Statements

In *Kibbe v. Kibbe*<sup>18</sup> a Massachusetts plaintiff brought an action in Connecticut against a Connecticut defendant and relied entirely on a prior judgment obtained against the defendant in Massachusetts. The defendant pleaded that service of the original writ was attempted by leaving a copy at his residence in Connecticut, that the Massachusetts judgment was therefore void, and that the action could not be maintained. The court agreed because "[i]t appears by the pleadings, that the defendant was an inhabitant of the state of Connecticut, and was not within the jurisdiction of the Court of Common Pleas for the County of Berkshire, at the time of the pretended service of the writ . . ."<sup>19</sup>

<sup>13</sup> Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 37 (1934) (citation omitted). In a later article Professor Cook specifically considered the territorial maxims of Justice Story and concluded that by and large they "ought to be discarded." Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368, 384 (1931).

<sup>14</sup> Brainerd Currie wrote in 1958 that the criticism by Professor Cook discredited Professor Beale's statement of the idea "as thoroughly as the intellect of one man can ever discredit the intellectual product of another." Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 966 (1958). See A. EHRENZWEIG, *CONFLICT OF LAWS* § 5 (1962).

<sup>15</sup> A. EHRENZWEIG, *supra* note 14, § 5. The role of Chief Justice Stone was particularly noteworthy. See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

<sup>16</sup> See pp. 24-27 *infra*.

<sup>17</sup> See pp. 29-30 *infra*. The work of scholars has been emphasized in this brief survey because of the strong impact of their views. See D. CAVERS, *THE CHOICE OF LAW PROCESS* viii (1965).

<sup>18</sup> 1 Kirby 119 (Conn. Super. Ct. 1786).

<sup>19</sup> *Id.* at 126.

The idea that delivery of original process within the jurisdiction is necessary for unlimited general jurisdiction,<sup>20</sup> or at least necessary for a judgment entitled to full faith and credit in another state, was further developed in the 1809 New York case of *Kilburn v. Woodworth*.<sup>21</sup> The plaintiff brought an action against the New York defendant to enforce a judgment secured in Massachusetts. The Massachusetts suit began by attachment of a bedstead belonging to defendant and delivery of process in Massachusetts to defendant's wife. Plaintiff's argument that such action alone would support a judgment enforceable in New York was rejected because "[t]he defendant was not a resident of Massachusetts when the suit was commenced; his domicile was in this State, and being a person here, and not within the jurisdiction of the court of Massachusetts, he was not, and could not have been served with process."<sup>22</sup>

The *Kibbe* and *Kilburn* cases indicate that early in the nineteenth century there existed an idea that unlimited general jurisdiction required physical delivery of process within forum states. The doctrine was not universally accepted and, as apparent from the cases, was first articulated where enforcement of an out-of-state judgment was asked as a matter of full faith and credit. A number of states had very broad statutes providing for service by publication,<sup>23</sup> obviously enacted on the premise that local delivery of process was unnecessary. Several state courts in fact held that delivery of process in the jurisdiction was not required for a valid local judgment.<sup>24</sup> But a statement of the exact extent of the service requirement as it existed in the early nineteenth century is unnecessary in order to understand the development of foreign corporation laws. The cases show that lawyers and legislators of the time knew that service of process within forum jurisdictions was often required if a judgment were to be enforced out of state, which suggested that local service might someday be generally required.

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<sup>20</sup> The terminology is that suggested in von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

<sup>21</sup> 5 Johns. 37 (N.Y. Sup. Ct. 1809).

<sup>22</sup> *Id.* at 41. The New York court relied heavily on a now famous English case decided in 1808, *Buchanan v. Rucker*, 103 Eng. Rep. 546 (K.B. 1808).

<sup>23</sup> The early New York and California statutes are described in Ehrenzweig & Mills, *Personal Service Outside the State*, 41 CALIF. L. REV. 383, 384 (1953).

<sup>24</sup> See the cases and authorities collected in Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 307 n.127 (1956). At that time there was, of course, no federal due process requirement imposed on the states and they were free to adopt judicial procedures considered locally adequate.

## 2. Nationwide Requirement of Due Process of Law

The development of this early scattered authority into a due process requirement is a subject beyond the scope of this article. But a series of four cases establishes the development and content of the requirement chronologically and can be related to the adoption of early foreign corporation laws.

In *Bissell v. Briggs*<sup>25</sup> the New Hampshire plaintiff brought an action in Massachusetts upon a judgment recovered in New Hampshire against the Massachusetts defendant. Process in the original action was served while defendants were personally present in New Hampshire. Nevertheless, Chief Justice Parsons posed the hypothetical case of a Massachusetts debtor not subject to service of process in New Hampshire, but owning property there. The New Hampshire assets, the Chief Justice said, would be subject to levy, but if the assets were insufficient "and the creditor should sue an action on that judgment in this state to obtain satisfaction he must fail; because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment."<sup>26</sup> *Bissell* played a direct role in the development of the due process requirement through an unusual chain of events.

In *Kane v. Cook*<sup>27</sup> the New York plaintiffs consigned goods for sale to the California defendants. The defendants received the goods and sold them, but did not pay the plaintiffs. The plaintiffs sued in New York and served the defendants under a New York statute establishing a broadly-applicable procedure for service by publication. The plaintiffs secured a judgment which was not paid, and sued in California on the same cause of action. The defendants contended that the New York judgment barred the California action, and the California Supreme Court was called upon to determine the effect of the New York proceedings. The opinion by Justice Stephen J. Field<sup>28</sup> relied on *Bissell*, calling it the "leading case,"<sup>29</sup> and held for a unanimous court that the prior judgment was not a bar to the California action. The reason was that "the judgment in New

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<sup>25</sup> 9 Mass. 462 (1813).

<sup>26</sup> *Id.* at 468. The Massachusetts court had little trouble finding on the actual facts that since defendants had been served in New Hampshire they could not impeach the prior judgment.

<sup>27</sup> 8 Cal. 449 (1857).

<sup>28</sup> Stephen J. Field was elected to the Supreme Court of California on September 2, 1857. In the October term of 1857, his first term, he was assigned the opinion in *Kane v. Cook*. Field was appointed by President Lincoln to the United States Supreme Court and on March 10, 1863, his appointment was confirmed by the Senate. 6 DICTIONARY OF AMERICAN BIOGRAPHY 372 (A. Johnson & D. Malone ed. 1931).

<sup>29</sup> 8 Cal. at 456.

York . . . was rendered without personal service on the defendant, or his appearance in the action. He was at the time in this State, and the Court therefore had no jurisdiction of his person.”<sup>30</sup>

*Kane* is significant largely because Justice Field dealt with the same problem in writing the opinion for the United States Supreme Court in *Pennoyer v. Neff*.<sup>31</sup> In that case Neff sued in an Oregon federal court to recover a tract of land located in that state, claiming title under a patent of the United States. Pennoyer claimed under a sheriff's deed executed in satisfaction of a judgment obtained against Neff in an Oregon state court. Service of process in the original action was by publication, but Neff's real property was not attached until sometime after the publication. The trial court decided that there were defects in the affidavits relating to service in the original action and found for Neff.<sup>32</sup> The Supreme Court opinion began by stating that a majority felt that the affidavits satisfied the requirements of the Oregon statute. Rather than reverse, however, the Court decided the threshold question of whether the service by publication was sufficient to support the state judgment. Justice Field postulated that “the laws of one State have no operation outside of its territory,” and therefore held that “no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.”<sup>33</sup>

Justice Field's opinion gave this conclusion sweeping application. Service within forum states was held (1) a requirement for enforcement of judgments under the full faith and credit clause, (2) a requirement for recognition of state court judgments in federal courts, and (3) a requirement of due process under the recently adopted fourteenth amendment.<sup>34</sup> The *Pennoyer* decision is important here because the case required physical delivery of process within forum states as a Constitutional prerequisite for unlimited general jurisdiction. Apparently Justice Field realized that his opinion would create difficulties for local plaintiffs. He wrote that the Court did not “mean to assert that a State may not require a non-resident entering into a partnership or association within its

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<sup>30</sup> *Id.*

<sup>31</sup> 95 U.S. 714 (1878).

<sup>32</sup> 17 F. Cas. 1279 (No. 10,083) (C.C.D. Ore. 1875).

<sup>33</sup> 95 U.S. at 722.

<sup>34</sup> Excepted were cases involving property located within forum states. *Id.* at 723. *Pennoyer* was such a case, but because of failure to attach the property before publication, the Court treated the case as one not involving the stated exception. Also note that sweeping application of the doctrine was not required. At issue only was recognition of the judgment in federal court. No other state was involved and the original action was decided prior to the effective date of the fourteenth amendment.

limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process. . . ."<sup>35</sup>

There was little doubt about the impact of *Pennoyer* on actions against foreign corporations, but Justice Field spelled it out five years later in *St. Clair v. Cox*.<sup>36</sup> In considering the effect of a Michigan judgment obtained against an Illinois corporation he reviewed the holding in *Pennoyer* and said that "the doctrine of that case applies, in all its force, to personal judgments of State courts against foreign corporations."<sup>37</sup>

As the jurisdictional problems multiplied and spread to every state as a result of *Pennoyer*, plaintiffs and their lawyers no doubt asked for legislative solutions. The problems were not limited to suits against foreign corporations. Local plaintiffs with claims against out of state individuals, partnerships, and other non-corporate organizations also had to serve them in forum states. But where corporate defendants were involved, a solution was at hand.

### C. Principle of Conditional Entry

The underpinning of foreign corporation laws, like the problems discussed above, reaches back at least to the works of Huber and those who followed him in describing law as strictly limited by sovereign boundaries.<sup>38</sup> The Supreme Court's holding that a state may admit foreign corporations upon condition was the result of a combination of this territorial notion and the idea that corporations are fictional creatures of the law of incorporating sovereigns.

In *Head & Armory v. Providence Insurance Co.*,<sup>39</sup> the Supreme Court held that an agreement to void an insurance policy was not effective because not executed by the corporate insurer in the manner specifically required by its charter. In reaching this decision, Chief Justice Marshall described the corporation as "the mere creature of the act to which it owes its existence," deriving "all its powers from that act, and . . . capable of exerting its faculties only in the manner which that act authorizes."<sup>40</sup> The Chief Justice restated this idea in *Trustees of Dartmouth College v.*

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<sup>35</sup> *Id.* at 735. In his dissent Justice Hunt pointed out that the Oregon statute involved was nearly identical to the service by publication provisions of the New York Code of Civil Procedure. *Id.* at 738. The New York Code was largely developed by Justice Field's older brother, David Dudley Field, and at a time when the two were law partners in New York. 6 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 28, at 361, 372. Did *Pennoyer* finally settle a kitchen table argument?

<sup>36</sup> 106 U.S. 350 (1882).

<sup>37</sup> *Id.* at 353.

<sup>38</sup> See pp. 2-4 *supra*.

<sup>39</sup> 6 U.S. (2 Cranch) 127 (1804).

<sup>40</sup> *Id.* at 167.

*Woodward*,<sup>41</sup> decided in 1819. One argument for upholding the New Hampshire legislature's alteration of the college's charter was that Dartmouth had become by incorporation a public institution subject to change by political process. In dismissing this contention Chief Justice Marshall described a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."<sup>42</sup> These formulations established the early viewpoint.

In the 1839 case of *Bank of Augusta v. Earle*,<sup>43</sup> a Georgia corporation sued to collect a bill of exchange made and sold in Alabama by the defendant to the corporation's agent. The defendant argued that the contract of purchase was void because the plaintiff, as a Georgia corporation, could not act in Alabama. By this time, corporations were dealing extensively across state lines,<sup>44</sup> and the case put in question the validity of a large number of contracts. Despite this persuasive fact, a decision in favor of the corporation was difficult to reach because of the territorial and fiction ideas. How could creatures of state law act beyond the borders of the states which created them? Chief Justice Taney accepted both ideas and wrote for the Court that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created" because "it exists only in contemplation of law, and by force of the law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence."<sup>45</sup> But the Chief Justice found a solution in the doctrine of comity and held that states are presumed, as a purely "voluntary"<sup>46</sup> matter, to allow foreign corporations to make and enforce local contracts. The Court also dealt with the argument that the corporation was entitled to protection under the privileges and immunities clause of the Constitution and held that corporations were not within the shelter of that provision. A contrary result would have radically changed—if not ended—the evolution of foreign corporation laws; such a Constitutional holding would have eliminated further development toward a principle of conditional entry. But the protection was denied on terms not directly related to the presumption of voluntary admission, so there was little effect on the principle.<sup>47</sup>

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<sup>41</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>42</sup> *Id.* at 636.

<sup>43</sup> 38 U.S. (13 Pet.) 519 (1839).

<sup>44</sup> E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, at 48 (1954).

<sup>45</sup> 38 U.S. (13 Pet.) at 588.

<sup>46</sup> *Id.* at 589.

<sup>47</sup> For a discussion of the Federal Constitutional aspects of the case see G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 57 (1918).

The logic of Chief Justice Taney's comity was given its due in *Lafayette Insurance Co. v. French*,<sup>48</sup> decided in 1855. The Ohio plaintiffs sued in Indiana to enforce an Ohio judgment against an Indiana corporation which maintained an agent in Ohio authorized to make contracts of insurance. Original process in the Ohio action was served on the agent in Ohio under a statute providing that service of process on a resident insurance agent was "effectual as though the same were served on the principal."<sup>49</sup> In his opinion, Justice Curtis cited the *Bank of Augusta* case and wrote that "a corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State."<sup>50</sup> Then in a contribution of his own Justice Curtis said that "this consent may be accompanied by such conditions as Ohio may think fit to impose."<sup>51</sup> The Court held that the Ohio statute amounted to a condition upon entry that bound the defendant. Justice Curtis's reasoning was central to the establishment of foreign corporation laws.

The principle received its most decisive statement in *Paul v. Virginia*.<sup>52</sup> The defendant was convicted in Virginia of issuing a policy of insurance as agent of an out-of-state insurance corporation which had been denied a license by Virginia for failure to post a security bond. The Court found the statute valid because the corporation was not a "citizen" within the meaning of the privileges and immunities clause, and because insurance was not "commerce" within the meaning of the commerce clause. In support of the first of these two holdings the Court followed the logic of *Lafayette* and concluded that states "may exclude the foreign corporation entirely"<sup>53</sup>—thus sanctioning the ultimate condition.

#### D. Original Foreign Corporation Laws

All fifty states<sup>54</sup> adopted their first foreign corporation laws during

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<sup>48</sup> 59 U.S. (18 How.) 404 (1855).

<sup>49</sup> Law of Jan. 21, 1847, § 3, 45 Ohio Laws 17. The concept of the act was similar to an earlier Maryland statute, which provided that foreign insurance companies could be held liable to local suit arising out of Maryland transactions, and that service could be made "upon any agent of the company." Law of Feb. 23, 1835, ch. 89 [1834] Md. Laws (not paginated). For a discussion of the Maryland act see E. DODD, *supra* note 44, at 174. Neither statute required the presence of an agent—but only provided that service could be made upon an agent if found in the state.

<sup>50</sup> 59 U.S. (18 How.) at 407.

<sup>51</sup> *Id.*

<sup>52</sup> 75 U.S. (8 Wall.) 168 (1869). The opinion was written by Justice Field which may explain his specific suggestion in *Pennoy* of the conditional entry technique. See pp. 7-8 *supra*.

<sup>53</sup> *Id.* at 181. The Constitutional aspects of the case are discussed in detail in HENDERSON, *supra* note 47, at 64, 104.

<sup>54</sup> No distinction is made here or elsewhere where the original act was passed

the period 1852-1946. The premise that problems of service of process and the principle of conditional entry combined to produce foreign corporation laws can be tested by comparing the historical data discussed thus far with the chronological and substantive pattern of these first statutes.

Before examining the pattern in detail several cautions are appropriate. An attempt to determine for every state just when its first law was adopted involves a judgment as to what is a foreign corporation law. In other words, what statutes are antecedent to the fifty states statutes currently in effect? Two particular requirements, designation of local agents and filing copies of corporate charters, appear in a substantial majority of today's laws, so early statutes including either of these two requirements are here considered significantly related to the current acts. Nineteenth century state legislation is poorly indexed and identification of first statutes in particular cases is subject to error. But the materials are sufficiently reliable to permit conclusions to be drawn from the general pattern.

### 1. Chronology

The first generally applicable foreign corporation law was enacted by Indiana in 1852.<sup>55</sup> The most recent was adopted by the Georgia General Assembly in 1946<sup>56</sup>—so recently that it is sometimes referred to as a long arm statute,<sup>57</sup> though its substance and applications clearly show otherwise.<sup>58</sup> The Georgia law was adopted thirty-three years after the forty-

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by a territorial legislature. Where an original statute was passed before division of a territory into two states, as in the case of Dakota's division into North Dakota and South Dakota, the date of the original territorial law has been used for both the resulting states. The growth of the laws was unique in all states, but only one original act was proclaimed by a King—Kalakaua of Hawaii. Law of July 3, 1878 [1878] Hawaii Laws 11.

These statutes apparently grew from native soil and did not result from prior British practice. Until 1907 there was no statutory scheme in Great Britain for dealing with companies incorporated outside that country. PALMER'S COMPANY PRECEDENTS 1161 (17th ed. R. Buchanan-Dunlap 1956). The Companies Act of 1907, 7 Edw. 7, ch. 50, § 35 established a set of requirements including filing of charter copies, designated agents, annual reports and other provisions similar to those at that time already in effect in some states, suggesting the possibility that foreign corporation laws were imported, not exported, by Great Britain. The present practice is governed by the Companies Act of 1948, 11 & 12 Geo. 6, c. 38, part X. The Companies Act of 1967, c. 81 left the overseas companies provisions of the 1948 Act in force with no material change. The 1967 Act was not a comprehensive revision, but a series of amendments to the 1948 Act. See Leigh, *Companies Act 1967*, 31 MOD. L. REV. 183 (1968).

<sup>55</sup> Law of June 17, 1852, printed at 1 IND. REV. STAT. 242-43 (1852).

<sup>56</sup> Law of Jan. 31, 1946, no. 586 [1946] Ga. Laws 687. The Georgia law is omitted from the graph on p. 13 for the reasons stated in the text.

<sup>57</sup> PRENTICE HALL, LAWYER'S WEEKLY REPORT § 3 (October 23, 1967).

<sup>58</sup> *Buckhead Doctor's Bldg., Inc. v. Oxford Finance Cos.*, 115 Ga. App. 52, 153

ninth act, the New Hampshire statute of 1913,<sup>59</sup> and it is fair to call the Georgia enactment aberrational. The period 1852-1913 more accurately suggests the time during which first foreign corporations acts became law.

*Paul v. Virginia*<sup>60</sup> made plain the potential of conditional entry, and *Pennoyer v. Neff*<sup>61</sup> made nationwide the requirement that original process be served within forum jurisdictions. The adoption of first statutes should be considered in chronological relation to the dates of those decisions, November 1, 1869 and January 21, 1878. The pattern of adoption may be related to *Paul* and *Pennoyer* as shown in the graph on page 13.

The fact that some laws were enacted before *Paul* is not surprising in light of the historical data that shows the development of the conditional entry principle as early as 1839. Similarly, the fact that a few laws were adopted before *Pennoyer* is not surprising because of the data that shows the requirement of service within the jurisdiction had been germinating for more than 75 years before that decision. Discounting four early acts that did not respond to jurisdictional problems,<sup>62</sup> the number of states adopting statutes before *Pennoyer* probably represents in a rough way the extent of the service requirement before it became a matter of due process in 1878.

The apparent hesitancy and then rapid increase in the number of statutes after *Pennoyer* is to be expected. A typical pattern in state legislation is an early testing period, then widespread enactment in follow-the-leader style. The fact that the greatest period of activity came ten years after *Pennoyer* does not show unresponsiveness. A ten-year lag is short as such matters usually develop. Long arm statutes, for example, represent a response to the 1945 Supreme Court decision in *International Shoe Co. v. Washington*,<sup>63</sup> but more than 15 years passed before they were adopted by more than a handful of states.<sup>64</sup> From the standpoint of time, then, there is significant correlation between the problems, the principle and the laws.

## 2. Content

The three earliest acts are worth detailed consideration: the Indiana

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S.E.2d 650 (1967) (application for certiorari was denied by the Georgia Supreme Court on Mar. 9, 1967).

<sup>59</sup> Law of May 21, 1913, ch. 187 [1913] N.H. Laws 748.

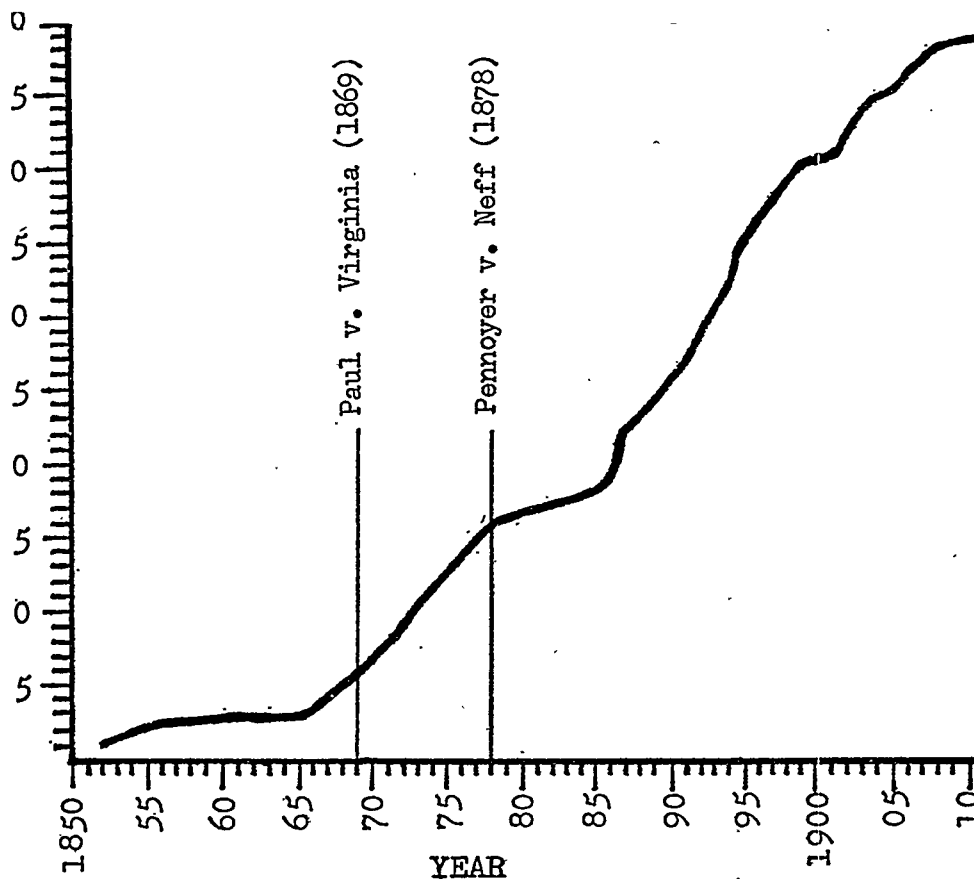
<sup>60</sup> 75 U.S. (8 Wall.) 168 (1869).

<sup>61</sup> 95 U.S. 714 (1877).

<sup>62</sup> See p. 16 *infra*.

<sup>63</sup> 326 U.S. 310 (1945).

<sup>64</sup> See D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 537. Major growth in the field has taken place since Professor Currie's article was written. See pp. 27-28 *infra*.



statute<sup>65</sup> shows the first development of the central requirement that a local agent be appointed; the New York law<sup>66</sup> shows the transition from a special to a general legislative remedy; and the Arizona statute<sup>67</sup> is a prototype of present laws.

The first generally applicable foreign corporation law in the United States was enacted June 17, 1852, by the Indiana General Assembly.<sup>68</sup> The brief statute required agents of corporations "not incorporated or organized in this State" to file with the clerk of court, in the county where "they propose doing business," a copy of the authorization under which they act for the corporation,<sup>69</sup> and written authority from the corporation

<sup>65</sup> Law of June 17, 1852, ch. 25, printed at 1 IND. REV. STAT. 242 (1852).

<sup>66</sup> Law of April 10, 1855, ch. 279, [1855] N.Y. LAWS 470.

<sup>67</sup> Law of Nov. 6, 1866, § 23-27, [1866] ARIZ. LAWS 38.

<sup>68</sup> Law of June 17, 1852, printed at 1 IND. REV. STAT. 242 (1852).

<sup>69</sup> *Id.* § 1.

for the agent to accept service of process in any action "arising out of any transaction in this State with such agents."<sup>70</sup> Noncomplying corporations were barred in Indiana from enforcing contracts made by local agents, who were subject to a fine of not less than fifty dollars for making the contracts. The general requirement that an agent be designated to accept service of process was an early reaction to the ideas that led to *Pennoyer*. The requirement that an agent file proof of authority was dropped in later statutes, probably as doctrines developed to better protect persons dealing with agents. The penalty for noncompliance was the same often found in current laws. No doubt, it was a product of a rough justice idea that corporations should not be allowed to appear locally as plaintiffs if not accessible as defendants.

In 1855 New York adopted a statute entitled "An Act to facilitate the service of process on Insurance and other corporations doing business in this state."<sup>71</sup> The act required corporations "created by the laws of any other state" to designate an agent for service of process in each county in which it transacted business.<sup>72</sup> The law further provided that where the designation was not made, service might be had upon "any person who shall be found within this state acting as the agent of said corporation."<sup>73</sup> The New York statute was transitional. Its application to insurance and "other" corporations points to the fact that general foreign corporation statutes were sometimes successors to acts applicable only to specific types of business, often insurance.<sup>74</sup> The requirement of designation of an agent was included, but the penalty for noncompliance was the same as the primary procedure set up by the Ohio statute<sup>75</sup> involved in the *Lafayette* case. Such statutes, allowing service on specified agents if found in the jurisdiction, were common, though not effective to solve the *Pennoyer* problem. The New York act requiring designation shows progress from those earlier statutes toward a solution.

Both the early Indiana and New York acts were far different from current laws. The 1866 Arizona statute,<sup>76</sup> on the other hand, was very similar to modern acts. The 1866 law was applicable to "any Company

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<sup>70</sup> *Id.* § 2.

<sup>71</sup> Law of April 10, 1855, ch. 279, [1855] N.Y. Laws 470.

<sup>72</sup> *Id.* § 1.

<sup>73</sup> *Id.* § 2.

<sup>74</sup> *E.g.*, Law of Feb. 23, 1835, ch. 89, [1835] Md. Laws (not paginated); Law of Jan. 21, 1847, 45 Ohio Laws 17.

<sup>75</sup> Law of Jan. 21, 1847, 45 Ohio Laws 17.

<sup>76</sup> Law of Nov. 6, 1866, § 23-27, [1866] Ariz. Laws 33.

incorporated under the laws of any other State or Territory"<sup>77</sup> carrying on business in Arizona and replaced a less sophisticated statute,<sup>78</sup> passed in 1864, applicable only to mining corporations. The Arizona act required corporations to file certified copies of their charters with the secretary of the territory and be locally represented by agents "who shall reside within the limits and under the jurisdiction of this Territory."<sup>79</sup> Upon compliance, out-of-state corporations were granted privileges allowed by the general corporation act, and "held liable and responsible to all its provisions"<sup>80</sup> to the same extent as domestic corporations. Noncomplying corporations were liable to "forfeit all their rights, interests, claims and demands within this Territory."<sup>81</sup> These requirements include most common provisions of current statutes.<sup>82</sup>

Development following these earliest statutes occurred in three phases. In a typical state there was legislative activity relating to foreign corporations which predated the first general foreign corporation act. These statutes often provided for attachment of local property belonging to out-of-state corporations,<sup>83</sup> or made grants to foreign corporations of specific local powers, often the power to hold real estate.<sup>84</sup> The second phase began with the adoption of general statutes similar to the Arizona law.<sup>85</sup> Then came a third period in which the laws were perfected by the addition of numerous administrative provisions, particularly requirements intended to keep current information initially filed.

In some instances a statutory or administrative relation between foreign corporation acts and state tax programs developed, and information used to assess certain taxes was required.<sup>86</sup> This connection between the

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<sup>77</sup> *Id.* § 23.

<sup>78</sup> Law of Nov. 10, 1864, ch. 11, §§ 38-42, printed at HOWELL CODE 412-13 (1864). The statute applied to "any company for mining purposes incorporated under the laws of any other State or Territory." *Id.* § 38.

<sup>79</sup> Law of Nov. 6, 1866, § 23, [1866] *Ariz. Laws* 33.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* § 24.

<sup>82</sup> See pp. 19-22 *infra*.

<sup>83</sup> *E.g.*, Part 3, ch. VIII, tit. IV, art. 1, §§ 15-30, N.Y. REV. STAT. (1827 & 1828). The *Revision* was adopted piecemeal by the New York legislature, then ordered published as a whole. Materials available in the Harvard Law School Library do not show the date of enactment of Part 3, hence the citation to the *Revision* as ordered published. In any case, this will be the most convenient source for further reference.

<sup>84</sup> *E.g.*, Law of April 9, 1875, [1875] Ill. Laws 65; Law of March 28, 1873, ch. CCCCVII, [1873] N.J. Laws 76.

<sup>85</sup> See p. 13 *supra*.

<sup>86</sup> See 3 SPECIAL SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE OF THE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R.

laws and tax programs was a comparatively late innovation. None of the early acts asked for information typically required to determine taxes.

In six states the content developed somewhat differently and the variation in this minority shows a secondary need met by many of the laws. Nevada and Wyoming adopted primitive statutes<sup>87</sup> in 1869, which required out-of-state corporations to file copies of their charters with specified officials before transacting local business. In contrast with the first acts of the great majority of states, neither Nevada nor Wyoming required designation of a local agent. Four other states—Florida, Montana, Tennessee, and Texas—initially omitted a local agent provision.<sup>88</sup> The Nevada, Wyoming, Montana and Tennessee statutes were adopted before *Pennoyer* and the omissions probably can be explained on that basis. There are no apparent reasons for the omissions by Texas in 1889 and by Florida in 1907, but few legislatures enact perfect statutes even with good examples handy, and it is not unreasonable to assume oversights. All six states did, however, include requirements that charter copies be filed locally, suggesting a need other than that defined by *Pennoyer*.

The most likely explanation for these provisions is found as early as the 1859 decision of the Supreme Court in *Pearce v. Madison & Indianapolis Railroad Co.*<sup>89</sup> The plaintiff sued two Indiana corporations in an Indiana federal court to enforce five \$1,000 promissory notes executed by the corporations. The trial court held that the execution of the notes had been an ultra vires act and therefore the notes could not be enforced. The Supreme Court affirmed and said that "persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation."<sup>90</sup> This strict view of ultra vires was carried forward by the federal courts. No doubt it was brought sharply to the attention of the bar by *Central Transportation Co.*

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REP. NO. 585, 89th Cong., 1st Sess. 925 (1965) [hereinafter cited as SPECIAL SUBCOMM. REPORT].

<sup>87</sup> Law of March 3, 1869, ch. LXVII, [1869] Nev. Stat. 115; Law of Dec. 10, 1869, ch. 8, art. IV, [1869] Wyo. Laws 264.

<sup>88</sup> Law of June 1, 1907, ch. 5717, no. 122 [1907] Fla. Laws 230; Law of June 12, 1872, [1872] Mont. Laws 419; Law of March 19, 1877, ch. XXXI, [1877] Tenn. Acts 44, *made generally applicable by* Law of March 21, 1891, ch. 122, [1891] Tenn. Acts 264; Law of April 2, 1887, ch. 128, [1887] Tex. Laws 116. All six states eventually added an agent requirement. *E.g.*, Law of Dec. 12, 1929, ch. 13, § 3, [1929] Tenn. Acts Ex. Sess. 21.

<sup>89</sup> 62 U.S. (21 How.) 441 (1859).

<sup>90</sup> *Id.* at 443. Though local defendant corporations were involved here, the rule announced was equally applicable when the residence of the parties was reversed—the possible application which no doubt created local concern.

*v. Pullman's Palace Car Co.*,<sup>91</sup> in which the Supreme Court held that all contracts made by a corporation beyond the scope of its powers are "unlawful and void, and no action can be maintained upon them in the courts."<sup>92</sup> Those statutes which required copies of foreign charters probably included the requirement in an attempt to lessen by disclosure the dangers pointed out and in part created by *Pearce* and *Central Transportation*. Requirements that copies of charters be filed are weak remedies compared with the remedies created for *Pennoyer* problems. In the former only information is provided; in the latter, agents for service.

### 3. Contemporary Opinion

The chronological pattern of enactment of the original statutes and their content support the premise that the original laws were adopted to solve service problems by conditioning entry upon the appointment of a local agent. No legislative history bearing on these conclusions exists, but there was some contemporary writing on the subject by scholars and judges. This material is both a source of knowledge and an appropriate test for conclusions suggested by historical analysis.

Frank Loughran, an early law review contributor, wrote about foreign corporation laws in 1895, and said:

These statutes, while presenting a general similarity of purpose and method, disclose a wide variety of detail. It is not proposed to enter into a minute analysis of these laws, or to consider their distinction and variations from each other, but to examine the general principles upon which such legislation is based . . . . The purpose of these statutes is not to withdraw all comity, but to require the corporations to take a position where its own contracts can be enforced against it in the local courts.<sup>93</sup>

Professor Beale in his book *Foreign Corporations*,<sup>94</sup> published in 1904, described foreign corporation laws as follows:

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<sup>91</sup> 139 U.S. 24 (1891).

<sup>92</sup> *Id.* at 48. Such a federal rule of law was of great significance in the pre-*Erie* period when foreign corporations could invoke the diversity jurisdiction of the federal courts and make use of such a rule of "general commercial law." See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. v. Tompkins* 304 U.S. 64 (1938).

<sup>93</sup> Loughran, *How Jurisdiction May Be Acquired in A State Court Over a Foreign Corporation, and What is the Effect of a Judgment Rendered Against Such a Corporation by Default*, 41 CENT. L.J. 247, 250 (1895).

<sup>94</sup> J. BEALE, *FOREIGN CORPORATIONS* (1904).

Statutory regulations of the business of a foreign corporation are directed, generally speaking, to secure the rights of domestic creditors, stockholders or others dealing with the corporations. The earliest need of regulation felt by the States was some provision by which it might be possible for a creditor to bring suit against a corporation. This was accomplished by a provision requiring a foreign corporation to appoint an agent within the state authorized to accept service of process; and such a provision has been adopted in every state.<sup>95</sup>

In *Utley v. Clark-Gardner Lode Mining Co.*,<sup>96</sup> decided in 1878, a New York corporation brought an action in Colorado in defense of certain mining rights. The defendants filed a special plea alleging that the corporation had not complied with the requirements of the Colorado foreign corporation act<sup>97</sup> and therefore could not bring the action in Colorado—though the statute did not specifically include such a penalty. The Colorado Supreme Court held that local courts were not closed to non-complying corporations by any implication of the law and in so doing described the substance and purpose of the Colorado act as follows:

They shall designate, in a manner prescribed, their principal place of business and an agent or agents residing thereat, upon whom process may be served. In substance, they shall put themselves in a position to be amenable to the process of the State courts. Similar statutes exist in most of the States of the Union, the object being to protect the citizens of the State, dealing with foreign corporations, from the hardship of pursuing their rights in distant jurisdictions.<sup>98</sup>

A similar opinion was expressed in *Groel v. United Electric Co.*,<sup>99</sup> where a stockholder derivative action was brought by a New Jersey resident on behalf of a New Jersey corporation against a Pennsylvania corporation. Service on the Pennsylvania corporation was made in New Jersey upon a resident of that state designated as defendant's local agent pursuant to the New Jersey foreign corporation law.<sup>100</sup> The defendant corporation contended that it no longer transacted business in New Jersey, had revoked the commission of its local agent, and was not subject to service

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<sup>95</sup> *Id.* at 185-86. Professor Beale's assertion that an agent designation provision "had been adopted in every state" was not accurate as of 1904, and his own detailed explanation of the state laws proves that inaccuracy. See, e.g., *id.* at 209 (Georgia); *id.* at 257 (New Hampshire).

<sup>96</sup> 4 Colo. 369 (1878).

<sup>97</sup> Law of March 14, 1877, § 23, printed at COLO. GEN. LAWS 151 (1877).

<sup>98</sup> 4 Colo. at 371.

<sup>99</sup> 69 N.J. Eq. 397, 60 A. 822 (Ch. 1905).

<sup>100</sup> Law of May 15, 1894, ch. CCXXVIII, [1894] N.J. Laws 346.

as attempted. The New Jersey Court held that the service was sufficient, and in reaching this decision made a thorough analysis of the purpose of the New Jersey act:

Foreign corporations, before the enactment of this legislation, could, as we have seen, come within the State of New Jersey and, unless service had been made upon some actual representative thereof while the corporation was actually doing business in the state, they were free to withdraw from the state and cause citizens who had transacted business with them here to pursue them to their home jurisdictions at great inconvenience and expense . . . . The act of 1894, therefore, was enacted to remedy this obvious evil. By its provisions, foreign corporations could not lawfully transact business in this state without designating an agent upon whom process might be served.<sup>101</sup>

## II. CONTENT OF PRESENT LAWS

The problem of describing statutes now in force is the problem of making a useful general statement about fifty statutes, each different from the other. A comprehensive list of possible requirements was made, and the fifty acts surveyed to determine which requirements are incorporated in particular statutes. The profile which follows was drawn from provisions found in at least a majority of the laws. But a picture of current statutes cannot show the probable direction of change. The foreign corporation provisions of the *ABA-ALI Model Business Corporation Act*,<sup>102</sup> which are serving as a guide for new legislation, are included in this section to indicate the direction of that development.

### A. Profile of Statutes

Current foreign corporation laws describe their scopes in terms of corporation-state contacts. Scope phrases define the levels of contact which will bring foreign corporations within the reach of the statutes. Typically the term of art is "doing business,"<sup>103</sup> though some states use the phrase "transact business,"<sup>104</sup> and several include "hold property"<sup>105</sup>

<sup>101</sup> 69 N.J. Eq. at 414, 60 A. at 628.

<sup>102</sup> ABA-ALI MODEL BUS. CORP. ACT §§ 99-119, 121, 124, 126, 128-30, (1953). For the impact of the *Model Act* and a survey of recent developments, see Folk, *Corporation Statutes: 1959-1966*, 1966 DUKE L.J. 875, and 2 MODEL BUS. CORP. ACT. ANN. 178 (Supp. 1966). Earlier developments are discussed in *Symposium: The New Look in Corporation Law*, 23 LAW & CONTEMP. PROB. 175-398 (1958).

<sup>103</sup> E.g., ARK. STAT. ANN. § 64-1201 (1947); GA. CODE ANN. § 22-1506 (1966).

<sup>104</sup> E.g., ALASKA STAT. § 10.05.597 (1962); COLO. REV. STAT. ANN. § 31-9-1 (1963).

<sup>105</sup> E.g., S.D. CODE § 11.2002 (1939).

located in the state. Most research in the field has been devoted to determining the content of these scope phrases,<sup>106</sup> though in truth there is little to be said except that it is difficult—if not impossible—to determine the application of particular statutes. Whatever the phrase, the scheme has resulted in countless law suits and given rise to a nonsensical body of case law. The mass of precedent turned out over a hundred years of confusion can support or defeat almost any claim.

Applications for admission require certain information, largely duplicated by other specific requirements. Most states require formal statements of name and jurisdiction of incorporation.<sup>107</sup> Some require descriptions of proposed local business activities.<sup>108</sup> Most require that addresses of principal offices<sup>109</sup> and of local offices and agents<sup>110</sup> be given. In addition, a number of states require the names and addresses of corporate officers and directors.<sup>111</sup>

All states require that out-of-state corporations name local residents to act as their agents to accept original process. In most cases these agents may be individuals or corporations, but in several states the choice is limited to public officials.<sup>112</sup> Designation requirements are typically accompanied by two supplementary provisions designed to eliminate service problems. Most states provide that if designated agents cannot be found after a reasonable effort, foreign corporations that have complied with the laws will be taken to have designated specified public officials as their agents.<sup>113</sup> Many of these statutes apply a similar presumption to corporations that have certain contacts with states but have failed to comply with

<sup>106</sup> *E.g.*, Cavin, *Doing Business As Applied to Foreign Corporations*, 11 TEMP. L.Q. 46 (1931); Issac, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925); Keane & Collins, *Changing Concepts of What Constitutes Doing Business By Foreign Corporations*, 42 MARQ. L. REV. 151 (1958); Roberts, *What Constitutes "Doing Business" By a Foreign Corporation In Kentucky*, 31 KY. L.J. 1 (1942). The *chef d'oeuvre* is published by the Corporation Trust Company. See CORPORATION TRUST COMPANY, *WHAT CONSTITUTES DOING BUSINESS* (1965).

<sup>107</sup> *E.g.*, CONN. GEN. STAT. ANN. § 33-399 (Supp. 1968); ILL. ANN. STAT. ch. 32, § 157.106 (Smith-Hurd 1954).

<sup>108</sup> *E.g.*, ALASKA STAT. § 10.05.615 (1962); KAN. GEN. STAT. ANN. § 17-501 (1964).

<sup>109</sup> *E.g.*, IOWA CODE ANN. § 496A.107 (1962); MICH. STAT. ANN. § 21.94 (1963).

<sup>110</sup> *E.g.*, ILL. ANN. STAT. ch. 32, § 157.106 (Smith-Hurd 1964); OHIO REV. CODE ANN. § 1703.04 (Page 1964).

<sup>111</sup> *E.g.*, ALASKA STAT. § 10.05.615 (1962); IOWA CODE ANN. § 496A.107 (1962).

<sup>112</sup> *E.g.*, MASS. ANN. LAWS ch. 181, § 3 (Supp. 1967); PA. STAT. ANN. tit. 15, § 2004 (1967); VT. STAT. tit. 11, § 692 (1959).

<sup>113</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 10-481 (Supp. 1967); GA. CODE ANN. § 22-1507 (1966).

the statutes.<sup>114</sup> Where these provisions are included, the problems of finding local corporate representatives are eliminated.

A substantial majority of states require that out-of-state corporations file copies of their charters or articles of incorporation with public officials.<sup>115</sup> At least one requires that charters be published locally,<sup>116</sup> and another requires that copies of corporations' bylaws also be filed.<sup>117</sup> Presumably these documents are subject to some degree of official inspection and are available to the public. In support of this requirement, a majority of the states specify that copies of subsequent charter amendments be filed.<sup>118</sup>

Statutes typically provide that out-of-state corporations will not be admitted to do business locally if their names are the same as, or deceptively similar to, the names of domestic corporations.<sup>119</sup> Grants of general power to act locally in the same manner as domestic corporations are usually made, but stated as contingent upon compliance with all statutory requirements.<sup>120</sup> A few states include specific powers, such as the capacity to hold local real property.<sup>121</sup> A substantial majority of the states provide that foreign corporations complying with their statutes are generally subject to local law. Usually the provisions are stated in relation to domestic corporations, as "subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like charter."<sup>122</sup> A few states include some element of selectivity,<sup>123</sup> but usually there is only unqualified authority to apply local law where there is compliance.

<sup>114</sup> *E.g.*, GA. CODE ANN. § 22-1508 (1966). Strangely, the *Model Act* does not include such a provision and states adopting the act have added appropriate language where the omission has been noticed. See 2 MODEL BUS. CORP. ACT ANN. 196 (Supp. 1966).

<sup>115</sup> *E.g.*, ALA. CODE tit. 10, § 21(90) (Supp. 1967); ARIZ. REV. STAT. ANN. § 10-481 (Supp. 1967).

<sup>116</sup> ARIZ. REV. STAT. ANN. § 10-481 (Supp. 1967).

<sup>117</sup> HAWAII REV. LAWS § 174-1 (Supp. 1965).

<sup>118</sup> *E.g.*, DEL. CODE ANN. tit 8, § 342 (1953); ILL. ANN. STAT. ch. 32, § 157.112 (Smith-Hurd 1954).

<sup>119</sup> *E.g.*, FLA. STAT. ANN. § 613.08 (1956); WIS. STAT. ANN. § 180.809 (1957).

<sup>120</sup> *E.g.*, ILL. STAT. ANN. ch. 32, § 157.103 (Smith-Hurd 1954); IOWA CODE ANN. § 496A.104 (1962).

<sup>121</sup> *E.g.*, CONN. GEN. STAT. ANN. ch. 32, § 33-397 (1958). Georgia limits land holding by foreign corporations to 5,000 acres each. GA. CODE ANN. § 22-1504 (1966). Indiana generally prohibits local ownership of real property by foreign corporations, though there are certain exceptions. IND. ANN. STAT. § 25-302 (Supp. 1967). Apparently these prohibitions are only xenophobic.

<sup>122</sup> ILL. ANN. STAT. ch. 32, § 157.103 (Smith-Hurd 1954). For other examples see COLO. REV. STAT. ANN. § 31-9-4 (1963); PA. STAT. ANN. tit. 15, § 2010 (1967).

<sup>123</sup> *E.g.*, N.Y. BUS. CORP. LAW §§ 1319-20 (McKinney 1963).

A number of housekeeping provisions are often included. Many states require annual reports designed primarily to keep information initially filed up-to-date.<sup>124</sup> In states where foreign corporation laws play a role in tax programs, annual reports provide information used to assess tax liabilities.<sup>125</sup> One or two states require current financial data<sup>126</sup>—but this is a limited practice. Most states provide methods for withdrawal.<sup>127</sup> Typically included are formal requirements designed to show that local obligations have been discharged and to provide for local service of process for a specified period after withdrawal. Finally, many statutes include mechanisms for revoking admissions.<sup>128</sup> Specified grounds usually include failure to appoint agents, file annual reports, or pay fees and franchise taxes, and misrepresentation of material information.<sup>129</sup>

All states fix some penalty for noncompliance. Most common are provisions that noncomplying corporations may not sue in local courts<sup>130</sup>—which the Supreme Court has held also bars the corporations from bringing actions in local federal courts.<sup>131</sup> In most states subsequent compliance will open local courts to the corporations, even for claims arising

<sup>124</sup> *E.g.*, CONN. GEN. STAT. ANN. § 33-406 (1958); S.C. CODE ANN. § 12-24.1 (Supp. 1967).

<sup>125</sup> *E.g.*, ILL. ANN. STAT. ch. 32, § 157.115 (Smith-Hurd Supp. 1967), which includes a page or more of reporting requirements and then adds "[S]uch additional information as may be necessary or appropriate . . . to . . . assess the proper amount of fees and franchise taxes payable by such foreign corporation."

<sup>126</sup> *E.g.*, MASS. GEN. LAWS ANN. ch. 181, § 12 (Supp. 1967). This requirement of a "certificate of condition" is elsewhere limited in scope. *See* MASS. GEN. LAWS ANN. ch. 156, § 49 (Supp. 1967).

<sup>127</sup> *E.g.*, DEL. CODE ANN. tit. 8, § 352 (1953; PA. STAT. ANN. tit. 15, § 2015 (1967)).

<sup>128</sup> *E.g.*, ALASKA STAT. § 10.05.675 (1962); ILL. ANN. STAT. ch. 32, § 157.122 (Smith-Hurd 1954).

<sup>129</sup> Some states attempt to further otherwise unrelated policies by threat of revocation. Alaska provides for revocation when corporations are "party to an illegal combination in restraint of trade." ALASKA STAT. § 10.05.675 (1962). Illinois by recent amendment provides for revocation for wilfull violation of the Illinois consumer fraud act. ILL. ANN. STAT. ch. 32, § 157.122a (Smith-Hurd Supp. 1967).

<sup>130</sup> *E.g.*, FLA. STAT. ANN. § 613.04 (1956); S.C. CODE § 12-23.15 (Supp. 1967). The extreme case is presented by the statutes of Nevada and Wisconsin which also prohibit defense of a local action. NEV. REV. STAT. § 80.210 (1967); WIS. STAT. ANN. § 180-847 (1957). Application of the Nevada statute was denied in *Scott v. Day-Bristol Consol. Mining Co.*, 37 Nev. 299, 142 P. 625 (1914), where the plaintiff successfully moved in the trial court to strike the defendant's demurrer on the ground that it could not defend the law suit, then took a default judgment on the theory that the defendant could never answer.

<sup>131</sup> *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). This decision closed an important avenue of relief and sharply increased the impact of door-closing penalties. The *Woods* case will be the subject of a later article by the author.

before compliance. But in a number of states subsequent qualification is not retroactive in effect, and contracts made before admission remain locally unenforceable.<sup>132</sup> This gives immunity from suit to local defendants who cannot be brought to court in other states. Fines are typically included in penalty provisions. They range from the amount of accrued fees and taxes plus a small fee for late payment<sup>133</sup> to as much as 10,000 dollars.<sup>134</sup> There is an occasional provision for fine or imprisonment of officers and agents of offending corporations. It is possible for a corporate officer to spend twelve months in an Alabama county jail for misjudgment of the state's requirements<sup>135</sup>—a possibility that no doubt encourages preventive compliance.

### B. The Model Act

The foreign corporation sections of the *ABA-ALI Model Business Corporation Act*<sup>136</sup> are now the pattern for new legislation. More than twenty states have adopted its requirements or generally similar laws.<sup>137</sup> The *Model Act* provisions include all of the features of the profile plus many others and constitute the most comprehensive foreign corporation law yet drafted. For example, the *Act* attempts to reduce scope problems by defining a number of activities that do not constitute transacting business.<sup>138</sup> The objective is good, but increased specificity rarely solves such problems. The *Act* requires considerable data about capital structure including a statement of the number of authorized shares, number of issued shares, and stated capital.<sup>139</sup> This information is needed primarily for purposes of assessing a franchise tax, which the *Model Act* ties directly to foreign corporation requirements by imposing the tax on "each foreign corporation authorized to transact business in this State."<sup>140</sup> In addition to the usual filing of charter copies, the *Act* requires filing of

<sup>132</sup> E.g., ALA. CODE tit. 10, § 21(89) (Supp. 1968); ARIZ. REV. STAT. ANN. § 10-482 (1956); ARK. STAT. ANN. § 64-1202 (1947); IDAHO CODE ANN. § 30-504 (1948); MICH. STAT. ANN. § 21.96 (1963); MISS. CODE ANN. § 5309-239 (1956); S.D. CODE § 11.2103 (1939); VT. STAT. ANN. tit. 11, § 764 (1958). In Tennessee, noncomplying corporations are barred by court decision. *United Artist Corp. v. Board of Censors*, 189 Tenn. 397, 225 S.W.2d 550 (1949), *cert. denied*, 339 U.S. 952 (1950). The opinion does not indicate that subsequent compliance would cure the defect, but there is no holding in Tennessee on that issue.

<sup>133</sup> ILL. ANN. STAT. ch. 32, § 157.125 (Smith-Hurd 1954).

<sup>134</sup> IND. ANN. STAT. § 25-314 (1948).

<sup>135</sup> ALA. CODE tit. 10, § 21 (94) (Supp. 1965).

<sup>136</sup> ABA-ALI MODEL BUS. CORP. ACT §§ 99-119, 121, 124, 126, 128-30 (1953).

<sup>137</sup> 2 MODEL BUS. CORP. ACT ANN. 178 (Supp. 1966).

<sup>138</sup> ABA-ALI MODEL BUS. CORP. ACT § 99 (1953).

<sup>139</sup> *Id.* § 103.

<sup>140</sup> *Id.* § 126.

articles of merger involving corporations admitted to do local business.<sup>141</sup> A formal procedure is included for change of local registered offices and agents,<sup>142</sup> and the mechanics of both withdrawal<sup>143</sup> and revocation<sup>144</sup> are complex. The basic structure of the profile is found in the *Model Act*, but the mechanism is perfected and extended, and the result is a formidable regulatory statute.

### III. ELIMINATION OF THE REQUIREMENT OF SERVICE WITHIN FORUMS

The *Pennoyer* decision mistakenly fused two issues: whether a sufficient relationship exists or existed between a particular defendant and the forum to allow adjudication of claims against him and whether the defendant received sufficient notice of the action. The court in *Pennoyer* should have asked whether there was reason to require the non-resident to defend the claim against him in Oregon and whether publication of the original process gave adequate notice. The court failed to make this two-step analysis and instead asked only whether the defendant was served with process while present in Oregon.

#### *A. Suggestion That Service Within Forums Is Not Necessary*

The 1917 case of *McDonald v. Mabee*<sup>145</sup> was an action on a note brought in a Texas court. The only defense was that the plaintiff had recovered a prior judgment on the note. The Supreme Court held the prior judgment invalid because the service, which had been made by publication, was not effective upon the particular facts. In reaching this result Justice Holmes did not fully accept *Pennoyer*, but wrote that "to dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."<sup>146</sup>

Justice Holmes' suggestion was for a long time ignored. In 1927 the Supreme Court decided *Hess v. Pawloski*,<sup>147</sup> which was an action brought against a non-resident motorist in the Massachusetts courts. Service of process was made upon the Massachusetts registrar of motor vehicles,

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<sup>141</sup> *Id.* § 110.

<sup>142</sup> *Id.* § 107.

<sup>143</sup> *Id.* §§ 112-13.

<sup>144</sup> *Id.* §§ 114-15.

<sup>145</sup> 243 U.S. 90 (1917).

<sup>146</sup> *Id.* at 92.

<sup>147</sup> 274 U.S. 352 (1927).

pursuant to a Massachusetts statute,<sup>148</sup> which provided that non-residents who used the state's highways were deemed to appoint the registrar as their agent for service of process. The Supreme Court held that service on the registrar was sufficient and adopted without question the unitary analysis of *Pennoyer*. According to the Court, "there must be actual service within the state of notice upon him or upon someone authorized to accept service for him."<sup>149</sup>

### B. The Two-Factor Analysis

The turning point came in 1940 in *Milliken v. Meyer*.<sup>150</sup> Meyer sued Milliken in a Colorado court and asked that a Wyoming judgment obtained by Milliken against him be declared void. Meyer's claim was based on the contention that the Wyoming court lacked jurisdiction in the prior action. The Colorado trial court found that Meyer was domiciled in Wyoming when the prior action began and that service was attempted under a Wyoming statute<sup>151</sup> by handing the original process to Meyer in Colorado. The trial court held that the service was sufficient, and dismissed the action. The Colorado Supreme Court reversed,<sup>152</sup> but did not consider the jurisdictional issue because it found error in the decree of the Wyoming court.

The United States Supreme Court reversed the state court, holding first that the issue considered by the Colorado court was not open to it under the full faith and credit clause, and second that the Wyoming judgment was valid. In his opinion for the Court, Justice Douglas used a two-factor analysis. First, he asked whether Meyer had a sufficient relationship with the state of Wyoming to be required to defend Milliken's claim in that state and held that "domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate

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<sup>148</sup> Law of May 22, 1923, ch. 431, [1923] Mass. Acts & Res. 438.

<sup>149</sup> 274 U.S. at 355. The *Pawloski* case is also of interest, because the concept of the statute there involved was borrowed from that of foreign corporation laws. The decision to allow application of the Massachusetts statute was difficult, for, as Justice Holmes made clear in *Flexner v. Farson*, 248 U.S. 289 (1919), there was no general principle as to individuals comparable to the principle of conditional entry. See pp. 7-10 *supra*. In *Kane v. New Jersey*, 242 U.S. 160 (1916), the Court upheld a requirement of actual appointment of a local agent by a non-resident motorist, though it did not consider the problem that Justice Holmes made clear three years later in *Flexner*. The Court in *Pawloski*, with considerable reliance on *Kane* and the practicalities involved—and not much attention to the strict demands of logic—upheld the Massachusetts act without resolving the conceptual difficulty.

<sup>150</sup> 311 U.S. 457 (1941).

<sup>151</sup> Law of Feb. 25, 1915, ch. 81, no. 167, [1915] Wyo. Laws 81.

<sup>152</sup> 101 Colo. 564, 76 P.2d 420 (1937).

substituted service."<sup>153</sup> He then considered separately the question of notice, dismissing *Pennoyer* with a judicial shrug:

That such substituted service may be wholly adequate to meet the requirements of due process was recognized by this Court in *McDonald v. Mabee* . . . , despite earlier intimations to the contrary. See *Pennoyer v. Neff* . . . ; Burdick, *Service as a Requirement of Due Process in Actions in Personam*, 20 Mich. L. Rev. 422. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.<sup>154</sup>

Thus Justice Douglas severed the questions of jurisdictional basis and notice to the defendant and introduced a new method of analysis.

### C. *New Technique Applied to Corporate Problems*

The two-factor technique was employed in *International Shoe Co. v. Washington*.<sup>155</sup> The defendant, a Delaware corporation, maintained, during the years 1937-1940, as many as thirteen salesmen in Washington State. The salesmen solicited and transmitted orders to defendant's principal office in Missouri. Washington imposed its unemployment compensation tax. The defendant contended throughout the subsequent administrative and judicial proceedings that the state lacked jurisdiction to tax. Counsel for the corporation argued specifically that service of the notice of assessment by handing a copy to one of its salesmen in Washington and mailing a copy by registered mail to its principal office in St. Louis was not effective.

Justice Stone's opinion contained a thorough redefinition of the jurisdictional basis required by the Constitution to call out-of-state corporations to defend actions in local courts. He wrote that a corporation must have "certain minimum contacts"<sup>156</sup> with a state such that the demand

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<sup>153</sup> 311 U.S. at 462.

<sup>154</sup> *Id.* at 463 (citations omitted). Professor Burdick's article is particularly informative as a statement of the law in this area as of 1922:

Attempts have repeatedly been made to take jurisdiction of non-resident defendants through service by publication or through personal service made outside of the State in which the action is brought. The Supreme Court has held that such procedure does not give jurisdiction of the non-resident, for a state cannot in that way extend its jurisdiction beyond its territorial limits.

Burdick, *Service As A Requirement of Due Process In Actions In Personam*, 20 MICH. L. REV. 422 (1922).

<sup>155</sup> 326 U.S. 310 (1945).

<sup>156</sup> *Id.* at 316.

to come and defend does not offend " 'traditional notions of fair play and substantial justice.' " <sup>157</sup> This holding made the decision famous, <sup>158</sup> but here the significant aspect of the opinion is Justice Stone's treatment of basis and notice as separate matters—just as the Court did in the *Milliken* case. Justice Stone first discussed the issue of whether the proper relationship existed between the defendant and Washington and then dealt separately with the sufficiency of notice. He wrote that "[i]t is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual." <sup>159</sup> Though there was service of process within the state, Justice Stone nevertheless wrote that the Court could not say "that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to appraise appellant of the suit." <sup>160</sup>

*International Shoe* was followed by new laws, popularly called long arm statutes. The scheme of these acts reflects the analysis used in the *Milliken* and *International Shoe* cases. Typically the statutes define in detail a number of contacts or relationships with forum states and provide that where any one of these contacts exists, there is a sufficient basis for jurisdiction. In addition these statutes, either by their own terms or by reference to more general statutes, provide for service of process outside forum states by a variety of methods, usually including personal delivery, mail, and any method allowed by states in which defendants are found. <sup>161</sup>

Illinois adopted the first comprehensive statute in 1955. <sup>162</sup> A number of jurisdictional relationships were defined by the act, which then provided: "[S]ervice of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State." <sup>163</sup> The most sophisticated statute to date is the *Uniform Interstate*

<sup>157</sup> *Id.*

<sup>158</sup> See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 923 (1960).

<sup>159</sup> 326 U.S. at 320.

<sup>160</sup> *Id.* In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the only attempt to serve the corporate defendant was by registered mail. The assertion of jurisdiction by California was sustained and the opinion by Justice Black used a two-factor analysis as a matter of course.

<sup>161</sup> Developments in this area until 1963 are described in D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

<sup>162</sup> ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

<sup>163</sup> *Id.* § 17(2). Reference is made to ILL. ANN. STAT. ch. 110, § 16 (Smith-Hurd 1956), which establishes the mechanics of out-of-state service of process.

and *International Procedure Act*. The jurisdictional bases are broadly stated,<sup>164</sup> and service of process outside the forum is specifically provided,<sup>165</sup> as in the Illinois act. Out-of-state service methods include personal delivery, delivery by any type of mail requiring a signed receipt, as prescribed by the law of the place where service is made, as directed by a foreign authority in response to a letter rogatory, and as directed by a forum court.<sup>166</sup> Any method used must be "reasonably calculated to give actual notice,"<sup>167</sup> putting the statute squarely within the *Milliken* standard.<sup>168</sup>

At least thirty states have adopted long arm statutes.<sup>169</sup> These laws vary somewhat in content, but there is every reason to believe that broad statutes much like the *Uniform Act* will eventually be adopted by every state. The interests of local plaintiffs and their lawyers virtually guarantee this result.<sup>170</sup> The significance of these developments is clear. In actions against foreign corporations where required jurisdictional bases exist, it is not necessary to serve agents physically present within forum jurisdictions. Under long arm statutes such as the *Uniform Act*, service can be made outside states in a number of ways. Local agents, whether individuals, corporations, or public officials, can be eliminated from the procedure.

#### D. *The Decline of Ultra Vires*

Removal of the original purpose for requirements that local agents be appointed is paralleled by a change related to requirements that foreign corporations file copies of their charters. *Erie Railroad v. Tompkins*<sup>171</sup> effectively did away with the void contract rule followed by the federal courts. Furthermore, the law of most states underwent significant change,

<sup>164</sup> UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03.

<sup>165</sup> *Id.* § 1.04.

<sup>166</sup> *Id.* § 2.01.

<sup>167</sup> *Id.* § 2.01(a).

<sup>168</sup> See p. 26 *supra*.

<sup>169</sup> The count in 1964 was 29. Note, *The Virginia Long Arm Statute*, 51 VA. L. REV. 719 (1965). Georgia has acted since then. Act of March 10, 1966, no. 494, [1966] Ga. Laws 342. Doubtless there are others.

<sup>170</sup> Recognition of the inevitable should not be mistaken for uncritical approval. The need for restraint was recognized in Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1968), which suggests the relevance of those interests in considering particular long arm applications. The technique is reminiscent of an early proposal that changed the choice of law process. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

<sup>171</sup> 304 U.S. 64 (1938). This decision eliminated application of federal commercial law in diversity cases. See H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 610-36 (1953).

primarily by adoption of legislation restricting the defense of ultra vires.<sup>172</sup> Vermont adopted the first of these acts in 1915,<sup>173</sup> and since that time a majority of states have adjusted the problem by statute.<sup>174</sup> Typical is the Illinois law,<sup>175</sup> which provides that "[n]o act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . ."<sup>176</sup> The Illinois act protects outsiders dealing with corporations, essentially the same objective served by the filing requirements. Statutes eliminating the defense are obviously more effective than charter filing requirements.

#### IV. PRINCIPLE OF CONDITIONAL ENTRY QUESTIONED

The joinder in *Bank of Augusta v. Earle*<sup>177</sup> of the ideas that law cannot operate beyond sovereign boundaries and that corporations are fictional creatures of law forms the conceptual basis of foreign corporation laws. The principle of conditional entry is laid on this foundation.

Traditional territorial notions are well shaken; further elaboration is unnecessary to suggest that this part of the foundation is eroded.<sup>178</sup> The accuracy and utility of describing corporations as fictional creatures of law has also come into question. Doubt was early expressed by Stewart Kyd, who wrote in 1793 that "a corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body united by that authority is seen by all but the blind."<sup>179</sup> During the nineteenth century the Supreme Court occasionally recognized the difficulties of the fiction theory. In *Marshall v. Baltimore & Ohio Railroad*,<sup>180</sup> Justice Grier wrote of the idea that a corporation is an artificial person, but pointed out that "a citizen who has made a contract, and has a 'controversy' with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with nat-

<sup>172</sup> For a description of the spread of this legislation to 1958, see Ham, *Ultra Vires Contracts Under Modern Corporate Legislation*, 46 KY. L.J. 215 (1958).

<sup>173</sup> VT. STAT. ANN. tit. 11, § 133 (1958).

<sup>174</sup> By 1956, 24 states had made some statutory modification of the ultra vires doctrine. R. BAKER & W. CARY, *CORPORATIONS* 370 (3rd ed. unab. 1959). Apparently the current total is more than thirty-five. 1 MODEL BUS. CORP. ACT ANN. 200-01; *Id.* at 81 (Supp. 1966).

<sup>175</sup> ILL. ANN. STAT. ch. 32, § 157.8 (Smith-Hurd 1954).

<sup>176</sup> *Id.* But lack of capacity may be asserted in a proceeding by a shareholder against a corporation to enjoin certain acts; in a proceeding by a corporation against officers or directors for exceeding their authority; and in a proceeding by the State to dissolve a corporation for transacting unauthorized business. *Id.*

<sup>177</sup> 38 U.S. (13 Pet.) 519 (1839).

<sup>178</sup> See pp. 3-4 *supra*.

<sup>179</sup> 1 S. KYD, *THE LAW OF CORPORATIONS* 16 (1793).

<sup>180</sup> 57 U.S. (16 How.) 314 (1853).

ural persons."<sup>181</sup> In 1911 Arthur W. Machen referred specifically to Chief Justice Marshall's characterization in the *Dartmouth College* case,<sup>182</sup> and called it "untrue."<sup>183</sup> He wrote that "a corporation exists as an objectively real entity, which any well developed child or normal man must perceive; the law merely recognizes and gives legal effect to the existence of this entity."<sup>184</sup> Philosopher John Dewey entered the lists in 1926 with an article urging elimination of the idea of personality "until the concrete facts and relations involved have been faced . . . and stated on their own account . . . ." <sup>185</sup> One year later a New York Supreme Court judge eschewed both houses and wrote that a corporation is "more nearly a method than a thing, and that the law in dealing with a corporation has no need of defining it as a person or an entity, or even as an embodiment of functions, rights and duties, but may treat it as a name for a useful and usual collection of jural relations."<sup>186</sup>

Without more, it is apparent that the formulations of Chief Justice Marshall relied on by Justice Taney in the *Bank of Augusta* case have been seriously questioned. This development, coupled with the bankruptcy of territorial thinking, shows that the rationale of the principle of conditional entry has disappeared.

#### CONCLUSION

The story of foreign corporation laws to date leads to two conclusions. First, the original purpose of the fifty state laws has now largely passed out of existence. Second, the operating principle of those laws is outdated, sustained by inertia but not by currently acceptable jurisprudence. Should these troublesome regulatory schemes now be enforced by the courts or conceded further life by the legislatures?

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<sup>181</sup> *Id.* at 327.

<sup>182</sup> *See* p. 9 *supra*.

<sup>183</sup> Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 260-61 (1911).

<sup>184</sup> *Id.* at 261.

<sup>185</sup> Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926).

<sup>186</sup> *Farmer's Loan & Trust Co. v. Pierson*, 130 Misc. 110, 119, 222 N.Y.S. 532, 543-44 (Sup. Ct. 1927).