ANNOUNCEMENT

The University of Pennsylvania Law Review announces the election and induction into office of its Managing Board for the year 1931-1932, as follows:

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NOTES

The Maritime Limited Liability Act—Its Availability in State and Federal Courts—Deviation from a well established and deeply ingrained legal doctrine demands a reason. Although not of first instance in the history of maritime law,1 Congress initially found sufficient2 cause to thrust a limitation upon a basic and fundamental rule of legal responsibility when it enacted the Limited Liability Act of 1851.3 The act's most frequently assigned purpose was to remedy the rigor of the common law liability of maritime entrepreneurs,

1 See Norwich Company v. Wright, 13 Wall. 104, 116 et seq. (U. S. 1871); Putnam, The Limited Liability of Shipowners for Master's Faults (1883) 17 Am. L. Rev. 1.
2 Whether there was and still exists sufficient reason, see (1929) 32 Law Notes 183; Regnault, (1876) REVUE CRITIQUE DE LEGISLATION 550, advocating plenary responsibility of shipowners for loss of life, cited in Putnam, op cit. supra note 1 at 20, n. 1. See also Bisschop, LIMITATION OF SHIPOWNER'S LIABILITY AND COMPULSORY INSURANCE OF PASSENGERS (1927).
3 9 Stat. 635 (1851), 46 U. S. C. §§ 182-188 (1928). This act with its amendatory and supplemental acts is embodied in Rev. Stat. §§ 4282-4289 and in 23 Stat. 57 (1884), 46 U. S. C. § 180 (1928). The important provisions are (1) that shipowners are not liable for loss or damage occasioned without their privity or knowledge, beyond the value of their interest in the vessel, and her freight pending; (2) wherever several suffer loss and value of vessel and freight pending is not sufficient to compensate all, they shall receive compensation in proportion to their respective losses, and owners may take appropriate proceedings for purposes of such apportionment; (3) it shall be sufficient compliance if owner transfers the vessel and freight to a trustee appointed by the court, for the benefit of the claimants, after which transfer all claims and proceedings against the owner shall cease; (4) that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, the aggregate of liability of all owners not exceeding the value of vessel and freight pending, act not applying to wages due to employees of shipowners (this last portion being Act of 1884 mentioned above).
in the promotion and encouragement of shipbuilding and the merchant marine in competition with foreign shippers. In view of its beneficent aid, foreign, as well as native shipowners have frequently sought to take advantage of its salutary features by employing one of three methods: (i) by pleading the statutory limitation as a defense; (2) by libel or petition in a United States District Court offering a transfer of the ship to a trustee appointed by the court; and (3) by offering in the federal court a stipulation to pay the value of the vessel into court, or by actual deposit of that amount into court. The latter two methods, however, are not always available to the shipowner.

The Judiciary Act of 1789 provides that the United States District Courts shall have original jurisdiction "in all civil causes in admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." This provision has been construed to confer upon state courts cognizance over actions in personam which may lie within the realm of admiralty. Therefore, whenever a common-law action is pursued in a state court, the defendant shipowner is confronted with the problem of how to employ, most effectively and advantageously, the provisions of the Limited Liability Act.

He first inquires—is a state court bound to, and does it, take cognizance of the terms of the statute? The answer appears to be that all that is necessary in order that limitation of liability enure to his benefit, is to plead the existence of his right to restrict the extent of his responsibility; but he must be certain that this is accomplished in the pleadings, for otherwise its utility as a defense will have terminated, for it is too late by request to charge the jury. Nor will he be embarrassed by the existence of a state constitutional or statutory provision forbidding a carrier from limiting its responsibility for

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4 23 Cong. Globe 713 (1851); In re P. Sanford Ross, 196 Fed. 921, 924 (E. D. N. Y. 1912). The effectuation of this purpose is deemed of such great public moment that it is also applicable to claims of the federal government, United States v. Hamburg-Amerikan, etc., Gesellschaft, 212 Fed. 40 (C. C. A. 2d, 1914).

5 Note (1930) 78 U. of Pa. L. Rev. 393.

6 1 Benedict, Admiralty (5th ed. 1925) § 484. In addition, the statute may be availed of by a creditors’ suit for an evaluation of the vessel and a distribu-


10 Carlisle Packing Co. v. Sandanger, supra note 9; (1922) 21 Mich. L. Rev. 93.
negligence, nor by a statute increasing liability, since the congressional control of the maritime law of this country is paramount and "when it has been exercised in a particular way all state authority must conform to it".

Further thought raises the question—can the state courts properly and capably administer the provisions of the enactment? State tribunals, including Pennsylvania, and a few federal courts, with determined conviction and apparent force of reasoning, have concluded in the affirmative when there is but a single possible claimant. This is so even though there are several owners of the injuring vessel, in which case the jury is directed, if they find for the plaintiff, to also determine the value of the vessel and freight pending, and the proportionate ownership of the several defendants, which verdict would be molded by the court into proper form. Many federal decisions, on the other hand, have manifested an equally resolute conviction that the state court machinery is inadequate to properly aid in limitation of liability, in that they cannot effect an appraisal of the vessel or the appointment of a trustee under rule 51 in admiralty. The evaluation of the vessel, however, does not demand extraordinary legal apparatus, but the determination of value is as appropriate and easy as is the determination of ordinary questions of value in common-law proceedings. In addition, the appointment of a trustee is not absolutely essential in order to avail oneself of the limited liability feature, and thus, if a state court can insure the reduction in the extent of responsibility and relieve the shipowner of every obligation for damages caused in any one voyage (by hypothesis, there being but one possible claimant), the latter surely cannot object.

A judgment has been entered against the delinquent shipowner in the state court. Is he bound to satisfy it? May he nevertheless seek the aid of a federal court in order to initiate affirmative limitation proceedings and stay execution on the judgment? If a federal court finds favor in his petition and lends its aid, will it be in any way affected by the existing judgment? The answers to these questions require a thorough and intensive examination of the decisions

13 Loughin v. McCaulley, supra note 11 at 520, 40 Atl. at 1021.
14 The Lotta, 150 Fed. 219 (D. S. C. 1907); Amos v. Delaware River Ferry Co.; Loughin v. McCaulley, both supra note 11.
15 Loughin v. McCaulley, supra note 11.
17 For General Admiralty Rules, see 254 U. S. 671, 40 Sup. Ct. v (1920).
on the right of a shipowner to employ the extraordinary mechanism of the federal court in limitation of liability proceedings.

That the statute was enacted primarily for the benefit of shipowners has become axiomatic. Courts are inclined, therefore, to construe its terms liberally in consonance with its avowed purpose. Judges, however, are not unmindful of that cardinal rule of statutory construction that a statute in derogation of the common law should not be interpreted to abridge the right of the injured party to a greater extent than that which is necessary to effectuate the purposes of Congress. Accordingly, the decisions manifest a qualification on the privilege of instituting limitation proceedings in order to insure to claimants, if possible, the advantages of a trial by jury in the common-law courts.

A shipowner, being liable to an action for default of master or crew, without awaiting the commencement of an action by possible claimants, may institute proceedings under the act. Where an action for injury has been started either in a state or federal court, and has even been prosecuted to judgment, or decree entered, this per se does not prevent the shipowner from invoking the limitation of liability statutes in the federal courts. The effect of the judgment or decree is that it is res adjudicata as to liability and amount of damages, but if the adjudication includes a finding of the petitioner's privity to the act causing the injury, such will constitute a bar to the assumption of jurisdiction by the federal court.

Although suffering the commencement of an action, or adjudication of the claim in a common-law court may not of itself prevent one from initiating proceedings for limitation of liability, yet circumstances may exist wherein the federal court may not deem it proper

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20 The Benefactor, 103 U. S. 239 (1880) (decree on libel in rem in admiralty); Strong v. Holmes, 238 Fed. 554 (C. C. A. 9th, 1916) (judgments in state and federal courts); Monongahela River, etc., Co. v. Hurst, 206 Fed. 711 (C. C. A. 6th, 1912) (decree on libel in personam in federal court); In re Starin, 124 Fed. 101 (E. D. N. Y. 1903) (judgment in state court). After a verdict in a state court, limitation proceedings were instituted and nevertheless the court permitted the plaintiff to prosecute the action to judgment in the state court to liquidate the amount of the claim, Davenport v. Winnisimet Co., 162 Fed. 862 (C. C. A. 1st, 1908); but the court may, as a condition to granting its relief, require the petitioning shipowner to pay the costs adjudged against him in the state courts, The Ocean Spray, 117 Fed. 971 (N. D. Cal. 1902).
21 Monongahela River, etc., Co. v. Hurst, supra note 21; In re P. Sanford Ross, supra note 4; unless the court is satisfied that the amount of judgment is excessive, The City of Boston, 182 Fed. 174 (D. Mass. 1909).
22 See supra note 3, provision 1.
NOTES

to exercise jurisdiction. As a condition precedent to entertaining such petition, where the shipowner pleads the existence of an adverse damage claim, it must be proved that it is upon a cause of action for an injury alleged to have been caused by the vessel, and a single claim of that nature is sufficient to authorize such proceedings. This does not mean, as some courts apparently believed, that this jurisdiction must be exercised upon proof of existence of the single claim, but rather that the federal court sitting in admiralty has jurisdiction in the “strict sense,” and whether or not it should be exercised remains as a matter of discretion depending on the circumstances of each controversy.

Great contrariety of opinion and a marked lack of uniformity prevailed among the federal courts concerning the advisability of affording to the shipowner the aid of the federal admiralty courts to limit liability when there is but a single possible claim. Apparently the first case in which the Bench was directly confronted with this situation was The Rosa in 1892, in which there was a single claim exceeding the value of the vessel, for which claim an action had been started in a state court, and there was no probability of others. The court, admitting that it had jurisdiction, citing with approval the dictum of an earlier case, dismissed the petition declaring that inasmuch as the “saving clause” reserved to suitors the right to seek their remedy in common-law courts where they are competent to give it, and since “the limitation of liability provided by law can be as fully and as readily secured in the common-law suit, as in this court”, it did not feel at liberty to grant the petition. The decision was disapproved, however, less than a year later in Quinlan v. Pew on apparently the same factual situation except that there were several owners (which fact was of no significance in the final decision). An opposite result was reached upon the construction of the statute establishing the fact that its purpose was also to afford relief against a single claim, and also by reason of the court's impression that without this the shipowner “could possibly be compelled to pay on a verdict of a jury perhaps more than her real value, or be forced to the trouble and expense of litigating any issue of that character”. The next

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24 The Laforrest L. Simmons, 276 Fed. 61 (D. Mass. 1921). Under the Act of 1851, limitation proceedings would not be granted against claims for a non-maritime tort only, Ex parte Phenix, 118 U. S. 610, 7 Sup. Ct. 25 (1886); but under the supplemental act of 1884, the owner’s liability could be limited even for non-maritime torts, Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27 (1911).
28 The Rosa, supra note 26 at 134.
29 Supra note 16.
30 The vessel.
31 Quinlan v. Pew, supra note 16 at 120.
case in which the court was directly faced with the problem was *The S. A. McCauley* which, upon the same facts as the antecedent case, and approving it, augmented its position with another argument to the effect that a state court did not possess the necessary powers to fully administer the act of Congress. These latter decisions, strangely enough, were not accepted by the next case *The Eureka No. 32* which adopted and re-enunciated the doctrine established by *The Rosa* and supplemented it with two potent arguments: First, “that practically the only object of applications upon a single claim—is to get the case away from the common-law jurisdiction and a trial by jury”; and secondly, that the costly limitation proceedings would diminish the fund to which claimants may resort, which diminution could be obviated by proper pleading in the action in the state court.

The federal courts continued to vacillate in their attitude toward this issue until the Supreme Court in 1913 in *White v. Island Transportation Co.* expressly adopted the rule that a proceeding to limit liability may be maintained whether there be a plurality of claims or only one. The courts, thereafter, in apparent conformity with this supreme authority, without exception or reservation, granted petitions for limitation regardless of the number of claims. And yet, *mirabile dictu*, the Supreme Court, in the recent case *Langnes v. Green*, effected a renascence of the apparently decadent cases and theories, and admitting the authority and conclusiveness of the White case, ruled that it merely established the doctrine that one claim is sufficient to confer jurisdiction on the federal court to limit liability; but once having acquired jurisdiction there still remained the issue as to the propriety of its exercise, and that where there is one owner and only one possible claimant, an action on whose claim is

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32 Supra note 16.
33 Supra note 18.
34 Ibid. 674. The Judiciary Act of 1789, 1 Stat. 73, 76 (1789), 28 U. S. C. § 770 (1928), provides that “the trial of issues of fact in the district courts, in all causes, except civil causes in admiralty and maritime jurisdiction, shall be by jury”. (Italics the writer's.)
36 Supra note 25.
38 51 Sup. Ct. 243 (1931).
39 *The Lotta*, supra note 14; *Delaware River Ferry Co. v. Amos*, supra note 35. Mr. Benedict, in his most authoritative treatise on the law of admiralty, considered *The Lotta*, and other decisions dismissing the petition in case of a single claim, as overruled, *BENEDICT, op. cit. supra* note 6 at 591, n. 42, and 593, n. 93.
pending in the state court, and the latter court is competent to preserve and protect the shipowner's right to limitation by proper pleading, the federal court should dismiss the petition. The court reasons that "to retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a common-law remedy; to remit the cause to the state court would be to preserve the rights of both parties".

The decision is undoubtedly sound not only because it accomplishes complete justice but also because of the impeccability of its arguments and logic. No more is required than the reasonable achievement of the purpose of the Limited Liability Act; if the shipowner may be accorded the entire benefits of the act in a common-law forum, then the federal admiralty court should not unduly assume jurisdiction and should remit the parties to their common-law remedies. Any different course would culminate in the depletion of the fund representing the vessel and pending freight, to which claimants may have recourse, by reason of the costs and expenses necessarily incident to the administration of the cumbrous and expensive limitation proceedings, and also, constitute a deprivation of the right of a suitor to a jury trial, to effect which is practically the object of the shipowner in presenting his petition.

The individuality of the claim, however, is not the only restriction on the privilege of instituting limitation proceedings. There also exists the established prerequisite that the aggregate of possible claims at the time of filing petition must exceed the value of the vessel and her freight pending. This broad doctrine rests on the principle that unless excess of claims over value of vessel and freight does exist, there is no liability to limit since the shipowner, in the final analysis, will be compelled to satisfy all the claims and thus no benefit or advantage could accrue from such proceedings. The action, however, will not be defeated because the only actual claims on which suit has been brought do not exceed the admitted value of the vessel, where there is a probability that there may be others, or by a recovery by a claimant of less than the stipulated value of the vessel, where his original claim was greater. It may be interesting to note that in the Langnes case the amount of the claim was greater than

40 Langnes v. Green, supra note 38 at 247.

41 Petition of Cunard S. S. Co., 17 F. (2d) 120 (S. D. N. Y. 1927); The Aquitania, 14 F. (2d) 456 (S. D. N. Y. 1926); but this does not seem to be a jurisdictional prerequisite, The Garden City, supra note 27.

42 Shipowners' and Merchants' T. Co. v. Hammond Lumber Co., 218 Fed. 161, 164 (C. C. A. 9th, 1914): "The proceeding is intended for the purpose of limiting liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the res involved."


the value of the vessel, and nevertheless the court did not deem this sufficient to justify them in exercising jurisdiction in the light of the other facts.

A plurality of claims of a greater amount than that of the vessel and freight will induce the federal court to entertain these proceedings. All other suits for the same loss will be superseded by this action, and they are automatically stayed upon issuance of the monition ordering all interested parties to interplead which constitutes a statutory injunction, although the court is at liberty to issue special injunctions to restrain such suits. The utility of this procedure is outlined by the Supreme Court:

"Unless some proceedings of this kind were adopted which should bring all the parties interested into one litigation, and all claimants into concourse for a pro rata distribution of the common fund, it is manifest that in most cases the benefits of the act could never be realized." 47

In other words, the proceeding is analogous to a bill in equity, in the nature of an interpleader, by which a multiplicity of suits is avoided and the whole matter determined in one action.

What if the federal court, having assumed jurisdiction, finds that the petitioner is not entitled to limitation of liability because the injury was due directly to the fault of the shipowner? May the claimants revert to their actions in the common-law tribunals? As has been adverted to above, it was ordinarily the privilege of the vessel owner to choose the court by either defending by plea in the state court, or seeking the aid of the federal court sitting in admiralty. The balance now seems to swing to the claimants and the attitude of the court now appears to favor their choice.

The court, having jurisdiction over the parties and the res and endeavoring to do equity, will exercise such jurisdiction within its sound discretion in order to fully protect the claimants and at the same time insure a "complete and full disposition of a many cor-

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46 In re East River Towing Co., 266 U. S. 355, 45 Sup. Ct. 114 (1924); 3 Foster, Federal Practice (6th ed. 1921) § 590. It is interesting to note that this is apparently the only instance in which federal admiralty courts may issue injunctions, see I. B. Benedict, op. cit. supra note 6 at 96, n. 97. In England, when limitation proceedings are commenced the court usually stays proceedings in any other court, unless it considers the case one which ought to go before a jury, 26 Halsbury, The Laws of England (1914) 616.


48 That is, the vessel and freight pending, their value, or a stipulation substituted therefor.
A recent Supreme Court case clearly exemplifies this attitude. The petition to limit liability having been dismissed, the surety upon the stipulation ad interim sought to avoid its obligation thereon, maintaining that now the claimants must be remitted to their actions in the common-law courts. Chief Justice Taft, however, declared:

"The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by a judgment in personam against the owners, so far as the court may decree."

It must nevertheless be remembered that it is entirely discretionary whether affirmative relief will be granted the claimants by federal admiralty court after dismissal of limitation proceedings. From a comprehensive survey of the decisions indicating how this discretion has been exercised, it seems that courts have usually conferred on claimants the power to elect between a decree for damages by the admiralty court, or recourse to the state courts, although some have enforced the rights of the damage claimants in full without any option of choice of tribunal. Although this method of disposition may appear unusual, its beneficial consequences surely constitute a sufficient justification. Where the many claimants, the owners, and the res are all before the court which has already determined the facts in deciding the issue of liability, it is in a position most capable of achieving equity for all parties concerned, and at the same time to terminate the controversy in a single proceeding.

From this brief exposition on the limitation of liability statutes, and in the light of the two recent decisions handed down by the Supreme Court, it is patent that the proceedings, from beginning to end, savor of equity practice and procedure. The extent of the discretion; the employment of the extraordinary writ of injunction; the prevention of multiplicity of suits, etc., undoubtedly show this. Not only do the practice and procedure partake of an equitable nature, but also the flexible and plastic character of the principles and tenets influencing the exercise of judicial discretion manifests this attribute. The

52 The Santa Rosa, 249 Fed. 160 (N. D. Cal. 1918); see The Erie Lighter, 108, supra note 37; The Virginia, 266 Fed. 437, 439 (D. Md. 1920) seem; 1 Benedict, op. cit. supra note 6 at § 488.
53 In re Jeremiah Smith & Sons, 193 Fed. 395 (C. C. A. 2d, 1911); see The Titanic, 204 Fed. 295 (S. D. N. Y. 1912).
decisions evince a great urge to effect justice and equity, to afford due protection to all parties, and to effectuate the asseverated purpose of the Limited Liability Act. That these results have been achieved most ably and with unusual equity is not to be denied.

J. S. R.

LIMITATIONS—ARE THEY PROPERLY VIEWED AS PROCEDURAL IN CONFLICT PROBLEMS?—That such a view of them is proper is, beyond dispute, the orthodox conception. But the question in a conflict case, What is substance here and what procedure, may prove on analysis one of the most vexatious in the entire field of conflicts. The question arises, obviously enough, out of purely pragmatic considerations: If a man comes into a jurisdiction with a claim alleged to have arisen in another, an attempt to enforce his claim, from beginning to end, by the law of the locus, would result, if not in chaos, then at least, in interminably prolonged procedure and, doubtless, more than a few complete impasses. The forum's entire machinery for the administration of justice would have to be remade to carry out such an attempt. Merely to state the situation is to reveal the utter impracticability of any such scheme.

The time-honored solution of the problem, as we know, is that the forum will follow its own rule as to matters of procedure, and as to matters of substance that of the locus. But what are the indicia as to which is which? Where lies the distinction? According to one analyst of the problem,2

"the distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a brutum fulmen, i.e., no law at all."

But this, obviously enough, only gives rise to a restatement of our problem. On the one hand we are told that all law relates to rights; on the other, that for the legal machinery in a given dispute to remake itself so as to conform to that of another form, would be all but impossible. The cleavage along lines of "substance" and "procedure" is the pragmatic answer to the problem and suggests the subject of this inquiry.

2 Chamberlayne, Modern Law of Evidence (1911) § 171. To the same effect, see a note by Professor Lorenzen (1919) 28 Yale L. J. 492, at 496.
Specifically, here, we are concerned with an analysis of limitation under the accepted classification. The problem is forcefully suggested by a recent Pennsylvania case. Plaintiff's husband was fatally injured in New Jersey and she brought action as widow under the New Jersey "death statute." The New Jersey statute fixes a two-year limitation for bringing the action; the Pennsylvania statute provides that "the action shall be brought within one year." Action was brought within a year of the time the right accrued. More than a year, but less than two years, after the accrual of the action, plaintiff took a rule to amend her pleadings by substituting her name as administratrix ad prosequendum (having been duly appointed to that capacity in New Jersey), that she might meet the requirement of the New Jersey statute. The Supreme Court of Pennsylvania held that the Pennsylvania statute controls the case, and that since amending the pleadings would make a new cause of action, judgment must be given for the defendant.

The cases indicating concretely whether limitation is to be regarded as substance or procedure disclose tendencies in both directions. In consistency with the theory that limitation is merely a matter of procedure, for example, we find the cases holding that although a mortgage debt be barred, yet the mortgage security is not thereby extinguished. But on the other hand, an imposing instance of the way in which a change in limitation annihilates a right completely is to be seen in a federal case. The Wisconsin statute for actions on municipal bond coupons was reduced from twenty years to six. In a suit brought on such a coupon after six years the United States Supreme Court held that the act reducing the limitation period did not violate the constitutional provision against impairment of contract obligations. Yet that the Wisconsin statute did impair some right of the coupon-holder—call it a contract right or not, as you will—is not to be denied. Even in assumpsit, where after the lapse of the statutory period a new promise may revive the right of action, a view of limitation as remedy produces a somewhat astonishing result. Thus in *Campbell v. Holt* a Texas statute had barred action on the contract in suit and a later statute extended the period within which action might be brought. Action was brought within the later-fixed period, but after the expiry of the earlier one. The Supreme Court of the

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5 Ibid. § 55 (8).
7 Supra note 4.
8 Norton v. Palmer, 142 Mass. 433, 8 N. E. 346 (1886); Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891); Hartranft's Estate, 153 Pa. 530, 26 Atl. 104 (1893); 2 Jones, Mortgages (8th ed., 1928) § 1542; 1 Wood, op. cit. supra note 1, § 222.
10 115 U. S. 620, 6 Sup. Ct. 209 (1885).
United States held that allowing recovery in such an action would not violate the due process clause of the federal constitution. The case was different, it pointed out, from a case of acquiring property by the lapse of a statutory period, for "time does not pay the debt, but time may vest the right of property." Here, it seems to the writer, is a capital paralogy: "time does not pay the debt, but time may vest the right of property." Whether it does vest the right or not will depend, obviously, on whether a court views limitation as remedial in conversion cases and contract cases equally and indistinguishably. Thus the court in *Campbell v. Holt* begs the question. The case has been pretty thoroughly keelhauled. The substantive effect, to make an end of our preliminary inquiry, of the lapse of a statutory period, can perhaps nowhere be more vividly seen than in the acquisition of title thereby. That such operation of a statute of limitations is substantive can hardly be gainsaid. The view of limitation as pertaining to remedy alone has, to be sure, an element of realism in it in relation to contract actions, for acknowledgment after action is barred may revive an obligee's right; but in a tort action there can be no such revival. Analysis, moreover, weakens the commonly accepted distinction between a statute said to be directed at the right, such as the New Jersey statute establishing a right of action "provided that action shall be commenced or sued within two years"; and one said to be directed at the remedy, such as the Pennsylvania statute, which provides that "the action shall be brought within one year." Both forms of

12 That property can be so acquired is established beyond dispute. See Davis v. Mills, 194 U.S. 451, 456, 24 Sup. Ct. 692, 695 (1904); Brent v. Tasker, 1 Harris & Moll. 89 (Md. 1737); Taylor v. Horde, 1 Burr. 60 (1757). Ames, op. cit. supra note 11, 197-198.
13 Wood, op. cit. supra note 8, § 66.
14 "The change [in the Statute of Frauds] from 'no action shall be brought' to 'such contract should be void' seems thus to have been made in New York rather by accident . . . than to change the effect of the statute; and the New York form of the statute seems to have been adopted in Michigan, and later in Wisconsin, without realizing . . . that the change of the language might make necessary or justify a change in meaning." Page, Effect of Failure to Comply with the Wisconsin Statute of Frauds (1928) 4 Wis. L. Rev. 323, at 325.
15 A reference to the Legislative Journals of Pennsylvania for the year 1855 (when the "Death Statute" was passed by the Legislature) fails to reveal any debate at all on the proposed statute—a fact casting doubt on the probability that the legislature recognized the distinction set forth.
17 Supra note 5.
18 Supra note 6.
phraseology produce the same result in cases not involving a conflict and it is difficult to see why they should yield different results in cases involving one—unless, of course, one starts with the assumption that statutes of limitation may affect either substance alone or procedure alone. Story seems to have been the first prominent observer of the distinction.\(^{28}\)

There is, however, as at least one writer on the subject has pointed out,\(^{19}\) a preliminary question to be considered before a court may proceed to apply the rule that questions of substance shall be settled by the law of the locus, those of procedure by that of the forum; the question is, To what law shall we look to determine whether the question is one of procedure or substance? This, by implication, the Pennsylvania Court, answers by saying, To our own law. But is the solution a legitimate one? The writer, as he has indicated, distrusts the distinction based on the language of the statutes. They seem to him to have neither substance \textit{per se}, nor (and perhaps a relationship of cause and effect evinces itself here) any foundation in legislative intent.\(^{20}\) But the important implications of the Pennsylvania decision remain, for if the court may decide by its own law whether limitation is substance or procedure, then so it may as to any other element of a case, for example, measure of damages.

Still another pertinent distinction arises with reference to the type of statutes involved in the Rosenzweig case. It consists in the fact that the statutes themselves incorporate the limitations. The limitations are not, then, as general limitations—general ones, that is, in the sense that they apply to a whole class of rights: all negligence actions, all contract actions, or all actions on municipal bonds. These, when a court comes to the consideration of a case to which they are applicable, the court must apply because the legislature \textit{has} fixed no other limitation, and the court \textit{cannot} fix any. The situation is otherwise, however, when the limitation is fixed in relation to a specific right of action. The legislature, it must be presumed, has fixed this limitation because it has deemed it peculiarly fitted to the right it accompanies. Thus it becomes interwoven with the right, it becomes, so to speak, a dimension of it. This, the writer feels—and so, too, do a number of courts, mainly federal ones\(^{21}\)—is the nature of the

\(^{28}\) \textit{Loc. cit. supra} note 15.


\(^{20}\) Wharton says that there is "a decided tendency to repudiate the distinction". \textit{Op. cit. supra} note 15, § 690c.

New Jersey right of action for death by wrongful act. And if it is, then why should the Pennsylvania Court separate this element of the right from all the others and say that as to this its own law applies? The answer to this question seems to be that the policy of the forum is dictated by the legislative enactment, and this has decreed a shorter period than that of the locus. But to this disposition of the problem there are several objections. To begin with, why should not the policy of the forum prevail even when the limitation there obtaining is longer than that of the locus—and that of the locus is couched in language of remedy, so that the right (in the light of the orthodox distinction) is not extinct? It would seem that it should prevail, but the law is clearly otherwise. Again one may point out that the policy of the forum has quite as strong a claim to preference in relation to other matters as it has in relation to limitation. Thus it has long been the policy of Pennsylvania that limitation by contract of a common carrier’s liability for injury resulting from negligence should be no defense in a tort action. Yet when a case arose where such a contract made in New York and the defendant’s negligent act occurred there, the Pennsylvania Supreme Court held the limitation a valid defense. There was but one dissident voice in the court to insist that “a well-settled rule of public policy [should not] give way to considerations of mere comity.” Yet here, as it seems to the writer, is a problem much more vital to the general public welfare than that of a court’s preservation of its procedural policy against the extension of a right of action beyond the period fixed by its own policy.

What then remains to be said for the rule that the limitation obtaining in the forum shall control as to all actions brought therein? Just what was said at the outset, it seems to the writer: namely, that

A majority of the authorities, however, take the opposite view. See Note (1913) 46 L. R. A. (N. S.) 687; Wharton, op. cit. supra note 15, at 1264; Goodrich, op. cit. supra note 1, at 171; Conflict of Laws Restatement No. 4 (Am. L. Inst. 1928) § 433, together with comment (b) thereon.

Goodrich, loc. cit. supra note 20.

Davis v. Mills, supra note 12; Richards v. Carpenter, 261 Fed. 724 (C. C. A. 6th, 1919); Selma, etc., R. R. v. Lacy, 49 Ga. 106 (1873); Cavanagh v. Ocean Steam Nav. Co., 59 Hun 618 (memorandum decision), 13 N. Y. Supp. 540 (full report) (N. Y. 1890); Capp v. Atlantic Coast Line R. R., 183 N. C. 181, 111 S. E. 533 (1922). None of these cases, it is true, take notice of the fact that the language of the statute of the locus is language of remedy, but in all of them that was the case. Wood, loc. cit. supra note 21 (and so too most of the other treatise writers), adopt the same view, also without reference to the distinction in question.

Goodrich, loc. cit. supra note 1 (and so too most of the other treatise writers), adopt the same view, also without reference to the distinction in question.


Forepaugh v. Del., etc. R. Co., 128 Pa. 217, 18 Atl. 503 (1899). The court said at 226, 18 Atl. at 505: “Such a contract, made in Pennsylvania, for transportation between points within this state, would be void as against the settled policy of this state.”

Ibid. at 232.
NOTES

it is desirable that the machinery of the forum for the administration of justice shall not be subject to the superimposition of the law of other fora; specifically, that the risks of perjured and ill-remembered testimony be minimized by the application of a policy approved (theoretically, at least) by the courts whose process is sought in adjudication of a dispute. Such a desideratum, plainly, is all the more exigent when the cause of action arises at a place remote from the forum. But as against this consideration there is the consideration that the holder of the right of action can avail himself of it only at the place where the tort-feasor (or other wrongdoer) is to be found. If his remedy be curtailed at such place in accordance with the limitation of the law obtaining there, it is meaningless to say that his right still persists. To say so, indeed, is only to indulge in verbalism of the emptiest kind. "An immortal right to bring an eternally prohibited action is a metaphysical subtlety," which Dean Ames, for one, "could not pretend to understand." 27 And Chamberlayne, observing that "severing the ligature between right and remedy as in the procedural limitation of actions deals a death-blow to the right itself," concludes that "the difference between substantive and procedural law is largely one in form of statement." 28

Thus the ambivalence between the desideratum of redress to the foreign claimant and that of protection of the established procedural policy of the forum tends to be clearly defined. So that when the Pennsylvania court gives the limitation of the forum preference to that of the locus, it implies that it deems it better that the plaintiff's remedy be cut off altogether (or, in any event, be made to depend on the plaintiff's at some time finding the defendant within the jurisdiction of the locus) than that the court be made to submit to the disadvantages of hearing testimony that has aged a fraction of a year more than its policy would sanction.

To the writer the results of such a view seem harsh and intransigent. More desirable to him would be the view, well expressed by another writer, 29 that the lex loci should be applied in those instances "where the result is so materially affected by the difference in the rule as to outweigh the inconvenience, if any, in departing from the procedural law of the forum." The suggestion of a standard such as this prompts an inquiry into the origination of the present cleavage between substance and procedure. Here Professor Lorenzen's researches come to mind. 30 He has brought forward the idea, with both eloquence and learning, that the distinctions between substance and procedure arose out of the problems of the English judicial problems of the Eighteenth Century. Finding their courts confronted

28 CHAMBERLAYNE, op. cit. supra note 2, at 216.
29 Note (1918) 18 Col. L. Rev. 354, at 356.
30 See his essay, Huber's De Conflictu Legum, at 199 of the collection Wigmore Celebration Legal Essays (1915); see also his article The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L. J. 311, at 327.
with a host of actions based on foreign—"created" rights, they borrowed the substance—procedure idea from the Dutch jurisprudence in order to exclude so far as possible the phases of foreign law that might be brought before them. Manifestly, no such considerations exist as between forum and forum of this country. So far from being compelled to acquaint themselves with essentially different systems of jurisprudence when causes of action which have arisen in other States are brought before them, our judges are not merely confronted with essentially similar systems but, often, as in the Pennsylvania case, with legislative enactments identical in their origin and principle, and fundamentally alike in their terms. The application of the foreign law in such a case as that one, is simple to a degree. But thinking, as they do, in terms of substance and procedure (or right and remedy) the courts have adopted as valid principles, rules of law formulated in a day when considerations both judicial and nationalistic urged their adoption, and which since have become, through a not unfamiliar process of fossilization, anachronistic and all but inutile. As early as 1834 Judge Story suggested a test based on the practicability of applying the rule of the *locus*; applied today, it seems to the writer, such a test would satisfactorily dispose of the undesirable results of the current substance—procedure classifications.

Finally, in connection with our problem, there arises the phrase "Full faith and credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State." It has been pointed out by Professor Cook that the constitutional provision originated from the provision of the Articles of Confederation that:

"Full Faith and credit shall be given, in each of these states, to the records, acts, and judicial proceedings of the Courts and Magistrates of every other State."

31 In § 557 of the first edition of his Conflict of Laws.
32 The Powers of Congress under the Full Faith and Credit Clause (1919) 28 Yale L. J. 421, at 422. On the same subject see also Field, Judicial Notice of Public Acts under the Full Faith Credit Clause, 12 Minn. L. Rev. 439, 439-443.

Field points out that there is some recognition of State constitutions under the full faith and credit clause; that a few recent cases have indicated that judicial decisions construing State statutes are in the same class; that corporation charters were so treated in two cases; and in one case even a pardon—the act of an executive. See his article at 440.

Only one case approximating that of the instant problem seems to have arisen, namely, Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810 (1896). Here it had been decreed in a State court that the plaintiff corporation might sue its shareholders for unpaid assessments. The application of the Statute of Limitations of the foreign State in which one suit so authorized was brought, however, seems in no way to militate against full faith and credit to the decree *per se.*
NOTES

and by Professor Cook that the first appearance of the clause as we know it today in the work of the Constitutional Convention was in the following form:

"Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates, of every other State."

The metamorphosis from "acts" to "Public Acts" with the evidently indicative "acts of the Legislature" in between, suggests to the student of conflicts the profoundly important query, To what extent would a proper application of the full faith and credit clause dispose of some of our most challenging problems in that field? If "Public Acts" does not mean acts of the legislature, what does it mean? And if it does, what is "full faith and credit"? Further, may not judicial proceedings comprehend decisional, so-called "common", law? These speculations at the moment may be academic ones; they may be merely a way of asking, Just what did the Fathers intend as to problems in conflicts? But with the possibility always present that Congress may prescribe "the Effect thereof", some not distant tomorrow may see them materialize into concrete law.

O. M. D.

THE ADOPTION OF THE LIBERAL THEORY OF FOREIGN CORPORATIONS—(II) THE FUNCTIONAL CAPACITY OF A FOREIGN CORPORATION—*—A preceding note has dealt with the development and present civil status of foreign corporations. Of perhaps greater, and undoubtedly more practical, importance is the problem involving the nature and extent of the power of a corporation to do business in foreign states. The *raison d'être* of all corporations for profit is the pursuit of some business; and many corporations contemplate extra-territorial enterprise either exclusively or in addition to the business done within the state of charter. Insofar as such a corporation may engage unhampered in business intercourse in foreign states, it achieves the purposes of its creation; and to the extent that its power to engage in business abroad is denied or unreasonably conditioned,

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* As to this, see Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 Sup. Ct. 389 (1925), which held that the construction placed by the Supreme Court of a State on a statute of that State was entitled to full faith and credit in a sister State.

* This is the second of two notes together presenting the thesis that the restrictive theory of foreign corporations has been displaced by what is today known as the liberal theory. The preceding note appeared in (1931) 79 U. of Pa. L. Rev. 956, and was entitled "The Adoption of the Liberal Theory of Foreign Corporations: (I) The Civil Status of a Foreign Corporation."
the corporate purposes are thereby thwarted. Such frustration is made possible by the doctrine of comity.\(^1\)

While the doctrine of comity exercised a liberalizing effect on the restrictive theory by sanctioning extraterritorial corporate business, insofar as it recognized a plenary power in the state to deal with foreign corporations, it was in full accord with the theory's provincial spirit. But comity has suffered a constant and gradual disintegration since its first enunciation by Chief Justice Taney in 1839;\(^2\) today the control of the state is not unlimited. This change is the product of two causes. One is the evolution of business from local enterprise to nation-wide organization; and such national and interstate business cannot flourish if provincially motivated states may at will impose upon the business unjustifiable and burdensome conditions. The other reason is the development of the method of incorporation from special charter to general incorporation acts and the consequent accessibility thereunder to all of a privilege once jealously restricted to a favored few and therefore viewed with fear and distrust. Such delimitation of the state's plenary jurisdiction over foreign corporations in the furtherance of the nation's economic welfare has been forced chiefly by the Supreme Court during the past two decades.

The scope of this note is limited to a survey of the more important and revealing situations involving the present constitutional position of the corporation in foreign states and the nature and extent of its power to do business therein. Especial attention has been given a number of recent cases embodying striking changes in the fundamental theory and law of foreign corporations. Case discussion, moreover, has been limited to Supreme Court decisions inasmuch as the questions presented herein are chiefly constitutional in nature.

I. THE COMMERCE CLAUSE AND FOREIGN CORPORATIONS

The first restriction upon the rigid application of comity arose under the commerce clause during the last quarter of the nineteenth century. Although \textit{Gibbons v. Ogden}\(^3\) as early as 1824 denied the power of the state to restrain persons engaged in interstate navigation from carrying on such commerce within the state, its effect for fully fifty years was limited to cases involving \textit{navigation}.\(^4\) It was not until \textit{Pensacola Telegraph Company v. Western Union Telegraph Company},\(^5\) decided in 1877, that the Supreme Court laid down the

\(^1\) A description of the doctrine of comity and a discussion of the forces which called the doctrine into being in order to alleviate the harshness of the restrictive theory will be found in the note referred to in supra note (*), at 960 et seq.


\(^3\) 9 Wheat. 1. For an excellent historical resume, see \textit{Henderson, Position of Foreign Corporations in American Constitutional Law} (1918) c. 7.

\(^4\) See for example, Railroad Co. v. Maryland, 21 Wall. 456 (1824); \textit{Veazie v. Moor}, 14 How. 568 (1852).

\(^5\) 96 U. S. 1.
inclusive and general principle that a state-granted monopoly is unconstitutional and inoperative as against a corporation engaged in interstate commerce. The power of the state to prevent such foreign corporations from doing business within the state was thus cut down; and the state's ancillary power to impose any conditions whatever as the price of admission was necessarily and similarly disabled.

Since the state could not exclude a foreign corporation engaged in interstate commerce from doing business therein, logically it should not be able to tax the corporation for the privilege of doing such business, and after some hesitation, the disability of the state to so tax was definitely established in 1884 by Gloucester Ferry Company v. Pennsylvania. The state, however, may impose an undiscriminatory tax on the corporation's property within the state. But a tax allegedly on such property which is in substance a privilege tax, or is measured by the interstate business is unconstitutional. Similarly a tax on property without the state, or on values referable to foreign business, is invalid. Nor may the state impose a tax whose method of collection or enforcement would unduly burden the interstate commerce.

Recent tax cases of interest are those involving no par value shares. In Air-way Electric Appliance Corporation v. Day, decided in 1924, a tax on the number of authorized no-par value shares represented by business and property within the state was declared unconstitutional as a burden on interstate commerce. It was believed by some writers that the tax was invalid because it assigned an arbitrary value to the shares; but the real unconstitutional feature of the tax was its computation on a basis of the total number of authorized shares, instead of the number actually issued. This is supported by two cases, decided in 1929, New York v. Latrobe, and International Shoe Company v. Shartel, both sustaining the constitutional-

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11 Supra note 9.
13 266 U. S. 71, 45 Sup. Ct. 12.
14 Since the corporation here taxed was engaged in interstate commerce, the tax of necessity must have been a property, not a franchise tax. And clearly a property tax on authorized but uncreated shares is invalid as an attempt to tax property not in existence.
ity of a tax on no-par value shares. The first of these cases fixed an arbitrary but reasonable value for the shares while the second taxed actual values. It may be said therefore that such a tax is valid even though it assigns an arbitrary value to the shares, providing a reasonable method of evaluation is used, and providing only that fraction of the issued shares referable to business within the state is taxed.

Foreign corporations, in addition to interstate commerce, frequently engage in intrastate business. Is this intrastate business entitled to the immunities of the interstate commerce, or is the taxing power of the state over such intrastate business unlimited? Early cases sustained the state's power to levy such taxes as it may desire, since the state could exclude, or the corporation renounce, the local business without affecting the interstate business. This theory was reversed, however, in a series of cases decided in 1910. In Western Union Telegraph Company v. Kansas, it was held that a foreign corporation engaged in interstate commerce could not be taxed for the privilege of doing an intrastate business by a tax measured by the entire capital stock of the corporation. Nor could the state, decided Southern Railway Company v. Greene, subject a foreign corporation doing both an interstate and intrastate business to a burdensome tax not imposed on domestic corporations for the privilege of continuing the intrastate business. The rule of the Kansas cases was relaxed in a few instances, notably Baltic Mining Company v. Massachusetts, which held that a tax measured by the entire capital stock may be valid if limited by a reasonable maximum amount. But in Alpha Cement Company v. Massachusetts, decided in 1925, such a tax was disapproved, and in Cudahy Packing Company v. Hinkle, in 1929, it was definitely decided that an excise tax measured by the corporation's total capital stock was unconstitutional even though limited to a negligible maximum.

Notwithstanding the imposed limitation on the state's power to tax unduly the intrastate business of a foreign corporation engaged in foreign commerce, the language of the decisions has always assumed that such intrastate business may be excluded at the state's

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24 216 U. S. 1, 30 Sup. Ct. 190 (1910).
30 278 U. S. 460, 49 Sup. Ct. 204.
31 For a discussion of the taxing power of the state over foreign corporation not engaged in interstate commerce, see infra p. 1125.
NOTES

pleasure. But since intrastate business is in many instances a necessary adjunct to proper and profitable interstate enterprise, the power of the state, despite the court's phraseology, had heretofore been in considerable doubt. In *Railway Express Agency v. Virginia*, decided in 1931, the question was finally adjudicated, the Supreme Court unanimously holding that Virginia may constitutionally deny to a foreign corporation engaged in interstate commerce in Virginia a license to do therein an intrastate business. The law must be therefore that a state may at its unappealable option entirely exclude such intrastate business; but if it sanctions the business, it may not impose conditions thereon constituting an undue burden on the corporation's interstate commerce.

No distinction seems drawn today between foreign corporations engaged in interstate commerce and other companies similarly engaged insofar as the nature and extent of the state's regulatory power is involved. One problem, however, peculiar to foreign corporations is whether a state may require a foreign corporation doing an interstate business to appoint an agent to accept process as a prerequisite to the business. In *International Text Book Company v. Pigg*, decided in 1910, the requirement was held unconstitutional; but the language of the opinion raises a strong inference that the invalidity was due chiefly to the drastic method of enforcement. Several subsequent cases seem similarly to leave the question open. But a statute, one of whose terms was such a requirement, was declared unconstitutional in *Dalnke-Walker Milling Company v. Bondurant*, decided in 1921. The effect of the case is weakened, however, by the fact that it is not clear from the opinion which specific terms in the statute are responsible for its invalidity. But the question was definitely settled by a recent 1931 case, *Furst v. Brewster*, which unequivocally declared the requirement to be an undue burden on interstate commerce and therefore invalid.

An important recent development in the law of foreign corporations has been the limitation imposed upon the jurisdiction of the state to entertain suits against foreign corporations engaged in interstate commerce. The reasonable subjection of such corporations to the jurisdiction of a state in which business is done may not validly be disputed. In some situations, however, the assumption of jurisdiction may unduly burden the corporation's interstate business. In

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26 See opinions of Justices Harlan, White, Holmes in the Kansas cases, supra notes 17 and 18 at pp. 18, 63, 75, respectively; see also St. Louis Ry. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99 (1914).
27 51 Sup. Ct. 201.
28 217 U. S. 91, 30 Sup. Ct. 481.
31 51 Sup. Ct. 295.
Davis v. Farmers' Cooperative Company,\(^{32}\) decided in 1923, the court denied the power of a nonresident plaintiff to serve process upon a soliciting agent of defendant carrier on a foreign cause of action, and in the 1929 case of Michigan Central Railroad Company v. Mix,\(^{33}\) the court declared the immunity of a foreign corporation engaged in interstate commerce from suit upon a foreign cause of action even in a state wherein it was doing business by a plaintiff who became a resident of the state after the accrual of the cause of action merely for purposes of suit. Assuming however that the plaintiff is a bona-fide resident of a state in which the foreign corporation engaged in interstate commerce is doing business, may the corporation be sued there on a cause of action whose locus is without the state and which is unconnected with the business done therein? There has been, as yet, no flat adjudication of the question but a strong dictum in Louisville & Nashville Railroad Company v. Chatters,\(^{34}\) decided in 1929 but subsequent to the Mix case, indicates a negative answer. It is important to note that according to the language of these three cases, the mere fact that the cause is foreign is insufficient of itself to result in the corporation’s non-suability; there must appear, in addition, that the action is unconnected with the corporate business done within the state. But a corporation, held Hoffman v. Foraker\(^{35}\) in 1927, even if engaged in interstate commerce is suable in the state of charter on all causes of action irrespective of origin and even by non-residents.

The apparent doctrine of the Mix and Chatters cases may if rigidly applied in all instances result in injustice. An illustration is Louisville & Nashville Railroad Company v. Deutsche Dampfschiffsfahrts-Gesellschaft,\(^{36}\) decided in an Alabama federal court in 1930. A Kentucky corporation brought suit against a German shipping corporation engaged in foreign commerce for a tort committed in Florida. The action was commenced by attachment of defendant's ship in Alabama waters. On removal to the district court, the suit was quashed on the ground that the defendant was engaged in interstate commerce and was therefore not liable to suit within the state on foreign causes of action. If the decision is upheld by the Supreme Court, plaintiff will be without remedy this side of the Atlantic since it is unlikely that defendant will consent to appear in Florida to be sued. It may be that a consideration of the spirit and purpose

\(^{32}\) 262 U. S. 312, 43 Sup. Ct. 556.
\(^{33}\) 278 U. S. 492, 49 Sup. Ct. 207.
\(^{34}\) 279 U. S. 320, at 322, 49 Sup. Ct. 329, at 330: “A foreign corporation is amenable to suit to enforce a personal business within the jurisdiction in such manner and to such extent as to warrant the inference that is it present there. Even when present and amenable to suit, it may not, unless it has consented, be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction”.

\(^{35}\) 274 U. S. 21, 47 Sup. Ct. 485.
\(^{36}\) 43 F. (2d) 651 (S. D. Ala. 1930).
of the commerce clause rather than of a technical jurisdictional rule derived therefrom would favor the assumption of jurisdiction in Alabama since plaintiff, who is also engaged in interstate commerce, will otherwise be relegated to suit in Germany.

II. THE FOURTEENTH AMENDMENT AND FOREIGN CORPORATIONS

The definitive limitations of the classical theory enunciated by Chief Justice Taney rendered theoretically impossible the corporations' presence in foreign states and its consequent inclusion as a "person" within the meaning of the Fourteenth Amendment. But within twenty years after the ratification of the Amendment in 1868, the Supreme Court had decided that a corporation notwithstanding theoretical difficulties, might under certain circumstances be a "person" within the foreign state.37 Until 1910, however, the scope of the due process and equal protection of law clause as applied to foreign corporation was limited to such an extent that the amendment may be said to have been substantially inoperative.38

The genesis of the modern interpretation of the clause and its application to foreign corporations may be found in that epoch-making series of cases decided in 1910. The Kansas cases held that due process protected a foreign corporation, once within a state, from the imposition of a capital stock tax, and, if a loss of property impending, from arbitrary expulsion from the state. And in the Greene case the levying of a privilege tax on the foreign corporation's intrastate business, when domestic corporations were not similarly taxed, was condemned as denying to the foreign corporation equal protection of law. Thenceforth the applicability of the amendment to foreign corporations was to be unquestioned.

Practically all of the taxes declared unconstitutional under the commerce clause are equally invalid under the Fourteenth Amendment. The capital stock tax in the Kansas cases, for example, was deemed invalid not only as an undue burden on interstate commerce but as an attempt to reach and tax extraterritorial property. Similarly the tax in the recent Hinkle case was rejected as contravening due process; and it is moreover probable that the actual basis for this decision was the due process and not the commerce clause since the tax, despite its relative minuteness, was nonetheless measured by property beyond the state, but did not because of the minuteness, constitute a burden on the corporation's interstate commerce. And the taxes involved in the Greene and Airway cases violated the equal protection of laws clause in addition to the commerce clause, in the first because of unjustifiable discrimination between domestic and foreign corporations, and in the second because of an attempted taxation of authorized but uncreated shares.

38 See Henderson, supra note 3, at 148.
At one time it was believed that the ownership of a substantial amount of permanent property within the state constituted an absolute prerequisite to inclusion within the meaning of the Amendment. Such was the intimation in the Greene case, to be repeated as late as Cheney Bros. v. Massachusetts,39 in 1918. But more recent cases have discarded the rule, allowing a claim under the amendment even in the absence of ownership of such permanent property. In Kentucky Finance Corporation v. Paramount Automobile Exchange Corporation,40 decided in 1923, a foreign corporation coming into the state to replevy an automobile but not otherwise owning property or doing business was held to be a person within the jurisdiction; and three years later the applicability of the amendment was similarly sustained in Hanover Fire Insurance Company v. Harding41 where the corporation's only asset within the state was good will.

Just as a state may not tax extraterritorial corporate property, it is equally well settled that it may not attempt to regulate the corporate acts occurring beyond the state's territorial limits. Thus in Fidelity & Deposit Company v. Tafoya,42 New Mexico was restrained from attempting to prevent the payment, by a Maryland corporation doing business in New Mexico of commissions to non-resident agent for the insurance of the corporation's property within the state even though the act of insurance and the payment therefor occur without the state.

A restatement of the precise degree and extent of equality a foreign corporation within the purview of the equal protection clause may today claim with respect to either natural nonresidents or domestic corporations may not be formulated with certainty. Perhaps the real but unexpressed rule is that any discrimination supported by justifiable cause or reasonable classification will be upheld as valid, while any not so based will be regarded as unconstitutionally prejudicial. Thus a foreign corporation, by reason, inter alia, of the limited liability of its associates may reasonably be required to file a statement of its financial structure and present condition as a prerequisite to the doing of business within the state although a natural nonresident person may not be similarly burdened.43 But a procedural statute subjecting foreign corporations, but not natural nonresidents, to adverse examination as a preliminary to bringing suit draws an unreasonable distinction and is therefore unconstitutional.44

39 246 U. S. 147, 38 Sup. Ct. 295.
40 262 U. S. 544, 43 Sup. Ct. 636.
41 272 U. S. 494, 47 Sup. Ct. 179 (1926).
43 See 9 FLETCHER, CORPORATIONS (1920) § 5909.
Similarly a statute demanding more security of foreign insurance corporations than is required of domestic corporations is sustainable since domestic corporations are more likely to own property within the state. But a privilege tax measured by 100 per cent. of the foreign corporation's receipts, and only 30 per cent. of the domestic corporation's receipts, is invalid in the absence of a reason for the classification.

The jurisdictional incidents of "corporate presence" within the foreign state have been determined and delimited by due process. The rule that a corporation is suable in a foreign state only if doing business therein is today well-settled, being recently restated in *Morris & Company v. Skandinavia Insurance Company*. A definition of "doing business," however, is not within the scope of this paper. It is equally unquestioned law that process may be served only upon an agent of the company sufficiently representative in character to justify the implication therefrom of power to accept service.

A number of state statutes provide that foreign corporations may be served by process upon a named state official, usually the Secretary of State or Insurance Commissioner. Such statutes are valid, it was decided lately in *Consolidated Flour Mills Company v. Muegge*, only if the official is required, when served, to notify the corporation. And it was further held in *Simon v. Southern Railway Company* that the official may not be served, in the absence of express consent by the corporation, on causes of action whose locus is beyond the state.

An unsettled controversy of many years standing is whether the limitation imposed by the *Simon* case extends to representative as well as statutory agents. Is it reasonable to subject a foreign corporation doing business within the state to suit on a foreign cause of action even when commenced by service on a representative corporate agent? In *Missouri K. & T. Railway v. Reynolds*, decided in 1921 in a *per curiam* opinion, the Supreme Court sustained a judgment against a foreign corporation doing business in Massachusetts on a suit so commenced, based on a cause of action accruing without the state. The *Davis* and *Mix* cases, being decided under the commerce

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48 For a definition of corporate presence and theories of corporate suability see Note (1931) 79 U. of Pa. L. Rev. 956, 966.
51 See 9 Fletcher, *op. cit. supra* note 43, § 5903.
54 255 U. S. 565, 41 Sup. Ct. 376.
but not the due process clause, would seem not to affect the question, and the Reynolds case may therefore be present law. But the broad language of the dictum referred to above in the recent Chatters case may well foreshadow the reversal of the Reynolds case and the probable grant of immunity to all foreign corporations, whether engaged in interstate commerce or not, from suit in the absence of express consent thereto on foreign causes of action unconcerned with the business in the state of the forum.

May a foreign corporation attack the validity of statutes, which although unconstitutional, do not discriminate between foreign and domestic corporations? It is well-settled today that it may. Thus, in Liggett v. Baldridge,⁵⁴ decided in 1928, the plaintiff, a Massachusetts corporation doing business in Pennsylvania, successfully resisted the operation of an unconstitutional statute limiting drugstore ownership to licensed pharmacists; and in Williams v. Standard Oil Company,⁵⁵ decided in the same year, plaintiff foreign corporation

III. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The doctrine of unconstitutional conditions, first enunciated in Home Insurance Company v. Morse⁵⁶ in 1874, was devised for the single and specific purpose of preserving the constitutional rights of foreign corporations against encroachment by indirection. Briefly stated, the doctrine disables a state from imposing upon a foreign corporation unconstitutional conditions or requiring consent thereto as an alternative to exclusion or expulsion from the state. The doctrine does not deny the absolute power of the state to exclude at will all foreign corporations; it insists, however, that the state shall not use this power to bargain with the corporation and compel consent to unconstitutional restrictions as an alternative to exclusion, thereby achieving by indirection what it may not do directly.

The doctrine was made necessary by a number of state statutes requiring the foreign corporation, as a condition of doing business, to renounce federal jurisdiction and confine its litigation to the state courts.⁵⁷ The question arose in the Morse case and it was there held that the rule laid down in Paul v. Virginia,⁵⁸ that a state may impose any conditions it sees fit upon a foreign corporation, is restricted to constitutional conditions and therefore a compelled waiver of the constitutional power to sue in or remove to federal courts is unconstitutional and inoperative. But two years later in Insurance Com-

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⁵⁴ 278 U. S. 105, 49 Sup. Ct. 57.
⁵⁷ The statutes are collected in 8 Fletcher, op. cit. supra note 43, § 5761.
⁵⁸ 8 Wall. 168 (1888).
pany v. Doyle, the Supreme Court upheld the expulsion from the state of a foreign corporation which had removed a suit to a federal court. The Doyle case, despite an apparent repudiation seven years later in Barron v. Burnside, was affirmed in Insurance Company v. Prewitt, decided in 1906; and thereafter for sixteen years, although intervening decisions cut into and vitiated the effect of the Doyle case, the curious distinction was maintained that a state might expel a foreign corporation for availing itself of federal jurisdiction, but could not deny the corporation entrance to the state for refusing to renounce such federal jurisdiction. But in Terral v. Burke Construction Company, decided in 1922, the Doyle and Prewitt cases were overruled, and the rule definitely established disabling a state from expelling a foreign corporation simply because it resorted to a federal court.

The states however continued the struggle to confine foreign corporate litigation to state courts. Statutes were enacted either requiring foreign corporations to reincorporate in the foreign state as a condition precedent to doing business therein or declaring that foreign corporations upon filing of the necessary papers prerequisite to obtaining a license to engage in business shall be considered as domesticated for all purposes. The effect of such statutes, it was believed, would be to make the corporation a "citizen" of the foreign state and therefore disentitled to federal jurisdiction when sued by or suing a resident of the state. The courts, however, emasculated the statutes by declaring that a reincorporated or domesticated foreign corporation, notwithstanding that it may be considered a local corporation for other purposes such as taxation, eminent domain, etc., remained a "citizen" for purposes of federal jurisdiction of the original chartering state only. But in a somewhat uncertain dictum in Railway Express Agency v. Virginia, decided in 1931, it is indicated that if the associates comprising the corporation, as contrasted with the corporation itself, petition for and receive a charter, the resulting corporation may be deemed also a citizen of the second state with consequent federal jurisdictional disabilities. The distinction, if true, may be justified on the ground that it has heretofore been held that if a corporation qua corporation voluntarily reincorporated under the laws of the second state, it may be considered a "citizen" of the second state for purposes of federal jurisdiction.

References:

94 U. S. 535 (1876).
95 U. S. 186, 7 Sup. Ct. 931 (1887).
96 U. S. 529, 42 Sup. Ct. 188.
97 U. S. 529, 42 Sup. Ct. 188.
98 U. S. 246, 26 Sup. Ct. 619 (1906).
100 2 Sup. Ct. 201 (1931).
101 See also Note (1930) 78 U. OF PA. L. REV. 538. A recent cases of interest is Carolina, etc., R. R. v. Clover, 34 F. (2d) 480 (C. C. W. D. S. C. 1929).
corporate in another state, it is deemed a citizen of only the first state, but if its constituent members voluntarily reincorporate, the resulting corporation is deemed a citizen of the second state also. It is submitted however that the indicated result is undesirable in that it permits to be done by indirection what cannot be done directly. It may be that federal jurisdiction based on diverse citizenship should be denied to corporate litigants because of continued abuse thereof, but in such a case the result should be attained directly.

The doctrine of unconstitutional conditions has been invoked to enforce more thoroughly the rights accruing to the corporation under the Fourteenth Amendment. Thus in *Quaker City Cab Company v. Pennsylvania*, the power of the state to impose a discriminatory tax as a condition to doing business was denied; and in *Fidelity and Deposit Company v. Tafoya*, New Mexico was restrained from requiring that a foreign insurance company consent, as prerequisite to the granting of a license, to regulations imposed upon extraterritorial business. The commerce clause, too, has been guarded against violation by indirection. Thus in *Furst v. Brewster*, a statute requiring a foreign corporation engaged in interstate commerce to appoint an agent to receive process was declared unconstitutional.

An important but unadjudicated question is whether the state may demand, as a condition precedent to doing business, express consent to service on a statutory agent as to foreign causes of action unconnected with business transacted within the state. It may well be that the question will be negatively answered when it is presented for adjudication, since the state may not constitutionally assume such jurisdiction in the absence of consent, and therefore a provision compelling consent to an assumption of jurisdiction otherwise unconstitutional may be regarded as an unconstitutional condition.

IV. Power of the State to Exclude Foreign Corporations

Until 1906 it was probably true that the state could arbitrarily exclude or expel foreign corporations. The accuracy of the state-

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68 For an explanation of the theoretical basis of the distinction see Note (1930) 78 U. of Pa. L. Rev. 538, 543.
69 See Note (1931) 79 U. of Pa. L. Rev. 956, 966.
71 270 U. S. 426, 46 Sup. Ct. 331 (1926).
72 51 Sup. Ct. 295 (1931).
73 See Note (1926) 10 Minn. L. Rev. 520.
74 The word "exclude" as herein used refers to the state's denial to the foreign corporation of the privilege of doing business in the state.
NOTES

ment is not so plain today. Certainly a state may not now decline to admit or afterwards expel a foreign corporation from motives contrary to the Constitution. But notwithstanding the limitations imposed during the past two decades upon the state's power over foreign corporations, the language in a number of recent Supreme Court cases assumes that the corporation, unless engaged in interstate commerce, may not enter the state without the state's consent; that the state may make its consent dependent upon compliance by the corporation with any constitutional conditions the state sees fit to impose; and that the state may, if it desires, even absolutely exclude foreign corporations. A paucity of cases renders uncertain the proper evaluation of these statements. Their literal implication is that although the state may not exclude for a bad reason, it may, fantasti-
cally enough, do so for no reason at all. But seemingly no cases have arisen in the past quarter century in which the state has arbitrarily excluded either an individual corporation or a class of corporations for no reason whatsoever. The cases generally present the question of constitutionality of a proposed condition or restriction and quite uniformly hold that if the condition or restriction is constitutional, the state may decline to allow the non-complying corporation to do business therein.

The recent case of Railway Express Agency v. Virginia is believed to be the furthest the Supreme Court has gone in actually realizing the assumption that the state may exclude at will. A Virginia statute denies to foreign public utility corporations the privilege of doing an intrastate business in Virginia; however, the statute further provides that the associates of the corporation may incorporate in Virginia; and that the domestic corporation thus formed may thereafter consolidate with the foreign corporation. Plaintiff, a foreign corporation, petitioned for and was denied a license to do an intrastate business. It appealed on constitutional grounds and the Supreme Court sustained both the state's refusal to license and the constitutionality of the reincorporation provision. It should be noticed, however, that the case does not precisely establish, although it approxi-
mates very nearly, the absolute excluding power of the state. Another comparatively recent case sustaining the power of the state to exclude under certain circumstances is Investors Syndicate v. Nebraska, wherein the Supreme Court affirmed the refusal of the state to renew the license of a foreign corporation which had violated a statute designed to prevent frauds.

In the absence of other controlling recent cases completing the description of the state's excluding power, it is difficult to determine

Bothwell v. Buckbee Co., 275 U. S. 274, 48 Sup. Ct. 124 (1927); Hemp-

Supra note 75.

with accuracy the power's nature and extent. The writer suggests, with considerable diffidence and hesitation, that the rules applicable to foreign corporations not engaged in interstate commerce may ultimately be established as follows:

(a) A state may exclude at will all foreign corporations, or certain classes thereof. A class as herein used is a group of corporations possessing any similar characteristic substantially distinguishing them from other corporations. Examples are corporations fraudulently formed, banking corporations, corporations creating no par value shares, etc.

(b) A state may not exclude without reasonable cause a foreign corporation if other foreign corporations possessing similar characteristics have been admitted.

(c) A state may exclude a foreign corporation for non-compliance with a state-imposed condition not contrary to the tenor of the Constitution.

(d) A state may not exclude a foreign corporation for non-compliance with a state-imposed condition contrary to the tenor of the Constitution.

It is submitted that the reservation to the state of the power to exclude at will all or specific classes of corporations is desirable. The social order and public policy of a state may well be affected and disturbed by the doing of business therein by foreign corporations; and it is therefore expedient that the state retain a controlling power over such prospectively adverse factors. But a state should not be permitted to discriminate in the matter of inclusion or exclusion between individual corporations; and such indiscrimination may ultimately be compelled by the equal protection of law clause when the probable further extension of the conception of “person within the jurisdiction” occurs.87

V. THE UNREALISM OF THE RESTRICTIVE THEORY 79

Much of the inconsistency and confusion existing in the law, both past and present, of foreign corporations may be traced to the restrictive theory and its idealistic and unreal conception of a corporation. Psychologically, the theory is the product of an age that regarded corporations, then created by special charter, and commonly associated with monopoly and privilege, with fear and distrust. Theoretically, the view is bottomed on the classical concept of a corporation as an intangible fiction of the law. A view which thus regards the corporation solely as an abstraction overlooks the more

87 See supra p.
79 This and the section following are by way of conclusion to much of the matter contained in the preceding note in (1931) 79 U. OF PA. L. REV. 655 in addition to the case discussion in this note.
visible, human group constituting the corporate entity. It is this group whose rights and duties are of social and economic significance; and the unquestioned tendency of the law in recent years has been to regard the group as the more important factor to be considered in determining the legal incidents of the corporate status, with a consequent disregard of the insulating personality.\footnote{See \textit{Wormser, Disregard of the Corporate Fiction} (1927) pp. 1-42.}

This note is unconcerned with the unabating contest over the “real” nature of a corporation, save as the courts purport to use one theory or another as a basis for the theory and law of foreign corporations.\footnote{For an excellent recent discussion of the several theories see \textit{Hallis, Corporate Personality} (1930).} To the writer, moreover, the several theories are unimportant except insofar as they explain the adjudicated cases and allow the formulation of a technique for the prediction, with probable accuracy, of decisions in future cases. To a large extent all theories of corporate existence have had their genesis in the fertile imagination of some theorist or in the opinion advanced as the reason for some decision, but not in the real \textit{rationes decidendi} of the cases. It may be more useful, therefore, to disregard the theories expounded by writers or jurists, and look upon the corporate existence as it seems to be recognized by the actual decisions of the cases.

From this viewpoint a normal corporation may be substantially contemplated as a bipartite mechanism of business. In this mechanism the more important component is the group of natural persons, the association, who have collectively united their resources and wills for the pursuit and accomplishment of some common purpose. The second element of this method of doing business is the legal personality with which the law has clothed the group for the purpose of more readily achieving results deemed socially and economically desirable. Some of these desiderata are the more effective and expeditious fulfillment of the purpose for which the corporation was created, the more convenient juristic administration of the association by contemplating it as a single legal unit rather than as an aggregate of many legal units, and the greater protection afforded outsiders dealing with the group, or affected by group activities, by allowing them to charge the association under a single, inclusive name.

Through this corporate personality, the law, for purposes of convenience, sometimes transmutes the multiple rights, privileges, powers, and immunities of the individuals comprising the corporate group into a single set of jural relations. While it is true that the legal relations of the corporation are distinct and separate from those of the members of the association, it is equally true that they have their origin in the legal relations of this human substratum enveloped by the corporate personality. It was the failure to comprehend this human source of corporate relations that led the more radical wing of that school of theorists headed by Gierke, in endeavoring to explain the genesis of these legal incidents of the corporation, to ascribe to it a
quasi-natural, quasi-organic personality. It may be convenient, therefore, to regard the corporate personality as a new sense of the association through which it enters into legal relations with an outside world. Restated, the personality is but a procedural medium whereby the group acts and is acted against as a single right and duty bearing unit.

But while it may be neither accurate nor useful to describe corporate personality as natural, it is unnecessary to decry it as fictitious. It is a creature of the law and therefore as real as other intangible legal concepts, such as domicile or chose in action. It is no less real than human personality, which is equally a creature of the law. We may therefore attribute to the corporate personality the reality common to all creatures of law, without ascribing to it either anthropomorphic or fictitious reality.

As a creature of law, the corporate personality exists, insofar as it may be said to exist, solely in contemplation of law. Conversely, whenever it is contemplated or recognized by law, it exists. Recognition of the corporate personality in a foreign state may be therefore said to result in existence therein to the same extent as similar recognition in the state of charter. A corporation therefore exists in every state wherein it is recognized as a legal unit. It follows that the doctrine set forth by the restrictive theory, that a corporation's existence is limited to the state of charter is but a meaningless formula.

Recognition of the corporate status in the foreign state, like that of any other status, will be determined by the Conflict of Laws rule prevailing therein. But comity is not invoked by the court in ascertaining whether effect shall be given the status; to make comity the measure of the recognition of foreign law would result in a surrender of the state's sovereignty pro tanto as its law was displaced by the foreign law. What the court actually does is to apply its own Conflict of Laws rule to a situation which includes foreign law and a status created thereby; it is the law of the forum and not the foreign law that governs. Whether the Conflict of Laws rule will sanction recognition, in a particular case, of the status created abroad will depend on the provisions of the Federal Constitution, the policy of the state, the interests involved, the nature of the cause, and other relevant facts, such as whether the corporation is plaintiff or defendant. Therefore the restrictive theory's remedial and concomi-

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82 See MAITLAND, INTRODUCTION TO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (1906).
83 GOODRICH, CONFLICT OF LAWS (1927) 7; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 6.
84 Take for example the case of Corporation C contracting with A in state S. C is doing business in S but has not complied with the statute requiring the appointment of an agent to accept process. If the policy of S is to protect fully its citizens in their contracts with foreign corporations, it may punish C for its noncompliance by denying it the right of access to the state courts to enforce its
tant doctrine of comity seems to be but an inaccurate and obscure mode of stating that foreign courts may and do recognize the corporate status of associations chartered in other states.

The theory also errs in its insistence on express legislative sanction as an imperative condition precedent to the judicial recognition of the foreign corporation; common law, generally speaking, allowed corporations to sue in their corporate names in the courts of foreign states even in the absence of legislative recognition. In this respect, the theory was fallaciously ideal; not actual, *ab origine*.

The theory has erred most of all in its denial of extraterritorial corporate existence and presence; is it not somewhat absurd to say that a juristic person which can be jurisdictionally present and therefore suable in a foreign state, and which is deemed, on occasions, to be a person within the state for purposes of the Fourteenth Amendment, exists and is present only in the state of charter? It may, of course, be argued that the words “presence” and “existence” as descriptive of corporate manifestation in a foreign state are used in a metaphorical or figurative sense; but it is equally true that they are used precisely in the same sense when applied to corporate functions within the state of charter. In either event, the repetition of the dogmatic phrases of the restrictive theory serves no useful purpose today; it merely obscures the true nature of the judicial process.

**VI. THE ADOPTION OF THE LIBERAL THEORY**

There are two theories known in International Law dealing with the status and capacity of foreign corporations. One is the restrictive theory the heyday of which was the nineteenth century. During this era it was advocated by many great jurists including Laurent in Belgium, Mancini and Bianchi in Italy, Weiss in France, and Taney, Field and perhaps Wharton in America.
But this theory, nurtured as it was by provincial jealousies and fears, the product of a business era which knew and understood but local and individual enterprise, was of necessity doomed by the growing collectivism and resulting internationalism of the past half century. No theory which so denied extraterritorial existence to foreign corporations and exposed them to harsh, invidious discrimination could well survive the recent increasing and expeditious intercommunication and interdependence of nations. Scientific progress made possible, and prevailing economic thought urged, such mutual communication and dependence. The law, as represented by the restrictive theory, offered sole opposition. Was it not natural, therefore, for a responsive jurisprudence, in the readjustment of these inconsonant tendencies, to discard and displace the restrictive theory?

Consequently there arose at the end of the nineteenth century what is today known as the liberal theory. Briefly expressed, it demands for the foreign corporation recognition of its civil status as of right. It concedes the power of the state to exclude the foreign corporation from doing business therein, i.e., from exercising its functional capacity; but if the privilege of doing business is granted, equality and protection should follow, it is held, as of course.

A number of varying arguments have been presented by its advocates. It is said that in the realm of international law, there is no essential difference between natural and juristic persons. Legal personality is always a creature of law and conferred equally upon natural and juristic persons; therefore why differentiate? But if the reason for extending to one a personal status everywhere is the fact of naturalness, is it not also true that beneath the corporation is a substratum of natural associates who are the real persons in interest? Furthermore, it is maintained that the individuals comprising the corporation acquire a “vested right” in the corporate personality, and this right is as much entitled to protection as other acquired rights. It is also argued that the will is the basis of all jurisprudence and the origin of personal status; and a group of persons operating as a unit in the executing of a common purpose has a distinct will of its own which is entitled, like any other will, to universal recognition and personification. Through the medium of these arguments the advocates of the liberal theory claim as of right universal personality for the foreign corporation.

But a distinction is made between such civil status and the capacity to do business. This is pointed out clearly by Young:

“They have two functions to perform. On the one hand they can sue and be sued, contract and own property. These are their civil capacities (Rechtefähigkeit). On the other hand they can educate, heal the sick, insure lives, or mine gold. This we may call their capacity to discharge their functions, or functional capacity (Zweckthätigkeit). There is nothing in the nature

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83 See Young, loc. cit. supra note 85.
of a juridical person to prevent it from exercising the former without exercising the latter." 94

Therefore, since the exercise of the functional capacity of the foreign corporation may affect, as pointed out above, the social interest of the state, it should be controlled by the state and may therefore be forbidden. But these same considerations of policy, as demonstrated in a preceding note, 95 do not apply to the bringing of proper suits in the courts of foreign states, and therefore the power to sue should be unabridged. Included, too, in the recognition of civil status, according to continental writers, is the privileging of all acts short of doing business, such as the making of a casual contract.

Although the state may exclude the corporation, it must grant it a certain measure of equality if it permits its entrance into the state. As Henderson has said:

"Not only civil recognition, but a certain degree of equality of treatment is called for by the adherents of the liberal system. The general principle of international law which accords equality of civil and commercial rights to foreigners is as applicable to corporations as to individuals. If freedom of incorporation prevails within the state, for given purposes, free access to foreign corporations for the same purposes and subject to similar restrictions follows as a necessary legal consequence. The commercial corporation . . . is looked upon as a cosmopolitan citizen transcending legal boundaries." 96

During the past thirty years most writers on International Law have advocated the liberal theory. Von Bar 97 in Germany, Fiore 98 in Italy, Pillet 99 in France, Westlake, 100 Young, 101 and Dicey 102 in England, and Henderson 103 in America have all recognized it as a more socially useful doctrine. A recent study of the position of foreign corporations in International Law reveals that today practically all of the more important commercial nations accord to foreign corporations a recognition and equality of treatment closely approximating the rights conferred under the liberal theory. 104

94 Ibid. at 46.
95 Note (1931) 79 U. of Pa. L. Rev. 956, at 964.
96 Henderson, op. cit. supra note 3, at 6.
97 PRIVATE INTERNATIONAL LAW (Gillespie Translation, 2d ed. 1892) § 104.
98 DIRITTO INTERNAZIALE PRIVATO (3d ed. 1888) § 317 et seq.
99 PERSONNES MORALES EN DROIT INTERNATIONAL PRIVE (1914) § 30 ff.
100 PRIVATE INTERNATIONAL LAW (5th ed. 1912) § 305.
101 Loc. cit. supra note 83.
102 CONFLICT OF LAWS (3d ed. 1922) 520.
103 Henderson, op. cit. supra note 3, c. 10.
It is the thesis of this note that the law of foreign corporations is today uncontrolled by its alleged doctrinaire basis, the restrictive theory. *Per contra*, the analysis herein contained of recent cases has demonstrated, it is believed, that the jural relations now existing between state and foreign corporation are those advocated by the liberal theory, that is, the recognition as of right of the corporation’s civil status, and equality in the exercise, if privileged, of its functional capacity. A previous note has shown that the most important consequence of civil recognition, the power of a foreign corporation to bring proper suit in state tribunals, has been upheld by the Supreme Court.\(^{105}\) Included in such recognition of civil status, if we are to accept the classification of continental jurists, is the privilege of doing all acts short of what is termed doing business;\(^{106}\) and the writer knows of no case establishing this privilege. The question however is chiefly academic and may never arise since state statutes in general purport to control or prevent only acts constituting doing business.\(^{107}\) And this note has indicated the measure of equality a corporation, once admitted to the foreign state, may demand and enforce. The writer cannot accept as valid, however, the philosophical bases alleged as a true and rational foundation for these legal relations. Nor does he believe there exists any quality inhering in the nature of a foreign juristic person which entitles it to such recognition or equality. Rather does it seem that the results have been forced by considerations purely pragmatic; the jural measure has been expediency and not metaphysics.

It is submitted that the reiteration of the dogma of the restrictive theory in the face of present day decisions unquestionably based not on the abstract rationalism of the theory, but rather on a not uncritical empiricism, is but a striking illustration of the power of ritual over reason. Such retention, in judicial opinion, of the theory’s archaic metaphysics hampers and obscures the progress and understanding of the law. But social expediency is too vague, too changeable, to constitute of itself the single *ratio decidendi* for such vital and far-reaching questions; and the resulting uncertainty and unpredictability of decision may prove a deterrent to commercial enterprise. The application of pragmatic standards, however, may result eventually in a coherent body of law sufficiently plastic to do justice in individual cases, yet certain enough to insure the predictability, with probable accuracy, of future adjudications.

*W. B. R.*

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\(^{105}\) Note (1931) 79 U. of Pa. L. Rev. 956, at 962.

\(^{106}\) See Young, *op. cit. supra* note 85, at 47.

\(^{107}\) See G Fletcher, *op. cit. supra* note 43, c. 65, § 13.