Recognition

I. Theories of Recognition

In the nineteenth century two rival schools of thought dominated the treatment of foreign corporations in private law. Young, in his admirable study of 1912, called them the restrictive and the liberal theories. Perhaps they may be better described as the theories of the territorial and the extraterritorial or international effect of incorporation. Scarcely noticed in the literature, before the present war a third current gained influence, having nationalism as its distinctive impulse.

1. The Territorial Theory

At one time, the idea generally prevailed that every state had to decide arbitrarily what foreign corporations should have legal personality within its own territory. This doctrine limited the functions of legal persons by geographical boundaries.

In the famous words of Judge Taney:

"A company can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in the contemplation of the law, and by force of the law, and where that law ceases to operate and is no longer obligatory the company can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty."  

And Field, J., declared:

"The Company being the mere creature of local law, can

1 For a survey in this country, see Machem, "Corporate Personality," 24 Harv. L. Rev. (1912) 253, 347.
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have no existence beyond the limits of the sovereignty which created it."**

This doctrine has taken root in American thought, Professor James reminds me, as a result of the colonial English companies. Nevertheless the doctrine sounds strange, when constantly repeated in the courts of the United States, the country of the Bill of Rights, for it comes directly from governmental absolutism and has been engendered by three factors:

First, the tradition of police states required that legal personality be conferred upon an association only by grant of the sovereign. The prince, the state, created the legal entity. This system of *concession, authorization, charter* (in the original meaning), goes back to Julius Caesar and Augustus who made the essential functions of corporations (*coire, con-vocari, cogi*) dependent on permission by the Emperor or the Senate. The purpose was political precaution against subversive factions, and the system has remained a weapon of suspicious and jealous rulers.

Second, discrimination against foreign corporations was nourished by the fear not only of political disturbance but also of foreign economic forces menacing domestic organizations by competition. Laurent, the principal European protagonist of this doctrine, was hostile to certain types of associations.

Third, Savigny and his followers constructed on this background the doctrine of the artificial nature of corporations: Any personality not produced by nature had to be conferred by the lawmaking power and hence was imaginary, fictitious, a mere creature of the law.

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8 Paul v. Virginia (1868) 8 Wall. 168.
4 Even Ballantine, Corporations 843 makes no exception.
6 Mitteis, Römisches Privatrecht (1908) 399; Rabel, "Grundzüge des römischen Privatrechts" in Holtzendorff-Kohler, 1 Enzyklopädie der Rechtswissenschaft 428; Schnorr von Carolsfeld, Geschichte der juristischen Personen (1933).
In a final conclusion from this apparently solid complex of ideas, a corporation was thought necessary to be restricted to the boundaries of the state and inexistent outside of it.

Such territorialism was defended in Europe by Mancini, Laurent and his contemporaries, and in a late isolated stand, 1908, by André Weiss. In this country, Taney’s and Field’s dicta were made the basis of the Restatement in 1934, although each part of the doctrine has been thoroughly refuted and entirely discarded by common opinion throughout the world. To maintain the doomed theory in the face of modern conditions, diverse auxiliary theories were invented, such as the “theory of comity” whereby the state permits foreign corporations to function in its territory, although not bound to do so, and the agents’ theory which pretends that a foreign corporation despite inexistence in the state nevertheless acts and contracts through agents, that the legal person dwells outside but its agents reside inside. These makeshift constructions also were long since destroyed by the criticism of scholars. The real American law has nothing to do with them.

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6 Laurent, 4 Principes 232, 285 § 119; 4 Laurent 256, 293 §§ 130, 154; Rolin. 1 Principes § 27, 2 id. § 806. For decisions in various countries, see Kosters 671 n. 1, 2 Beale § 166.1: “The association can exist as a corporation only where that law prevails which makes it such, that is, within the territorial limits of the state of its charter; for the law of a country has no extra-territorial operation.” Dudley Field § 545.


European leaders: 1 Bar § 104; Lainé, Clunet 1893, 273; Pillet, Personnes Morales 17-57; id., Principes §§ 73, 74; id., 1 Traité 336; Michoud, 2 Personnalité Morale §§ 232ff.; 2 Lyon-Caen et Renault § 1093; 1 Fiore § 319; Fedozzi, Gli enti collettivi nel diritto internazionale privato (1897) 197-216 and Il diritto processuale civile internazionale (1905) 185-212; Lo Monaco, Filangieri 1885, 1, 379.

For more literature see Kosters 672; Gutzwiller 1627; Charles De Visscher, Revue 1913 at 193.

9 Young 48; Henderson 36-49; see 1 Bar 302; Pillet in Mélanges, Antoine Pillet (1929) 500; Rigaud, 10 Répért. 226 No. 11.

Nevertheless, these ghosts from metaphysical spheres reappear in the Restatement and survive in the language of the courts. More dangerous, a few derivatives are popular such as the following: "A corporation cannot perform outside of the state by which it was created, acts which are strictly corporate acts." In particular, meetings of stockholders in matters of formal organization can be held only in the state of incorporation. Authority to an agent must be given in this same state. A state has the right to “exclude” foreign corporations from doing business, or to impose conditions on them for doing business, at its pleasure. Foreign corporations cannot have more rights than domestic corporations.

What life or value there is left in these sayings, we shall have to discover.

2. The International Theory

The system developed in the epoch of liberalism brings corporations into a position analogous to that of individuals. Created by the competent state, they need no particular recognition at all in other states. This theory has the background of an even older history than that of the territorial theory. Research in medieval law has discovered that before the time of the princes who claimed sovereignty like Roman Caesars, corporations were freely formed by the association of members. Also the collegia and sodalitates of the Roman Republic were autonomous creations. Moreover, Germanic as well as Roman legal history has taught that the conception of a corporation as a merely artificial being is utterly wrong.

12 Restatement § 163; BEALE, 5 Col. L. Rev. (1905) 255. Outmoded, see STEVENS Corporations 482.
13 2 BEALE 768 par. 2.
15 See infra pp. 150ff.
For a time, the scholars of old Germanic law\textsuperscript{16} even popularized the idea that in complete antagonism to the allegedly "Roman" fictitious legal person, the medieval associations were living bodies, vigorously working in all public spheres and of more economic, social, and political significance than their individual members. This Germanistic approach left lasting improvements in domestic laws, as for instance in giving the principal representatives of corporations the role or "organs" that embody the will of the corporate "body" and are able to obligate the entity by contract and in tort.\textsuperscript{17} But this theory also has been abandoned by better advised scholars. From the historical point of view, the concept of the "universitas," designed by the Roman jurists after the pattern of the autonomous city (\textit{polis}), has formed the eternal model of an entity distinct from its members in its relations to the outside world. The internal relation between a private corporation and its members with respect to their participation in the common assets and debts varied even in the ancient world. Thus, the antithesis of a "Roman" soulless fictitious person and a Germanic living organism was highly distorted. From the theoretical angle, present writers like to say that individuals also take their legal status from the law, hence there is no innate ground why organizations should be discriminated against. In addition, the normal method of bestowing personality upon associations is no longer granted by special act but statutory determination of conditions precedent—in Europe called "normative conditions"—by complying with which private persons may create legal bodies.

While trade and industry have multiplied their associations and gained for them wide international admission, the

\textsuperscript{16} In the first place, Otto Gierke, \textit{Die Genossenschafts-theorie und die Deutsche Rechtsprechung} (1887) 5, 604.

\textsuperscript{17} See German BGB. § 31; Swiss C.C. art. 55: the will of a juristic person is expressed through its organs (not "organisms" as Schick translates).
mightiest impulse, of course, has come from the immense growth of capitalism. Industrialization favored and needed concentration of means. Exchange of raw materials, industrial products, and skilled enterprise opened countries to corporate ventures. In the height of the capitalistic era, few nations wanted to hide behind Judge Taney's doctrine, certainly not the United States.

It is of extraordinary interest that the liberal system was declared in England as early as 1724 by leading cases which still have authority. Foreign companies have ever since been accorded recognition as respects their personality, as well as full freedom to do business in Great Britain. The Canadian courts are well aware, despite their many contrary statutes, that "at common law, a foreign corporation may carry on business in a jurisdiction other than its own without having special authority to do so."

Elsewhere, this system was adopted in the course of the nineteenth century. The commission of German states, which drafted the General Commercial Code of 1862, found it so obvious that the civil existence of foreign companies must be recognized that no provision to this effect was considered necessary. But the right to do business was distinguished. Unconditional recognition, at least in this meaning, has remained the nearly unchallenged principle for commercial associations in most of Europe, and has been defended with respect to all juristic persons by most of the literature. Only the French Republic has insisted in principle, despite the French writers, on certain restrictions established under Napoleon III, against foreign stock corporations.

18 Dutch West India Co. v. Henriques Van Moses (1724) 1 Strange 612; Henriques v. General Privileged Dutch Co. (1728) 2 Ld. Rayn. 1532, 92 Eng. Re. 494.
20 Protokolle 371, 42, Sitzung (quoted by WALKER 202).
21 See also ARGANA, Report in Republica Argentina, Segundo Congreso Sudamericano 223.
3. Reactionary Trends

Developments between the two world wars have demonstrated once more that the problem of recognition of foreign corporations is more intimately connected with economic and political considerations than with abstract speculation. From the beginning, the Soviet Union has been slow to recognize foreign legal persons. The National Socialist Law on Stock Corporations of 1937 abolished free admittance of foreign business associations to the carrying on of business, and the comment by a national socialist author revives Laurent's theory. French and Latin-American laws and literature have shown much of the same spirit, perhaps not so much aiming at restoring the territorial nature of incorporation, as endeavoring to strengthen the examination, supervision, and governmental domination of foreign enterprises. Regulations to enforce control over the activities of immigrant business go hand in hand with measures to close certain branches to all foreigners and to enforce the practice of certain quotas of nationals on boards of directors and membership lists.

Nevertheless, except for Russia, the principle of unconditional recognition, has not lost its prevailing role. Notwithstanding conscious and unconscious exceptions, it may be asserted that this principle prevails at this moment throughout the world. Language in both Americas sounding as if recognition depended on authorization, often is not to be taken literally. Even so, the picture is complicated, and the practical effect of recognition is reduced or menaced by restrictions of many kinds.

It is convenient, therefore, to define first the concept of recognition according to actual laws.

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22 See infra p. 183.
4. Concept of Recognition

If the liberal theory were carried through without exception, there would be no need for a notion other than that of the personal law, since under this theory any foreign corporation created by the personal law exists within the forum. The need arises only because in certain countries or for certain types of legal persons the personal law acquired abroad is not held sufficient to support the existence of a corporation within the forum. There is no evidence that any jurisdiction would disregard the existence of a juristic person in the state where it has been validly constituted according to the law regarded as competent at the forum.

Recognition, consequently, signifies that the authorities of a state affirm a foreign-created legal person as existent for all purposes, applying the law considered to be the personal law.

Recognition does not mean the creation of a new person, as would be the logical implication of the theory whereby a corporation "can exist only in the country which makes it such" and "the consent of another state cannot alter the matter." Under the influence of such imaginations, (1) recognition of an existing legal entity, (2) reincorporation, i.e., the constitution of a new personality, and finally, (3) "domestication," which lies in between, were easily confused.

By an effect felt up to our days, we still hear the contention that recognition is dependent on a sort of naturalization. But a sharp distinction is important. A compulsory requirement of the latter character has correctly been called an unjustifiable trespass on the foreign competent law.

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24 2 Beale § 166.1.
25 1 Fiore § 320. On the distinction of "domestication" from the mere pursuit of business, see 2 Beale § 153.7. The German Reichsgericht (July 11, 1934) JW. 1934, 2845, Clunet 1935, 164, IPRspr. 1934 No. 12 observed this distinction with respect to an English certificate of registration.
26 Charles De Visscher, Revue 1913 at 194, 195 and n. 1.
Of course, there is no rule of present international law obligating a state to recognize foreign-created juristic persons. There exists, however, theoretical agreement on the desirability of mutual liberality, expressed in numerous drafts to multipartite treaties.

On the other hand, recognition does not necessarily include, and in the great majority of countries does not include, permission to have a place of business or an agent, or to do business in the country. Moreover, various restrictions are imposed. This, of course, deprives recognition of much of its practical value. Yet recognition involves legal personality only, not permission to engage in commercial or other activities. These two categories, although correctly contrasted, have been inadequately termed by some Anglo-American writers “civil capacity” and “functional capacity.”

With more clarity, commentators on the recently repealed Italian Commercial Code state that the poorly drafted sections therein, regulating the business of foreign mercantile organizations, do not really “create the prerequisites of their legal constitution” but instead “presuppose their legal constitution under the foreign law.”

What prerogatives usually flow from recognition as such will have to be discussed more closely after a survey of the systems adopted in the present legislations.

II. Conditions for Recognition

1. Unconditional Recognition

Under the system attaching international effect to the

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27 BAR 302; NIEMEYER, "Les Sociétés de commerce," Recueil 1924 III 40 n. 1
29 PILLET, Personnes Morales § 13.
31 Note, Rivista 1912, 509.
creation of a corporation, recognition in the practically restricted meaning, just defined, is obtained *ipso jure*, without the need of any step, such as filing for registration, paying of fees, or applying for a decree.

(a) *For all organizations.* This system, applied to all corporations and other associations, is actually in force in England,\(^82\) and the United States,\(^83\) as well as Brazil,\(^84\) Greece,\(^85\) the Netherlands,\(^86\) Spain,\(^87\) Switzerland,\(^88\) and certain other countries.\(^39\) It has also been adopted in the Montevideo Treaties\(^40\) and in the *Código Bustamante*.\(^41\)

The statutory Argentine rule is in controversy but the best authorities indicate a system exactly parallel to that of the United States, requiring authorization only for the carrying on of business.\(^42\) In Italy, the principle was for a long time

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\(^82\) See *supra* n. 18. A condition is that the government of the country of creation is recognized by the British Government, see 5 *Halsbury's Laws of England* (1932) 860.

\(^83\) Restatement §§ 152ff. speaks of all incorporated associations, but as to unincorporated bodies see *supra* pp. 109 n. 59, 113 n. 80.

\(^84\) Brazil: This theory has been prevailing in the opinion of the leading writers, see CARVALHO DE MENDONÇA, 4 Trat. Dir. Com. § 1510, ESPINOLA, 6 Tratado 557, and clearly adopted in Introd. Law (1942) art. 11, cf. ESPINOLA, 8-C Tratado 1775.

\(^85\) Greece: App. Athens (1937) No. 2091, 49 Themis 406, Clunet 1938, 900; 2 STREIT-VALLINDAS § 23; C. C. (1940) art. 10 (the draft had required royal authorization).

\(^86\) The Netherlands: H. R. (March 23, 1866) W. 2781; KOSTERS 672.

\(^87\) Spain: *Arg. C. C.* art. 28, cf. 27; C. Com. art. 15, cf. 21 last par.; see TRIAS DE BES 376 § 324. This includes associations, excepting certain classes such as religious orders, since the Law of Associations of June 30, 1887 does not distinguish domestic from foreign associations.

\(^88\) Switzerland: BG. (July 12, 1934) 60 BGE. I 225; SCHNITZER, Handelsr. 81.

\(^39\) Austria: The Imperial Decree of Nov. 29, 1865, concerning "the admission of foreign stock corporations and stock companies with limited partners to carrying on business in Austria" has been explained in the prevailing opinion as not referring to recognition, see WALKER 202. This construction was maintained in Czechoslovakia, see LAUFKE, 7 Réperti. 186 Nos. 58, 59.

For the group of codes following the Spanish model, see Chapter 23 n. 31.

\(^40\) *Supra* p. 35.

\(^41\) *Código Bustamante*, art. 33; see, however, art. 32.

\(^42\) Argentina: C. Com. arts. 285-287; ZEBALLOS, Clunet 1906, 604-618; MACHADO, 1 Cód. Civ. Arg. 74; 1 WEISS-ZEBALLOS 414; RIVAROLA, 14 Revista Gen. Legisl. y Jur. (Madrid 1924) 533, 539. More recently, opinions on the interpretation of C. C. arts. 33, 34, as against art. 45 were sharply divided between ALCORTA, 2 Der. Int. Priv. 34 and 3 VICO § 83. The old liberal doctrine defended by Vico seems to
affirmed by the writers and rejected by the courts. Finally, the Supreme Court adhered to it in 1930 and 1931, and so apparently does the new Civil Code.

In Belgium, unconditional recognition has been granted by statute to foreign "commercial companies" only, but is extended to all legal persons, public and private, by liberal writers and by some courts, although other authorities continue to deny capacity, particularly to foreign nonprofit associations when they bring actions.

(b) For trading associations. In a second system, the principle applies only to trading corporations and other commercial organizations, having a stable central place abroad. Also some followers of the territorial theory, making remain victorious. See App. Buenos Aires (April 20, 1934) 46 Jur. Arg. 183, 187; Romero del Prado, Der. Int. Priv. 83; Note, Clunet 1938, 838. Art. 45 of C. C. thus, is understood to apply to authorization for business only. Law No. 8867, of February 6, 1912, is understood to mean that this authorization is not needed in case of reciprocity. However, the practice is called "peu libérale" in Clunet, loc. cit.

Paraguay: The liberal theory is adopted by Baez 47.

43 Fedozi 71; Cavagliere, Dir. Int. Com. 241; Udina, Elementi § 79, referring to C. C. (1865) arts. 2 and 3; C. Com. (1882) art. 230.


45 Disp. Prel. (1938) art. 6; id. (1942) art. 16 par. 2, states that the rule of par. 1, on principle granting foreign individuals the civil rights of nationals, applies also to foreign legal persons. The final draft (art. 9) expressed the principle that they enjoy the same capacity as national juristic persons but not more than in the foreign country. The Minister of Justice held it more prudent to say expressly that juristic persons are treated like foreign individuals in order not to revive a former controversy. (Relazione Solmi, 1938, § 7). Evidently, in this line of thought, the law of aliens and recognition of the personal law are identified. Soberly considered, however, the actual text limits itself to a somewhat problematic provision regarding merely the law of aliens. Hence, it is understandable that Azzari-Martinez, 1 Diritto civile italiano secondo il nuovo codice (1940) 371, raises the question whether foreign legal persons may be considered existing and may exercise their civil rights in Italy without being "recognized" by the Italian State. In his own opinion, recognition is granted without a formal act.

46 Consolidated Companies Act 1935, art. 196, corresponding to art. 128 of the original text of 1873 and art. 171 of 1913. See Poulet §§ 200-203; Cass. (April 12, 1888) Pasicrisie 1888,1.186.

47 Belgium: Cour Bruxelles (May 4, 1932) Clunet 1933, 184 (a French association of cheese manufacturers); Cass. (Nov. 12, 1935) 3 Giur. Comp. DIP. No. 131 (action by the French association of authors and composers, with strange arguments, see supra, Chapter 21, n. 51).
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an exception, consent to this result for the sake of advanced international commerce. Nonprofit associations encounter more distrust.

Thus, in Germany foreign business corporations and partnerships have been recognized *ipso jure* from an early time in what may be qualified as customary law. The same rule obtains, e.g., in the Netherlands, Rumania, Yugoslavia, Japan, and in the influential Civil Code of Chile whose example has been followed in numerous special Latin-American laws on stock corporations.

In France, an analogous customary rule has been strongly curtailed by an exceptional legislation concerning capital stock corporations, so as to limit unconditional recognition to business organizations on a personal basis: copartnership and partnership *en commandite*.

Whether the Soviet Russian law recognizes in any way foreign business organizations, as has been asserted, cannot be ascertained.

49 ROHG. (April 28, 1871) 22 ROHGE. 147; and the constant decisions of the Reichsgericht from 7 RGZ. 70. See 83 RGZ. 367.
50 The Netherlands: Rb. Rotterdam (June 5, 1913) W. 9549.
51 Rumania: C. Com. (1887) art. 237.
53 Japan: C. Com. art. 255, now 479. Although the Japanese Civil Code, art. 36 (1) speaks exclusively of commercial companies, art. 255 of the Commercial Code has been interpreted by the Supreme Court (April 17, 1905) 1 C. Com. of Japan Ann. 406 case 165, as not distinguishing whether a foreign company is a juristic person or not.
54 See Vico 40.
55 See especially Honduras: C. C. art. 57, cf. Bijon, 6 Répert. 443 No. 35; C. Com. (1950) art. 2 par. 3.
56 Mexico: C. C. (1928) art. 2736, see Schuster, 7 Tul. L. Rev. (1933) 348; Ley General de Sociedades Mercantiles (1934) art. 250.
58 See 2 Weiss, Traité 484; 2 Lyon-Caen et Renault 914 § 1093.
59 Makarov, Précis 229 apparently thinks that the special authorization required by the laws of the USSR regards only the doing of business, but that unrecognized foreign corporations may sue in Russia, upon claims arising abroad, only under reciprocity.
(c) *For nonprofit corporations.* Prevailing though somewhat uncertain French doctrine\(^{68}\) traditionally has regarded foreign associations with purposes other than profit as *ipso jure* existent, irrespective of reciprocity. Nor were exceptions of public policy raised even when a foreign domiciled religious congregation, whose French department had been dissolved in 1901, brought actions in France.\(^{59}\) However, among others, the question remained unsettled whether foreign associations could do more than the modest acts permitted to French associations not enjoying a declaration of "public utility." At present, these doubts are ended; a decree prior to the war of 1939, which may be of temporary character, required governmental authorization as a condition of recognition.\(^{60}\)

A German statutory provision, too, declares that associations pursuing noneconomic purposes need a decree of recognition,\(^{61}\) but the Reichsgericht has recently confirmed the doctrine that such a decree is unnecessary except to validate a contract concluded in Germany and also governed by German private law.\(^{62}\) Apart from this case, such an association is treated like a German association without legal personality, its agents acting in the country are personally liable,\(^{63}\) and the entity may also be sued.\(^{64}\)

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68 See the opinions (very divergent on many points) of PILLET, Personnes Morales § 269; HÉMARD, Théorie des nullités §§ 335-351; LEREBOURS-PIGEONNIÈRE § 185; NIBOYET § 319 and contra, 2 Traité 463 § 814.


70 France: Decree of April 12, 1939, see supra Chapter 19 n. 109.

61 EG. BGB. art. 10; a decree as envisaged in this section has very seldom been requested. Only one case is known where an authorization was granted, that of the German-Austrian Alpinist Association when it moved headquarters temporarily to Innsbruck, Austria.

62 RG. (Oct. 29, 1938) 159 RGZ. 33 at 47, implicitly indorsing the opinion of WIELAND, 43 Z. Schweiz. R. (N. F.) 225; Th. KIPP in BGB. Handausgabe FISCHER-HENLE-TITZE (1932) note to EG. BGB. art. 10; RAPE 161; M. WOLFF, IPR. 117 n. 14.

63 BGB. § 54 par. 2; EG. BGB. art. 10 sent. 2.

64 In analogy to ZPO. § 50 sent. 2, § 735.
There are, on the other hand, laws recognizing foreign corporations of public interest more readily than commercial companies.65

(d) Foundations. With respect to foundations, whether public or private, the contrast of theories has been solved by a definite victory of the "liberal" doctrine. Even in France, the rule has been adopted that no authorization is needed for recognition of the legal existence and capacity of a private foundation in accordance with the law of its foreign "seat."66 Of course, activities in pursuance of the constitutional documents are subject to particularly anxious control under the territorial law.67

(3) Partnerships. While partnerships are recognized unconditionally in many countries along with corporate business associations, they are also treated in the same manner in countries where barriers against stock corporations or against nonprofit associations have been established,68 with the possible exception of a few Latin-American countries.69 Partnerships have never been subject to authorization, nor has territoriality been claimed to affect their creation. The doctrine regarding partnerships has been helped by the usual exaggerated emphasis on their personal basis, but substantially it must have been important that economic dangers

65 See for instance Chile: Corte Suprema (August 10, 1936) 33 Rev. Der. Jur. y Ciencias Soc. II, 1, 449, 452, 470 recognizing the Junta Provincial de Beneficencia de Sevilla, Spain, according to Spanish law, as testamentary heir of Chilean immovables; the court emphasizes that the Chilean legislature has not established the requirements as for lucrative corporations.
66 Neumeyer, Int. Verwaltungs R. § 13; Pillet, Personnes Morales § 306; Charles De Visscher, Revue 1913, at 191; Crémeau, 8 Répert. 437 No. 52; Lerebours-Pigeonnier § 185.
67 Charles De Visscher, id. at 206.
68 Hence even in France a Colombian partnership could obtain without formalities a judgment and, therefore, in Belgium an exequatur, Trib. Antwerp (June 27, 1936) Jur. Port Anvers 1937, 56.
69 For Brazil see infra Chapter 23, p. 184 n. 54.
Mexico: C. C. art. 2736 speaks of authorization necessary for the "foreign associations and companies of civil character."
from partnerships were not so feared as from big corporations.

Only one question has disturbed the simplicity of this matter. As the distinction between mercantile and nontrading or civil associations may be decisive, which law determines the mercantile character? Is it the law of the forum, the personal law (of the "seat" or creation), or either of them? The Belgian solution accepting the last answer is the best; if an association serves commercial, industrial or financial purposes, as defined at the forum, it should be recognized even though it may be considered nontrading at home.

2. Special Conditions for Recognition

(a) **Authorization in case of reciprocity—France.** When in the 1850's under the spell of Laurent's territorial theory Belgian courts suddenly declared French stock companies (sociétés anonymes), which played a large part in Belgian economics, to be "inexistent" in Belgium and denied them the right to sue, the French government protested. Finally, the two countries reciprocally recognized each other's governmental charters creating stock corporations. The French Law of May 30, 1857, sanctioning this agreement, permitted the French government to extend by decree the rights conferred upon the Belgian companies to those of other countries. In 1867, France, following the model of England, replaced the method of special decrees creating individual corporations

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70 Lex fori: Lyon-Caen et Renault § 211 and 2 id. § 1127; Arminjon, Revue Dr. Int. (Bruxelles) (1927) 368; Nussbaum, D. IPR. 190; Schnitzer, Handelsr. 131ff.


72 See Diena, I Dir. Com. Int. 293, 296.

73 Poulet § 213, and cases cited. To the same effect, Yugoslavia, C. Com. (1937) § 500 par. 2.

74 Lyon-Caen et Renault §§ 909ff.
by that of general statutes under which private persons may create corporations, and Belgium (1873), as well as most other countries, followed suit. Nevertheless, France maintained the system of stating by decree that a certain foreign country observes reciprocity with France, and that therefore stock corporations created in that country are to be recognized. These decrees have reached a great number. In addition, many bipartite treaties grant mutual recognition of corporations and are regarded as equivalent to decrees stating reciprocity. Such treaties have been concluded among others, with Great Britain, on April 30, 1862, and Canada, on December 15, 1922, while a decree was rendered with respect to the United States on August 6, 1882. The list of nations so involved is long but not exhaustive.

The French system has been imitated in some other countries, in Greece in particular. In Belgium and Italy, it was soon abandoned. A devastating criticism was expressed by the greatest French writer on commercial law, Charles Lyon-Caen, but has not been of any avail.

The position of an unauthorized foreign stock corporation in France has been developed without consistency. A corporation has no capacity to contract and may not sue third parties but, if sued, is not allowed to defend on the ground of its own irregularity, because domestic creditors

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75 On controversies concerning the right of the most favored nation, see 2 Lyon-Caen et Renault § 1102.
76 See the list given by Niboyet 371 n. 3.
77 See Carabiber, 6 Répert, 414 Nos. 42-44; Maridakis, 11 Z.gel.PR. (1937) 119. But the present Code is liberal, see supra n. 35.
78 Belgium: Consolidated Companies Act, of May 18, 1873, art. 128.
79 Italy: C. Com. (1882) art. 230.
80 Reports of 1888 and 1891 to the Institute of Int. Law, 11 Annuaire (1889-1891) at 160. Also Niboyet, in this case, advocates the liberal principle of recognizing foreign legal persons not doing business in the country, see 2 Traité 458 § 812.
81 Hémand, Théorie des nullités §§ 342-345; 2 Lyon-Caen et Renault § 1104; Thaller, Traité § 771.
should be protected. The incoherence of this system is increased by the consideration that the entity may function as a *de facto* corporation under domestic law and in such quality can engage in contracts and maintain branches, as well as be subject to bankruptcy proceedings.  

*Other countries.* Reciprocity has been required as the only condition of recognition in Hungary and Czechoslovakia. In Latin-American states, reciprocity has been a popular requisite, but increasingly it has been found incompatible with the principle that foreigners and foreign juristic persons are assimilated to nationals. For this reason, Colombia cancelled the requisite of reciprocity in its Constitution of 1936.

(b) *Special authorization.* It follows from the restricted domain of unconditional recognition already mentioned that all foreign nonprofit corporations need special authorization for being able to avail themselves of their existence in Belgium, France, Germany (with modifications), the Netherlands, Rumania, Soviet Russia, Yugoslavia, Chile and most other Latin-American countries, and Japan.

Also, private and public foundations need authorization in some countries, and business corporations which are not of a certain type may possibly need it in some jurisdictions.

In a few Latin-American countries, finally, it is claimed that the personality of a foreign corporation is recognized only when it is authorized by the government, and some authors take this pretension seriously. In these jurisdictions

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82 Pillet, 1 Traité § 740.
83 De Magyari, Clunet 1924, 595; anonymous, 6 Répert. 456 Nos. 18 bis, 19.
84 On the basis of § 33 of the Allg. BGB., see Laufke, 7 Répert. 187 No. 62.
85 Reciprocity is still required in other respects in Argentina, see infra p. 179.
86 See TULIO ENRIQUE TASCÓN, Derecho Constitucional Colombiano (ed. 2, 1939) 60; cf. with respect to individuals, CAICEDO 123 § 81.
87 See Chapter 23 ns. 48ff.; and see as an example of certain laws, Honduras, Law of Foreigners of 1926, art. 4: foreign juristic persons enjoy the rights granted them by the laws of the country of their domicil provided that they have been recognized by the Executive Power.
nonauthorized companies seem not to be allowed the minimum of rights which recognition usually confers. Moreover, there are countries where either authorization of the existence, or the registration at an office, is said to be essential for the recognition of any legal person. We shall encounter such theories, mostly of a doubtful nature, with respect to several Latin-American jurisdictions. Also, the Chinese authorities, using their peculiar technique, have declared that "it is not known" how a foreign juristic person having no business place in China could be registered, and therefore that it is "difficult to recognize its personality." 

3. Treaties

The problem was much discussed for a time whether the clause usual in bilateral treaties that the "subjects" of either contracting power should enjoy treatment of the most favored nation in matters of commerce, applied to the recognition of the personality of corporations. Therefore, treaties of amity or commerce have included provisions expressly assuring the reciprocal recognition of corporations and, sometimes, also of associations. But the significance of these clauses is now limited to countries denying recognition in the absence of a treaty, factual reciprocity, or special authorization.

Among the other provisions, the clauses allowing isolated acts of business or minor activities, and access to courts, concern our present subject but scarcely alter the existing situation.

88 See infra ns. 101, 122.
89 2 Interpretations du Yuan Judiciaire en matière civile (Le Droit Chinois Moderne, No. 35. 1940) 16 § 387, Interpr. No. 1471 of April 3, 1925.
90 See for the affirmative view, WEISS, 2 Traité 505 (with many references). Contra: 2 Lyon-Caen et Renault 924 § 1102; PILLET, Personnes Morales 183, 184 § 124.
91 On Código Bustamante, art. 32, see SCHUSTER, 8 Tul. L. Rev. (1934) 571 n. 14.
III. Effects of Recognition

1. Full Effect

In a few countries outstanding for their broad views and cosmopolitan mentality, such as Great Britain, Switzerland, the Netherlands, and Greece, recognition is traditionally granted to any organization in the world legally created in the state of its central office or, in the British case, in any state. This recognition means in principle no less than the permission to exercise the purposes of the charter. It is fair to state that, although France reserves its general authorization of foreign stock companies, this authorization, if given to the companies of a certain country, includes the right of doing business within the country. The principle is not inconsistent with regulations such as the prescription of registration.

But this standard is not reached in most countries.

2. Minimal Effect

In view of the manifold impositions and restrictions to which in the majority of the territorial laws the activities of foreign associations are subject, it is convenient to ask, What position results from the mere fact of authorization, independently of any other requisite?

There are two such rights guaranteed and generally accorded in the international treaties. One is the capacity to be a party to a suit, and the other the capacity to engage in “isolated acts.” Not without justification the first category sometimes appears absorbed by the second, but it has to be considered here separately in accordance with the more common usage.

(a) Capacity to be a party. Capacity to sue and to be sued as a party to litigation in court has been regarded as a “natural

right" of a corporation, or as a means of realizing its rights, and as "indispensable to protect the personal status." The Supreme Court of the United States has held that the power of a foreign corporation to bring proper suit in a state tribunal is guaranteed by the Due Process Clause. We may take it as the by far prevailing view that foreign corporations are considered capable of being a party not only in jurisdictions where they are entitled to carry on business of a permanent character, but also in those where they would need to comply with some impositions if they were to do "business" but in fact do not carry on any such business. The situation is different, when a foreign corporation should have complied with statutory requirements and in violation thereof has done business in the state, but in many jurisdictions full capacity

93 2 KENT 284; STORY § 565; LINDLEY, On Companies 1221 g; WALKER 158.
94 YOUNG 89.
95 THOMPSON § 7977.
97 England: WESTLAKE § 306; YOUNG 179.


Canada: Creamette Co. v. Famous Foods, Ltd. (1933) Ex. C. R. 200 (action for infringement of trade mark).


Brazil: Sup. Trib. Fed. (Sept. 2, 1932) 24 Arch. Jud. 394 (action by Delaware corporation to cancel defendant’s commercial name). The cases are digested by RODRIGO OCTAVIO, Dicionario Nos. 1259 to 1269 and reviewed by KNIGHT, 7 Tul. L. Rev. (1933) 210. Cf. CARVALHO DE MENDONÇA, 4 Trat. Dir. Com. 277; ESPINOLA, 6 Tratado 567 No. 6 and 8-C id. 1775.

Chile: In one opinion, see HERRERA REYES, Sociedades Anónimas (1935) 271 § 299.

Denmark: BORUM and MEYER, 6 Répért. 217 No. 28.
The Netherlands: C. Civ. Proc. arts. 127, 768; Rb. Amsterdam (March 17, 1899) W. 7351, and (May 7, 1900) W. 7400, Clunet 1903, 925.

Portugal: C. Com. art. 109.

Rumania: Cass. (June 8, 1937) No. 1428, Clunet 1938, 961.

Sweden: MALMAR, 7 Répért. 141 No. 149.

Switzerland: BG. (July 12, 1934) 60 BGE. I 220, 226; corporation of New York; recognition exists ipso jure and implies the faculty of standing in court.

Turkey: Law of Nov. 30, 1930/1914, art. 12.

is granted even in this case. 98

Capacity for suing and being sued is so much the most important incident of recognition and so frequently causes international preoccupation, that provisions for securing it appear in all bipartite and multipartite treaties or drafts involving business associations.

Exceptions to this principle, however, discernible in numerous instances, deserve examination.

Sometimes an alleged exception is caused by confusion between recognition and permission to do business, as only recently in the Yugoslavian Commercial Code. 99


Canada: Alberta: Companies Act, s. 149 (1) as construed in Lampson, Fraser & Huth, Inc. v. Simpson [1942] 3 W. W. R. 238 (Alta.);


Ontario: Howe Machine Co. v. Walker (1877) 35 U. C. Q. B. 37 (C. A.);

Quebec: Ontario Marble Works, Ltd. v. Lepage Marble Works, Ltd. [1924] 31 Que. Pr. 217;


Austria: (Stock companies not having been permitted business): OGH (Oct. 10, 1888) 26 GIU. No. 12389; (June 22, 1932) 14 SZ. 425 No. 132; Walker 204 n. 11.


Brazil: The question seems not to have been decided, although the decisions referred to in the preceding note (see in particular Sup. Trib. Fed. (May 6, 1925) 83 Revista Dir. 326, ESPINOLA, 1 Pandectas Brasileiras, pt. 2, 280) regularly held that foreign business corporations have personality "independently of governmental authorization."

Chile: In one opinion, see HERRERA REYES, Sociedades Anónimas (1935) 271 § 299.


Rumania: See NEGULESCO, Clunet 1910, 55.

99 Yugoslavia: C. Com. § 503, criticized by EISNER, 1 Symmikta Streit at 293.
In other cases, a corporation has been declared nonexistent, simply because it did not have a business place or do business in the state and therefore omitted registration or filing for license. Isolated language to this effect in the United States has been noticed abroad\textsuperscript{100} but must be considered inexact. However, such a deviation from the general behavior of courts has been observed in a few Latin-American jurisdictions, particularly on the part of the Mexican Federal Tribunal.\textsuperscript{101} Such restriction has been the object of a declaration on juridical personality of foreign companies, opened for signature by the Pan-American Union on June 25, 1936, recently ratified by the United States, Chile, Dominican Republic, Ecuador, El Salvador, Nicaragua, Peru, and Venezuela.\textsuperscript{102} It declares:

"Companies\textsuperscript{103} constituted in accordance with the laws of one of the Contracting States, and which have their seats in its territory, shall be able to exercise in the territories of the other Contracting States, notwithstanding that they do not have a permanent establishment, branch or agency in such territories, any commercial activity which is not contrary to the laws of such States and to enter all appearances in the courts as plaintiffs or defendants, provided they comply with the laws of the country in question."

The word "notwithstanding" directly refers to the men-

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\textsuperscript{100} LOEB, Clunet 1922, 319, and BEITZKE, Jur. Personen 164 have cited Texas Rev. Stat. 1911, 1318 (corresponding to art. 1536 Rev. Stat. 1934); Chapman v. Hallwood Cash Register Co. (App. Texas 1903) 73 S. W. 969, but in this case the corporation had an office in Dallas, Texas, and carried on business.

\textsuperscript{101} Mexico: See casesexpertly commented by SCHUSTER, 7 Tul. L. Rev. (1933) 341, 374, 8 id. 563 and more recently the decision in Amparo Molina (1935) 403 Seman. Jud. (1935) 1312; VOELKEL, 14 Tul. L. Rev. (1940) 52, 66.

Furthermore, "personality" is denied in:

- Bolivia: Law of Nov. 13, 1886, art. 4.
- Panama: Law No. 32, of Feb. 26, 1927, art. 91.

\textsuperscript{102} Proclamation of the President of the United States, 55 Statutes at Large 1201; the text of the Pan-American declaration has also been published in Hudson, 7 Int. Legislation 355 No. 445.

\textsuperscript{103} Spanish sociedades, see supra p. 10. Chile, in its "understanding" in signing, speaks of sociedades mercantiles.
tioned case, namely, where the corporation has no business ties with the country, although its solution would seem a commonplace.

Finally, it occurs frequently within and without the United States that a foreign corporation is not permitted to bring an action, as one of the penalties for noncompliance with the statutory requirements for doing intrastate business. This is comparable to the refusal by French courts of the right of suit to foreign corporations not recognized through decree or treaty, a refusal strongly disapproved in the French literature.

In connection with the Pan-American resolution mentioned above, the United States has declared its "understanding" that the companies "shall be permitted to sue or defend suits of any kind without the requirement of registration or domestication." Certainly what was meant was "authorization" rather than "domestication," in the proper sense. Does the declaration mean that the resolution extends to the case of unauthorized business? This, in fact, was the significance of an analogous resolution by the Institute of International Law as early as 1891. But another "understanding" of the Chilean Delegation points to the contrary conception, and many states of this country deny the right to sue to noncomplying corporations.

Also the recommendations of the Council of the League of Nations of 1923 demanded the faculty to appear as plaintiff or defendant only for such persons, firms and companies as are permitted to be established, but the International Chamber of Commerce, in its proposals to the Universal Economic Conference in Geneva, 1927, desired to secure the right of standing in court for all companies.

None of these statements refers to the other half of the so-called capacity to sue and to be sued, viz., the capacity to

104 See infra Chapter 23, pp. 203ff.
105 See PILLET, 2 Traité §§ 745, 746.
106 11 Annuaire (1889-1892) 171 arts. I and III.
perform procedural acts. The distinction is more important than in the case of individuals, because even in countries applying the personal law to the procedural competence of physical persons, organizations usually are subject to the local law of procedure. This is particularly remarkable in the case of noncorporate associations.

Illustration: An English partnership is capable, under the English court rules, of being a party and, therefore, has the right to sue in a German court. The plaintiff partnership failed to send in particulars for registration under the English Registration of Business Names Act, 1916, and thus lost enforcement of its rights arising out of any contract. But this regards only the procedural disability of the firm; “the capacity of being a party according to English law engenders procedural capacity in Germany even though it is missing under English law.” LG. Berlin (December 13, 1929), IPRspr. 1930 No. 20.

(b) Single acts. Regulations requiring foreign corporations to register or to obtain a license generally apply only if the business to be carried on reaches some degree of permanence, allowing “single” or “isolated” acts unconditionally. The boundaries of the permitted zone vary a little, but ordinarily activities such as taking orders from customers by letter, or by traveling agents, acquiring, holding, or administer-

108 LINDLEY, Partnership (ed. 10) 159.
109 Cf. Restatement § 167 comment.
Argentina: C. Com. art. 285.
El Salvador: C. Com. art. 299.
For other Latin-American countries, see VOELKEL, 14 Tul. L. Rev. (1940) at 47 ns. 21, 22; 55 n. 52.
110 United States: This frequent assumption follows the English distinction made for purposes of jurisdiction and taxation in La Bourgogne [1899] P. 1; [1899] A. C. 431; The Holstein (1936) 155 L. T. R. 466. See, for example, West Pub. Co. v. Superior Court of San Francisco (Cal. 1942) 128 Pac. (2d) 777: “mere solicitation of business, advertising or demonstrating products, listing of names of the company in the telephone directory or the company having its name on the door of an office or presence of a company official on personal business . . . .” However, continuous and systematic solicitation through years may constitute “doing busi-
property, and other simple exercises of the corporate capacity, are included.

In the United States, no comprehensive definition of doing business exists, but approximate agreement obtains on certain definite rules or principles which are "suggestive and illustrative rather than definitive," as the draftsmen of the Uniform Foreign Corporation Act have stated. Their tentative definition:

"The term 'doing business' means the transaction by a foreign corporation of some part of its business substantial and continuous in character and not merely casual or occasional," has been supplemented by an enumeration of permitted activities of a rather liberal extent.\(^\text{114}\)

On the other hand, there are certain outstanding cases in which neither the constitutional freedom of interstate and foreign commerce nor the usual statutory faculty of doing single acts may be relied on. Thus, intrastate business is assumed to exist if a warehouse is maintained in the state,
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from which goods are shipped to customers in the state; or if a foreign corporation sells and, through its agent in the state, installs machinery, constructs highways, supplies concrete pipe for a sewer job, or installs fixtures. But a transaction made by an agent in the state is likely not to be regarded as doing business, if the authority of the agent is limited to soliciting and transmitting applications.

In the Latin-American countries, the main criterion, as will be seen, is the carrying on of a branch or agency in the territory. Bolivia, however, is said to deny even the minimum of tolerance to any nonregistered foreign company.

3. Is the Extent of Recognition Determined by Domestic Law?

All particular solutions described above evince the simple principle that the foreign personal law, if recognized, is applied exactly as it is established by the state of creation. The smooth operation of this principle is, however, jeopardized by frequent broad references to the concepts and measures of the law of the forum. Constitutions, statutes, and courts are prone to declare that a foreign juristic person cannot have more rights than domestic persons have.

In Europe this is an opinion of long standing, followed by

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115 Where the goods are shipped from another state, the corporation is recognized as engaged in interstate commerce, see Caldwell v. North Carolina (1903) 187 U. S. 622.

116 2 Beale 843 § 179.15.


120 Union Trust Co. of Md. v. Rodeman (1936) 220 Wis. 453, 264 N. W. 508 at 512.

121 See infra Chapter 23, I. Guatemala: C. Com. (1942) art. 416 shares in this view. In addition, the C. C. (1933) art. 25, continuing former provisions, establishes a series of duties for foreign companies and associations "habitually" carrying on business in the Republic.

122 Bolivia: Law of Nov. 13, 1886, art. 4; Araoz, 1 Nuevo Digesto de Legislación Boliviana (1929) 24; Voelkel, 14 Tul. L. Rev. (1940) at 56.
some eminent writers. Michoud, the author of the French standard work, regards it as a “principle generally accepted that foreign corporations ought not to enjoy treatment more favorable than the French corporations,” which principle, in fact, “constitutes an exception to the personal law.” If German courts, in recognizing the existence and capacity of a foreign business association, describe its status as similar to that of a German stock corporation or a limited partnership, they try only to make the personality of the enterprise clear. In one case, however, a banking corporation of Tennessee was refused recognition because it did not seem to conform to any legal type of association at the forum—a decision without authority. Of English courts, it is only known that, not accustomed to regard the monarchical state of England as a person, they would not allow the King of Spain to sue as personifying the Spanish fiscus, but required that he should act as a royal corporation sole, like the Crown of England or as a trustee for his subjects, or on his own behalf. But this intolerance pertained to the overextended procedural concepts of British judges.

Drafts of the Swiss Civil Code adopted the said doctrine and granted corporations and establishments having foreign headquarters civil personality only within the limits de-

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123 MAMELOK 76; ASSER-RIVIER, Éléments 202; YOUNG 92, 94; POULET in Clunet 1904, 828 and in Manuel 238 § 217. See also PILLET, Personnes Morales 91 § 66.
124 Michoud, 2 Personnalité Morale 352 § 329.
125 See for instance, RG. (Dec. 16, 1913) 83 RGZ. 367; RG. (June 3, 1927) 117 RGZ. 215 at 217; RG. (Oct. 29, 1938) 159 RGZ. 33 at 46.
126 OLG. Hamburg (June 23, 1903) 14 Z. int. R. 64, criticized by BEITZKE, Jur. Petsonen 60 n. 16, expressly overruled by the same senate OLG. Hamburg (Nov. 22, 1904) 15 Z. int. Recht 320.
127 United States v. Wagner (1867) 2 L. R. Ch. 582 art. 593 per Cairns, J.; cf. YOUNG 180.
128 King of Spain v. Hullett & Widder (1833) 7 Bli. N. S. 359, 1 Cl. & F. 333.
130 YOUNG 299. Contrary to this spirit, SCHMITTHOFF, (ed. 1) 331 tries to apply Dicey’s proposition that a foreign status unknown to the English law is not recognized, see, however, now ed. 3, p. 369.
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termined by Swiss law. This idea was criticized and omitted in the final text, but it has been incorporated in the Civil Code of Liechtenstein and the Commercial Code of Yugoslavia. The latter recognizes the capacity of foreign companies to no greater extent than is granted to domestic companies of a similar or kindred type, serving similar or kindred purposes. Foreign types unknown to the internal law are subjected to the provisions involving the next related domestic type. If the foreign type cannot be fitted into any of the domestic categories, it is treated like an ordinary stock corporation.

The recent Civil Code of Peru joins this group, stating that “the capacity of foreign juristic persons cannot be contrary to the public policy nor more extensive than that granted to nationals,” and, while the Latin-American statutes following the Spanish model regularly set forth the principle that (recognized) foreign corporations enjoy the same private rights as national individuals, certain ones, such as the Constitution of Venezuela of 1936 (art. 37), add that they have in no case greater rights than nationals. The tentative drafts of the Restatement (Nos. 1-3, § 171) declared that:

“No power given to a foreign corporation by the law of the state of incorporation can give it a right to do any act which a corporation as such is not permitted to do by the law of the state in which the act is done.”

The final text has cancelled this statement, but comment b of § 165 says that:

“A state usually restricts the activities of a foreign corporation to the same extent to which it restricts the activities of a domestic corporation.”

181 Preliminary Draft (1900) art. 70; Draft of March 3, 1905, art. 1748. See criticism by SAUSER-HALL, 50 Bull. Soc. Législ. Comp. (1921) 246.
182 Liechtenstein: P. G. R. art. 235 par. 3.
184 Yugoslavia: C. Com. § 500 pars. 3, 4.
186 Spain: C. Com. art. 15, see TRIAS DE BES 68.
In fact, most American jurisdictions have a clause in their constitutions or statutes enouncing one of the following versions of the same idea: 137

(a) Any foreign corporation shall have the same rights and privileges as are enjoyed by domestic corporations of the same or similar character, 138 or

No foreign corporation shall have any greater rights or privileges than those enjoyed by domestic corporations of a similar character. 139

(b) No foreign corporation shall be allowed to transact business in the state on more favorable conditions than are prescribed by local law for similar domestic corporations. 140

(c) No foreign corporation may carry on any business which a domestic corporation is prohibited from doing, 141 or

The exercise of which is either prohibited to domestic corporations or against the public policy of the state, 142 or

Foreign corporations must be organized for a purpose for which local corporations may be organized. 143

(d) Many states have some slight variations, such as combining the “same rights and privileges” clause with the

137 A survey as of the year 1923 was made by the French writer Lepaulle, Condition des sociétés étrangères 161, 164.
Mississippi: Code (1942) § 5341.
South Carolina: Code (1952) § 12-701.
140 Arizona: Constitution (1912) art. XIV § 5.
California: Constitution (1879) art. XII § 15.
Utah: Constitution (1895) art. XII § 6.
Maryland: Ann. Laws (1951) art. 23 § 84 (a).
Oklahoma: Constitution (1907) art. IX § 44.
Virginia: Constitution (1902) § 163.
142 Georgia: Code (1933) § 22-1503.
143 Kansas: Statutes (1949) § 17-503.
clause that a foreign corporation cannot transact business forbidden to a domestic corporation,\textsuperscript{144} or
\[(e)\] Foreign corporations are subject to all liabilities, restrictions, and duties imposed on like domestic corporations and have no other or greater powers.\textsuperscript{145}

The emphasis in these statutes is on the penalties and restrictions rather than the powers and privileges.

What do all these rules mean? Do they affect the recognition of the foreign-created personality?

It would seem so in a few instances. Among European cases, there are some that have already been considered and refuted, such as the Dutch decision rejecting the legal personality of a French partnership because the law of the forum knew only partnerships without full personality;\textsuperscript{146} the court failed to see that as the party was not a Dutch partnership, Dutch law could not apply. The Appellate Court of Brussels recognized a Dutch association for nonprofit purposes only since a Belgian law shortly before had introduced similar associations;\textsuperscript{147} this was not a convincing reason, as was noted, since the same court denied legal existence in Belgium to a French manufacturers' association,\textsuperscript{148} although the analogous "professional syndicates" had been instituted in Belgium.\textsuperscript{149}

Because in Illinois domestic banks were forbidden to hold stock in another bank corporation, the Supreme Court of Illinois held that a foreign bank corporation licensed to do business was not authorized to purchase bank stock, purchase

\textsuperscript{146} Arkansas: Constitution (1874) art. XII s. II.
\textsuperscript{148} App. Bruxelles (June 9, 1925) Pascrisie 1925.2.157.
\textsuperscript{149} App. Bruxelles (May 4, 1932) Pascrisie 1932.2.221.
\textsuperscript{149} DUBOIS-CLAVER, Clunet 1933, 199.
and transfer of the stock being "ultra vires and void." The Court thus directly denied the corporate powers acquired in another state. But, if ordinarily the theory of special powers and the doctrine of illegality should be clearly separated, this is doubly needed where a legal prohibition is territorially limited. The true solution was simply to extend the policy of Illinois, viz., that no bank should hold stock in another bank, to the branch of a foreign bank. On the same line, it was declared public policy in Illinois that no corporation, whether domestic or foreign, should engage in the business of buying and selling real estate, although the statute seemed not to envisage foreign corporations. Unincorporated associations, whether domestic or foreign, have been held excluded from writing insurance in Idaho. A foreign corporation, authorized in Michigan to do telegraph business was not granted a concession for other, viz., telephone, business "for which a domestic corporation could be formed," but the court saw clearly that what the statute intended was to prohibit one corporation from engaging in both kinds of business, and this policy was decisive.

The obvious conclusion may be verified by counterproof. Although in Illinois a corporation cannot be organized to do different classes of insurance business, there is no implied prohibition for a New York corporation to do such multi-form business in Illinois. Frequently, objections against the purpose or the structure of a foreign corporation divergent from domestic legislation, have been raised but rejected. A corporation organized in another state solely for religious,

150 Golden v. Cervenka (1917) 278 Ill. 409 at 440, 116 N. E. 273 at 286.
151 CARPENTER, "Should the Doctrine of Ultra Vires be Discarded?" 33 Yale L. J. (1924) 49, 68.
153 Intermountain Lloyds v. Diefendorf (1931) 51 Ida. 304, 5 Pac. (2d) 730.
155 People v. Fidelity and Casualty Co. (1894) 153 Ill. 25, 38 N. E. 752.
missionary, educational, and charitable purposes was held capable of acquiring and holding land in California without complying with certain provisions of the California Civil Code. A Kansas corporation having its capital stock divided into shares of no fixed nominal par value, was recognized in Missouri, and a Delaware corporation, having a mixed stock structure, was admitted in California, despite divergent domestic legislation. The New York courts have permitted an insolvent foreign corporation to make an assignment to creditors, prohibited to New York corporations, and so forth.

The reasonable intention of legislatures and courts is to segregate within the territorial enacted law a portion embodying imperative public policy to be applied to all corporations, whether foreign or domestic, doing business in the state. The intention is not, however, to restrict recognition otherwise than by the well-known provisions concerning the doing of business. Only on this basis can the sanction of violations be adequately determined.

Great help in avoiding harmful applications of the existent incautious provisions has come from the popular statement that the failure of a state to provide domestic corporations with the same powers, or to authorize them to be formed for the same purposes, is not presumed to exclude a foreign corporation from exercising activities according to its charter.

These observations suffice for the limited purpose of the present inquiry, which is not concerned with the delicate

156 General Conference etc. v. Berkey (1909) 156 Cal. 466, 105 Pac. 411.
158 Commonwealth Acceptance Corp. v. Jordan (1926) 198 Cal. 618, 246 Pac. 796. The Constitution of Washington does not warrant exclusion of a foreign corporation because it is permitted to issue common stock of different classes not allowed domestic corporations, Fibreboard Products v. Hinkle (1928) 147 Wash. 10.
159 Vanderpoel v. Gorman (1894) 140 N. Y. 563, 35 N. E. 932.
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question how far public policy goes or should go. Evidently all doctrines and provisions forcing all foreign organizations into a domestic mould, are ill-framed and would be quite dangerous but for the good sense of judges throughout the world. To ban or degrade foreign types of associations would entirely deform the principle that the law of the charter governs. The progress of international intercourse which has engineered the "liberal" theory of recognition, in turn, depends upon a liberal concept of recognition. Moreover, the parties who organize an enterprise must choose its juristic shape and adjust its structure in accordance with the types offered by the local law and are unable to comply with every idea of legislators in all parts of the globe. They should not, in fairness, have to give thought to any law except that of creation, except perhaps that designed to govern the principal place of business.

The retrogression would be worse, if these clauses under consideration should mean that domestic corporations would be protected against competition by other means than taxation and licensing for business. This would largely exceed the scope of the famous reciprocity or "retaliatory" clauses.

If the problem, instead, is confined to its proper domain, internal law will be held to affect the original nature of a foreign organization only on the ground of a vital public policy, important enough to overcome the needs of trade or spiritual and cultural interchange. The theory of comity should at last lose its grip.

There is, however, a reverse side of the thesis that "foreign juristic persons enjoy the same private rights as those of the same class" formed at the forum. De Becker believed it was "the awkward result" of the Japanese rule, formulated in

161 This is the interpretation by LEPAULLE, supra n. 137, 164 who is apprehensive of the sphere of discretion left to the administrative agencies.
these terms, that foreign corporations may enjoy in Japan rights which they cannot enjoy at home. This is not the meaning, of course. But it has likewise been observed in this country that the domestic law of the state where activities are exercised, increases the powers of a foreign corporation in such matters as usury, taking land by devise, making preferential payments, and eminent domain. Thus, the well-settled rule that a state never concedes permission to a foreign corporation to go beyond its charter would be overridden. However, all such results may be explained, each one separately, in other ways. Regrettably, this matter exceeds the scope of this treatise.

IV. THE POWERS OF THE CORPORATION AND OF ITS AGENTS

There is no disagreement on the principle that the capacity of a corporation and the authority of its principal representatives are primarily determined by its personal law.

1. Powers of Corporation

Powers denied to a corporation by the law of incorporation are denied it in any country. American courts say, "Comity does not add powers but only recognizes existing ones." Conflicts, however, are immediately presented by the fundamentally different conceptions of common and civil law in construing corporate powers.

In modern civil law, capacity to have rights and powers pertains to juristic persons in the same full extent as to individuals, excepting natural abilities such as capacity to marry.

163 Note, 40 Col. L. Rev. (1940) 1225.
164 See next note.
165 Relfe v. Rundle (1880) 103 U. S. 222, 225; 2 Beale § 165.1; Pillet, Personnes Morales 105; Raape 136; Trías de Bes 386. For instance, a foreign company in liquidation has the limited capacity of the law of charter: App. Athens (1929) Clunet 1931, 494.
and to make a will, but including name, honor, and credit. For the benefit of third persons dealing with corporations, the laws usually freeze this full capacity into a “formal,” i.e., an absolutely fixed sum of faculties, independent of the purposes of incorporation and restrictions imposed through charter or by-laws. Even though a juristic person ought not to make certain transactions according to the constitutional documents and resolutions of stockholder meetings, it can yet do them with legal effect. Any transaction with third persons, therefore, is valid, at least if there is no fraudulent collusion between the agents and the third parties.

At common law, a juristic person has no more than the special capacity conferred upon it by the act of creation in view of its particular purposes. Whenever a corporation enters into a transaction beyond the prescribed radius of its activity, it acts “ultra vires,” without power, and the act in principle is legally in-existent as nobody’s act. An English judge believed this view self-evident and “not a mere canon of English municipal law but a great and broad principle which must be taken as part of any system of jurisprudence.” He allowed a minority of stockholders in a Turkish railway corporation to sue the directors with the demand to restrain them from making payments ensuing from a majority vote in a general meeting, the vote being “ultra vires of the majority.” The court thus not only interfered with the internal affairs of a foreign corporation but applied an imagined Turkish law similar to the English.

The French Conseil d’État has developed a somewhat comparable doctrine of “specialty” (principe de spécialité) limiting the powers of public administrative boards that have legal personality, in accordance with their specific purposes.

166 Udina, Elementi No. 80. Quebec: C. C. art. 352, 358, 17; cf. 2 Johnson 177.
167 Pickering v. Stephenson (1872) 14 L. R. Eq. 322.
But this doctrine is intended to foster good administration and by no means to serve as a rule of private law or as a restriction on capacity. 168

This contrast must be realized in applying the conflicts rule. It follows that American or English courts should recognize the formal, general powers of Belgian, Brazilian, French, and other civil law corporations, and that courts in civil law countries should note the limited, special powers of American and British corporations. The latter effect is actually well known in Europe. 169

All theories of special powers, however, involve manifest dangers to third persons who act in good faith, and the more so in extraterritorial operation. The basic principle of the personal law in itself rightly disregards whether third persons do or do not know the extent of corporate capacity. The Supreme Court of the United States once arrived at this result by the presumption or fiction that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation with which he voluntarily contracts as that government authorizes." 170 But the concealed limitation to the "vires" inherent in the common law doctrine of special powers, has caused inconveniences more acutely felt in the United States than in England, because of the close co-existence of so many states which are the common territory of so many business corporations. Judicial inventiveness has developed an abundance of remedies tempering the result and particularly effective in case a corporation acts outside of its

168 See RIGAUD, IO Répert. 277 No. 151.
169 Trib. civ. Bruxelles (Dec. 6, 1893) Clunet 1894, 916 (English memorandum of association); approved in France by PILLET, Personnes Morales § 166; in Germany by M. WOLFF, IPR. 118 and others; in Switzerland by STEIGER, 67 ZBJV. (1911) 317; SCHNITZER 328.
Thus, the courts presume that a particular contract entered into by a corporation is within its powers. More important, many prohibitions are construed as applying to corporate action only in the state of incorporation, e.g., statutory prohibitions against taking lands by will or general assignment. Such limitations present a hard task of interpretation, and no smooth formula has been found to designate generally which parts of the charter, the by-laws, or the general law "migrate with the corporation." More adequate relief is furnished by skillful drafting of charters and by-laws covering every reasonably expected activity. Moreover, despite omission of required formalities or transgression of prescribed purposes, contracts are held valid on the ground of assumed "general powers" of the corporation for the benefit of other parties who act in good faith. In addition, fully executed contracts are safe, and those executed by one party are protected in most jurisdictions through the estoppel doctrine. What remains prevalingly unenforceable after all, are only executory ultra vires contracts, and in some jurisdictions also those executed on one side, still with exceptions. Where incorporation has been obtained in several states, the corporation is not allowed to plead lack of power, if it possesses it in any one of these states. Presumptions are in favor

171 Restatement § 156 comment c; id. § 165 comment a; 2 Beale 758 § 165. The purpose of protecting third persons must be borne in mind. E.g., as the Nevada Act of March 24, 1909 (Statutes of Nevada, 1908/1909, p. 251), gave priority to certain claims against an insolvent banking corporation, the Ninth Circ. Ct. of Appeals in Washington-Alaska Bank v. Dexter etc. Bank (1920) 263 Fed. 304 said that "depositors and others who dealt with the bank were not required to search the statute of Nevada to ascertain what their rights were. They were entitled to rely upon the laws of the territory where the bank was engaged in business."

172 2 Beale 757-762; Restatement § 165 comment a; Note in 40 Col. L. Rev. (1940) 1211-1215. Provisions against lending money in excess of a fixed rate are likewise interpreted as territorial, but this regards illegal and not ultra vires transactions.


174 For a recent case of denial that defense by estoppel is barred by estoppel see Pattison v. Illinois Bankers Life Ass'n (1935) 360 Ill. 616, 196 N. E. 882.

175 Mackay v. New York etc. R. Co. (1909) 82 Conn. 73, 72 Atl. 583.
of general and unlimited capacity, although it is not presumed that a foreign corporation of a particular type or class has power not necessarily or usually possessed by corporations of the kind in question. There are even other ways to evade the *ultra vires* theory.

Well meaning and widely opportune though all these developments are, the "harsh and inflexible" doctrine of special capacities has not been improved but broken; it survives in incoherent fragments, involving differences in the various courts as well as "confusion, uncertainty and injustice."

Under these circumstances radical reforms have been widely sought and in some states achieved in fact, partly on the suggestion of the Uniform Business Corporation Act by exempting most classes of cases from the doctrine; partly, as in California, on the more adequate conception that corporations have general power although the actual authority of the directors may remain bound to the specified purposes.

For all these reasons, a conflicts rule is needed even within this country. It has been held in a single case by the Missouri Supreme Court that the law of the place of contracting rather than that of the place of performance determines whether or not a corporation, when sued on a contract, is precluded from setting up the defense of *ultra vires*. The law of the state of incorporation was disregarded. This solution has been

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176 I4a C. J. § 3943.
177 See 2 Beale 762; Kessler, 5 Z. ausl. PR. (1931) 538.
179 California: General Corp. Law, 1947, § 803; see the important comment by Ballantine, "Drafting a Modern Corporation Law," 19 Cal. L. Rev. (1931) 465, 473.
Michigan: Comp. Laws (1948) § 450.11.
Ohio: General Corp. Law, 1955, § 1701.13 (H).
181 Goodrich 315 § 108; cf. 2 Beale 1215 n. 9.
generalized in the Restatement\textsuperscript{182} in the highly enigmatic rule that "the effect of an act directed to be done by a foreign corporation is governed by the law of the state where it is done." If we give the rule the most reasonable construction, the compass of the powers of a corporation is determined by the law of the incorporating state, but the effect of an act beyond such powers is determined by the local law. The Missouri Court, however, reached its result quite as the former Italian Commercial Code did,\textsuperscript{183} by simply applying the law of the place of contracting to the capacity of legal persons, although the personal law governs their existence.

The systems generally subjecting capacity to the personal law, necessarily have to use other methods. The case was not foreseen in the older provisions under which individuals incompetent by their personal laws, nevertheless are bound by contracts concluded with third persons in the forum. A few German and Swiss authors, opposed by others, however, have advocated analogous application of these provisions to corporations, so that an \textit{ultra vires} contract made by an American corporation in Germany would be as valid as one concluded by a German corporation with full powers.\textsuperscript{184} This analogy has been embodied in the recent codifications of Poland, Liechtenstein, Yugoslavia, Rumania,\textsuperscript{185} and perhaps Italy.\textsuperscript{186}

\textsuperscript{182} Restatement § 166.
\textsuperscript{183} Diena, i Dir. Com. Int. 313; id., 2 Princ. 287, 293; Cavaglieri, Dir. Int. Com. 249.
\textsuperscript{184} Wieland, 43 Z. Schweiz. R. 225; Kessler, 3 Z. ausl.PR. (1929) 769; Nussbaum, D. IPR. 191 n. 6; Rühlhand, 45 Recueil (1933) III 446; M. Wolff, IPR. 118 n. 17; Beitzke, Jur. Personen 118.
\textsuperscript{185} Contra: Neumeyer, i Int. Verwaltungs R. 176; i Frankenstein 486; von Steiger, 67 ZBJV. 253; Schnitzer, Handelsr. 115; Raape 137.
\textsuperscript{186} Poland: Int. Priv. Law, art. 3.
Liechtenstein: P. G. R. art. 235 par. 6.
\textsuperscript{186} Disp. Prel. (1942) art. 17 par. 2, speaking of aliens, does not seem to refer to both paragraphs of art. 16, but may be nevertheless so interpreted.
This rule also refers capacity to the law of the place of contracting, but only if this place is within the forum. In addition, the outcome differs essentially from the American, since the theory of ultra vires is abolished rather than mitigated for the purpose of recognition. It might be objected to this radical result that foreign juristic persons are more easily recognizable than foreign individuals and that persons dealing with any corporation may well be required to do their best in inquiring into its nature and purposes. However, international commerce is interested in eliminating such costly and delaying duties. Foreign courts may be excused when they avoid both the unmitigated English and the entangled American doctrines.

This has been strikingly confirmed by the Californian reform of 1931. The defense of ultra vires has been abrogated also in case of foreign corporations:

“This section shall extend to contracts and conveyances made by foreign corporations in this state and to all conveyances of real property situated in this state by foreign corporations.” (Cal Code § 345, last paragraph)

Similarly, the General Corporations Act of Michigan of 1935, on the basis of the Uniform Business Act, excludes the plea of ultra vires made of a foreign corporation against a person not being a director, officer, or shareholder and not having an actual knowledge of the ultra vires character of the act.

Consistently with the suggestions made in other parts of this work, the plea of ultra vires ought to be governed by the law that governs the contract.

187 People v. Wiersema State Bank (1935) 361 Ill. 75, 197 N. E. 537 at the end; RABEL, 3 Z. ausl. PR. (1929) 810.
187a Now Cal. General Corp. Law, 1947, § 803 (d).
2. Legal Restrictions on the Capacity of Corporations

It is natural that the capacity of corporations may be restricted, on one hand, by general statutes of the state of incorporation and, on the other, by the law governing the particular case—which formula is more exact than to refer to the "territorial" law or that where "an act of the corporation is done." A corporation may, for instance, take a legacy, only if it has capacity under the laws both of the charter and of succession.\(^{189}\) Still other legislations may claim consideration, such as that of the situs or that of the place of contracting, if different from the former two.

Two widespread examples of prohibitory provisions are to be mentioned.

(a) Acquisitions by gift or will. The traditional mortmain legislation of the 18th and 19th centuries was inspired by the twofold consideration that a donor to church funds may deprive his family of their just inheritance, and that the continuous accumulation of wealth may dangerously increase the secular might of the Church. In more recent times, reasons of national economy have prevailed in fostering a policy to prevent any long-lived juristic person from retaining possessions needed for the general welfare. Land in particular has been regarded as an inestimable asset, limited in quantity, which ought not to be monopolized by holders who usually do not alienate their acquisitions.

In numerous countries, legal persons may not acquire property by gift or other benevolence unless authorization is obtained, if the value exceeds a certain amount or sometimes irrespective of the value.\(^{190}\) Since such a provision may

\(^{189}\) \textit{Beale} 971, 1036. That this rule underlies also English and German law is shown by Breslauer, Private International Law of Succession (1937) 99. Cf. also treaty provisions cited by Drobnić, 5 Am. J. Comp. Law (1956) 493 n. 55.

\(^{190}\) Belgium and France: C. C. art. 910 concerning associations, not stock corporations, see Cass. (Nov. 29, 1897) D.1898.1.108; (Oct. 29, 1894) D.1896.1.145. Italy: C. C. (1942) art. 17. Spain: C. C. arts. 746, 748.
be a part of the law of charter, or of the law governing the donation, bequest, or devise, or of the *lex situs*, the task of a court in selecting the applicable law may be difficult. In France, it has been held that a foreign corporation claiming any acquisition in France by donation or legacy ought to show authorization according to its personal law and, in addition, French authorization, if it is not profit-seeking and a French family is affected, article 910 of the French Civil Code not being intended to protect a foreign family. In the United States, it is generally held, in agreement with the prevailing rule elsewhere, that acquisitions by devise or bequest require the consent of both the charter state and that determining succession upon death, that is, the state of situs for immovables, or that of the last domicil for movables.

Statutes protecting the family of the donor against inconsiderate disinheritation, may leave doubts respecting the law determining the family's composition. In New York, it has been convincingly argued that it is the family conceived according to the law of the testator's domicil, that is envisaged by the statute forbidding "any person having a husband, wife, child, or parent, to devise or bequeath to any benevolent, charitable, literary, scientific, religious or

Portugal: C. C. art. 1781.
Germany: EG. BGB. art. 86; cf. Prussia: Ausführungsgesetz, art. 6; some Swiss cantons, etc.
The Netherlands: Arts. 947 and 1717 of the Dutch BW., treated by Kosters 682, have been repealed by Law of Nov. 29, 1935, par. 2.

191 cf. Pillet, Personnes Morales 90; Lewald, Questions 68; Frankenstein 486; Walker 160; Poullet 239 § 218; Raape 638; Beitzeke, Jur. Personen 151 § 16.

missionary society, association or corporation... more than one half of his or her share...." 198

(b) Taking of land. Acquisition of land by corporations 197 and, particularly in many Latin-American countries, acquisition by foreign states or public corporations, 198 is not only prohibited to corporations not licensed for doing business in numerous states, but also is subject to special authorization, without regard to consideration or value. Such restrictions arise from mortmain policy, mistrust of foreigners in general, or protection of certain districts for military reasons. Only in the last two cases should the nationality of the members be of importance.

With respect to the mortmain provisions commonly used in the United States, the Restatement 199 asserts that ordinarily statutes relating to usury, receiving land by devise, and assigning and transferring property, are interpreted as purely local in their application and do not restrict the acquisitions

196 Then N. Y. Laws (1860) c. 360 § 1, now Decedent Estate Law, § 17.
197 United States: Carroll v. East St. Louis (1873) 67 Ill. 568, 16 Am. Rep. 632; Washington: Rev. Code (1951) § 31.04.120. For some older statutes, see Fletcher, 17 Cyc. Corp. § 8353 n. 38.
198 Belgium: Pouillet § 218.
199 England: Companies Act, 1948, s. 14; Mortmain and Charitable Uses Act, 1888.
200 Germany: See EG. BGB. art. 88 and commentaries.
201 Spain: Law of June 30, 1887 against religious corporations.
202 For the Latin-American laws, see H. Zorraquín Becú, El Problema del Extranjero en la reciente legislación latino-americana (Buenos Aires 1943) 101ff.; for the official interpretation of the Mexican Constitution, art. 27, see Wheless, Compendium of the Laws of Mexico (1938) 564ff.
203 On the doubtful law regarding nonregistered foreign companies in Argentina, Chile and other countries, see Voelkel, 14 Tul. L. Rev. (1940) at 62 n. 73.
204 Argentina: By analogy to Brazil, 2 Vico § 85.
205 Brazil: Introd. C. C. art. 20; now Introd. Law (1942) art. 11 §§ 2, 3 (on the history of this legislation see Espinola, 6 Tratado No. 101).
206 Guatemala: Decree No. 2369, of May 9, 1940; Law on Foreigners of 1936, arts. 20, 21.
207 Mexico: Constitution (1917) art. 27 fr. II (restrictions on religious associations, charitable and educational institutions); cf. Note, Schuster, 7 Tul. L. Rev. (1933) 347.
208 Venezuela: Ley de Minas, of July 17, 1925, art. 30.
209 See for Europe, Fedozzi 47.
210 Restatement § 165 comment a; 2 Beale 762 § 165.3.
of a corporation in other states. Thus, even a statute of the
charter state preventing corporations from taking land by
will, is not applied to taking land in another state. There
is contrary authority, however.

3. Authority of Agents

One of the expedients for remedying the untenable theory
of territoriality was the fantastic idea that although a foreign
corporation cannot "exist" in the state, it can act therein
through agents. This theory was taken seriously enough to
require that the authorization of an agent, being a corporate
act, must take place within the state of incorporation, and
that the corporation must be organized and the agent be
appointed prior to his acting. These not even clever aberrations are unknown to other countries and alien to the law
practice of this country. Corporations are daily acting through
individuals without regard to geographical frontiers and,
where they act, they must exist.

Another distinction instead is essential. It is well known that there are two classes of individuals serving as representatives of corporations. One is formed by the principal officers, called directors in the British companies laws and termed "organs" of the corporate body in modern codes, following

200 White v. Howard (1871) 38 Conn. 342; Cf. the Reisig case, supra n. 194.

201 Kerr v. Dougherty (1880) 79 N. Y. 327; Metropolitan Bank v. Godfrey (1860) 23 Ill. 531; other instances are cited by 2 Beale 762, and see Lorenzen, 6 Répért. 369 No. 463; Goodrich § 166 n. 32; Harper, Taintor, Carnahan, and Brown, Cases 508. n. 8.


203 2 Beale 768 § 166.3.

204 Young 49.

205 Fletcher, 2 Cyc. Corp. § 266. For the doctrine of Otto Gierke, see his summary in 1 Deutsches Privatrecht (1895) 466, 469ff.; and in English, R. Huebner, A History of Germanic Private Law (transl. Philbrick) 140ff. This theory has been adopted in France; see Michoud, 1 Personnalité Morale §§ 50-64 bis; 2 id. §§ 187, 189.
a result of Gierke’s theory of “real personality.” The other class is composed of ordinary employees. The offices administered by the first group are created by the fundamental documents and form an integral part of the organization. These officers express the will and execute the potential powers of the legal entity. All other individuals acting in the name of a legal person do so by virtue of contractual relationship only, as “mere agents” or “employees.”

This classification is of significance also in conflicts law. With respect to simple agents, either of a corporation or of a partnership, no special conflicts rule is needed in addition to the general rules concerning agents appointed by private declarations. The most important of these latter rules predicates that the extent of an agent’s authority is determined by the law of the place where the agent acts upon his authority.

If the principal establishes a permanent place of business in a foreign state, the law of this place has an even more decisive claim to define the authority of the agents negotiating at these places.

The powers of a corporation’s principal functionaries, however, are rooted in its constitution and are comparable to the powers of the legal person itself. Such power is defined for all individuals holding the same position and brought to public knowledge through the articles of incorporation or by-laws. Wherever a state of charter prescribes recording of corporations in a register, it requires the individual names of the officers to be included. Even in the absence of such legal precaution, it has been firmly maintained that a party dealing with the main officers of a foreign corporation should inform himself about the extent of their allotted powers. “Dealings with these companies are not like dealings

206 “Organs” or “constitutionally authorized representatives” as a term has been used in the German BGB. § 31, Swiss C. C. art. 55, etc.
207 See for first information, Restatement § 345; and as to English and comparative law, RABEL, 3 Z. ausl. PR. (1929) 809, 818; BRESLAUER, 50 Jurid. Rev. (1938) 282, 308.
with other partnerships, and ... the parties dealing with
them are bound to read the statute and the deed of settle-
ment," though they need not do more. This has been the
true consideration underlying the common law doctrine re-
garding acts of directors exceeding their authority. It was the
same as that embodied in the solid doctrine of Continental
conflicts law, that the personal law of a corporation deter-
mines whether a director’s contract is binding on the entity.
In this opinion, a third party dealing with an “organ” of a
foreign corporation is charged with notice of the existence and
extent of this representative’s constitutional power.

For example, in the interest of all third parties, German
law gives the board of directors of a German Aktiengesell-
schaft a legally defined all-inclusive authority of the broadest
scope, charter restrictions upon their authority being regarded
as mere instructions without external effect. In a German
nonprofit corporation, on the contrary, limitations on
the authority of directors, if publicly registered, restrict the
director’s power to bind the entity. Under French law,
widely followed, administrators have exactly the authority
corresponding to the functions assigned to them by the
charter or, in the case of silence or insufficiency of the latter’s
provisions, the normal scope of the enterprise. Under the
conflicts rule referring to the personal law of the corporation,
all these domestic rules also govern abroad. Incidentally,

208 Royal British Bank v. Turquand (1856) 6 E. & B. 327; In re Hampshire
Land Co. (1896) 2 Ch. D. 743.
209 See in general, 2 ZITELMANN 207; RABEL, 3 Z.ausl.Pr. (1929) 810; ASSE and
STREET, Annuaire 1929 I 700.
Germany: ROHG. (Feb. 17, 1871) 2 ROHGE, 36; RAAPE, IPR. 195.
The Netherlands: Rb. Haag (March 9, 1933) W. 12589; Rb. Maastricht (June 25,
1931) W. 12366 (authority of liquidators).
210 HGB. § 235; Aktiengesetz § 74; Gesetz betreffend Gesellschaften mit
beschränkter Haftung, of April 20, 1892, § 37, 2.
211 BGB. §§ 30, 26 par. 2 (1).
212 2 LYON-CAEN et RENAULT § 819. In the Law of March 7, 1925, on Private
Companies with Limited Liability, art. 24, however, the German model, supra
n. 210, has been followed.
it may be noted that an increasing number of German writers have borrowed from the theory of special powers the idea that a corporation should not be bound by the act of a director, exceeding the purposes of the corporation and recognizable as such by a third party.²¹³ This corresponds with the result envisaged in this country by those scholars who propose to grant corporations simply general powers, whereas agents would remain limited by the powers and purposes of corporation²¹⁴ and incapable of performing corporate acts beyond this line. The formation of conflicts rules would be strongly aided by such converging developments of the actually contrasting municipal systems.

In the American discussions of conflicts law, the particular position of the directors seems never to have been contemplated. The Restatement states that “the effect of an act directed to be done by a foreign corporation” is governed by the law of the state “where it is done” (§ 166), and the comment expressly applies this rule to the case where “an agent of a corporation makes an agreement on behalf of the corporation which he was directed to make”; “the law of the state where the agreement is made determines whether the corporation is bound thereby....” While the only added harmless example has no bearing on the question, the provisions of the Restatement seem to result in the rule that the authority of the board of directors, president, and other officers is governed by the law of the state where the contract with the third party is “made.”

To understand the origin of this doctrine is easier than to approve of it. So long as the constitutional documents were the exclusively determinative expression of the au-

²¹³ ÖRTMANN, Allgemeiner Teil des BGB. 99; VON TUHR, I Allgemeiner Teil des Deutschen Bürgerlichen Rechts 527; EHRENZWEIG-KRAINZ § 82 sub I.
Objections or doubts: PLANCK-KNOKE, I Kommentar § 26 n. 4; MÜLLER-ERZBACH, Wohin führt die Interessenjurisprudenz 96; and others.
²¹⁴ BALLANTINE, Corporations 249 § 70.
Corporations, Kindred Organizations

Thorough interpretation of their provisions could be expected in all common law courts. With uniform substantive law, no conflicts rule is needed. The situation, however, has changed somewhat, even among the sister states of the Union, as a result of statutory modifications of the formerly uniform rule, as well as through variations in court practice. For example, the old rule that the president of a corporation has no privileged power except one conferred expressly by the charter or by-laws, has been substantially modified in many jurisdictions, but not in all, and the alterations are different enough to create an “Alabama rule,” an “Arizona rule,” an “Arkansas rule,” and so forth. Should a Chicago court in the case of a New York corporation contracting in Illinois follow its own “Illinois rule”? While in interstate cases this difficulty may often be evaded by assuming the contract to have been made at the office of the officer representing the corporation, the problem presents itself unequivocally where a corporation of the German type enters into transactions by means of one of its directors at a place in the United States. Should the president of such a corporation be regarded as unauthorized, for the only reason that a similar officer would be without authority under the Arkansas or Illinois rule? Of course, he should not. An American court would correctly argue that the general statutes giving the director absolute powers are to be read into the charter. But this means that the rules of the Restatement are sadly incomplete. The authority of a principal officer is determined by the law of the charter. Exceptions to the effect that authorization may be derived from the law of the place where the officer acts, have to be carefully considered in connection with agency rules in general.215

215 According to the International Law Association’s proposal, the liability of the company for an unauthorized act of an organ is equated to an act beyond the powers of the company (supra n. 188).