been excluded from the Act, it nevertheless would have been utilized by the courts to provide government immunity in certain instances.[94]

Of the cases that have arisen involving "discretionary" activities, the results have often been phrased in terms of the activity being "governmental" or "sovereign."[95] It appears that the word "governmental" retains its importance under the Tort Claims Act only in so far as it may be useful to describe the consequence of United States immunity for "discretionary" activities as contrasted with its use as one of the categories in the "governmental-proprietary" distinction. The "discretionary" exception in the Tort Claims Act provides the immunity from tort liability necessary to ensure adequate performance of functions essential to the public welfare free from the possibility of damage claims which if present might result in timid, hesitant administration of public programs. At the same time utilization of the "discretionary" exception does not result in unnecessary immunities at the operational level of government activity such as would necessarily occur should the "governmental-proprietary" distinction be used.

FOREIGN CORPORATIONS: THE INTERRELATION OF JURISDICTION AND QUALIFICATION

There are two bases of personal jurisdiction over foreign corporations: a corporation may give actual consent to judicial jurisdiction manifested normally by compliance with a state foreign corporation qualification act;[1] and secondly, a corporation, even though it has not qualified, by engaging in sufficient activity within the state to establish a basis for jurisdiction other than actual consent is subject to judicial jurisdiction.[2] Under the doctrine of *International Shoe Co. v. State of Washington*[3] the latter basis has undergone substantial change in recent years. The instant inquiry involves an examination of the interrelation of these two bases and the impact of *International Shoe* thereon with particular emphasis on

94. This has occurred under the statutory waiver of immunity from damages arising out of activities of the T.V.A. Although the waiver does not mention any exceptions it has been interpreted by the courts so as to exclude liability for discretionary functions. See Grant v. T.V.A., 49 F. Supp. 564 (E.D. Tenn. 1942); Pacific National Fire Ins. v. T.V.A., 89 F. Supp. 978 (W.D. Va. 1949).

95. *E.g.*, Coates v. United States, 181 F.2d 816, 819 (8th Cir. 1950); Williams v. United States, 115 F. Supp. 386, 388 (N.D. Fla. 1953), *aff'd per curiam*, 218 F.2d 473 (5th Cir. 1955); North v. United States, 94 F. Supp. 824, 828 (D. Utah 1950).

1. RESTATEMENT, CONFLICT OF LAWS §§ 90, 91 (Tent. Draft No. 3, 1956).
2. *Id.* at §§ 91a, 92.
3. 326 U.S. 310 (1945).

the necessity for and propriety of the judicial disability commonly imposed upon noncomplying foreign corporations by state qualification statutes.[4]

Personal Jurisdiction over Unqualified Foreign Corporations Prior to International Shoe Co. v. State of Washington

Typically, state statutes provided for jurisdiction over noncomplying foreign corporations "doing business" in the state. Doing business represented that quantum of activity needed to establish a sufficient nexus between the corporation and the forum state to provide a basis for in personam jurisdiction under principles of natural justice,[5] or, as later developed, under due process of law.[6] The rationale originally employed in creating a basis for personal jurisdiction was the "implied consent" theory. It rested on the exclusion-condition power of the state.[7] By its activities within the state, an unqualified foreign corporation impliedly

4. The number of cases in which a corporate plaintiff has failed because of noncompliance with qualification requirements is substantial. 17 FLETCHER, CYCLOPEDIA OF CORPORATIONS, §§ 8503-8543 (perm. ed.). The treatises and digests of course do not reflect the unreported cases nor instances where the corporation has not sought legal relief due to its disability.

5. Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404 (1856).

6. Riverside and Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915).

7. The theoretical framework of the law of foreign corporations was constructed in the landmark case of Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). It was there held that a corporation could act beyond the borders of the state of incorporation and sue on actions arising from these activities in foreign forums. The opinion is not remembered for this, but instead, and not always too favorably, for the broad principles that Chief Justice Taney enunciated. The case teaches that a corporation has no legal existence beyond the state of incorporation; that activity of a corporation outside the incorporating state is recognized by comity; that a state can exclude foreign corporations, or admit on condition; and that the exercise of the exclusion-condition power negates the presumption of comity. This "provincial theory" of the corporate form has provided the foundation for judicial and legislative thinking on foreign corporation law. It is from this background that the reasoning, if not the results, has flowed. The acquisition of personal jurisdiction over a foreign corporation is especially hard to square with the doctrine of the legal non-existence of a corporation beyond the state of its incorporation; for that matter the very holding of *Bank of Augusta* is difficult to reconcile with this principle. For a general discussion and criticism of *Bank of Augusta* and the traditional doctrines of foreign corporation law, see HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) (especially c. x); Note, *The Adoption of the Liberal Theory of Foreign Corporations,* 79 U. PA. L. REV. 956, 1119 (1931).

Several of the more important provisions of the United States Constitution are directed toward persons and citizens and hence it might be well to review briefly the position of a corporation with respect to these provisions. A corporation is not a citizen within the meaning of the privileges and immunities clause of Art. IV, Sec. 2, Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), nor of the Fourteenth Amendment, Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907). However, a corporation is a citizen for diversity purposes within Art. III, Sec. 2. McGovney, *A Supreme Court Fiction,* 56 HARV. L. REV. 853, 1090, 1225 (1943). Corporations are persons entitled to equal protection and due process. Santa Clara v. Southern Pacific R.R., 118 U.S. 394 (1886); Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26 (1889).

consented to the conditions required by the state prior to admission, one such condition being consent to service.[8] Due to inherent inadequacies,[9] the implied consent theory gave way, at least in part, to the "presence" theory as a basis for personal jurisdiction over an unqualified foreign corporation.[10] The presence theory was not based on the power to exclude but upon the activities of the foreign corporation through its agents within the state.[11] The foreign corporation had to engage in activity amounting to doing business "in such a manner and to such extent as to warrant the inference that it is present there."[12]

The persistent problem under either theory was what quantum of activity amounted to doing business so that a basis for jurisdiction of

8. Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404 (1856). The implied consent theory logically was limited to the power to exclude and condition entrance; that is, if the state could not exclude and condition, then the doing of business by the noncomplying corporation could not be said to be the equivalent to consent to such conditions. And the power to exclude was limited by the commerce clause of the Federal Constitution. See notes 38-51 *infra* and accompanying text. Since there generally was no power of exclusion over a corporation engaged in interstate commerce, the efficacy of the implied consent theory was substantially impaired. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). Moreover, foreign corporations apparently took precautions in order to avoid the prevailing doing business quantum standard. For instance, the rule was that solicitation did not amount to doing business. Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907). Corporations naturally sought to limit their activities to solicitation. International Harvester Co. v. Kentucky, *supra*. When they "slipped" and did more than solicit and therefore met the doing business standard, to assert that they had consented was to place the basis of jurisdiction upon a patent fiction.

9. See note 8 *supra*.

10. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

11. It seems to have been a shifting within the *Bank of Augusta* framework, see note 7 *supra*, from the exclusion-condition principle to extraterritorial activity for a rationalization of a basis for personal jurisdiction, notwithstanding the supposedly nonmigratory character of the juristic entity.

12. Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917).

Interstate commerce, notwithstanding its constitutional immunity from exclusion, was activity within the state and therefore was a doing of business from which presence could be found and valid jurisdiction imposed. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). However, the assertion of personal jurisdiction for a foreign cause of action over an unqualified foreign corporation engaged in interstate commerce has been held to involve not only due process but commerce clause limitations. The leading case is Davis v. Farmers Co-operative Equity Co., 262 U.S. 312 (1923). See generally, McGowan, *Litigation as a Burden on Interstate Commerce,* 33 ILL. L. REV. 875 (1939); Farrier, *Suits Against Corporations as a Burden on Interstate Commerce,* 17 MINN. L. REV. 381 (1933). Recent cases have limited the commerce defense to jurisdiction and today the doctrine is of questionable vitality. Moss v. Atlantic Coast Line R.R., 157 F.2d 1005 (2d Cir. 1946), *cert. denied,* 330 U.S. 839 (1947); Standard Oil Co. v. Superior Court, 44 Del. (5 Terry) 538, 62 A.2d 454 (1948), *appeal dismissed,* 336 U.S. 930 (1949). Extent of jurisdiction as a due process problem is discussed in notes 55-59 and 85-87 *infra* and accompanying text.

The presence theory, like implied consent, was not without its limitations. For instance, if a corporation came into the state, carried on activities, incurred liabilities, and then withdrew prior to service, it was difficult to talk "presence." Yet in withdrawal cases jurisdiction was valid, at least for local causes of action. Mutual Reserve Fund Ass'n v. Phelps, 190 U.S. 147 (1903).

consent or presence could be established. The judicial determinations of this question tended to be mechanical. Neither the mere presence of an agent,[13] nor a single act, nor sporadic acts was sufficient.[14] Solicitation was likewise insufficient,[15] but "solicitation plus" constituted doing business.[16] Logically under neither theory was the doing business concept an essential element. Any act, except those constitutionally protected, *e.g.* commerce,[17] could be excluded and permission to enter a state could be conditionally granted; thus, the doing of a single act without compliance was as logical an inference of consent as engaging in a series of acts. Likewise, the same result could have been reached under the presence rationale insofar as it was analogous to personal jurisdiction over nonresident individuals. The doing business requirement seems to have been imposed as a policy limitation on the assertion of personal jurisdiction. And as a policy choice, it was defensible since some restraint on jurisdiction was undoubtedly warranted. But this limitation tended to become rooted and in the end was an obstruction rather than a guide to fairness and justice.[18]

Foreign Corporation Qualification

The second method of acquisition of personal jurisdiction over foreign corporations is by compliance with conditions prescribed by the state in a foreign corporation qualification act.[19] Qualification entails

13. Riverside and Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915); Goldey v. Morning News, 156 U.S. 518 (1895).

14. Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

15. People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907).

16. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). A factual distinction between the corporation's activity in the *Harvester* case where jurisdiction was allowed and the *Tobacco* and *Green* cases, note 15 *supra*, where jurisdiction was not found is difficult. Perhaps the cases can be better reconciled on extent of jurisdiction. In both the *Tobacco* and *Green* cases the cause of action was foreign to the forum.

17. See note 8 *supra*.

18. The *International Shoe* doctrine as a contribution to the acquisition of personal jurisdiction over unqualified foreign corporations is discussed subsequently. Although a brief discussion of the pre-*International Shoe* era is essential as a background to an understanding of foreign corporation qualification acts, their sanctions, and the impact of *International Shoe* thereon, the material presented here is far from exhaustive. The area, if not complicated per se, has been made so by the competing theories and the great amount of litigation concerning the activity quantum necessary to establish a basis for jurisdiction. Among the many good discussions are: HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW c. v (1918); Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676 (1917); Farrier, *Jurisdiction Over Foreign Corporations*, 17 MINN. L. REV. 270 (1933); Fead, *Jurisdiction Over Foreign Corporations*, 24 MICH. L. REV. 633 (1926); Scott, *Jurisdiction Over Nonresidents Doing Business Within the State*, 32 HARV. L. REV. 871 (1919).

19. See note 1 *supra*.

the giving by the corporation of information concerning its incorporation and charter, directors and officers, financial structure, utilization of capital, location of property, receipt of income etc.; filing fees are required; and most important, the corporation is required to designate a corporate agent within the state and in his absence a public official as agent for service of process.[20]

Failure to qualify subjects a foreign corporation to a variety of sanctions. Nearly every state subjects a noncomplying corporation and often its agents to a pecuniary penalty.[21] In a few states this is the only penalty exacted.[22] But most states, usually in addition to a fine, prohibit or restrict the civil remedies of a noncomplying foreign corporation in some manner. These "no-suit" sanctions, either by unequivocal legislative direction or by judicial interpretation, prevent the corporation from suing as a plaintiff on contracts made in violation of the qualification requirements and generally are of three types: the contracts are "void";[23]

20. For typical statutes, see, *e.g.*, ILL. ANN. STAT. c. 32, § 157.106 (Smith-Hurd 1954); IND. ANN. STAT. § 25-304 (Burns 1948); MINN. STAT. ANN. § 303.06 (1947). For general discussions of the types of statutes, their provisions, and purposes, see Peter & Burghard Stone Co. v. Carper, 96 Ind. App. 554, 172 N.E. 319 (1930) and Model Heating Co. v. Magarity, 25 Del. (2 Boyce) 459, 81 Atl. 394 (1911).

In Garrett Ford Co. v. Vermont Mfg. Co., 20 R.I. 187, 189, 37 Atl. 948, 949 (1897), the court in discussing the purpose of the statute in relation to the problem of its enforcement said: "If the legislature intends to make such contracts as the one in suit invalid, it is easy to say so; but, in the absence of such a provision, it is a wide stretch of judicial construction for the court to hold that such a result was intended. The purpose of the statute is not to invalidate contracts, but to require foreign corporations to appoint an attorney in this State upon whom service of process may be made. This purpose seems to be adequately served by imposing a penalty upon the agent who ventures to do business for the company without complying with the law. While we do not question the right of the State to impose such conditions and penalties upon foreign companies doing business here as it may deem proper, subject to the provisions of the Federal constitution as to the regulation of commerce among the States, yet, in view of the vast amount of business now done by such corporations, we think it is a conservative position to hold that the legislature did not intend to exempt our citizens from paying just debts, upon grounds of non-compliance with our statutes, which may have been fully known to the debtors, when the General Assembly has not clearly expressed that intention, and the inference of it is not necessary to the object of the statute."

21. The fines are substantial; they are enforceable by and payable to the state. See, *e.g.*, ALA. CODE ANN. tit. 10, § 196 (1940) (corporation and agent liable for fine of not less than $100 nor more than $1000 or twelve months at hard labor, or both); IND. ANN. STAT. § 25-314 (Burns 1948) (corporation fine of not more than $10,000; agent fine of not more than $100); MINN. STAT. ANN. § 303.20 (1947) (corporation fine of not more than $1000 plus not more than $100/mo. for period during which it transacts business without qualification); TENN. CODE ANN. § 48-908 (1955) (corporation fine of not less than $100 nor more than $500; each day during which corporation engages in business without qualification constitutes a separate violation).

22. NEB. REV. STAT. § 21-1206 (1954). "The failure of any corporation [foreign] . . . to appoint a resident agent or agents, and to file the certificate . . . shall not invalidate any contract of or with such corporation. . . ."

23. ALA. CODE ANN. tit. 10 § 191 (1940). "All contracts or agreements made or entered into in this state by foreign corporations which have not qualified to do business

the contracts are "unenforceable";[24] or the contracts are unenforceable but "subsequent compliance" removes the disability.[25] Usually, the "no-suit"[26] sanctions do not apply to actions in tort.[27] The significant point to note is that the no-suit sanctions do restrict or prohibit the noncomplying foreign corporation as a plaintiff and that the "void" or "unenforceable" types often result in a windfall to an "excused" defendant.[28]

Before the case of *Erie R. Co. v. Tomkins*[29] the position of the unqualified foreign corporate plaintiff was often mitigated by recourse to the federal courts on a diversity theory. The type of no-suit sanction determined the success of this alternative. State statutes limiting the

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in this state shall be held to be void at the suit of such foreign corporation or anyone claiming through or under such corporation. . . ."

24. N.Y. GEN. CORP. LAW § 218. "A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority. . . ."

TEX. REV. CIV. STAT. art. 1536 (1948). "No such [foreign] corporation can maintain any suit or action, either legal or equitable, in any Court of this State upon any demand, whether arising out of contract or tort, unless at the time such contract was made, or tort committed, the corporation had filed. . . ."

25. FLA. STAT. § 613.04 (1955). "The failure of any such foreign corporation to comply with the provisions of this chapter shall not affect the validity of any contract with such foreign corporation, but no action shall be maintained or recovery had in any court of this state by any such corporation, or its successors or assigns, so long as such foreign corporation fails to comply. . . ."

IND. ANN. STAT. § 25-314 (Burns 1948). "No foreign corporation transacting business in this state without procuring a certificate of admission or, if such a certificate has been procured, after its certificate has been withdrawn or revoked, shall maintain any suit, action, or proceeding in any of the courts of this state upon any demand, whether arising out of contract or tort. . . ."

The Indiana statute has been construed to permit subsequent compliance to remove the disability and to allow the corporation to maintain actions on transactions prior in time to the compliance. Farmers Mut. Hail Ins. Co. of Iowa v. Gorsuch, 123 Ind. App. 264, 110 N.E.2d 344 (1953); Peter & Burghard Stone Co. v. Carper, 96 Ind. App. 554, 172 N.E. 319 (1930).

See generally, Note, *The Enforcibility of Contracts of Unlicensed Foreign Corporations,* 25 COLUM. L. REV. 806 (1925).

26. The phrase "no-suit" includes, unless limited specifically, any type of disability placed upon an unqualified foreign corporation's capacity to acquire jural rights or remedies. That is to say, it includes any of the three type statutes discussed in notes 23-25 *supra.* In the "void or illegal" type statute, note 23 *supra,* it is really more apt to describe the result as "no-right." However, as a concession to convenience no distinction will be made, except for those instances where differences in result require separate treatment.

27. *But see, e.g.,* Texas statute, note 24 *supra,* and Indiana statute, note 25 *supra.*

28. See note 20 *supra.* For details of the particular operation of the sanctions recourse must be made to the specific wording of the state statute in question and the case law arising thereunder. Some of the more common problems where there is considerable divergence in results are rights of assignees and other third parties, quantum meruit and restitution, and counterclaims and cross-actions brought by corporate defendants who as plaintiffs would be barred from relief. It is apparently the universal rule that the disability applies only to the corporation and that the corporation cannot use its disability in defense to actions brought against it.

29. 304 U.S. 64 (1938).

jurisdiction of the state courts could not be extended to apply to the federal courts.[30] Therefore, if the statute made the contract unenforceable by barring the corporation from a remedy,[31] the right remained and could be redressed in the federal courts.[32] But, if the statute declared the contract to be void or illegal,[33] no right accrued to the corporation, and therefore no remedy was available in any court.[34] After *Erie* the situation remained unchanged for a time.[35] However, the "substance-procedure" of *Erie* grew into the "substantially the same result" test,[36] and shortly thereafter the federal court relief was withdrawn.[37]

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30. Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874).

31. In other words, the statute is either an "unenforceable" or "subsequent compliance" type. See notes 24 and 25 *supra.*

32. David Lupton's Sons v. Automobile Club of America, 225 U.S. 489 (1911). Or it could be enforced in the courts of another state having jurisdiction over the parties. Allen v. Allegheny Co., 196 U.S. 458 (1905).

In the *Lupton's* case, a noncomplying foreign corporation was precluded from suit in the New York courts under a statutory provision substantially the same as that set forth in note 24 *supra.* The corporation sought relief in the federal courts. The Supreme Court through Justice Holmes said at 225 U.S. at 500: "The State could not prescribe the qualifications for suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. . . . The State in the statute before us made no such attempt. The only penalty it imposed . . . was a disability to sue 'in the courts of New York.'"

33. That is, the statute is of the type set forth in note 23 *supra.*

34. Chattanooga Nat'l Bldg. & Loan Ass'n v. Denson, 189 U.S. 408 (1903). In Midland Linseed Products Co. v. Warren Bros. Co., 46 F.2d 870, 873 (6th Cir. 1925) the court said: "It is true . . . that a state cannot prescribe the qualifications of suitors in the courts of the United States, nor deprive them of the privileges to which they are entitled under the Constitution and the laws of the United States. . . . Yet it is equally true that, where a state statute has declared a transaction such as is involved in the instant case void, or where the highest court of the state in construing the statute has held such contracts void, federal courts are equally bound, and cannot lend their aid to the enforcement of a contract falling within either the terms of such statute or the construction so placed thereon by the state courts."

See Note, 44 HARV. L. REV. 428 (1931) discussing the availability of federal court relief to an unqualified foreign corporation in the pre-*Erie* era.

35. Metropolitan Life Insurance Co. v. Kane, 117 F.2d 398 (7th Cir. 1941).

36. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

37. Interstate Realty Co. v. Woods, 337 U.S. 535 (1949). In this case, Interstate, a Tennessee corporation, brought an action on a diversity theory in the District Court for Mississippi for a broker's commission due from Woods, a Mississippi resident, for the sale of realty in Mississippi. Woods defended on the ground that Interstate was a noncomplying foreign corporation doing business in Mississippi and as such was precluded from suit. The District Court dismissed the action, ruling that under Mississippi law the contract was void. The Circuit Court reversed, finding that under Mississippi decisions the contract was only unenforceable, and therefore, under the *Lupton* rule, note 32 *supra,* a remedy was available in the federal courts. On certiorari the Supreme Court reversed. The famous language of the *Lupton* case was specifically set forth and rejected. See generally, Note, 11 PITT. L. REV. 113 (1949).

The dissent of Mr. Justice Jackson in *Interstate Realty* is of particular interest. He argued that the application of the uniformity of result principle stemming from *Erie* was inappropriate since the Mississippi policy was to bar corporate plaintiffs only from Mississipi courts. To use the same result test where a different result would violate state policy is to be distinguished from the situation here where the state policy was not

Qualification statutes are grounded, at least by traditional theory, on the exclusion-condition power of the state, and just as with the implied consent rationale, the commerce clause acts as a limitation.[38] A state may not require a foreign corporation to qualify as a condition precedent to doing business within the state when the corporation's activity giving rise to the attempted application of the statute is interstate commerce,[39] nor may a state prevent recourse to the state courts for the enforcement of interstate transactions.[40] Since there is no general power of exclusion of activities falling within the protection of the commerce clause, the requirements imposed by the states, rather than being conditions on admission, are regulations and as regulations have generally fallen before constitutional attack as unreasonable burdens on interstate commerce. Thus, the commerce clause often provides a foreigu corporation with a defense to state qualification requirements and the imposition of a no-suit sanction.[41] However, the fact that the corporation may be engaged in interstate commerce does not excuse it from qualification for severable local activity; and failure to qualify will preclude enforcement of these local activities, even though the state may not impair the interstate business nor prevent the corporation's enforcement of its interstate transactions.[42]

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to limit access to a federal court. If Mississippi had wanted to close the federal court alternative, the legislature would have "voided" the corporation's activities, thus barring federal court relief. He also emphasized that the Court's decision gave support to a harsh sanction and an unwarranted benefit accrued to the defendant.

Erie, Interstate Realty, and the resultant limitation on federal court jurisdiction in a diversity case does not of course preclude access to the courts of another state if jurisdiction is obtainable. Hicks Body Co. v. Ward Body Works, 233 F.2d 481 (8th Cir. 1956).

38. See note 8 *supra.*

39. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); International Textbook Co. v. Pigg, 217 U.S. 91 (1910). Interstate commerce as used in these cases as a limitation on the state power of exclusion-condition is "pure" commerce, *i.e.,* interstate sales and purchases, communication, and transportation. It is to be distinguished from activity "affecting" commerce which although within the scope of the commerce power of Congress, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), is not beyond state control, Hicks Body Co. v. Ward Body Works, 233 F.2d 481 (8th Cir. 1956).

40. Furst v. Brewster, 282 U.S. 493 (1931) (suit by noncomplying seller on interstate sale); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) (suit by noncomplying buyer on interstate sale); Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914) (suit by noncomplying seller on interstate sale).

41. See notes 39 and 40 *supra.* The great bulk of litigation in this area never gets beyond the state or lower federal courts. The plaintiff corporation successfully raises the commerce defense to state qualification, succeeds or fails on the merits of its case and there the matter rests. It is very probable that the states are overly cautious in the application of qualification requirements in the face of the commerce defense. See Union Brokerage Co. v. Jensen discussion at notes 43-51 *infra* and accompanying text.

42. Railway Express Agency v. Virginia, 282 U.S. 440 (1931); Interstate Amusement Co. v. Albert, 239 U.S. 560 (1916); Superior Concrete Accessories v. Kemper,

In the relatively recent case of *Union Brokerage Co. v. Jensen,*[43] the United States Supreme Court seemed to limit the commerce defense to state qualification. Union was engaged in the customhouse brokerage business[44] with the bulk of its activity arising from imports from Canada crossing into Minnesota. Union, as a noncomplying foreign corporation, was denied access to the Minnesota courts in a suit against its former president on a breach of fiduciary obligation.[45] The Court emphasized the non-discriminatory, general application of the Minnesota statute,[46] the localized nature of Union's business,[47] and the benefits accruing to the public from qualification.[48] To the extent that the decision in *Union Brokerage* rests on justifying the state regnlation of a foreign or interstate activity,[49] normally within the constitutional protection of the com-

284 S.W.2d 482 (Mo. 1955). *Compare* York Mfg. Co. v. Colley, 247 U.S. 21 (1918), *with* Browning v. Waycross, 233 U.S. 16 (1914).

43. 322 U.S. 202 (1944).

44. A customhouse broker acts as agent for the consignee-importer, facilitating entry by declaring the contents of the shipment and paying the duty at the entry point.

45. The fact that the action is brought against a former employee rather than an importer-principal may be important in reaching the Court's decision. The employment relation is characterized as being local in nature. 322 U.S. at 208. However, it appears that Jensen had resigned as an officer in Union Brokerage before Union's business became localized in Minnesota. *Id.* at 203. The question arises whether Union Brokerage is as fully identified with the foreign transactions as its importer-principals. The general answer is in the affirmative. *But see* California v. Thompson, 313 U.S. 109, 114-15 (1941).

Union, although not qualified under the Minnesota statute, see note 46 *infra,* had complied with federal licensing requirements for customhouse brokers and on this basis Union raised but lost a preemption defense to Minnesota qualification. 322 U.S. at 207.

46. MINN. STAT. ANN. §§ 303.01-303.25 (1947). The present provisions are substantially the same as those under consideration in the *Union Brokerage* case. The statute contains the normal requirements, see text *supra* at note 20, and has a "subsequent compliance" no-suit sanction which is imposed on noncomplying foreign corporations doing business in the state. The Court in *Union Brokerage* distinguished the Minnesota statute from the South Dakota statute which was held not applicable to a corporation in interstate commerce in Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914). The South Dakota statute absolutely excluded unqualified foreign corporations; *any* contract or transaction by such a corporation was unenforceable. The problem of the quantum of activity necessary to cause the imposition of qualification requirements and a no-suit sanction will be subsequently discussed at notes 67-80 *infra* and accompanying text. But it should be noted here that this question also appears to be significant in determining the validity of qualification in the face of a commerce defense.

47. See Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

48. See note 20 *supra.* In Kraft v. Hoppe, 152 Minn. 143, 188 N.W. 162 (1922) it was said that the purpose of the Minnesota qualification law was to subject foreign corporations to the process of Minnesota courts. In *Union Brokerage* the requirements were characterized as "a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State." 322 U.S. at 210.

49. The *Union Brokerage* opinion did not seem to be based on a distinction between the validity of qualification requirements for a corporation engaged in foreign activity vis-à-vis the usual situation of interstate activity. It is true that corporations engaged in foreign commerce may more readily have their activities localized in one state; however, the localized or avoidance of multiple burdens concept has not always removed

merce clause, as a reasonable requirement for the public benefit, it is crucial that there be in fact a bona fide public interest[50] and that the requirement represents a reasonable means for its accomplishment for which no less burdensome technique is available.[51] There is certainly a valid public interest in the acquisition of personal jurisdiction over Union. However, to the degree that this end is attainable through means other than qualification requirements and the imposition of a no-suit sanction for noncompliance, the *Union Brokerage* case rests on a doubtful basis.

Although the commerce defense to qualification may or may not possess its original vitality depending upon the import of *Union Brokerage,* it is clear that the elimination of federal court relief[52] has increased the efficacy of the no-suit sanction.[53] As a result the question of its necessity and propriety has become more urgent.

In Personam Jurisdictional Span between Compliance and Noncompliance as a Justification for the No-Suit Sanctions Prior to International Shoe

It is clear that a foreign corporation was amenable to personal jurisdiction without qualification and actual consent. However, there were two problems in the acquisition of personal jurisdiction over a noncomplying foreign corporation. First, there was the need for a basis of jurisdiction. An unqualified corporation was required to be doing business before a basis for personal jurisdiction could be found. However, if the corporation qualified and thereby gave actual consent, it followed that there was a basis for jurisdiction independent of the activity factor of doing business.[54]

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activity from commerce protection and is of questionable validity. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).

50. *Compare* Breard v. Alexandria, 341 U.S. 622 (1951), and South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938), *with* Morgan v. Virginia, 328 U.S. 373 (1946).

51. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

52. See note 37 *supra.*

53. See, *e.g.,* Hicks Body Co. v. Ward Body Works, 233 F.2d 481 (8th Cir. 1956); Waggener Paint Co. v. Paint Distributors, Inc., 228 F.2d 111 (5th Cir. 1955); Tel-Pic Syndicate, Inc. v. Station WIBS, 94 F.Supp. 888 (D.C. Puerto Rico 1951).

54. "By its consent a foreign corporation subjects itself to the judicial jurisdiction of a state to the same extent as would an individual. This consent is effective even in the absence of any other basis for the exercise of jurisdiction over the corporation and, assuming always that the particular exercise of jurisdiction is within the terms of the consent, even though the cause of action did not arise out of business done in the state. As in the case of an individual, a corporation's consent can, for example, take the form of a confession note, or of a waiver of service of process or of its acceptance outside the territory of the forum. Most commonly, however, consent by a corporation takes the form of the appointment of a statutory agent to receive service of process in compliance with the statutory requirements of a state in which the corporation desires to do business." RESTATEMENT, CONFLICT OF LAWS § 90, comment b (Tent. Draft No. 3, 1956).

But even if there was a basis for jurisdiction, there was the further problem of the extent of that jurisdiction, *i.e.* to what causes of action. Of first importance were the terms of the statute under which the service of process on the corporation was made. If the statute did not expressly or by interpretation extend to foreign causes of action, the question of extent of jurisdiction was not reached and the corporation was amenable only for local causes.[55] It made no difference whether the statute involved provided for service on qualified foreign corporations and the corporation had in fact qualified, or whether it authorized service on noncomplying corporations. In either case jurisdiction was limited by statute to local causes of action.

However, where the statute permitted service for foreign actions, the compliance-noncompliance distinction may have been constitutionally significant.[56] In *Simon v. Southern Railway Co.*[57] it was held that a noncomplying foreign corporation was not amenable to jurisdiction for a foreign cause of action when service was made on a public official; due process limited jurisdiction in this situation to local actions.[58] But, if the corporation had qualified and had given actual consent to suit for foreign causes of action, jurisdiction was valid.[59]

See Berner v. United Airlines, 2 Misc.2d 260, 149 N.Y.S.2d 335 (1956); Farmers Educ. and Co-operative Union of Am., Minn. Div. v. Farmers Educ. and Co-operative Union of Am., 207 Minn. 80, 289 N.W. 884 (1940).

55. Mitchell Furniture Co. v. Breck Construction Co., 257 U.S. 213 (1921).

56. This equivocal assertion is necessary because of the probable ambiguity of the holding in Simon v. Southern Ry., 236 U.S. 115 (1915). See note 58 *infra*. The case of Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), see notes 85-87 *infra* and accompanying text, probably resolves the ambiguity of the *Simon* case, leaving it as a notice, and not an extent of jurisdiction, decision.

57. 236 U.S. 115 (1915).

58. In the *Simon* case the Court assumed that the foreign corporation was doing business within the state so that the holding cannot be explained on the ground of a lack of basis for jurisdiction. The state statute was broad enough to cover foreign causes of action, forcing the Court to the constitutional question of the extent of a state's jurisdiction under due process. The Court held that the state had the power to assert jurisdiction over noncomplying foreign corporations doing business within the state and to provide for service on a public official, but that "this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law." 236 U.S. at 130. Although it apparently was not relied upon by the Court in reaching its decision, it should be noted that the Louisiana statute under which service was made in the *Simon* case did not provide for notice to the foreign corporation. Also the Court did not suggest the outcome if the service had been on a corporate agent. The importance of these facts will be discussed in connection with the case of Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), see notes 85-87 *infra* and accompanying text.

59. Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917). In this case the Court held the assertion of jurisdiction was valid where the corporation had actually consented to jurisdiction through qualification, and where the terms of the consent as expressed in the qualification statute rationally could be construed to include foreign causes of action with service on

Thus to recapitulate: If the corporation's activities are insufficient to meet the doing business standard, qualification and the attendant giving of actual consent provides a basis for judicial jurisdiction where none would exist in its absence;[60] and even if the corporation is doing business within the state, the compliance-noncompliance distinction may be significant in determining the extent of jurisdiction.[61] Therefore, actual consent secures jurisdiction in a "span" of situations where none exists in its absence.

The problem is to secure compliance in order to acquire jurisdiction within this "span." In the extent of jurisdiction aspect, the corporation is doing business;[62] thus a basis for jurisdiction is available and the state[63] needs merely to fine, enjoin from further activity etc. in order to force compliance.[64] But in the basis part of the "span," positive sanctions prescribed by the state fail, just as suits by private party plaintiffs, for want of a jurisdictional basis. However, no-suit sanctions are effective in this area. They are based on the exclusion power which, when present,[65] may be made absolute.[66] As negative, self-enforcing sanctions they possess the capability of inducing compliance where positive sanctions, subject to the infirmities of judicial jurisdiction, are ineffective.

The difficulty with this rationale in defense of the no-suit sanctions

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a public official. The compliance-noncompliance distinction was relied upon in distinguishing the *Simon* case. The Court said that "when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be placed upon it by the courts." 243 U.S. at 96.

60. Even where the corporation's activities within the forum state are in fact sufficient to make out "doing business" or any other contact standard necessary to provide a basis of jurisdiction, the act of qualification and actual consent avoids proving and litigating the sufficiency of the activity facts. The only problems open if actual consent has been given are ones of statutory construction concerning the terms of the consent obtained. See note 54 *supra*.

61. The compliance-noncompliance distinction is relevant in other situations related to this discussion. For notice requirements, *compare* State of Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1933) *with* Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 260 Pac. 745 (1927), *rev'd per curiam*, 278 U.S. 559 (1928) on authority of Wuchter v. Pizzutti, 276 U.S. 13 (1928). For federal venue purposes, *compare* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939) *with* Olberding v. Illinois Central R. Co., 346 U.S. 338 (1953).

62. That is to say, problems of extent of jurisdiction are never reached, at least logically, if there is no basis for jurisdiction. However, as in the *Simon* case, a court may pass over and in a sense assume the basis question, and decide the issue on extent.

63. An action brought by the state is not foreign and therefore no extent of jurisdiction problem is present.

64. The burden placed on the state to enforce qualification in an affirmative matter does not seem too great in view of the substantial fines imposed for noncompliance. See note 21 *supra*.

65. The commerce clause affords the main exception to the exclusion power of a state. See notes 38-51 *supra* and accompanying text. An exception of lesser significance is the doctrine of intergovernmental immunities.

66. But see note 79 *infra*, in regard to the doctrine of unconstitutional conditions.

is that in practice they generally do not have this effect. If they are to induce compliance within the basis aspect of the "span," then it should follow that they would apply to noncomplying conduct within that area. But the qualification statutes and their accompanying no-suit sanctions are typically applied to foreign corporations "doing or transacting business" within the state.[67] Thus, before a foreign corporation must qualify, and therefore before the no-suit sanction for noncompliance is imposed, the corporation is engaged in a sufficient level of activity to be subject to jurisdiction without actual consent.[68] Moreover, doing business for qualification purposes is often held to require a higher quantum of activity than when the same phrase is employed in the statute providing for the acquisition of personal jurisdiction over noncomplying foreign corporations.[69] And, when the noncomplying corporation is not engaged in sufficient activity within the state to bring it within the meaning of doing business as used in the qualification statute, it is not prohibted from suit by the no-suit sanction.[70]

If, before the no-suit sanction is applied, there is sufficient activity by the noncomplying foreign corporation to provide a basis for jurisdiction other than actual consent, it becomes difficult to defend the utilization of a negative sanction. The self-enforcing attribute is no longer needed since there now is a jurisdictional basis available for private party plaintiffs and for the implementation of a positive sanction by the state.

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67. See, *e.g.*, IND. ANN. STAT. §§ 25-301, 25-314 (Burns 1948); N.Y. GEN. CORP. LAW §§ 210, 218.

68. This is true at least for local causes of action. See note 88 *infra* and accompanying text.

69. "But activities insufficient to make out the transaction of business, within the meaning of those statutes [qualification], may yet be sufficient to bring the corporation within the state so as to render it amenable to service of process." Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917). See also State v. Ford, 208 S.C. 379, 38 S.E.2d 242 (1946).

For a general discussion of doing business and its varying meanings according to the context in which it is used, see Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925).

70. Doing business within the terms of the qualification statute is clearly in issue in those cases where an unqualified foreign corporation brings suit and the defendant raises the no-suit clause. If the corporation's activities are not sufficient to bring it within the qualification act, it is not precluded from suit. Worcester Felt Pad Corp. v. Tucson Airport Auth., 233 F.2d 44 (9th Cir. 1956); Wilson v. Williams, 222 F.2d 692 (10th Cir. 1955); Suss v. Durable Knit Corp., 4 Misc.2d 666, 147 N.Y.S.2d 363 (1955); Land Development Corp. v. Cannaday, 74 Idaho 233, 258 P.2d 976 (1953).

However, the fact that the corporation is not within the qualification "meaning" of doing business does not necessarily mean that it is not subject to suit as a defendant. See notes 68 and 69 *supra* and accompanying text. In fact, if the corporation has more contacts thus precluding it from bringing an action, it would be correspondingly easier to assert jurisdiction over the corporation as a defendant. Thus, it often turns out that "you can't sue me since you didn't qualify so as to insure that I could sue you; but even though you didn't qualify, I can sue you."

Positive sanctions operate directly on the foreign corporation to induce qualification with the benefits thereof accruing directly to the state and those dealing with the corporation without the windfall to an "excused" defendant which is characteristic of the "void"[71] and "unenforceable"[72] type of no-suit sanctions. The higher activity quantum of doing business for qualification purposes, although inconsistent when viewed with respect to the utilization of a no-suit sanction, is defensible on other grounds. As a policy matter it would seem unwise and unnecessarily burdensome, at least in regard to the non-jurisdictional purposes of qualification, to saddle the business community with the obligation to qualify for unsubstantial and temporary contacts within the state.[73] The severity of the penalties for noncompliance does not distract from such a determination. And even to the degree that qualification in this situation is desirable, it is probably an unattainable goal. The qualification laws have not readily converted business practice to their standards. Furthermore, the doing business for qualification issue usually arises when an unqualified corporation seeks to sue, and the emotional pull is for the corporate plaintiff vis-à-vis the would-be excused defendant. But when the issue is doing business for jurisdiction over a corporate defendant, the pull is toward a lower standard in order to make the forum available.[74]

In a few states the qualification statute and the no-suit sanctions do operate within the "span" area. For example, in Alabama the state constitution[75] and the foreign corporation qualification act[76] forbid the doing of *any* business within the state by a noncomplying foreign corporation.[77] In these states the sanction may reach conduct which a positive sanction, at least under pre-*International Shoe* standards, could not touch. Without conceding that the no-suit sanctions *ought* to be employed in this manner, at least this application *is* logically defensible since no other method of securing compliance is available. However, this

71. See note 23 *supra.*
72. See note 24 *supra.*
73. Penn Collieries Co. v. McKeever, 183 N.Y. 98, 75 N.E. 935 (1905).
74. Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So.2d 615 (1951).
75. ALA. CONST. § 232.
76. ALA. CODE ANN. tit. 10, § 192 (1940). Alabama has made statutory exceptions to its "any" rule. *Id.* at § 191(1) (Supp. 1955).
77. In Chattanooga Nat'l Bldg. & Loan Ass'n v. Denson, 189 U.S. 408, 414 (1903), the Court reviewed the Alabama constitutional and statutory provisions and the case law thereunder and said: "These cases . . . clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied . . . and that contracts hence resulting are illegal and cannot be enforced in the courts." Crites v. Associated Frozen Food Packers, 183 Ore. 191, 191 P.2d 650 (1948) (prior to statutory change in Oregon in 1953). *But cf.* Cooper Mfg. Co. v. Ferguson, 113 U.S. 727 (1885).

utilization of the exclusion-condition power to secure actual consent to jurisdiction is by indirection reaching for conduct which may be protected under due process concepts from direct imposition of jurisdiction and raises a question under the doctrine of unconstitutional conditions.[78] Even where the statute prohibits any business, some courts have given no especial effect to the absolute, exclusionary language and decide the cases using the normal doing business analysis.[79] This interpretation avoids the constitutional question and the rather harsh results on the business community, but leaves the no-suit sanction in the somewhat anomolous position described earlier.[80]

Impact of International Shoe on Personal Jurisdiction over Foreign Corporations and the No-Suit Clauses

Compliance and actual consent by a foreign corporation secures jurisdiction in a "span" of cases where none is available in its absence. And the no-suit sanctions, since they are not subject to the infirmities of judicial jurisdiction, may force compliance where positive sanctions are ineffectual. However, the no-suit sanctions are often used where positive sanctions could operate and this utilization is subject to criticism. Qualification acts purport to regulate foreign corporations and insure their availability to parties dealing with them and not to relieve persons

78. A state's power of exclusion, at least according to traditional doctrine, is limited only by the commerce clause and the doctrine of intergovernmental immunities. Butler Bros. Shoe Co. v. U.S. Rubber Co., 156 Fed. 1 (8th Cir. 1907). However, the greater does not necessarily include the lesser so that even where the power of exclusion is present, the power to condition is not without limitations. A state may not exact from nor enforce an agreement on the part of a foreign corporation to forego access to the federal courts. Terral v. Burke Construction Co., 257 U.S. 529 (1922). Territorial limitations in the state's taxing power cannot be circumvented by the exclusion-condition device. Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910). See generally, HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW c. viii (1918); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929).

The doctrine is possibly relevant under the "any business" statutes. The question arises whether the state may exclude the doing of any business by an unaquified foreign corporation and attach as a condition of compliance actual consent to jurisdiction enforced by a no-suit sanction. If the compliance requirements include consent to suit for foreign causes of action the issue is even clearer. This use of the exclusion-condition power through qualification requirements and a negative sanction seemingly circumvents the normal due process limitations on the acquisition of personal jurisdiction. See Worcester Felt Pad Corp. v. Tucson Airport Auth., 233 F.2d 44, 49 (9th Cir. 1956) where it was apparently this problem that the court avoided by statutory construction. For a recent discussion of the doctrine of unconstitutional conditions, see Mr. Justice Frankfurter's concurring opinion in Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 74 (1954).

79. Worcester Felt Pad Corp. v. Tucson Airport Auth., 233 F.2d 44 (9th Cir. 1956) (applying Arizona law). *But see* Glo Co. v. Murchison, 208 F.2d 714, 210 F.2d 372 (5th Cir. 1954) (applying Texas law), *cert. denied*, 348 U.S. 817 (1954).

80. See notes 69 and 70 *supra* and accompanying text.

of valid obligations owed to foreign corporations. The inconsistency in the interrelation between personal jurisdiction and the application of the no-suit sanctions prior to *International Shoe*[81] has been magnified to the degree that *International Shoe* has reduced jurisdictional requirements and rendered noncomplying foreign corporations more readily amenable to jurisdiction, thus reducing the scope of the "span" area.

In *International Shoe* the Supreme Court discarded the "doing business—presence or implied consent" rationale and its mechanistic determinations in favor of a more flexible and realistic jurisdictional basis of reasonableness in view of the activity within the state.[82] Chief Justice Stone spoke in terms of "certain minimum contacts" within the state "such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.' "[83] Not only the quanttiy but also the quality and nature of the corporation's activity become relevant factors.[84]

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81. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). There has been no paucity of comment on *International Shoe* and its progeny. See, *e.g.*, Notes, 104 U. PA. L. REV. 381 (1955), 16 U. CHI. L. REV. 523 (1949).

82. A few cases prior to *International Shoe* indicated dissatisfaction with the prevailing concepts concerning personal jurisdiction over corporate defendants. See, *e.g.*, Frene v. Louisville Cement Co., 77 U.S. App. D.C. 129, 134 F.2d 511 (1943); Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930).

83. 326 U.S. at 316.

84. *Id.* at 318-19.

In the later case of Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950), the Court held that the defendant mail-order health insurance business, a Nebraska corporation, was amenable to suit through process served on a public official and notice by registered mail. The suit was brought by Virginia to enjoin Travelers from further business activity until it had properly complied with state qualification regulations, one of which was consent to suit. Travelers apparently had never had any agents active within the state. Instead, for nearly fifty years non-employee members of the Association had solicited new members who in turn dealt by mail with the Omaha office. Thus, not only was solicitation held to be sufficient to provide a basis for jurisdiction, but here the solicitation was accomplished by quasi agents at best. It is not clear from the opinion, the transcript of record, or the parties' stipulation of facts how Travelers had investigated claims arising from Virginia risks. The extended course of dealing with Virginia residents resulting in approximately eight hundred policies outstanding in the state, the prospect of leaving a Nebraska court as the only forum available to an insured, and the dominant public interest in the insurance business were the factors relied upon in finding the assertion of jurisdiction as reasonable.

In McGee v. International Life Ins. Co., 78 S. Ct. 199, 201 (U.S. 1957), the Court held: "It is sufficient for the purposes of due process that the suit was based on a contract which had a substantial connection with the state. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." The interesting point of the *McGee* case is that the policy the plaintiff was suing under was the only contract the company had outstanding in the state.

It is true that insurance represents an area particularly affected with the public interest. Foreign insurance companies are subject to a special statute in most states, separate from but analogous to the general foreign corporation act. However, jurisdictional extensions, although perhaps easier to establish in the insurance area, have not been limited thereto. See notes 93-95 *infra* and accompanying text.

The problem of the connection between the activity within the forum state and the source of the controversy in litigation, *i.e.* the extent of jurisdiction, came before the Court in *Perkins v. Benguet Consolidated Mining Co.*[85] The plaintiff, a non-resident of the forum state of Ohio, sued the defendant foreign corporation whose temporary wartime headquarters were in Ohio. The corporation had not qualified; however, the Court found that its activities in Ohio were sufficient to provide a basis for jurisdiction. The cause of action was foreign to its activities in Ohio, and service was on the defendant's president. The defendant urged that the *Simon* case was controlling since there had been no qualification and the cause of action was foreign. The *Simon* case was distinguished because "unlike the case at bar, no actual notice of the proceedings was received."[86] The Court held that the assertion of jurisdiction was constitutionally valid although it emphasized that Ohio was not required to take jurisdiction, it being a matter of discretion.[87]

Thus, limitations on both the basis and extent of jurisdiction over unqualified foreign corporations have been reduced. In cases involving jurisdiction over foreign causes of action the "minimum contacts" of *International Shoe* are increased, for as was said in *International Shoe* the contacts must be "so substantial and of such a nature as to justify suit against it [and unqualified foreign corporation] on causes of action arising from dealings entirely distinct from those activities."[88] In short, minimal or even single contacts can support jurisdiction for causes of action arising from these activities, but there must be substantial activity

85. 342 U.S. 437 (1952). There was prior authority for allowing jurisdiction over an unqualified foreign corporation for foreign causes with service on a corporate agent. Missouri, K. & T.R. Co. v. Reynolds, 255 U.S. 565 (1921), *affirming per curiam*, 224 Mass. 379, 113 N.E. 413 (1916); 228 Mass. 584, 117 N.E. 913 (1917); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917). However, the relationship between these cases and the *Simon* case—foreign cause, service on a public official, see note 58 *supra*—was in doubt and still is today unless the reasoning of the *Perkins* case can be said to clarify the issue. For extent of jurisdiction as raising questions under the commerce clause, see note 12 *supra*.

86. *Id.* at 443.

Since who is served, *i.e.* a corporate agent or a public official as the corporation's involuntary agent, in no way alters the burden of defending a suit and only raises a notice problem, the inference to be drawn is that if the state statute provided for service on a public official for a foreign cause of action and proper notice provisions were included, jurisdiction is valid. In other words, the *Simon* case stands on notice and not extent of jurisdiction. Notice is not an insurmountable obstacle since for local causes of action the statutes of most states provide for alternative service on a public official, and if there is a basis for jurisdiction, notice through the public official secures jurisdiction.

87. *Id.* at 440, 448.

88. 326 U.S. at 318.

within the forum state to support jurisdiction for foreign causes of action.[89]

However, the full impact of *International Shoe* is not felt in every state. As the *Perkins* case made clear, a state need not assume the full reach of jurisdiction constitutionally permitted to it under the Fourteenth Amendment.[90] And a federal court, especially in diversity cases, often sits as a state court when resolving questions as to place of trial.[91] Many of the state statutes still use the pre-*International Shoe* "doing business" language, and some state courts are reluctant to expand their jurisdiction without legislative authorization.[92] On the other hand, some courts, reasoning that doing business was a constitutional mandate and not a reflection of legislative policy, have followed the lead of *International Shoe*.[93] Several states have enacted legislation, commonly called "single transaction statutes," to enlarge the jurisdiction of their courts to the constitutional limit.[94] Under these statutes jurisdiction has been asserted

89. But whether the service for the foreign cause of action is made upon a corporate agent or a public official has no further effect on the basis of jurisdiction. This distinction should raise only a question of notice.

90. This is true whether the particular question involved is one of basis or of extent of jurisdiction.

91. The interrelation between federal venue, 28 U.S.C. § 1391 (a) and (c) (1952), federal rules for service of process, FED. R. CIV. P. 4 (d) (3) and 4(d) (7), Erie v. Tompkins and choice of law, removal or original actions, diversity or federal question cases, and federal transfer, 28 U.S.C. § 1404(a) (1952), is a matter of continuing confusion. See Notes, 30 IND. L. J. 324 (1955), 56 COLUM. L. REV. 394 (1956), 69 HARV. L. REV. 508 (1956), 5 DUKE B. J. 129 (1956) and 1957 WIS. L. REV. 339 [discussing Riverbank Laboratories v. Hardwood Products Corp., 220 F.2d 465 (7th Cir. 1955), *rev'd per curiam*, 350 U.S. 1003, *amended*, 350 U.S. 1012 (1956)].

92. Ames v. Senco Products, 1 App. Div. 2d 658, 146 N.Y.S.2d 298 (1955), *leave for appeal*, 1 App. Div. 2d 774, 149 N.Y.S.2d 212 (1956); Western Gas Appliances v. Servel, Inc., 123 Utah 229, 257 P.2d 950 (1953); Lutz v. Foster & Kester Co., 367 Pa. 125, 79 A.2d 222 (1951); Pellegrini v. Roux Distributing Co., 170 Pa. Super. 68, 84 A.2d 222 (1951). See Jenkins v. Dell Publishing Co., 130 F.Supp. 104, 132 F. Supp. 556 (W.D. Pa. 1955) following the common two step analysis of a federal court in a diversity case, see text *supra* at note 91, but finding the Pennsylvania law modified since the *Lutz* and *Pellegrini* cases by intervening legislation. PA. STAT. ANN. tit. 15, § 2852-1011 (Supp. 1957).

93. London's, Inc. v. Mack Shirt Corp., 114 F. Supp. 883 (D. Mass. 1953); Eclipse Fuel Engineering Co. v. Superior Court, 148 Cal. App.2d 736, 307 P.2d 739 (1957); S. Howes Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954), *appeal dismissed*, 348 U.S. 949 (1955).

"This review of the decisions of our courts indicates that the expression 'doing business in this State,' as used in § 411 of our Code of Civil Procedure . . . reflects the changing concepts of 'doing business' as it has evolved over the years, and as it continues to evolve, through the decisions of the federal courts interpreting the due process clause and applying it to new and developing situations from time to time. . . . In other words, 'doing business' enlarges to the extent that the federal Constitution permits it to enlarge." Kneeland v. Ethicon Suture Laboratories, 118 Cal. App.2d 211, 222, 257 P.2d 727, 734 (1953).

94. See, *e.g.*, ARK. STAT. ANN. § 27-340 (1947); N.C. GEN. STAT. §§ 55-144, 145, 146 (Supp. 1957; PA. STAT. ANN. tit. 15, § 2852-1011 (Supp. 1957); VT. STAT. § 1562 (1947).

over foreign corporations for causes of action arising out of single contacts within the state.[95]

In summary, *International Shoe* and its progeny clearly represent a relaxation of the due process standards for basis and extent of jurisdiction. A substantial percentage of cases where jurisdiction failed under the old concepts of doing business would undoubtedly reach a different result today. The jurisdictional spans of basis and extent arising from the distinction between qualification and noncompliance are greatly diminished, if not extinct. It is true that qualification and actual consent do make jurisdiction "automatic" in the sense that the only questions that then arise are problems of statutory construction concerning the terms of the consent obtained. But when the corporation has not qualified, the parties and the court, even under the reduced requirements of the *International Shoe* doctrine, must face the factual problem of jurisdiction. However, in as much as the results where the corporation has not qualified now tend to approximate those reached where the corporation has qualified, it would seem that the convenience that the plaintiff enjoys in the latter instance does not overcome the faults of the no-suit sanctions. This is not to say that qualification is no longer important; its non-jurisdictional benefits and the advantages of "automatic" jurisdiction are to be desired. What it does mean is that insofar as qualification sought jurisdiction through actual consent and sought to induce compliance by a negative, self-enforcing, no-suit sanction, the present rules and the results thereunder are without reason. A noncomplying foreign corporation is denied access to the courts through the application of a no-suit sanction on the ground that by its failure to qualify it has not made itself available to the local forum. But in truth, if the state or a private party plaintiff sought to bring an action against the corporation, jurisdiction could be had. This is especially evident in those cases where the corporation is barred from suit only after engaging in activity in quantum equal to or greater than the prevailing standard needed for the acquisition of personal jurisdiction. The result is that defendants to actions brought by corporate plaintiffs are often relieved of their just obligations, a result that should be permitted only if necessary to serve a greater public interest. Such justification is lacking now and perhaps always has been.

95. Compania De Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955), 22 U. CHI. L. REV. 674 (1955); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951). For a discussion of recent decisions under the North Carolina statute and comparative comments to other jurisdictions, see Note, 35 N.C.L. REV. 546 (1957).

The foremost difficulty in the present status of foreign corporation jurisdiction and qualification is that the laws in too many instances lag behind the constitutionally permitted opportunities that have been made available to accommodate modern needs. States, whether by statute or decision, or both, should take advantage of the greater jurisdiction made available by the recent constitutional developments. Concomitantly with this increase in jurisdiction, the qualification policy and especially the techniques of enforcement are in need of review. Perhaps qualification should remain "behind" jurisdictional standards as is the usual case today. Or perhaps a state will decide that the activity standard for qualification should approximate that for jurisdiction, especially if the no-suit sanction is eliminated and the fines for noncompliance are reduced. In either event the enforcement of qualification should be left entirely in the hands of the state. The non-jurisdictional benefits and the advantages of "automatic" jurisdiction from qualification can be acquired through the utilization of positive sanctions, now sufficiently efficacious since the infirmities of judicial jurisdiction have been significantly reduced. Reasonable pecuniary penalties could satisfactorily compensate the state for this burden of enforcement. If the no-suit sanctions are to be retained in any form, then the "subsequent compliance" type would seem clearly preferable.

THE EFFECT OF FORCED SHARE STATUTES ON INTER VIVOS CONVEYANCES OF PERSONALTY

The law has long favored the policy that some type of provision should be made for the support of a widow. This has commonly been accomplished by setting aside, for the benefit of the widow, a fixed portion of the deceased husband's estate. The evolution of this policy is both long and varied, with its most familiar manifestation being found in common law dower.[1] Dower, however, is no longer the most common means of its accomplishment. In a majority of states, a contemporary statutory scheme which utilizes a modified form of dower or a "forced heir" arrangement has replaced the common law estates of dower.[2] As a consequence of this legislative trend, the widow, in many instances, has been classified as an heir—an heir which the husband cannot exclude in

1. See Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 (1936).
2. 3 VERNIER, AMERICAN FAMILY LAWS, §§ 188, 189 (1935); Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 at 141 (1936).