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# SERVICE ON FOREIGN CORPORATIONS AFTER WITHDRAWAL FROM THE STATE

Alvin E. Evans
*University of Kentucky College of Law*

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IT MIGHT reasonably be expected in this corporate age that the question of how service of process should be made upon foreign corporations would have been solved, especially in situations where the cause of action arose within the state and grew out of business done there.[1] Such is not the case, at least respecting suits brought after the withdrawal of the corporation from the state on causes of action arising during the period that it did business there. That there is a conflict in the decisions seems to be due either to a difference *inter se* of the statutes under which the action arose or to a difference of interpretation where the legislative intent is not made clear.

## I

## THE STATUTES

Some statutes make the appointment of an agent irrevocable, even after the corporation has withdrawn from the state,[2] so long as any obligation arising during the period of doing business within the state is outstanding. A similar but better form of statute, which continues liability to service for a stated period after withdrawal, was formerly found in Texas.[3]

On the other hand, it is specifically stated in some state statutes

* Dean of the University of Kentucky College of Law; A.B., Cotner; A.M., Nebraska; Ph.D., J.D., Michigan. Author of numerous articles published in legal periodicals.—*Ed.*

[1] It seems probable that a statute is necessary, even in this simple situation, to make it possible for an action to be brought elsewhere than in the state of incorporation. See Germania Insurance Co. v. Ashby, 112 Ky. 303, 65 S. W. 611 (1901); Chicago & Alton Ry. Co. v. Walker, 9 Lea (77 Tenn.) 475 (1882); 1 BEALE, CONFLICT OF LAWS §§ 88.2, 91.4 (1935); Bank of Augusta v. Earle, 13 Pet. (38 U.S.) 519 (1839). See FARNSWORTH, THE RESIDENCE AND DOMICILE OF CORPORATIONS 80 (1939); HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, c. 5, "The Jurisdiction of the Courts over Foreign Corporations" at p. 77 (1918).

[2] Generally, if a private agent is named and the agency is revoked, it must still continue until another agent is named. See Reese Lumber Co. v. Licking Coal & Lumber Co., 156 Ky. 723, 161 S. W. 1124 (1914).

[3] See note 19, infra. See also Green v. Endowment Association, 105 Iowa 628, 75 N. W. 635 (1898).

that liability to service upon the agent required to be named shall continue so long as the corporation does business within the state. Here it is not possible to interpret the statute as authorizing service after the corporation has withdrawn,[4] and the last form seems to be objectionable for this reason.

Some statutes say nothing about the matter of service after withdrawal and there is consequently a conflict whether or not the action is thereafter maintainable. Thus, in Kentucky there is a general provision in the case of foreign insurance companies[5] that a corporation shall file a written consent, authorized by a resolution of the board, for service upon any agent of the corporation within the state or upon the commissioner of insurance, whose duty it is to send the summons by mail to the company. The federal court for Kentucky has held that this statute did not give authority for service of process after the company had withdrawn.[6] But, as this is a question involving the interpretation of a state statute, such a holding by the federal courts was never binding on the state courts even before the *Erie Railway Co. v. Tompkins* case. It was soon thereafter repudiated in the state courts,[7] which declared

[4] See Mont. Rev. Codes (1907), § 4414; United Mo. River Power Co. v. Wisconsin Bridge Co., 44 Mont. 343, 119 P. 796 (1911). This provision was revised in 1931 so that a corporation is now required to consent to service on the secretary of state in suits brought after withdrawal on causes of action arising during the period of doing business within the state. See Mont. Rev. Codes Ann. (1935), § 6661.1; Lathrop-Shea & Henwood Co. v. Interior Const. Co., (C.C.N.Y. 1907) 150 F. 666.

[5] Ky. Rev. Stat. (1942) § 296.200. Id. § 271.090 applies to corporations other than insurance companies and requires that the foreign corporation shall have an authorized agent upon whom process can be served and that it shall be unlawful for a corporation to carry on any business until it shall have filed in the office of the secretary of state a statement signed by its president or secretary giving the name or names of its agent or agents upon whom process can be served. If a change is made in its agent or agents, the secretary of state shall be notified and the former agent shall remain agent for the purpose of service until the appointment of a new agent is filed. Failure to comply with the provisions of the statute becomes a misdemeanor. See also, for fraternal benefit societies, id. § 300.090. Foreign corporations engaged in real estate brokerage must consent to service upon the secretary of the Kentucky Real Estate Commission; Ky. Rev. Stat. (1942), § 324.140.

[6] Swann v. Mut. Etc., (C.C. Ky. 1900) 100 F. 922 (court speaks of the extorted agreement of enforced appointment. The license to do business had been revoked). Friedman v. Empire Life Ins. Co., (C.C. Ky 1899) 101 F. 535. But there was the same holding on this statute in De Castro v. Compagnie Etc., (C.C.N.Y. 1896) 76 F. 425, where the withdrawal was voluntary. See also Davis v. Kansas Etc. Coal Co., (C.C. Ark. 1904) 129 F. 149.

[7] Germania Ins. Co. v. Ashby, 112 Ky. 303, 65 S. W. 611 (1901) and International Harvester Co. v. Kentucky, 147 Ky. 564, 144 S. W. 1064 (1912). Commonwealth v. Provident S.L.A. Soc., 155 Ky. 197, 159 S. W. 698 (1913). (Service on insurance commissioner after withdrawal, on liabilities arising within the state, is valid.

that such an interpretation was not a necessary one and, if followed, would render the statutory provision largely futile.[8] Other states have agreed with the Kentucky reasoning, adding further that the remedy provided at the time the consent was given is a part of the contract[9] between the state and the corporation.

In still other states it is held that since service after withdrawal is not provided for, such service, on a proper interpretation of the statute, does not constitute due process.[10] Thus, in Minnesota[11] it was recently held that jurisdiction must exist when summons is served and that jurisdiction does not continue after the withdrawal. There is an implication that a statute requiring consent to service upon an agent after the withdrawal of the corporation would be unconstitutional. In fact, the court went out of its way to reach this result when the holding could have been based upon the simple fact that the alleged agent served, though a subsidiary corporation, was not an agent.[12] Such an interpretation is frequently based upon the presence theory, presence being held to grow out of doing business.

Some of the incidental peculiarities of state statutes in regard to service on foreign corporations are as follows:

Relatively few of these statutes provide expressly for service on the corporation after it has withdrawn from the state.[13] Liability to

Company is still doing business when collecting premiums, even though it no longer solicits insurance). In Reese Lumber Co. v. Licking Coal & Lumber Co., 156 Ky. 723, 161 S. W. 1124 (1914), service on one who had been designated as agent but no longer served in that capacity is good service, though he did not notify the corporation.

[8] This position was sustained in American Railway Express Co. v. F. S. Royster Guano Co., 273 U.S. 274, 47 S. Ct. 355 (1927). See also Davis v. Kansas & Texas Coal Co., (C.C. Ark. 1904) 129 F. 149; Sydemann Bros., Inc. v. Wofford, 185 Ark. 775, 49 S. W. (2d) 363 (1932); Ark. Dig. Stat. (Pope, 1937) §§ 2248, 2250; Meixell v. American Motor Co., 181 Ind. 153, 103 N. E. 1071 (1914); Brown-Ketchum Iron Works v. Swift, (Ind. App. 1913) 100 N. E. 584; Pervangher v. Casualty Co., 81 Miss. 32, 32 So. 909 (1902); Groel v. United Electric Co., 69 N. J. Eq. 397, 60 A. 822 (1905).

[9] Frazier v. Steel & Tube Co., 101 W. Va. 327, 132 S. E. 723 (1926); Billmyer Lumber Co. v. Merchants Coal Co., 66 W. Va. 696, 66 S. E. 1073 (1910).

[10] National Park Bank v. Concordia Land & Timber Co., 154 La. 31, 97 So. 272 (1923); Gouner v. Mo. Valley Bridge Co., 123 La. 964, 49 So. 657 (1909).

[11] Garber v. Bancamerica-Blair Corp., 205 Minn. 275, 285 N. W. 723 (1939).

[12] See also Forrest v. Pittsburgh Bridge Co., (C.C.A. 7th, 1902) 116 F. 357; Cady v. Associated Colonies, (C.C. Cal. 1902) 119 F. 420. (But dictum that such service is possible under apt legislation).

[13] For those which have such express provision see: Mont. Rev. Codes Ann. (1935), § 6661.1; Pa. Stat. Ann. (Purdon, 1938), tit. 15, § 2852-1011 (so long as any liability remains outstanding in the commonwealth); Tex. Stat. (Vernon, Supp.

service is implied in some statutes.[14] On the other hand, in some states the statute, either expressly or by implication, seems to exclude liability to service after withdrawal.[15] Seventeen jurisdictions have no such provision, express or implied.[16] This leaves open the question how these statutes are to be interpreted. Colorado, Montana, and Texas formerly had no such provision and courts of the last-mentioned state have held that no suit was maintainable after withdrawal.[17] The statute involved in these decisions has very recently been changed, as has also a comparable statute of Montana. Two states provide for service by publication in such cases.[18]

A good many statutes declare that the liability to service shall continue after the corporation has surrendered its license to do business or has withdrawn its agent, for such time as any obligation shall be outstanding, or for a fixed period.[19]

In addition to naming a list of corporate officers upon whom service may be had, the statute often provides for alternative service on a

1943), § 2031a (Liability to suit continues after withdrawal). Wash. Rev. Stat. Ann. (Remington, 1932) § 3854.

[14] Cal. Civil Code (Deering, 1941), § 406. See also §§ 406a, 406b, 411. Ill. Rev. Stat. (Bar Assn. Ed., 1937), c. 32, § 157.111, Stat. Ann. (Smith-Hurd, 1935), c. 32, § 157.111 (Such authority is implied in the requirement made of the secretary of state to forward the notice if a local agent can't be found); Ind. Stat. Ann. (Burns, 1933), § 25.313 (similar); Md. Code Ann. (Flack, 1939), art. 23, § 118 (After withdrawal, may serve the last resident agent in the state); Minn. Stat. (Mason, Supp. 1940), § 7495-13 (If corporation has withdrawn, serve secretary of state); Ohio Code Gen. (Page, 1938), § 8625-20 (On surrender of license to do business corporation must give secretary of state address where he may send notice of process); Utah Code Ann. (1943), § 18-8-1 (similar), or the converse is implied: Fla. Stat. (1941), § 47.39 (service on a foreign corporation now doing business within the state).

[15] Fla. Stat. (1941), § 47.39 (provision for service on foreign corporations *now doing business within the state*); N. D. Comp. Laws Ann. (1913), § 7426, ¶ 6.

[16] Alaska, Arkansas, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Iowa, Kentucky, Mississippi, Missouri, Nebraska, New York, Oklahoma, Rhode Island, Tennessee, Wyoming.

[17] St. John v. Okla. Nat. Gas. Corp., (C.C.A. 5th, 1934) 69 F. (2d) 96.

[18] Fla. Stat. (1941), § 47.39; Iowa Code (Reichmann, 1939), § 11078.

[19] Cal. Civil Code (Deering, 1941), § 411; Colo. Stat. Ann. (Michie, 1935), c. 87, § 20 (applies only to insurance companies); Idaho Laws, 1937, c. 133, p. 214 (continuation of liability implied); Ind. Stat. Ann. (Burns, 1933), § 25.313; La. Gen. Code (Page, 1938), § 8625-21; Pa. Stat. Ann. (Purdon, 1938), tit. 15, § 118 (continued liability implied); Mont. Rev. Codes Ann. (1935), § 6661.1; Ohio Gen. Code (Page, 1938), § 8625-21; Pa. Stat. Ann. (Purdon, 1938), tit. 15, § 2852-1011. Texas: The former statute (Tex. Stat. (Vernon, 1936) § 2031a) provides for four years. The more recent statute (Tex. Stat. (Vernon Supp., 1943) § 2031a) applies the general statute of limitations. Wash. Rev. Stat. Ann. (Remington, 1932), § 3854.

private agent of the corporation,[20] which may be made in some states upon the agent who performed the act out of which the cause of action arose, even though he is no longer an agent,[21] and formerly in one state upon a resident shareholder.[22]

## II

### THEORIES AS TO AUTHORITY FOR PROCESS

Several statutes indicate the theory upon which they were drawn, i.e., the basis upon which a personal judgment against a foreign corporation may be obtained. Thus, they frequently require the foreign corporation to file a consent to be sued within the state. This consent is likely to take the form of a resolution of the board of directors certified and placed on file with the secretary of state.[23] The submission theory appears in some statutes.[24] The Illinois statute adopts the constructive presence theory.

There are, of course, three theories of control, the *presence*[25] theory, the *consent* theory and the theory that, since a foreign corporation can be prevented from entering the state altogether, it can be admitted on reasonable conditions. This latter view was put forth by Judge Hand[26] and seems to be the one adopted by the late Professor Beale, which he calls the submission theory.[27] If the presence theory were followed, it seems clear that jurisdiction could not be obtained after withdrawal, even though the statute specifically provided therefor.

The consent theory is now regarded by Judge Hand and Professor Scott and perhaps also by Beale, in his *Conflict of Laws*, as fictional. However, it does not seem necessarily to differ very materially from the theory of conditional admission to the state. If a foreign corpora-

[20] Ala. Code Ann. (1940), tit. 7, §§ 188, 192, 193.

[21] La. Gen. Stat. Ann. (Dart, 1939), §§ 1251, 1252; Tenn. Code Ann. (Michie, 1938), § 8678.

[22] Mills Colo. Stat. Ann. (Courtright, 1927), § 988.

[23] Cal. Civil Code (Deering, 1941), § 405; Colo. Stat. Ann. (Michie, 1935), c. 41, § 110; Iowa Code (Reichmann, 1939), § 8355; Ky. Rev. Stat. (1942), § 271.090; Mont. Rev. Codes Ann. (Courtwright, Supp. 1941) § 6651; Nev. Comp. Laws (Supp. 1931-1941), § 8580; N.D. Laws, 1937, c. 116, § 13; Utah Code Ann. (1943), §§ 18-8-1, 82-1-12; Vt. Pub. Laws (1933), § 5974; Wis. Stat. (1941), § 226.02; Wash. Rev. Stat. Ann. (Remington, 1932) § 3854.

[24] N.C. Code Ann. (Michie, 1939), § 1137; Pa. Stat. Ann. (Purdon, 1938), tit. 15, § 2852-1011; W. Va. Code Ann. (Michie, 1937), § 3083.

[25] See e.g., Anderson-Oliver v. U.S. Fidelity Co., 174 N.C. 417, 93 S.E. 948 (1917).

[26] Smolik v. Philadelphia etc. Iron Co., (D.C. N.Y. 1915) 222 F. 148 at 151.

[27] 1 BEALE, CONFLICT OF LAWS, § 89.9 (1935).

tion, knowing fully the terms of the local statute, determines to do business under the named restrictions, it is difficult to say that it does not consent to them. This would be comparable to the case where a beneficiary of a legacy, devisee under a will or grantee in a conveyance imposing certain conditions upon the beneficiary or grantee accepts the devise or grant made to him. It seems fair to say that the devisee or grantee also assents to the conditions under which the devise or grant is made.

Some commentators, misled, as it would seem, by the consent theory, have urged that the statute should clearly state that the corporation's assent is required.[28] Thus, it is considered that a statute like that in Kentucky, above mentioned, requiring the corporation to file a "resolution adopted by its board of directors consenting to service of process upon any agent" makes the consent of the corporation obeying it clearly necessary. The precise form of the statute is probably not material and a statute providing for service upon a state officer without the filing of such consent should have the same effect. If provision is not expressly made for service after the corporation's withdrawal, then the question whether such method of service is sufficient after the corporation has withdrawn depends on the interpretation of the statute and the legislative intent. It is, of course, far better that the statute be specific with respect to the period in which service is to be made.

The importance of the effect to be given to the wording of the statute respecting the character of the agent on whom service may be made is shown in many ways. Thus, under the old New York statute not only must the corporation be doing business at the time of suit but the agent must be the one who had direction of the business out of which the suit arose.[29] This illustrates one of the defects of the earlier statutes. Conditions are likely to change so that under such a law an action might become impossible. The difficulty was perhaps avoided in Mississippi by the fiction of assuming that the agent served was the one who solicited the business out of which the action grew.[30] Under the later New York statute it was held that in order to have service on an actual agent, though not the one provided for under the statute, the company must be presently doing business within the state at the time of suit. The theory seems to be that while the corporation does business it consents to service on any agent but after it has withdrawn it consents only to

[28] See., e.g., 6 MICH. L. REV. 506 (1908).
[29] St. Clair v. Cox, 106 U.S. 350, 1 S. Ct. 354 (1882).
[30] Pervanger v. Surety Co., 81 Miss. 32, 32 So. 909 (1902).

such service as the statute requires.[31] The majority of states permit the corporation to name its agent (a private one) for service. It has been held, however, that service on another person who is in fact an agent is sufficient under the statute,[32] as is also service on a special agent sent to settle the dispute.[33]

It was once the view in a few states that their statutes, literally interpreted, permitted service on a foreign corporation by service on any responsible agent such as the president or vice-president, though he was only temporarily within the state and though the corporation either was not at the time doing business or had never done business therein. That is, suit was authorized against a foreign corporation on a transitory cause of action arising elsewhere if any agent could be found within the state. This would discard the presence, the consent, and the submission theories as if none of them were necessary under the statute.[34] Most courts, including the federal courts, do not now so interpret the statute.[35] It might be observed that where service is had on a president, vice-president or general manager, wherever he may be found, notice is most likely to come to the corporation and thus it would have a chance to be heard. Yet great hardship might well accrue to it either because of the difference in the local law or because of the inconvenience in defending a suit at a place where the corporation has no other interest. This latter reason may well be the ground for the formula respecting the effect of doing business within the state. It would also conflict with the theory as to the place where a corporation exists as an entity.

The necessity for notice seems scarcely to be provided for under a decision in South Carolina which permitted a copy of the summons to be left at the place of business of the former agent after the corporation had withdrawn, the agent himself not being found.[36] In New Jersey service on a resigned agent was held sufficient in the particular case because plaintiff had no knowledge of the termination of the agency. This also seems to be a questionable rule if, in fact, the statute requires service to be made upon one who actually represents the corporation at

[31] Kellogg & Co. v. Barrett, (Sup. Ct. 1930) 240 N.Y.S. 824.

[32] Lesser Cotton Co. v. Yates, 69 Ark. 396, 63 S. W. 997 (1901).

[33] Conn. Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S. Ct. 308 (1898).

[34] In Atchison, T. & S. F. Ry. Co. v. Weeks, (C.C.A. 5th, 1918) 254 F. 513, service was had on a general manager of defendant permanently located in the state but corporation did no business there and the cause of action arose outside the state.

[35] See e.g., Zelnicker Co. v. Miss. Co., (Mo. Ct. App. 1903) 77 S. W. 321; Aldrich v. Anchor Coal Co., 24 Ore. 32, 32 P. 756 (1893).

[36] Terry Packing Co. v. Southern Express Co., 125 S. C. 198, 118 S. E. 628 (1923). See, to same effect, Maine statute, Me. Rev. Stat. (1930), c. 95, § 19.

the time. There is no assurance that notice will be forwarded in such a situation.[37] The case seems different where the statute expressly provides in the alternative for service on a former agent. The corporation with knowledge of such a statute can take at least some precautions in order that it may receive notice of the action. If, however, the statute requires service upon an agent, service upon a former agent is insufficient.[38] If he must be a resident agent, service on a non-resident, traveling agent within the state is not good.[39] Service upon a director after the corporation has withdrawn does not seem to be inadequate since his interest in the affairs of the corporation continues.[40] Sometimes a director or stockholder is by statute made an agent for service.

## III

### THE AGENT

It is better to require service to be made upon a state officer and to provide that he shall communicate with the corporation by letter put in the mail or possibly by telegraph. It is hardly probable that the defendant will fail to receive the notice in that case. But if the statute does not require the officer to give such notice he probably will not do so and it is likely that notice will never be received. While some courts may hold that in the particular suit the corporation is bound by a personal judgment on the ground that it has actually assented to such substituted service, the practice of serving a state officer who is not required to forward notice of it may often sanction personal judgments against defendants who have never had notice nor a chance to be heard. If the doctrine of *Pennoyer v. Neff*, that a personal judgment must be based upon personal service within the state where the action is brought, applies to corporations and is to be broken in upon in the manner just described, then perhaps there should be some relaxation of it in the case of individual defendants, if they have received actual notice given in some way other than in the present statutory fashion. The requirement of service upon a state officer exclusively eliminates all difficult

[37] Moulin v. Trenton Mutual Ins. Co., 25 N.J.L. 57 (1855).

[38] Guthrie v. Conn. Mut. Indem. Assoc., 101 Tenn. 643, 49 S. W. 829 (1899). SCOTT, FUNDAMENTALS OF PROCEDURE 56 (1922), develops the three theories of jurisdiction.

[39] Cumberland Tel. & Tel. Co. v. Turner, 88 Tenn. 265, 12 S. W. 544 (1889).

[40] Boggs v. Inter-American Co., 105 Md. 371, 66 A. 259 (1907), and see International Harvester Co. v. Ky., 234 U.S. 579, 34 S. Ct. 859 (1914). Service on a stockholder was formerly provided for in Colorado.

issues as to what person can be regarded as an agent. Surely a carpenter or ditch digger employee ought not to be regarded as an agent, partly because he is not likely to forward the notice. Such a requirement would also eliminate even an officer of the corporation as a suitable person on whom service should be made in a case where the claim against the corporation was his own and he had assigned it in order to make possible service upon himself as agent.[41] There is no sound objection to the appointment of a state officer, even when a managing agent is domiciled within the state.

There is a further difficulty respecting the appointment of a private agent whether or not alternative service upon a state officer is provided. The private agent may die, resign, move away, become incompetent, or acquire an adverse interest in the subject matter of the litigation. If the appointment should not be irrevocable or made to endure until a new agent is named, no service would be possible in these contingencies (where the alternative of a state agency is not provided), even though liability to service were made to continue so long as any obligation arising from doing business in the state should be outstanding. The cases holding that service on an agent who has moved away and happens to return on his own business is sufficient, and those holding that service can be had on an officer who merely happens to be within the state at the time, are questionable with respect to the matter of the right to notice and an opportunity to be heard.[42] There seems to be no objection, however, to extending the right to serve the agent to causes of action that arose before the right to serve the agent was created.[43]

As for causes of action arising within the state but out of interstate commerce, it is now definitely held that a state statute may appropriately authorize service within the state.[44] Presumably service could also be had on the corporation after its withdrawal under an appropriate statute. A close question may arise as to where the transaction occurred. Thus, in *Paulus v. Hart-Parr Co.*,[45] an action on a contract made in

[41] See Tortat v. Hardin Co., (C.C.S.D. 1901) 111 F. 426, and see on the problem of the character of the agent, Culp, "Constitutional Problems Arising from Service of Process on Foreign Corporations," 19 MINN. L. REV. 375 at 383, n. 33 (1935).

[42] Goldey v. Morning News, 156 U.S. 518, 15 S. Ct. 559 (1895) and Meixell v. American Motor Car Sales Co., 181 Ind. 153, 103 N.E. 1071 (1914).

[43] Conn. Mut. Life Ins. Co. v. Duerson, 28 Gratt. (69 Va.) 630 (1877).

[44] Ark. Dig. Stat. (Pope, 1937), § 1368. Neb. Comp. Stat. (1929), § 24-1201. But see Cal. Civil Code (Deering, 1941), § 407 (statute does not apply to corporations engaged in interstate commerce only).

[45] 136 Wis. 601, 118 N. W. 248 (1908).

Iowa for the shipment of an engine from Iowa to Wisconsin, it was held that the action could be brought in Wisconsin, though the statute limits suits against foreign corporations to cases arising within the state, it being held that the breach occurred in Wisconsin.

A further question often arises which, for the purpose of this discussion, is not very important. It is, may either residents or non-residents sue under such a statute (providing for service on a state officer, notice of which he is required to forward) on a cause of action arising outside the state? Some statutes expressly limit suits against foreign corporations to causes arising within the state.[46] Two expressly permit the action to be brought by a non-resident upon a transitory cause of action arising elsewhere,[47] while others require plaintiff to be a resident or the cause of action to have arisen within the state.[48] Thus, in two states residence of plaintiff outside the state is of itself not determinative of his right to sue.[49] As to such actions where there is no such limitation stated,[50] some commentators are of the opinion that the matter has not been clearly decided by the Supreme Court on the question of due process. However, it has been held that "the purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state, and that it is unreasonable and unfair to permit suits on all transitory causes of action to be commenced within a state after the foreign corporation has ceased to do business therein." [51]

There is no consistency with respect to which officer of the state shall serve as agent. Thus:

[46] Colo. Stat. Ann. (Michie, 1935), c. 87, § 20 (insurance companies—by inference); Ind. Stat. Ann. (Burns, 1933), § 25.313; N.J. Rev. Stat. (Supp. 1941-1942), § 2:26-47; N.C. Code Ann. (Michie, 1939), § 483; Ohio Gen. Code (Page, 1938), § 8625-21; Wash. Rev. Stat. Ann. (Remington, 1932), § 3854.

[47] Ga. Code Ann. (Park, 1933), § 22-1101; Miss. Code Ann. (1930), § 4166. See Vicksburg S. & P. R. Co. v. Forcheimer, 113 Miss. 531, 74 So. 418 (1917).

[48] N.C. Code Ann (Michie, 1939), § 483.

[49] Ga. Code Ann. (Park, 1933), § 22-1101; N.C. Code (Michie, 1939), § 6415.

[50] See Culp, "Constitutional Problems Arising from Service of Process on Foreign Corporations," 19 MINN. L. REV. 375 at 396 (1935).

[51] Mitchell Furn. Co. v. Selden Breck Construction Co., 257 U.S. 213 at 215, 42 S. Ct. 84 (1921). In Am. Ry. Exp. Co. v. Rouw Co., 173 Ark. 810, 294 S. W. 401 (1927), the shipping contract in interstate commerce was made in Missouri and was breached in Michigan. Under the statute plaintiff, being a resident, may sue, inasmuch as the corporation does business within the state. But there is no right of action if plaintiff, under such circumstances, is a non-resident. See Davis v. Farmers Coop. Co., 262 U.S. 312, 43 S. Ct. 556 (1923).

(a) One state specifically provides that no state officer shall act as agent for service for a foreign corporation.[52]

(b) In several states there is no provision for service on a state official, hence none is permissible.[53]

(c) In several states foreign corporations are required to appoint some state official as agent for service.[54]

[52] Ariz. Code Ann. (1939), § 53-305.

[53] Ark. Dig. Stat. (Pope, 1937), § 1368; Colo. Stat. Ann. (Michie, 1935), c. 41, §§ 110, 111 (except in the case of insurance companies); Conn. Gen. Stat. (1930), § 5469; D.C. Code (1940), §§ 13-103, 13-104; Ga. Code Ann. (Park, 1933), § 22-1101; Kan. Rev. Stat. (1935), §§ 60.2419, 60.2520, 60.2522; Ky. Rev. Stat. (1942), §§ 302.100, 324.140 (as to all corporations save insurance companies and real estate brokerage companies); Md. Code Ann. (Flack, 1939), art. 48A, § 172 (similar to Kentucky); Miss. Code Ann. (1930), § 4167; Mo. Rev. Stat. Ann. (1939), § 880; Mont. Rev. Codes Ann. (Courtwright, Supp. 1939), § 6651, Mont. Rev. Codes Ann. (1935) § 6661.11 (5) (Except after withdrawal when secretary of state is made agent in some situations); R.I. Gen. Laws Ann. (1938), c. 116, §§ 16, 64-70; Va. Code Ann. (Michie, 1942), §§ 3845, 6064, 6064a, 6065, 6066.

[54] Colo. Stat. Ann. (Michie, 1935), c. 87, § 20 (In case of insurance companies, insurance commissioner must be named. No provision made for naming any state officer in other cases); Idaho Laws, 1937, c. 133, p. 214 (after corporation has surrendered its license to do business); Ill. Acts, 1939, c. 60, p. 407 (where corporation does business without a license); Ind. Stat. Ann. (Burns, 1933), §§ 25.310, 25.313 (where corporation has withdrawn or its license has been revoked); Iowa Code (Reichmann, 1939), § 8420; Md. Code Ann. (Flack, 1939), Art. 48A, § 172 (In case of insurance companies, company must appoint commissioner of insurance as agent for service); Mass. Gen. Laws (1932), c. 181, § 3; Mich. Comp. Laws (1929), § 14096, Stat. Ann. (1938), § 27.763 (Insurance companies must appoint commissioner of insurance, secretary of state, or other state officer); Mont. Rev. Codes Ann. (1935), § 6661.1 (which states that after the corporation has surrendered its license to do business service can be had only upon a state officer); Nev. Comp. Laws (Supp. 1931-1941), § 8581; N.H. Rev. Laws (1942), c. 280, §1, c. 325, §10 (Corporations other than insurance companies must appoint secretary of state. Insurance companies must appoint insurance commissioner); N.C. Code (Michie, 1939), §§ 1137, 6414 (Serve secretary of state where no agent appointed or insurance commissioner, in case of insurance companies. Three ways for service on insurance companies, see id. § 483); N.D. Laws, 1937, c. 116, § 13, N.D. Laws (1913) § 7426, ¶ 5 (Must appoint secretary of state where there is a failure to appoint private agent or its license is revoked or it has withdrawn. Insurance companies must appoint secretary of state in all events); Ohio Gen. Code (Page, 1938), § 8625-20 (Serve secretary of state after corporation has surrendered its license); S.C. Code (1942), § 7765 (Serve secretary of state if no agent designated but in case of insurance companies, serve insurance commissioner); S.D. Code (1939), § 11.2108 (Serve secretary of state only); Tex. Stat. (Vernon, Supp. 1943), § 2031a (where no license obtained, must appoint secretary of state); Vt. Acts, 1937, No. 40, p. 69 (any act of foreign corporation within state is construed as an appointment of the secretary of state as agent for service); Va. Code Ann. (Michie, 1942) § 6064 (must serve the secretary of state); Wis. Stat. (1941),

(d) Provision for alternative service on some state officer is made in a considerable number of states.[55]

Where service is on an agent or alternatively upon a state officer, several states require a showing of diligence to be made in the return of the officer respecting the effort made to find the private agent.[56]

In case of appointment of state officers as agents, the one most commonly selected is the secretary of state.[57] He is the exclusive agent in Vermont.[58] Others named are: the commissioner or superintendent of

§§ 215.41 (3), 226.02 (Some corporations must appoint the commissioner of banking, others the secretary of state).

[55] Ala. Code Ann. (1940), tit. 7, §§ 188, 192, 193; Cal. Civil Code (Deering, 1941) § 406a; Del. Rev. Code (1935), § 2080; Fla. Stat. (1941), § 47.36; Idaho Code Ann. (1932), § 5.507 (3). Ill. Rev. Stat. (Bar Assn. Ed., 1937), c. 32, § 157.111, Stat. Ann. (Smith-Hurd, 1935), c. 32, § 157.111; Iowa Code (Reichmann, 1939), § 8355; La. Gen. Stat. Ann. (Dart, 1939), § 1248; Md. Code Ann. (Flack, 1939), art. 48A, § 172 (in the case of insurance companies); Mich. Comp. Laws (1929), §§ 14095, 14096, Stat. Ann. (1938), §§ 27.762, 27.763 (in the case of insurance companies); Minn. Stat. (Mason, Supp. 1940), § 7495-13; Miss. Code Ann. (1930), § 4167; N.J. Rev. Stat. (Supp. 1941-1942), § 2:26-47; N.M. Stat. Ann. (1941), § 19-306; Nev. Comp. Laws (Supp. 1931-1941), § 8581; Thompson's Law of N.Y. (1939), Part II, p. 1649, § 229, Con. Laws (McKinney, 1929), § 22-210 as amended by N.Y. Laws, 1935, c. 471; N.C. Code (Michie, 1939), §§ 1137, 6414; Ohio Gen. Code (Page, 1938), § 8625-19; Pa. Stat. Ann. (Purdon, 1938), tit. 15, § 2852-1011; S.C. Code (1942), § 7765; S.D. Code (1939), § 11.2108; Tenn. Code Ann. (Michie, 1938), § 4124; Tex. Stat. (Vernon, Supp. 1943), § 2031a; Vt. Pub. Laws (1933), § 1522; Wash. Rev. Stat. Ann. (Remington, 1932), § 3854; W. Va. Code Ann. (Michie, 1937), §§ 3083, 4937, 4938, 5539.

[56] Among them are Cal. Civil Code (Deering, 1941), § 406a. The present Florida Statutes (1941) omit the requirement of diligence in § 47.36, which showing was required in the earlier statutes; Fla. Comp. Gen. Laws Ann. (Skillman, 1927), § 4264. La. Gen. Stat. Ann. (Dart, 1939), § 1248; Miss. Code Ann. (1930), § 4166; Nev. Comp. Laws (Supp. 1931-1941), § 8581.

[57] Ala. Code Ann. (1940), tit. 7, §§ 188, 192, 193; Cal. Civil Code (Deering, 1941), § 406a; Del. Rev. Code (1935), § 2080; Ill. Rev. Stat. (Bar Assn. Ed., 1937), c. 32, § 157.111, Stat. Ann. (Smith-Hurd, 1935), c. 32, § 157.111; Ind. Stat. Ann. (Burns, 1933), § 25.310; Iowa Code (1939), § 8355; La. Gen. Stat. Ann. (Dart, 1939), § 1248; Mich. Comp. Laws (1929), § 14095, Stat. Ann. (1938), § 27.762; Minn. Stat. (Mason, Supp. 1940), § 7495-13; Mont. Rev. Codes Ann. (1935), § 6661.1; N.H. Rev. Laws (1942), c. 280, § 1; Nev. Comp. Laws (Supp. 1931-1941), § 8581; N.J. Rev. Stat. (Supp. 1941-1942) § 2:26-47; N.M. Stat. Ann. (1941), § 19-306; Thompson's Laws of N.Y. (1939), Part II, p. 1649, § 229, Con. Laws (McKinney, 1929) § 22-210 as amended by N.Y. Laws, 1935, c. 471; N.C. Code (Michie, 1939), § 1137; N.D. Laws, 1937, c. 116, § 13; Ohio Gen. Code (Page, 1938), § 8625.19; Pa. Stat. Ann. (Purdon, 1936), tit. 15, § 2852-1011; S.C. Code (1942), § 7765; S.D. Code (1939), § 11.2108; Tenn. Code Ann. (Michie, 1938), § 4124; Tex. Stat. (Vernon, Supp. 1943), § 2031a; Vt. Pub. Laws (1933), § 1522.

[58] Vt. Acts, 1937, No. 40, p. 69.

insurance,[59] the commissioner of banking,[60] the commissioner of corporations,[61] the director of the securities commission,[62] the state auditor,[63] the county auditor,[64] the circuit clerk,[65] any public officer designated by the corporation.[66]

Where the service is on a state officer, some statutes make no provision for forwarding notice. This seems to have been the earlier practice.[67] Now it is common to require notice of process to be sent to the home office but the manner is sometimes not stated, or it is required to be sent by mail, either registered,[68] or unregistered,[69] or by telegraph,[70] or both by telegraph and registered mail.

## IV

### FOREIGN CAUSES OF ACTION

Where an action on a foreign cause is brought in the federal courts, there is now some authority that it will lie. Thus, in *Morrell v. United*

[59] Colo. Stat. Ann. (Michie, 1935), c. 87, § 20; Ky. Rev. Stat. (1942) § 296.200; Md. Code Ann. (Flack, 1939), art. 48A, § 172; N.C. Code (Michie, 1939), § 6414; S.C. Code (1942), § 7964.

[60] Wis. Stat. (1941), § 215.41 (3).

[61] Mass. Gen. Laws (1932), c. 181, § 3; Ore. Comp. Laws Ann. (1940), § 77-301.

[62] Utah Code Ann. (1943), § 82-1-12.

[63] Neb. Comp. Stat. (1929), § 24-1201; W. Va. Code (Michie, 1937), §§ 4938, 4937 (d).

[64] Idaho Code Ann. (1932), § 5.507 (3).

[65] Fla. Stat. (1941), § 47.36, 47.37-47.39, 48.07.

[66] Mich. Comp. Laws (1929), § 14094, Stat. Ann. (1938), § 27.761; Thompson's Law of N. Y. (1939), Part II, p. 1649, § 229, Con. Laws (McKinney, 1929), § 22-210 as amended by N.Y. Laws, 1935, c. 471.

[67] See 89 A. L. R. 658 (1934).

[68] Colo. Stat. Ann. (Michie, 1935), c. 87, § 20 (postpaid); Ill. Rev. Stat. (Bar Assn. Ed., 1937), c. 32, § 157.111, Stat. Ann. (Smith-Hurd, 1935), c. 32, § 157.111; Minn. Stat. (Mason, Supp. 1940), § 7495-13; Miss. Code Ann. (1930), § 4167; N. H. Rev. Laws (1942), c. 280, § 6 (prepaid postage); Nev. Comp. Laws (Supp. 1931-1941), § 8581; S.C. Code (1942), § 7765; Tenn. Code Ann. (Michie, 1938), § 4124 (must require return receipt); Utah Code Ann. (1943), § 82-1-12.

[69] Fla. Stat. (1941), § 47.36; Idaho Code Ann. (1932), § 5.507 (3) (failure to forward shall not affect validity of service); N.H. Rev. Laws (1942), c. 280, § 6 (postage prepaid); N.C. Code (Michie, 1939), § 6415; Ore. Comp. Laws Ann. (1940), § 77-301 (postage prepaid); Vt. Pub. Laws (1933), § 1523; Wis. Stat. (1941), § 215.41 (3) (by letter).

[70] Cal. Civil Code (Deering, 1941), § 406a (charges prepaid); N.M. Stat. Ann. (1941), § 19-306 (charges prepaid); Ohio Gen. Code (Page, 1938), § 8625-19 (notice both by telegram and registered mail).

*Air Lines et al*,[71] plaintiff administrator appointed in New York sued defendant, a Delaware corporation, for the wrongful death of her intestate. His death was caused in Ohio. Service was had on the New York agent of defendant. Defendant Air Lines Company summoned the Bethlehem Steel Corporation, a Pennsylvania company, as third party defendant by similar service upon the latter's New York agent. The claim arose out of an injury arising from alleged defective aircraft construction, which wrong was committed elsewhere than in New York. The Bethlehem Steel Company unsuccessfully moved to set aside the service on the ground of improper venue. Thus, two foreign corporations, one chartered in Delaware and the other in Pennsylvania, were held to answer to the plaintiff's claim in a New York court on a cause of action arising in Ohio.

So in *Neirbo Co. v. Bethlehem Shipbuilding Co.*[72] plaintiffs, citizens of New Jersey, brought an action against defendant corporation chartered in Delaware. The service was made on defendant's New York agent. The court declared that the sole question was whether the provisions of section 51 of the Judicial Code[73] are satisfied by service upon the agent of a foreign corporation in a case where it has named such an agent for service of process in conformity with the law of the state in which suit is brought. It was held that the privilege accorded by this section of the code was waived positively by consent to be sued, and by compliance with the statutory requirement of the state that an agent be appointed for service of process. Thus, presumably plaintiff is not limited to causes of action arising within the state,[74] where the action is brought in the federal courts.

It does not necessarily follow, however, that in either of the above cases it would have been held that the venue was appropriate if the corporation had withdrawn from the state before suit had been begun. It would seem that in this event the so-called waiver in the latter case would itself have been withdrawn before it had been acted upon and we may surmise also that the action based on diversity of citizenship in the *Morrell* case would have required a different forum.

[71] (D.C.N.Y., Oct., 1939) 29 F. Supp. 757. For the application of the federal rules of procedure to third party proceedings as ancillary with respect to jurisdiction. See 10 AIR LAW REV. 422 (1939); 24 MINN. L. REV. 437 (1940); 26 VA. L. REV. 376 (1940).

[72] 308 U.S. 165, 60 S. Ct. 153 (1939).

[73] 7 F.C.A., tit. 28, § 112.

[74] 7 UNIV. CHI. L. REV. 397 (1940); 49 YALE L. J. 724 (1940).

## V

### DISTINCTIONS BETWEEN CORPORATIONS

In many states there is no express provision for service on foreign corporations, but it is commonly held that a statutory provision for service on corporations applies to both domestic and foreign corporations.[75] In a larger number the statute expressly applies to foreign corporations.

If service after withdrawal is appropriate, as it has been held to be, one wonders why insurance companies have been picked out for special treatment. It may be true that the problem arises more often in connection with insurance business; but, if the statute is valid and appropriate in insurance cases, it is clearly valid with reference to all foreign corporations that are doing or have done business within the state.[76] This distinction respecting foreign insurance companies and other foreign corporations is made in a good many states.[77] Thus, in Kentucky, the principal section dealing with the matter is made applicable to all foreign corporations save insurance companies and real estate brokerage companies. The only difference is that no provision is made for service on a state officer save in the case of insurance companies, which

[75] Ariz. Code Ann. (1939), §§ 53-305, 21-313, 21-314; Conn. Gen. Stat. (1930), § 5469 (Foreign corporations are mentioned to the effect that they may be served); Del. Rev. Code (1935), § 2080; Ga. Code Ann. (Park, 1933), § 22-1101; Mo. Rev. Stat. Ann. (1939), § 880; Neb. Comp. Stat. (1929), § 24-1201; Thompson's Laws of N. Y. (1939), Part II, p. 1649, § 229, Con. Laws (McKinney, 1929), § 22-210 as amended by N.Y. Laws, 1935, c. 471; Okla. Stat. (1941), tit. 12, §§ 163-167; Tenn. Code Ann. (Michie, 1938), § 4124; Wyo. Rev. Stat. (Courtwright, 1931), §§ 89-814, 89-816.

[76] See Culp, "Constitutional Problems Arising from Service of Process on Foreign Corporations," 19 MINN. L. REV. 275 at 378-380, ns. 13, 14. Florida provides for service on the agent of a corporation whose name must be forwarded to the secretary of state. The agent also must file his acceptance of the agency for process, Fla. Stat. (1941), § 47.35, and in the alternative the clerk of a circuit court may be designated, id. § 47.36. But this whole provision for service on foreign corporations has little significance in view of id. § 47.45, which exempts some sixteen types of corporations from its terms.

[77] Colo. Stat. Ann. (Michie, 1935), c. 87, § 20; Kan. Rev. Stat. (1935), § 60.2523; Ky. Rev. Stat. (1942), § 302.100; Md. Code Ann. (Flack, 1939), art. 48A, § 172; Me. Rev. Stat. (1930), c. 95, § 22; Mich. Comp. Laws (1929), § 14096, Stat. Ann. (1938), § 27.763; Mont. Rev. Codes Ann. (Courtwright, Supp. 1939), § 6651; Neb. Comp. Stat. (1929), § 24-1201; N.J. Rev. Stat. (1937), § 2-26-53.

must alternatively appoint the insurance commissioner as agent.[78] In a few cases other kinds of foreign corporations are singled out for special treatment.[79] In Wisconsin a distinction is made as to building and loan associations.[80]

## CONCLUSION

There should no longer be a doubt that a state may validly require a foreign corporation to be subject to service of process upon obligations created within the state, after it has withdrawn from the state. Any decisions to the contrary due to the presence or consent theories are no longer tenable. The great variations in the decisions are likely to be based, however, quite as much upon the variations in the statutes as upon any constitutional theory of due process. Recent statutes show that this problem was formerly realized dimly, or not at all, but that a process of education has been going on. Most courts, however, without a special provision thereto, will probably hold that liability of a corporation to service after withdrawal is implicit in the fact that it has elected to do business within the state unless the statutory language negatives such an implication. The presence theory and even the consent theory has, in the past, had the unfortunate result that no action could be brought within the state after the withdrawal of the corporation. To select the insurance companies for special treatment or, for that matter, any others, such as banking, bridge, brokerage, building and

[78] Ky. Rev. Stat. (1942), §§ 271.090, 302.100. See Cal. Civil Code (Deering, 1941), § 405; Colo. Stat. Ann. (Michie, 1935), c. 87, § 20 (Insurance companies must name commissioner of insurance as agent for service. In other cases, plaintiff may serve an agent or in the alternative, a stockholder); Kan. Rev. Stat. (1935), § 60-2523 (Serve alternatively the superintendent of insurance. No service on state officer provided in other cases); Mass. Gen. Laws (1932), c. 223, §§ 38, 39 (unimportant distinctions); Mich. Comp. Laws (1929), §§ 14094, 14095, 14096, 14097, Stat. Ann. (1938), §§ 27.761, 27.762, 27.763, 27.764 (Insurance companies may appoint alternatively the insurance commissioner or the secretary of state or other state officer but must appoint alternatively a private agent for service); Neb. Comp. Stat. (1929), § 20-513 (no important distinctions); N.H. Rev. Laws (1942), c. 280, §§ 1, 2, 6 (Insurance companies must appoint commissioner of insurance, others must appoint secretary of state); N.C. Code Ann. (Michie, 1939), §§ 1137, 6414 (Service in case of foreign insurance companies must be on insurance commissioner. In other cases, service may be alternatively on a private agent).

[79] Ky. Rev. Stat. (1942), § 324.140 (real estate brokerage companies); Mass. Gen. Laws (1932), c. 181, § 3 (bridge, railway and highway companies); Wis. Stat. (1941), §§ 215-41 (3), 226.02 (7) (banking corporations and loan associations); Wyo. Rev. Stat. Ann. (Courtwright, 1931), § 89-816 (sleeping car companies).

[80] Wis. Stat. (1941), § 215.41.

loan, railroad, and real estate corporations seems without a rational basis. Service on one agency for all is preferable. The officer served can appoint a deputy who will keep a complete record and file for all corporations. Greater assurance of proper service would thus be gained.

In view of the great diversity in the existing statutes where uniformity is much to be desired, a uniform statute is herewith proposed. It provides that the secretary of state shall be the exclusive agent for service of process. This seems to involve no hardship. It does distinguish, in this respect, between foreign and domestic corporations, but no constitutional privilege is interfered with.

It is also desirable that the secretary of state make a return showing the performance of his statutory duty. This device is useful to insure certainty of service. The plaintiff has an opportunity to discover whether service has been made and will have adequate remedies in case of failure of the secretary to act.

An express provision for limitation of these actions affords definiteness and certainty. There is no occasion to distinguish in this regard between contracts and torts. Since obligations for taxes may not be discoverable within this period, it may be wise to eliminate claims made by the state from this provision for limitation.

## APPENDIX

## PROPOSED UNIFORM STATUTE FOR PROCESS ON FOREIGN CORPORATIONS

The secretary of state and he only shall be the agent for service of process for every foreign corporation which carries on business within this state. Such service shall be applicable to all causes of action arising within this state but not to causes arising elsewhere. Such corporation shall be liable to suit for a period of four years after the withdrawal of the corporation from the state, and no longer, unless the applicable statute of limitations shall have run prior to its withdrawal. The above limitation of actions shall not apply to claims made by the state.

It shall be the duty of such corporation, before doing any business in this state, to file with the secretary of state the exact name under which it does business and its post office address.

The plaintiff shall cause to be served two copies of its complaint, together with two copies of the summons, upon the secretary of state. It shall be the duty of the said secretary to forward immediately, by registered mail, one copy of the complaint, together with a copy of the summons, to the corporation at its post office address as shown by information on file with the secretary. The process server shall make the usual return to the court and in addition the secretary of state shall make a return to the court where the action is brought, showing that the acts herein required to be performed by him have been done. Jurisdiction over defendant shall not attach until such return by the secretary is filed.

The secretary of state shall keep a proper file of all complaints, together with the

summons served upon him, and he shall enter on his record the action taken by him respecting the service made upon him in each case. His return to the court of his action taken shall be conclusive as between the parties but shall not protect him in an action for damages, by any party aggrieved, in case of his dereliction of duty in this regard.

For such service, the complainant against any foreign corporation shall pay to the secretary of state the sum of $5.00 at the time the service of summons is made. The net fees so received shall be covered into the state treasury after deducting the actual costs involved by the performance of his duties as agent for service.

It shall be the duty of each foreign corporation, upon withdrawal from the state, to inform the secretary of this fact in writing and the above statute of limitations shall not run until this information is supplied.