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How to maintain public order without impairing our freedoms of expression is one of the major dilemmas of our time. The public turns to the law and to the lawyer for its solution. The lawyer can help with the answer only when he is aware that every restriction placed upon the free exchange of ideas of public interest, however justified, is a restriction upon a basic right of a citizen in a free society and, further, realizes that those elements which would overthrow our democratic society employ disorder and mob violence as primary weapons.\(^2\)

WILLIAM V. BURROW.

Corporations—Process—Service on Non-Resident Directors of Domestic Corporation

The corporation is a necessary party to a stockholders' derivative suit against the directors for mismanagement.\(^1\) This suit has been held to be an action in personam,\(^2\) service not being allowed by publication on the non-resident directors.\(^3\) Thus a long recognized problem arises: "**How can service of process be had on non-resident directors in the jurisdiction where the corporation is resident?**

**"*** those (directors) who have looted and misappropriated corporate assets will be enabled to escape liability by reason of the fact that the corporation is not doing


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1 13 FLETCHER CYC. CORP. (PERM. ED.) §5997.
2 3 FLETCHER CYC. CORP. (PERM. ED.) §1283.
business within the jurisdiction where the wrongdoers reside and where they alone can be served.\(^5\)

In 1947 the Legislature of South Carolina passed a statute in an attempt to remedy this unwarranted situation as to South Carolina corporations.\(^6\) The statute provides in essence that by becoming or remaining a director in a domestic corporation, a non-resident thereby appoints the Secretary of State of South Carolina his lawful attorney in fact for service of process in the courts of South Carolina for any action \(\textit{thereafter}\)\(^7\) arising relating to actions of the corporation which arose while he held office. In a recent case arising under this statute the Supreme Court of South Carolina refused to give the statute retroactive effect, saying: "Not only does the act evince an intent that it should operate prospectively but such is the reasonable inference from the fiction of implied consent upon which it is based."\(^8\) Thus the constitutionality of the statute was not directly in issue, but the inference to be drawn from the opinion is that the court would hold the statute constitutional, a proper case arising.

This South Carolina statute appears to have been patterned after the non-resident motor vehicle laws which have been held constitutional.\(^9\) It provides that notice be mailed to the director by the Secretary of State,\(^10\) that such continuance shall be granted by the court as to afford reasonable opportunity to defend the suit,\(^11\) and that any person who is a director may resign within thirty days and not be subject to this act.\(^12\) The "motor vehicle laws" have been upheld on the theory that "In the public interest the state may make and enforce regulations

\(^5\) Goldberg v. Emanuel, 166 Misc. 610, 613, 2 N. Y. S. 2d 943, 946 (Sup. Ct. 1938) rev'd 254 App. Div. 556, 2 N. Y. S. 2d 946 (1st dept. 1938). This problem would also exist where there are resident directors but they are insolvent.

\(^6\) Acts and Joint Resolutions South Carolina, 45 \textit{Stat. at Large} 277 (May 19, 1947).

\(^7\) Italics added.


\(^10\) Sec. 2: "... ; PROVIDED, the Secretary of State shall forthwith forward one copy of such Summons and Complaint to the non-resident director so served, by registered mail directed to such non-resident director at the last address filed with the Secretary of State as hereinafter provided." This is a requirement under the decision of Wuchter v. Pizzuti, 276 U.S. 13 (1928).

\(^11\) Sec. 5: PENDING ACTIONS.—"That the Court in which any action provided for herein is pending shall order such continuance as may be necessary to afford such non-resident director so served as provided herein reasonable opportunity to defend the action."

\(^12\) Sec. 6: NONRESIDENT DIRECTOR RESIGNING SUCH OFFICE. "That any person now a non-resident director of any such domestic corporation who shall within thirty (30) days from the date of approval of this Act, resign in good faith as such director and shall file with the Secretary of State a copy of such signed resignation shall not be subject to the provisions of this Act; and any person who may hereafter be subject to this Act may terminate its application as to him except for causes of action already accrued, by bona fide resigning as such director and filing a signed copy of said resignation with the Secretary of State;..."
reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways." Following this idea of "in the public interest," statutes have been upheld requiring non-residents "doing business" in a state to appoint agents for service of process. The reasoning behind these statutes is that although a state may not exclude an individual from doing business in the state, it may require that certain conditions be complied with to safeguard its citizens. It is submitted that by participating in the management and direction of a corporation a director is thereby doing business in the state where the corporation is present. Is this "doing business" sufficiently related to the public interest to justify such a statute as South Carolina has passed? In view of the number of "Blue Sky Laws" and regulations governing the sale of securities it would appear that the public is vitally interested in the protection of the investor. Further the Supreme Court of the United States upheld an Iowa statute providing for service on an agent in that state where the non-resident was doing business, his business being the sale of securities. It would appear that the South Carolina statute is a further means of protecting the investor, non-resident as well as resident, by providing him with a practical means of protecting his investment against unwarranted acts of corporate directors.

Another approach to this problem would be via the corporation. A corporation is a creature of the law, and it is not entitled to the "privileges and immunities" clause of the constitution. The privilege of forming a corporation is granted by the state, therefore the state necessarily lays down the regulations and requirements to be complied with in incorporation. Why could not a state require, as South Carolina has in essence done, that all the directors of a domestic corporation must be amenable to process within the state, non-residents

17 14 FLETCHER CYC. CORP. (PERM. ED.) §§6734-6780.
20 Blake v. McCullough, 172 U.S. 239 (1898).
21 BALLANTINE, CORPORATIONS (REV. ED.) ¶¶ 17: CLARK, CORPORATIONS (2d ED.) p. 4; STEVENS, CORPORATIONS c. 1, §1; FLETCHER CYC. CORP. (PERM. ED.) ¶114.
22 1 FLETCHER CYC. CORP. (PERM. ED.) ¶114.
through service on the Secretary of State? This would not appear to be a discrimination in violation of the constitution, but rather a provision to put nonresidents on an equal footing with residents—a provision to put nonresidents on an equal footing with residents. The Supreme Court of the United States has said, "Literal and precise equality in respect of this matter is not attainable, it is not required."24

A closely related problem arose in North Carolina in connection with the "double liability" feature of bank stock.25 A resident of New York held stock in a North Carolina bank. The bank failed and an assessment was made against the stock of the non-resident and docketed in the local county where the bank was located, in accordance with the North Carolina statute. On failure of the stockholder to pay this assessment, the commissioner brought suit on said assessment in New York, and recovery was allowed on the theory that the non-resident stockholder assented to this type of liability by becoming a member of the corporation.27 Thus, if a stockholder by becoming a member of a corporation consents to the liability involved, why could this not hold true for a non-resident director in a South Carolina corporation under the statute herein discussed?

From the foregoing discussion it is submitted that this South Carolina statute should be upheld as constitutional and very desirable. Though it is conceded that this type of statute may tend to discourage incorporation in South Carolina, this seemingly disadvantageous aspect is well overcome by the advantage secured to the investing public in being able to better protect its interest.

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25 It is interesting to note further that the Supreme Court has upheld a statute requiring non-residents to post bond for cost, even though such is not required of a resident. Ownby v. Morgan, 256 U.S. 94 (1921). N. C. Gen. Stat. §28-35 (1943) requires a foreign executor to post bond whereas a local executor does not have to.
27 Said assessment "shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Court of this state *** if not paid execution may ***** issue against the stockholder delinquent." N. C. Pub. Laws (1927) c. 113, §13.
28 Hood v. Guaranty Trust Co. of New York, 270 N. Y. 17, 200 N. E. 55 (1936). It is interesting to note that the court continually repeated that this assessment was not the same as a judgment, though the Supreme Court of the United States upheld the statute which said that it was, supra note 26.
29 However, it is doubtful whether at the time of incorporation, misfeasance of the directors is anticipated. A possible solution to avoid the "strike suit" would be the requirement that a person seeking to take advantage of the procedure under this statute be required to post a bond to cover the traveling expenses of the non-resident director in defending an unsuccessful suit.