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JURISDICTION OF MARYLAND COURTS OVER FOREIGN CORPORATIONS UNDER THE ACT OF 1937

By G. KENNETH REIBLICH*

In the Laws of 1937, Ch. 504, the Maryland legislature made an extensive revision of the corporation laws with reference to the assertion of jurisdiction of the Maryland Courts over foreign corporations. The new statute eliminates certain provisions of the old law; consolidates certain features concerning domestic and foreign corporations; enlarges upon the means of service formerly allowed; and makes more explicit in several instances, and expands definitely in others the jurisdiction that may be exercised over foreign companies. In doing this, however, the law may encroach upon territory already constitutionally closed by United States Supreme Court decision. In some instances, it enters undiscovered, or at least unclaimed regions of doubtful constitutionality. In one respect it may fail to provide completely for what it seeks to attain. This article accordingly devotes itself to a careful analysis of the law to determine what it seeks to accomplish by way of allowing judicial jurisdiction over foreign corporations, and what are the salient constitutional questions raised thereby.

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This article confines itself to the problems of judicial jurisdiction raised by the new statute. It should be observed, however, that Ch. 504 made substantial changes in other phases of the Maryland corporation law. For a discussion of these changes, see Myerberg, Revision of the Maryland Corporation Law, The Daily Record, Oct. 15, 1937. Also, on the phases of the law's validity, see the two opinions of the Attorney General in The Daily Record, Sept. 10, 1937, and Nov. 10, 1937. An analysis of the qualification and jurisdiction provisions of the statute appears in note (1938) 38 Col. L. Rev. 1090.

2 Md. Laws 1937, Ch. 504, Sec. 3. The chief sections dealing with jurisdiction that were repealed without any form of re-enactment were: Art. 56, Sec. 162; and Art. 73, Sec. 31 (dealing respectively with service on telegraph and express companies and service on the Adams Express Co.); cf. the new statute, Md. Laws 1937, Ch. 504, Sec. 124.

3 Compare the old and new sections of the Code covered by Md. Laws 1937, Ch. 504, Sec. 4; or see Myerberg, op. cit. supra note 1.

4 The present notice provisions are discussed infra note 107. They can be compared to the Restatement, Conflict of Laws, Maryland Annotations, Sec. 92 (1937), prepared prior to the new statute. Also, cf. Myerberg, op. cit. supra note 1.
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ANALYSIS OF THE PROBLEM—SECTION 118

What the law seeks to accomplish by way of allowing judicial jurisdiction is set forth as the new Section 118 of Maryland Code, Article 23. It reads:

"118 (a) Every foreign corporation doing intrastate or interstate or foreign business in this State shall be subject to suit in this State by a resident or non-resident of this State on any cause of action arising out of such business and on any other cause of action.

"(b) Every foreign corporation which has heretofore done or hereafter does intrastate or interstate or foreign business in this State shall be subject to suit in this State by a resident or non-resident of this State on any cause of action arising out of such business, whether or not such foreign corporation has ceased to do business in this State.

"(c) Every foreign corporation shall be subject to suit in this State by a resident of this State or by a person who has a usual place of business in this State on any cause of action arising out of a contract made or liability incurred, within or without this State, if when such contract was made or such liability was incurred such foreign corporation was doing intrastate or interstate or foreign business in this State, whether or not such foreign corporation shall have ceased to do business in this State.

"(d) Every foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business in this State on any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State."

The jurisdiction asserted here breaks up readily into three parts: (1) a general jurisdiction to be asserted over all foreign corporations "doing business" in Maryland, regardless of where the cause of action arose, and regard-

\* Md. Code (1924) as amended, Laws 1937, Ch. 504. Future references to the statute are to the law as amended in 1937, unless the contrary is indicated.
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less of where the plaintiff is a resident;⁶ (2) a continuance of such jurisdiction after the corporation has ceased to do business in Maryland, as to causes of action arising out of business done in Maryland, or in favor of Maryland residents and others with a usual place of business in Maryland;⁷ (3) jurisdiction for any cause of action arising out of any act done in Maryland, whether or not the corporation is regularly doing business, if plaintiff is a resident or has a usual place of business in Maryland.⁸

Each of these parts raises certain distinct (although at times over-lapping) constitutional questions, of possible “due process” or “commerce clause” objection. And, with reference to each, the answer may be affected by whether or not the corporation has qualified or registered (and appointed a resident agent for receipt of service) as required by section 119 of the law. Accordingly, discussion is divided so as to indicate as clearly as possible whether the provisions of each major part of section 118 may violate either the due process clause or the commerce clause with reference to either the qualifying or the non-qualifying corporation. After that, and supplementary to it, attention will be given to the notice provisions of the statute, the validity of which should be generally the same for each of the phases of jurisdictional power discussed. They would seem to be constitutional as far as they go, but they possibly fail to provide an appropriate means of service with reference to the third class of jurisdiction mentioned earlier.⁹

**General Jurisdiction, Sec. 118(a)**

Sec. 118(a), Due Process Objection, Qualifying Corporation

The Maryland statute requires the appointment of a resident agent for receipt of service of process as a pre-

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⁶ Subdivision (a).
⁷ Subdivisions (b) and (c). This would seem to be the primary purpose of these subdivisions. However, because of their wording they might be construed to cover also specialized instances of the assertion of jurisdictional power while the corporation is still within the state; see infra circa note 81.
⁸ Subdivision (d).
⁹ *Infra*, discussion of Secs. 105-109, circa note 107.
liminary to "qualification" for the foreign corporation engaged in intrastate business or "registration" for the corporation engaged in interstate business. This provision, when coupled with the notice provisions allowing for service where such resident agent has not been appointed, immediately suggests that the provisions of section 118 can apply: (1) to jurisdiction asserted over corporations that have qualified and appointed the required agent; or, (2) to corporations that have ignored section 119 and have not appointed the agent.

This distinction between the qualifying and non-qualifying corporation might be eliminated by a construction of the statute to the effect that compliance with section 119 would not be deemed a consent to a jurisdiction not other-

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10 Sec. 119. Space has not permitted in this article a complete discussion of the problem of whether the mere requirement of "registration" (as such) imposes an unreasonable (and hence unconstitutional) burden on interstate commerce. The differentiation from "qualification" was an attempt to indicate that the law did not mean to subject the corporation engaged in interstate business to the same extent as one engaged in intrastate business. However, the only difference apparent on the face of the law is that "registration" does not require the filing of a charter or the payment of the tax attached to "qualification". Both "qualification" and "registration" require the appointment of a resident agent for receipt of service and consequently submission to jurisdiction as allowed in Sec. 118. The same penalties attach to failure to "register" as to "failure to qualify". While it is admitted that the mere fact of requiring "registration" and the consequent maintenance of an agent for receipt of service might of itself be burdensome, it is believed that in many instances this would not be true unless the jurisdiction allowed for by service on such agent were burdensome. To that extent the material discussed subsequently in the text of this article is important to consider in determining the validity of the "registration" provision. It would seem that the same approach should be taken to determine the validity of the sanctions imposed by the law, Secs. 121-122.

This approach, in weighing heavily the purpose of registration and of the penalties for non-registration in order to answer the problem of their validity as applied to corporations engaged solely in interstate commerce, emphasizes the facts, along with the words, of cases such as Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 66 L. ed. 239, 42 S. Ct. 106 (1921); and Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 S. Ct. 57 (1914). However, the latter case indicates that the penalty provision of Sec. 121 (c) when coupled with Secs. 118 and 119 may be inapplicable to a corporation in interstate business, unless Sec. 118 is interpreted much more narrowly than it reads. Cf. infra circa notes 75, 79. This is predicated upon the fact that the jurisdiction provisions of Sec. 118 are too broad as applied to the corporation engaged in interstate commerce and not that every requirement of "registration" as such is bad. This is further reason for greater segregation of the types of jurisdiction covered in Sec. 118 as suggested from time to time in this article. For more detailed consideration of the problem here discussed, see: Myerberg, op. cit. supra note 1; and note (1938) 38 Col. Law Rev. 1060.

11 Secs. 105 (b), (c), (d), as amended 1937.
wise present. Such a construction has been given by the Attorney General. But under the cases to date, compliance with the qualification sections of such a law has been taken to be consent to the jurisdiction provisions. Because such a construction would not be impossible here, this article segregates the qualifying from the non-qualifying corporation.

As to the qualifying corporation, the prevailing present opinion would be that the provisions of the Maryland law are entirely valid as far as the "due process" objection is concerned, even though qualification is taken to be consent to jurisdiction. In such case, jurisdiction is said to rest upon the express consent of the foreign corporation and may be asserted as broadly as the law allows. This rests mainly upon the case of Pennsylvania Fire Insurance Co. v. Gold Issue M. & M. Co., where, under a statute not clearly applying to all causes of action, the state courts interpreted the law as covering causes of action arising outside as well as within the jurisdiction. The Supreme Court of the United States, in sustaining this construction in a case where suit was brought on a cause of action arising outside of the state and over the objection of a foreign corporation which had appointed the superintendent of insurance its agent as required by the law, said:

"The construction of the Missouri Statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such case, there would be equally little doubt. New York, L. E. & M. R. Co. v. Estill, 147 U. S. 591, 37 L. Ed.

11a Supra note 1.
12 Restatement, Conflict of Laws (1934), Sec. 91; Goodrich, Conflict of Laws (2nd ed. 1938), Sec. 73; Beale, Conflict of Laws (1935), Secs. 89.4 91.1.
292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Other statutes have been construed in a similar way. The Maryland statute calls for no construction, but is explicit on its face in extending jurisdiction to suit by "a resident or a non-resident" to causes of action arising out of business done in Maryland or to "any other causes of action". The only problem is whether the Pennsylvania v. Gold Issue case, as is generally assumed, excludes all possibility of attack by the qualifying corporation.

A possible basis of attack would seem to lie in some future application of the doctrine of unconstitutional conditions. This doctrine may be briefly stated that although a state has power to exclude the foreign corporation altogether, it may not make the surrender of a constitutional right the condition of entry and continuance within the state. Presently, in considering the jurisdiction that may be asserted over the non-complying corporation where power must rest solely on "doing business," we shall observe certain cases that have said (and have been construed to hold) that jurisdiction is limited by the "due process" clause to causes of action arising within the state. Could it not be argued that, to the extent this is true, there is an unconstitutional condition imposed in making a consent to any broader jurisdiction a condition of entry

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to do business? There seems an inconsistency, otherwise, between the "due process" objection as applied to jurisdiction based on doing business and jurisdiction rested on consent as a result of the appointment of an agent.

However, it is believed that the Supreme Court is more likely to extend the power resting on "doing business" than to contract the "consent" jurisdiction already enunciated very clearly in its decisions. To the extent this is true, section 118 (a) may be accepted for the present as valid as to the corporation engaging in intrastate business that has assented to its provisions by the appointment of an agent under section 119.

Sec. 118(a), Due Process Objection, Non-Qualifying Corporation

As applied to corporations which have not complied with the qualification provisions of section 119, nor consented in any other manner to the application of section 118, the provisions of the law raise several constitutional questions. Subdivision (a) emphasizes three separate factors: (1) "doing business," (2) the nature of the cause of action (as arising out of business done or otherwise), (3) the party plaintiff's being "resident or non-resident", each of which may have a definite constitutional significance.

"Doing business" is clearly necessary because it is generally accepted law that in the absence of express consent, the foreign corporation may not be sued except in the state where it is doing business. This has been said...

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16 In speaking of the doctrine of unconstitutional conditions in an "equal protection of the laws" case, the Court, in Power Manufacturing Co. v. Saunders, 274 U. S. 490, 496, 47 S. Ct. 678, 71 L. ed. 1165 (1927) used language broad enough to support this. It said: "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a state does not thereby become obligated to comply with, or estopped from objecting to, any provision in the state statute, which is in conflict with the Constitution of the United States." But cf. Washington v. Superior Ct., 289 U. S. 361, 53 S. Ct. 624, 77 L. ed. 1256, 89 A. L. R. 653 (1933), as indicating possible reluctance to apply the doctrine to a service situation.

17 Cf. articles infra note 44.

18 Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189, 35 S. Ct. 509, 59 L. ed. 910 (1915); Restatement Conflict of Laws, Sec. 89; I Beale, op. cit. note 12, Sec. 83.
to call for more than the doing of a single act (at least when a general jurisdiction for all purposes is asserted)\(^{19}\) both by the Supreme Court of the United States\(^{20}\) and by the Maryland Court of Appeals.\(^{21}\) The former has emphasized the importance of "doing business" as a jurisdiction basis in cases denying jurisdiction because an officer or agent is casually within the state,\(^{22}\) or resides within the state\(^{23}\) or has come into the state to attend to an affair of the corporation.\(^{24}\)

Just how much need be done in the state before the concept is satisfied presents more of a problem. The Supreme Court has attempted definition, saying that the corporation is subject to the jurisdiction of the state if it is doing business "such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and the laws of the district in which it is served,"\(^{25}\) or elsewhere, that it is business carried on by the corporation "in such sense as to manifest its presence."\(^{26}\)

A survey of all the decisions,\(^{27}\) can result in no better conclusion than that this term, when used as a basis for a general jurisdiction over the foreign corporation, describes some consistent course of activity in the state, or some single act looking forward to continued activity there.\(^{28}\) When such act or activity is of such character that the Court feels it is reasonable to assert jurisdiction (in the absence of express consent or any basis other than the activity) the

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\(^{19}\) As distinguished from a jurisdiction specially limited to a cause of action arising out of the act done to be discussed with reference to Sec. 118 (d), infra.


\(^{28}\) Restatement, Conflict of Laws, Sec. 167 (a).
Court says the corporation is "doing business"; otherwise, not "doing business". This latter approach of reasonableness would seem to be a proper recognition of the "due process" character of the problem although it has received little explicit acceptance in judicial decision. Judge Learned Hand, in *Hutchinson v. Chase and Gilbert*, comes closest to recognition of it, where, in concluding his argument, he says:

"... But a single transaction is certainly not enough whether a substantial business subjects the corporation to jurisdiction generally, or only as to local transactions. There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home.

"This last appears to us to be really the controlling consideration, expressed shortly by the word 'presence', but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts."

and later in his argument:

"None of this, and not all of it, seems to us a good reason for drawing the defendant into a suit away from its home state. In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no vade mecum."

It might be noted that the term "doing business" is a relative term and might require less activity within the state so as to support service of process, than to render the corporation amenable to taxation, or to the qualification

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29 45 Fed. (2d) 139 (1930); see also: Farmers & Merchants Bank v. Federal Reserve Bank, 286 Fed. 506 (1922).
The extent to which this variability should exist would seem to depend upon the extent to which there are substantial variations in the purpose for which the term is used. In a recent commentary on the Maryland statute here in question, the opinion is expressed that there is no substantial difference in the purpose of the qualification section 119, so as to justify a different definition there from that used for section 118.81

"... The apparent reason for a stricter interpretation of the phrase for purposes of qualification is the greater harshness in excluding from the state a corporation not engaged in regular activities because it will not qualify. But since the principal statute provides for no exclusion even of the corporation doing intrastate business, and since its requirement for qualification is primarily, and that for registration is solely, for the purposes of facilitating service, it would seem logical that no greater test of "doing business" should be applied to Section 119 requiring a resident agent than to Section 118 providing for the assumption of jurisdiction."

This seems to be sound reasoning. That it may be a correct prophecy of the interpretation to be expected under the Maryland Statute could be suggested from a recent case. In Lime Co. v. Wolfenden82 the Court of Appeals indicated a certain fixedness for the concept "doing business" when it accepted as authoritative in the interpretation of the local venue statutes the Supreme Court's interpretation of "doing business" as a basis of jurisdiction to support service of process as established in People's Tobacco Co. v. American Tobacco Co.83

In whatever fashion, however, one solves the problem of what amounts to "doing business" as a jurisdictional concept under holdings to date, it may be assumed that the inquiry with reference to section 118(a) of the Maryland Statute is solely for the purpose of delimiting its intended application. The fact that the terms "regularly doing

81 (1938) 38 Col. L. Rev. 1060, 1066.
82 171 Md. 299, 303, 188 Atl. 794 (1937), noted (1937) 1 Md. L. Rev. 165.
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business," as used in the old law, have been reduced in the present section to "doing business" would not seem to effect any change in the corporations to be covered thereby. The cases interpreting the old statute indicated an intention in the statute to assert power as fully as the limits of due process of law allowed. The new statute could go no further if it intended to. Its continued use of the term "doing business" would seem to be an indication of an intent to stay within the meaning of the concept as defined by the Supreme Court for purposes of assertion of jurisdictional power.

Not so, however, as to the second factor: i.e. where the cause of action arose. Although no limitation has appeared in the Maryland decisions, and the prior statute in its terminology expressed none, there is a strong current opinion that the United States Supreme Court decisions preclude the assertion of jurisdiction, based merely upon "doing business," unless such jurisdiction is limited to causes of action arising within the state. Such is the assertion of the Restatement of Conflict of Laws and the view of Professor Beale in his recent work on the same subject. Subdivision (a), however, is worded so as seemingly to include causes of action arising outside of Maryland as well as those arising out of business done in Maryland. An inquiry, therefore, as to the basis for the conclusions ac-

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84 Cf. contra, note (1938) 38 Col. L. Rev. 1060, 1066.
85 Central of Georgia R. R. Co. v. Eichberg, 107 Md. 363, 68 A. 690, 14 L. R. A. (N. S.) 389 (1908); for other cases, Restatement, Conflict of Laws, Maryland Annotations (1937) Sec. 167.
86 The Attorney General has expressed such an opinion, The Daily Record, Nov. 10, 1937; op. cit. supra note 1.
87 Hagerstown Brewing Co. v. Gates, 117 Md. 348, 83 Atl. 570 (1912); Restatement, Conflict of Laws, Maryland Annotations (1937), Sec. 392 (c); Md. Code, Art. 23, Sec. 118.
88 Such was accepted as law in note (1938) 38 Col. L. Rev. 1060, 1068, in a comment on the Maryland statute; also infra notes 39, 40.
89 Sec. 92.
91 Sec. 118, of course, could be construed as applying only to corporations that had complied with Sec. 119. That would seem inconsistent, however, with the service provisions of the law which make provision for service on the non-qualifying as well as the qualifying corporation. Also, it would mean that the corporation doing business in Maryland in violation of Sec. 119, would not be subject to the process of the Courts. Such construction is unlikely. There could be also a construction that the words "and on any other cause of action" meant to cover only those arising in Maryland; but, this does not seem likely, nor is it consistent with subdivision (c).
cepted by the Restatement of Conflict of Laws is pertinent to a determination of how far the Maryland law may operate against the non-qualifying corporation as to causes of action arising outside of Maryland.

*Old Wayne Life Ass’n. v. McDonough* and *Simon v. Southern Railway Co.*, are the cases taken as supporting the doctrine that if the foreign corporation has not complied with the state statute, a suit can be valid only as to causes of action arising within the state. Definitely, such a statement of their holding goes beyond their facts and is not a necessary consequence of their reasoning.

In the *Old Wayne* case, suit was brought in Indiana upon a Pennsylvania judgment against an Indiana insurance company. The Indiana company contested the validity of the judgment as violating the due process clause of the fourteenth amendment and ultimately was sustained in this contention by the Supreme Court of the United States. The Pennsylvania judgment was obtained in a suit on a policy of insurance issued in Indiana upon the life of a Pennsylvania resident for the benefit of Pennsylvania residents. Service in the suit was on the State Insurance Commissioner under the Pennsylvania Statute which provided for service on a corporation designated agent or on the insurance commissioner if the corporation had not appointed an agent. The old Wayne Life Ass’n. did business in Pennsylvania, but had not qualified by appointing an agent for receipt of service. The statute did not require the Insurance Commissioner to send notice of any kind to the company and it was not shown that any notice was sent. It is apparent that this want of provision for any kind of notice could have been the real basis for the Supreme Court’s due process holding.44

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42 204 U. S. 8, 27 S. Ct. 236, 51 L. ed. 345 (1907).
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It is very possible that a court working on a theory of jurisdiction based on implied consent resulting from doing business might be willing to apply it to causes of action arising within the state even though notice were lacking (it could be argued that this lack resulted solely from the Company’s failure to exercise its privilege to appoint); would be unwilling to imply such consent as to causes arising outside the state (thus explaining the wording of the above opinion along those lines); and yet be willing to support jurisdiction as to all causes if adequate notice is provided for (as in the Maryland law). A reading of the opinion, with this in mind, will reveal nothing that necessarily calls for the broader interpretation usually given to it. The case can also be explained away on its facts, as being nothing more than a holding that the statute involved did not cover the type of jurisdiction asserted.  

The facts of the Simon case were not substantially different from those in the Old Wayne case, except that the cause of action arose in tort. Suit was brought in Louisiana against a Virginia corporation which had not complied with the Louisiana statutes requiring the appointment of an agent for receipt of service, and a default judgment was obtained for damages arising out of a railroad accident outside of Louisiana while the injured party was traveling on a ticket from Selma, Alabama, to Meridian, Mississippi. Service was made on an assistant to the Secretary of State under the statute providing for service on the Secretary of State in such case. No provision was made for the Secretary of State to send notice to the corporation, and the corporation received no notice of the suit until after the judgment was rendered. It then brought a proceeding in the United States District Court for Louisiana to enjoin the enforcement of the judgment and ultimately the United States Supreme Court affirmed the issuance of such injunction.  

45 Farrier and Foster, both supra note 44.  
46 The language of this case in referring to the Old Wayne case is particularly strong in leading to the conclusion adopted by Mr. Beale and the Restatement. The court said: “But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the
Read carefully, this case, like the Old Wayne case, can be limited to being a decision based on the inadequacy of the notice provided for. With the holdings of both cases so limited, the law could be analyzed as being that due process of law does not prevent a state from asserting jurisdiction as to any cause of action against a foreign corporation, with "doing business" within the state as the base of jurisdictional power, so long as appropriate notice is provided for.

The problem has not been presented directly to the United States Supreme Court since the Old Wayne and Simon cases, although there is one citation of them strongly supporting the interpretation followed by the Restatement.

On the other hand, there are certain earlier United States Supreme Court cases and some state decisions which would lend support to the interpretation of the Simon and Old Wayne decisions as being notice decisions with jurisdiction allowable for all causes based merely on "doing business", if the notice given to the corporation is adequate. Barrow Steamship Co. v. Kane, Railroad Co. v. Harris,60 and New York L. E. & M. R. Co. v. Estill51 seem to recognize, on their facts at least, that jurisdiction may be asserted over a foreign corporation based solely upon its "doing business" within the state even though the cause of action arose elsewhere, if the service is on a corporate official. The New York Court of Appeals, with Judge Car-
dozo writing the opinion, held the same, making the service on the corporate official a basis of distinction from the *Old Wayne* and *Simon* cases.\(^{52}\) The result of these cases and other state cases holding similarly\(^{58}\) would seem to be sound, but it would not seem that they should be distinguished on the ground stated.

The distinction lies between good and bad notice. "Doing business" is the basis of jurisdictional power and must be present in all cases to support the jurisdiction in the absence of corporate consent; but, if present it will be sufficient for all causes if adequate notice is given. This notice is adequate if service be made on a responsible corporate official. It is obviously inadequate if made on a statutory designated state official without provisions for him to forward notice (the *Simon* and *Old Wayne* cases). It would seem to be adequate if made on a statutory designated official if the statute requires adequate steps to be taken by him to notify the corporation.\(^{54}\) The Maryland statute provides for this\(^{55}\) and would seem to be good, if the *Simon* and *Old Wayne* cases can be avoided as above indicated. Otherwise, section 118 (a) must fail to the extent that it seeks to apply to causes of action arising outside of Maryland when suit is brought against a foreign corporation that has not appointed a resident agent.

Because so much hinges upon the adoption or rejection of the view of Professor Beale and the Restatement as to the effect of the *Old Wayne* and *Simon* cases, a word might be said as to a further theoretical justification for disposing of these cases as notice cases, one which is contrary to the Beale interpretation.

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\(^{55}\) See discussion of Secs. 105-109 *infra* circa note 107.
The limited construction of Professor Beale gets a result inconsistent with the rules for assertion of jurisdiction over a foreign corporation that has qualified. That is, if the corporation complies with the qualification statutes of a state, it may be subjected to suit for any cause of action; but if it does business in violation of the statute without so qualifying, it may be subjected to suit only as to causes of action arising out of business done within the state. It is hard to conceive of a good reason why the non-complying corporation should have this premium placed upon its misbehavior. The argument that where there is compliance there is express consent (but not otherwise), overlooks the view, accepted by the Restatement of Conflict of Laws, that consent may be by acts or by words.

If a state statute, in providing for suits against foreign corporations doing business within the state, says that the doing of business shall be construed to be an assent to its terms, is there any good reason for saying such doing of business is not an express consent to the type of service provided for and for any cause of action provided the service is reasonably calculated to give notice? Being fundamentally a question of whether a corporation is deprived of its property without due process of law, should not the same criteria be used here as would be used in the situations of so called express consent cases where the corporation appoints the agent? Is not the question the same in both instances; namely, whether it is an unconstitutional condition of entry to do business to subject the foreign corporation to the jurisdiction of the courts for all purposes?

Or, pursuing another line of approach, in terminology already used by the courts, could it not be said the corporation doing a regular course of business in the state is "present" there and that this provides a basis of jurisdiction similar to that provided by the presence of an individual. Hence, if proper notice is given, jurisdiction is

56 Supra notes 12, 13 and 14.
57 Restatement, Secs. 81, 90.
58 Md. Code, Art. 23, Sec. 117 (as amended Laws 1937, Ch. 504) so provides.
59 Supra notes 15-17.
appropriately exercised in any transitory cause of action regardless of where it arose. If using the concept “presence” bothers anyone who cannot conceive of a corporation as being “present” in the sense that an individual is, eliminate that method of description. Recognize that what one is looking for is a basis of jurisdictional power in the state to subject the corporation to the processes of its courts. Should it be any different than the contact necessary for the state to legislate effectively with regard to such corporation? Obviously not! Yet, it is recognized that the state may pass and enforce laws requiring that such foreign corporation doing business within the state appoint an agent for receipt of service for all causes of action and may attach penalties for non-compliance. If such legislative power is present, the basis for it is the doing of business within the state.

It would seem that such doing business, regardless of what it is called ("consent", "presence", or something else) can logically be conceived of as creating a base of jurisdiction or a control element broad enough for the state to confer jurisdiction on its courts regardless of where the cause of action arose. If the procedure (notice) is in compliance with due process of law, the state’s exercise of jurisdiction should be valid for all purposes. We acknowledge such power over an individual on the basis of domicil or citizenship regardless of how little the individual is physically present within the state.

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60 Goodrich, op. cit. supra note 12, 176 reasons that since an individual is “present” only where he physically is and cannot be present in a state because an agent acts there, the presence theory is weak for a corporation. This, likewise, is answerable by the next few sentences in the text above.


62 Restatement, Conflict of Laws (1934) Secs. 79, 80. The Maryland courts have recognized this type of jurisdiction in enforcing foreign judgments based thereon (Restatement, Conflict of Laws, Maryland Annotations, Secs. 79, 80). But there is no general statutory provision (nor have the courts proceeded in absence of statute) for a personal jurisdiction in law or equity after substituted service on a resident or citizen of Maryland (Code provisions such as Art. 16, Sec. 134, 72 etc., seem to be generally recognized as limited to proceedings in equity in rem). It is submitted that it would be desirable to have specific provision for personal judgments at law or in equity after substituted service on resident defendants who could not be served personally after reasonable effort to reach them. Any such
carrying on a systematic course of business any less significant than that necessary for one of these two bases with reference to individuals? It would seem not, and it is believed that for the sake of simplicity and consistency, the conceptualism of treating corporate "presence" the same as individual "presence" is justifiable.

It might well be argued that the State, in pursuance of sound policy, should limit the jurisdiction it asserts over causes of action arising outside of its borders so as not to subject the foreign corporation to useless burdens. This seems to be the justification offered by Professor Beale for restricting jurisdiction based on the doing of business to causes of action arising within the state, and is implicit in the reasoning of the Simon case.63 It is submitted that this argument is one which is more appropriately directed at the extent to which the state should exercise its power than to the existence of that power. It well might be a reason why a state, in a liberal application of the doctrine of forum non conveniens64 should refuse to exercise its admitted jurisdiction, rather than argument that such jurisdiction is altogether lacking. Certainly, it is an argument that has found no force as applied to natural persons. No one suggests that the inconvenience to the defendant precludes the assertion of jurisdictional power in the courts of a state over an individual who is present in the state at the time of service, no matter how casual the presence happens to be. There is no greater reason for limiting the power when exercised as to a foreign corporation.

statute, however, should provide for an attempt to use first the best forms of substituted service (copy with member of family at last address, registered mail return receipt requested, etc.) with service by publication only as a last resort (cf. McDonald v. Mabee, 243 U. S. 90, 37 S. Ct. 343, 61 L. ed. 608, L. R. A. 1917 F. 458 (1917).

63 Also in Judge Learned Hand's opinion, supra note 29.

64 This doctrine, not developed in Maryland, for such jurisdiction cases, is treated in American decision and comment; Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619 (1903); Heine v. N. Y. Life Ins., 45 Fed. (2d) 426 (1930); Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law (1929) 29 Col. L. Rev. 1. It reposes discretion in the court to refuse to exercise an admitted jurisdiction if on the facts of a given case there is no sufficient reason for suit at the forum. It is suggested that it might be an appropriate inclusion in a statute with as broad an application as Sec. 118.
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Whatever the theoretical grounds in support of or against the view as adopted by the Restatement and Professor Beale, whatever the holdings in the courts may indicate by numerical weight, there is a real possibility that section 118 (a), in applying to causes of action arising outside of Maryland, may violate due process. Because of this, it is suggested that the statute should have separately classified jurisdiction asserted according to where the cause of action arose, so that one bad portion of the statute would not easily drag down the whole.\footnote{Space has not permitted (and the scope of this article does not call for) a discussion of the problem of separability in a statute which on its face includes in the same wording both constitutional and unconstitutional possibilities. There is a chance, however, that such a statute would fail entirely. On this see Stern, \textit{Separability and Separability Clauses in the Supreme Court} (1937) 51 Harv. L. Rev. 76. The danger may be eliminated by the separability provision, Laws 1937, Ch. 504, Sec. 513, and it would be a difficult task to draft a comprehensive law that would completely avoid the danger.}

A question might be raised as to the effect of the third factor in section 118 (a), "resident or non-resident" plaintiff, as a due process factor. Until the present, it does not seem to have had any controlling significance in the United States Supreme Court cases and we are left largely to speculation. It would seem that if the view is adopted that jurisdiction may be asserted based merely on "doing business" and be good for all causes provided adequate notice is provided for the defendant, this factor has no constitutional significance. And, if the Restatement-Beale view of the Simon and Old Wayne cases is followed, the fact that suit is precluded where the cause of action is foreign is not helped by the fact that the plaintiff is a resident.

It would seem, though, that the residence of the plaintiff would be a definite factor in the reasonableness of the forum's hearing a suit against a foreign corporation and it might yet become a due process factor. However, under the view expressed earlier, it would seem that due process ought to allow the doing of a regular and systematic course of business as a sufficient basis of jurisdiction for any cause of action; with the residence or non-residence of the plaintiff, just as the cause of action being local or for-
eign, operating solely as a factor to determine the application of the doctrine of *forum non conveniens*.

As for the latter, though, the Maryland statute indicates no intention for its application. The wording seems to leave the courts no discretion to decline to exercise jurisdiction even though the plaintiff is a *non-resident*, the cause of action arose elsewhere, and the foreign corporation is greatly inconvenienced by suit in the forum. Yet in most such situations, there would be no good reason why the Maryland court should be burdened with the suit. The statute would express a wiser policy if the courts were given some discretion to refuse to entertain such suits, although allowed to handle them if a sound policy should demand it. Of course, the courts might act without special provision.

**Sec. 118(a), Commerce Clause Objection, Qualifying or Non-Qualifying Corporation**

When the problem is raised as to the extent section 118 (a) causes an unreasonable burden on interstate commerce, the several factors of "doing business", "residence of plaintiff", and "nature of the cause of action" all assume an immediate importance.

In the early case of *International Harvester Co. v. Kentucky* the Supreme Court indicated that the corporation, if "present" within the State, was not exempt from suit solely because it was engaged in interstate commerce. However, it was later established that the commerce clause objection was nevertheless available if the assertion of jurisdiction operated as an *unreasonable burden* on such commerce. In *Davis v. Farmers' Cooperative Equity Co.* jurisdiction was asserted in Minnesota under a statute which provided: "Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent." Suit was against the Director General

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of Railroads, as agent, for a cause of action arising in Kansas against the A. J. & O. F. Rr. Co., a Kansas Corporation engaged in interstate transportation. It did not own or operate any line in Minnesota; but it did maintain there an agent for solicitation of traffic. The cause of action was in no way related to Minnesota or with the soliciting agency located there. Holding that the Minnesota statute violated the commerce clause if applied so as to allow jurisdiction on such facts, the Supreme Court through Justice Brandeis said:

"... It may be that a statute like that here assailed would be valid, although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them. But orderly effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to ensure to carriers efficiently operated a fair return on property devoted to the public use. ... Avoidance of waste, in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce.

Essentially the same sort of "burden" holding as was involved in the Davis case, appeared in Atchison T. & S. F. Ry. Co. v. Wells. In later cases the United States Su-

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The Supreme Court has been inclined to be liberal in allowing the assertion of jurisdiction over corporations engaged in interstate commerce, against commerce clause objections, if there is some good reason why suit should be brought in the state in question—some reason sufficient to make it "reasonable", although "burdensome" to allow the suit. Citizenship of the plaintiff, cause of action arising out of business done within the state, or extensive operations in the state by the defendant, have all been held to be factors tending to make the assertion of power reasonable although the corporation engages in interstate commerce.

The latest case *International Milling Company v. Columbia Transp. Co.* summarized the cases on each side and held that an attachment in Minnesota was not an unreasonable burden under the facts of that case. The plaintiff was a Delaware Corporation, but had its principal office in Minneapolis, Minnesota. Defendant was a Delaware corporation, a carrier by water, with its principal office in Cleveland, Ohio. Its vessels traveled the Great Lakes, stopped frequently at Duluth where it had agents, a firm of vessel brokers. The plaintiff had loaded a cargo of grain on one of the vessel's of the defendant's predecessor for transportation and storage. The voyage was between Chicago and Buffalo and at one of these points or between them the grain was negligently handled with damage to the plaintiff. Suit was brought by attachment of one of the defendant's vessels while stopping at Duluth, Minnesota. Thus the court was faced with foreign plaintiff, foreign corporation defendant, foreign cause of ac-

69 The cases referred to next all use a factual approach as to what makes the burden "reasonable". For best discussion of all the cases until 1932, see Farrier, *supra* note 44.

70 Citizenship or Residence of Plaintiff and Cause of Action Arising Within the State: State of Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor, 266 U. S. 200, 45 S. Ct. 47, 69 L. ed. 247, 42 A. L. R. 1232 (1924) ("the plaintiff is a resident of Missouri that is, has a usual place of business within the state"); also, Denver & Rio Grande W. R. Co. v. Terte, 284 U. S. 284, 42 S. Ct. 152, 76 L. ed. 295 (1931). "Operating in State": Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21, 47 S. Ct. 485, 71 L. ed. 905 (1927); also International Milling Co. v. Columbia Transit Co., 292 U. S. 511, 78 L. ed. 1396, 54 S. Ct. 797 (1934). For a table showing various combinations of these factors, and an opinion as to the constitutional result of each combination, see Farrier, op. cit. *supra* note 44, 390; Myerberg, op. cit. *supra* note 1.

71 *Supra* note 70.
tion, but apparently allowed the facts of the plaintiff's principal office in Minnesota, plus the defendant's carrying on substantial activities there to sustain the argument of "reasonable" burden. Somewhere between this and the Davis case the line must be drawn.

To the extent that the Maryland statute could, on its face, catch a situation within that of the Davis case it allows for the imposition of an unreasonable burden on interstate commerce and is susceptible of an unconstitutional application. If interpreted so as to include no such set of facts, it is clearly constitutional as far as the "commerce clause" objection is concerned.

The Attorney General of Maryland has expressed an opinion that the statute was not meant to extend any jurisdiction that would constitute an undue burden on interstate commerce, and that section 118 "as amended appears to be no broader in substance than in its previous form." Such a definite prediction of constitutionality assumes that the previous form of the statute, if applied as broadly as the words allowed, was free from commerce clause objection (which at best would be doubtful). The opinion could rest upon a narrower construction of 118(a) than its words indicate and an ignoring of the special difficulties raised by 118(b) and (c), upon which there is at present little definite authority. Or, it could rest, with reference to 118(a), upon a construction that "doing business" by the corporation engaged in interstate commerce is sufficient without more to make suit against it a "reasonable burden".

While the Supreme Court cases cited above have used "operating in the state" as a factor combining with either "resident plaintiff" or "cause of action arising within the state" to overcome the commerce clause objection, no one of them has indicated that it would be sufficient of itself. Professor Farrier concludes, from state cases and lower federal court cases, that "operating in the state" has been accepted as sufficient to sustain jurisdiction against commerce clause objection even where the plain-

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tiff was non-resident and the cause of action arose outside of the forum. Mr. Myerberg accepts Mr. Farrier’s conclusion to sustain the Maryland statute. However, it should be observed that the decisions did not uniformly support Farrier’s view, and it is not necessarily correct. Also, as a due process matter the Old Wayne and Simon cases, discussed above, might preclude application of the statute unless the cause of action arises within the state. And, even if the latter is not the case, “operating in the state” sufficient to overcome the commerce clause objection might conceivably call for considerably more activity than would be necessary for “doing business” within the state so as to preclude the due process objection. The latter is not indicated by Farrier and seems to be completely overlooked by Myerberg, who uses Farrier’s term “operating in the state” as synonymous with “doing business” as used in the Maryland statute.

The difficulty, of course, lies in the fact that section 118(a) uses the same term “doing business” as a basis for the broad power asserted over both interstate and intrastate operation. To secure an interpretation of constitutional against the commerce clause objection, the subdivision might have to be construed as requiring much more business activity within the state than would be necessary to assert control over the corporation engaged in intrastate business, although control over the latter might be desirable as based on less activity. It is submitted that better draftsmanship would segregate in section 118(a) the jurisdiction asserted over corporations engaged in in-

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79 Myerberg, op. cit. supra note 1.
terstate activity from that with reference to corporations engaged in intrastate activity.

The cases have not yet raised the question whether a corporation by qualifying ("registering" under the Maryland act) under a state statute could consent (and thereby waive any right to object) to unreasonable burdens imposed on its interstate business. The closest we have to a holding is probably the case of Atchison T. & S. F. Ry. Co. v. Wells where the Supreme Court allowed the commerce clause to be asserted in the Federal courts to restrain enforcement of a state judgment obtained by default. Although the point was not argued, this is a tacit recognition that the objection was not waived because not used as a defense to the state proceeding. It might be argued from this that it could not be waived by the appointment of an agent for receipt of service. This would seem to be the purport of clear language in another Supreme Court case, decided on other subject matter, indicating that the imposition of such burden would be an unconstitutional condition not accepted by qualification. This is consistent with our earlier analysis of the due process problem. A special argument in favor of allowing the objection to be raised after qualification is that an individual (corporation) should not be allowed (by "registration" or otherwise) to waive the effect of a constitutional protection imposed for the benefit of the national transportation system and the nation at large. However,

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7 In the opinion of the Attorney General, The Daily Record, Nov. 10, 1937, the question is answered by the statement that "registration" under the statute is not meant to subject the corporation to any jurisdiction not asserted in the absence of registration, that no attempt is made "to exact from the corporation a consent to be sued in this state in actions in which it could not be sued". If the statute receives this construction when a corporation that has registered is sued and raises objection that some subdivision of Sec. 118 is too burdensome on interstate commerce, the ensuing discussion in the text is pointless. However, "registering" under such a statute is capable of being construed as a consent to the jurisdiction asserted as against "due process" objection (supra note 13) and the text is raising the quaere whether, if a similar holding should occur here, it can be effective against "commerce clause" objection.

77 365 U. S. 101, 44 S. Ct. 469, 68 L. ed. 928 (1924) and see discussion Foster, op. cit. supra note 44, 1235.


79 Supra circa note 16.
until the question is definitely determined, there is the possibility that a corporation might weaken its position by "registering" under the Maryland statute.80

SEC. 118(B) AND (C), CONTINUANCE OF JURISDICTION

Due Process Objection

Subdivisions (b) and (c), from the general set-up of section 118, seem directed mainly to the continuance of jurisdiction after the corporation has ceased to do business in the state. However, their wording is such that they apply "whether or not such foreign corporation shall have ceased to do business in this state". While this results in a definite overlapping with subdivision (a) as to suits brought while a corporation is still doing business in Maryland, it is a fortunate wording in that certain types of jurisdiction asserted in each of subdivisions (b) and (c) might stand up against constitutional objection, as applied to corporations still doing business in Maryland although failing for some reason under subdivision (a). Subdivision (b) purports to apply only to causes of action arising out of business done in Maryland, but allows for the plaintiff to be either resident or non-resident. Subdivision (c) applies to all causes of action (arising "within or without this state") if the plaintiff is a "resident" or "has a usual place of business in this State". Each has, accordingly, a definite sphere of action; each overlaps with (a) and to a certain extent with the other; but their combined effect is to assert a jurisdiction less than that allowed for in (a), except for continuing it after "doing business" ceases.

The extent to which subdivision (b) and (c) may operate is determinable, therefore, by reviewing the constitutional limitations as already discussed for (a), and considering whether the attempt to continue jurisdiction after withdrawal from the state by the corporation adds any tenable objection. As applied to the corporation which has

80 But cf. the opinion of the Attorney General, supra note 75. Observe that the question posed by the text is one of constitutionality of a broader interpretation of the statute than the Attorney General deemed likely.
qualified and appointed the resident agent, and is still doing business in Maryland, both are probably beyond due process attack.\textsuperscript{81} For the non-qualifying corporation, subdivision (b) in limiting its effect to causes of action arising out of business done in Maryland would seem to be within the "due process" limitation even under the stricter interpretation of the \textit{Old Wayne} and \textit{Simon} cases, as followed by the Restatement, unless some special significance attaches to the continuance of power after withdrawal. Subdivision (c), however, since it expressly covers causes of action arising outside of as well as within the state must meet the objections of the strict interpretations of the \textit{Simon} and \textit{Old Wayne} cases.\textsuperscript{82} If they preclude jurisdiction based on "doing business" as to causes of action arising outside of the state, then subdivision (c) fails by so much, as being in violation of due process of law, without consideration of the doubt raised by its attempts to continue power after the corporation has withdrawn.

The constitutional effect of this attempt to continue jurisdiction after the corporation has ceased to do business is not ascertainable for all purposes from the decided cases. \textit{Washington v. Superior Court},\textsuperscript{83} in the Supreme Court of the United States, would seem to be sufficient basis for the constitutionality of both subdivisions as applied to corporations which have qualified or registered as provided by section 119 (except that the possibility of commerce clause objection is not eliminated by it).\textsuperscript{83a}

In that case a Delaware corporation qualified in 1926 to do business in Washington and, pursuant to the applicable statute, appointed an agent for receipt of service. In 1929, the company withdrew from the state, ceased to do business there and was dissolved in accordance with the laws of Delaware. The appointment of the Washington agent was never revoked; but, in 1929, he removed to Cali-

\textsuperscript{81} Discussion \textit{supra} circa notes 11-17. The discussion of unconstitutional conditions would be relevant here; although \textit{Washington v. Superior Court} may be an indication of reluctance on the part of the Supreme Court to apply the doctrine to a service problem.

\textsuperscript{82} \textit{Supra} notes 38-43.

\textsuperscript{83} \textit{289 U. S. 361, 53 S. Ct. 624, 77 L. ed. 1250 (1933)}.

\textsuperscript{83a} But Cf. \textit{supra}, notes 11-17.
fornia. In 1932, an action was begun in the Washington courts naming the Delaware Company as one of the defendants and summons and complaint were served on the Secretary of State, as allowed by the Washington statute in the event of the Company's withdrawal. No notice of this was forwarded by the Secretary of State, or anyone else, to the Delaware Company. In a contest on this proceeding, the United States Supreme Court held that the Washington statute's provisions were validly applicable to a corporation which had consented thereto by its original compliance.

While there is probably a construction preference for limiting the effect of such statutes to causes of action arising within the state, it would seem to be reasonably safe to assume that the express consent resulting from qualification or the appointment of an agent will be allowed to operate as broadly as the statute calls for. The Maryland statute, particularly, since it provides for good notice and retains power only as to causes of action arising out of business done within the state, or else where the plaintiff is a resident or has a usual place of business within the state, would seem to raise little objection as applied to the consenting corporation under the decisions to date.

This being true, there would seem to be no plausible practical or business reason for refusing the continuance of jurisdiction as attempted with reference to the corporation engaged in intrastate business that has not qualified. However, there is less support for it in the decisions and it is a misfit under the generally accepted theories of jurisdiction. Professor Beale in his recent treatise says:

"If the foreign corporation has not been required to designate and has not designated a particular agent to receive service of process, and can be sued, if at all, only under a statute providing for suit against a foreign corporation by service of process upon agents of a certain sort, since 'implied consent' to be sued under

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89 Supra notes 12-17, and 84. Cf. also: Mutual Reserve Fund Life Association v. Phelps, 100 U. S. 147, 47 L. ed. 987, 23 S. Ct. 707 (1903) to the effect that the corporation may not destroy the power by withdrawing its appointment.

90 Op. cit. supra note 12; Sec. 93, 1, p. 409.
such a statute is derived from doing business in the state, the corporation no longer gives assent when it ceases to do business in the state. In such a case, therefore, the foreign corporation cannot be sued after it has ceased to do business in the state."

However, his position is not supported by the authority cited for it and would seem to be contrary to the Restatement of Conflict of Laws, which reads:

"A state can exercise through its courts jurisdiction over a foreign corporation which has done business within the state but has ceased to do business at the time of service of process, as to causes of action arising out of business done within the state, if, by the law of the state at the time when the business was done, the corporation by doing business in the state subjected itself to the jurisdiction of the state to that extent."

There is some case authority tending to support this view of the Restatement and it is submitted that it is sound. There would seem to be nothing so "unreasonable" in this continuing jurisdiction as to involve a violation of due process of law. And, if some theoretical conceptual explanation is necessary, it may be said that the doing of each act out of which each suit arises is sufficient basis of jurisdictional power to cover any objection that the corporation, by ceasing to do business, has removed the only existing source of state power over it.

In three cases cited (Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 S. Ct. 728, 47 L. ed. 1113 (1903); Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 1122 (1903); Cady v. Associated Colonies, 119 F. 420 (1902)), the statutes did not expressly provide for continuance of jurisdiction after withdrawal; in Thurn v. Pyke, 8 Ida. 11, 66 P. 157 (1901), the type of statute involved and the type of service used are not sufficiently clear to make the case a good holding; in Gabouri v. Central Vt. Ry. Co., 250 N. Y. 253, 165 N. E. 275 (1929) the cause of action arose outside of the forum and part of the opinion indicates a view in support of allowing continuing jurisdiction in the appropriate case; Baker v. Walker S. & B., 18 N. S. Wales W. N. 282 (1901) is a note opinion, too brief to be clear but seeming to rest on a doctrine peculiar to the court involved in claiming jurisdiction only over "resident" companies. American Ry. Express Co. v. Royster Guano Co., 273 U. S. 274, 47 S. Ct. 355, 71 L. ed. 642 (1927); Boggs v. Mining Co., 105 Md. 371, 66 Atl. 259 (1907); Ben Franklin Ins. Co. v. Gillett, 54 Md. 212 (1880). There are probably cases in other states.

Of course, this depends upon the validity of the doing of an act basis of jurisdiction discussed in fra with reference to Sec. 118 (d).
This reasoning, and the Restatement section referred to, can apply, however, only to subdivision (b). When we look at subdivision (c), we find that it applies to all causes and hence goes beyond the Restatement and the reasoning to support it. The problem presented would seem to be, (granted that the Simon and Old Wayne cases do not apply), whether this protection for the benefit of residents and those with a usual place of business in Maryland is reasonable (and hence due process) as over against the inconvenience caused to the foreign corporation in forcing it to defend where it no longer has any association and where the cause of action has no contact except through the plaintiff’s relation to the forum. The answer would seem to be uncontrolled by decided law.

The conclusion must be that while subdivisions (b) and (c), like subdivision (a), are probably valid against due process objection when applied to corporations that have qualified and appointed the resident agent, they raise several questions as to their constitutionality when applied to non-qualifying corporations. The possible limitation that jurisdiction may not, in this latter instance, be extended to other than causes of action arising within the state; the argument (as found in the quotation from Beale above) that continuance of jurisdiction is impossible because the basis of all jurisdiction is gone; the further argument that, granted it may be continued as to causes of action arising out of business done within the state, there is definitely no basis of power for extending it further, must all be met and answered successfully before subdivisions (b) and (c) can be sustained in their entirety against the due process objection.

It would seem that, as a matter of reasonableness, all but the last argument can be met successfully. That one, which goes to the continuance of jurisdiction as allowed by subdivision (c), presents the most difficult question to determine as a matter of social policy, aside from any hazards raised by inability to comply with existing concepts of

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If the Beale-Restatement view of those cases is followed, obviously subdivision (c) fails, as indicated supra notes 38-41.
jurisdictional theory. Detailed drafting so as to segregate a little more clearly the types of jurisdiction allowed might be helpful.

Sec. 118(b) and (c), Commerce Clause Objection

The possible commerce clause objection to subdivisions (b) and (c) follows from the same cases discussed with reference to subdivision (a). The same principle applies, namely: Do the reasons of policy in favor of allowing jurisdiction on the facts of each particular case make the burden reasonable when weighed against the possible obstruction to interstate business? But, under (b) and (c), the continuance of jurisdiction after the corporation has ceased to do business in the state is definitely an additional factor on the burden side. It is no longer as convenient for the corporation to defend. It might be argued, accordingly, that the reasons for asserting jurisdiction need be stronger in order to make the obvious burden a reasonable one.

How does this apply? Subdivision (b) in limiting jurisdiction to causes of action arising out of business done in Maryland has seized upon a factor which has been generally accepted as making the burden reasonable in all cases where the corporation was still doing business in the forum. There could be a question whether if the same would be true after it had ceased to do business. It would seem that validity would be least questionable if the plaintiff were a resident, more questionable if some lesser contact with the forum existed, and most questionable if there were no contact of the plaintiff with the forum other than his instituting suit there. Accordingly, a more desirable form of statute would be one which acknowledged this by segregating under subdivision (b): (1) suits by resident plaintiffs; (2) suits by plaintiffs with usual place of business in Maryland; (3) suits by all other plaintiffs. There would be more possibility of separability should any one or more, but not all, of the above situations constitute an

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92 It might be observed that the rationale of having the same result for qualifying as non-qualifying corporations under Sec. 118 (a) is applicable to subdivisions (b) and (c) (supra circa notes 11-17).
unreasonable burden on interstate commerce. This suggestion is merely combining with (b) the theory that obviously lies behind (c), that there is more reason for protecting residents and those with business in the forum than other plaintiffs.

This line of attack indicates the analysis of subdivision (c). In allowing continuance of jurisdiction in favor of "residents" or those with a "usual place of business" in Maryland it, too, has seized upon factors which seem to have been recognized as making the burden reasonable as to the corporation engaged in business within the state. Their being segregated relieves (c) of the re-drafting suggestion made for (b). The only problem is whether they can of themselves hold the scales on the reasonableness side as against the added burden of continuance after withdrawal. Something is to be said for the fact that the statute limits jurisdiction to causes arising while the corporation was doing business in Maryland.

Recent law review comment on these very suggestions indicates that the usual concepts used to justify continuance of jurisdictions (such as the right of a state to impose conditions based on the power to exclude) may break down when applied to the corporation engaged in interstate business solely. It would seem that this is an indication of the inherent weakness of the concepts rather than an indication that the attempted continuance of power is necessarily bad. The factual approach of reasonable or unreasonable burden seems to be the proper analysis to apply, recognizing that the jurisdictional power carries over from the business originally done. Obviously, though, a greater conceptual difficulty occurs with reference to (c) than (b) in such case, and (c) is accordingly of more doubtful validity.

No separation has been made here between the qualifying and non-qualifying corporation because the discussion under subdivisions (a) and (b) inevitably carries over and leaves no room for further comment.

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92a See supra note 65.
93 Supra notes 70-72.
94 Note (1938) 38 Col. 1060, 1075. Observe on p. 1072 of the same comment an interesting analysis of the several situations for continuance of jurisdiction that may arise under subdivisions (b) and (c).
SEC. 118(D), JURISDICTION BASED ON DOING AN ACT

Due Process Objection

Subdivision (d) allows a "resident" or person having a "usual place of business" in Maryland to sue on any cause of action arising from a contract made or liability incurred for acts done within the state, "whether or not such foreign corporation is doing or has done business in this state." This is an apparent attempt to extend to corporations a basis of jurisdictional power recently recognized for natural persons; but to extend it in a more extensive fashion than has as yet been recognized in any opinions of the courts.

As a bar to the validity of subdivision (d) there stand repeated statements of the courts to the effect that in the absence of "consent" or "doing business" there is no basis for the assertion of jurisdiction over the foreign corporation. Further, the cases dealing with natural persons, in their language, have restricted the allowed jurisdiction in each case to the special facts dealt with. This statute asserts power in the courts for all purposes.

What can be said in favor of this new and unique provision of the law? As applied to non-resident individuals, state statutes have been sustained in the United States Supreme Court asserting judicial control over non-resident motorists as to causes of action arising from negligent operation of an automobile on the state highways and as to causes of action arising out of the sale of corporate securities through an agent in a state. In each instance there was emphasized that the notice provided for must

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96 Supra notes 18-24.

97 Supra note 95.

98 Hess v. Pawloski, supra note 95; and see for similar statute in Md. Code Supp., Art. 56, Secs. 187 (c), 190 A & B, specifically applying to: "a non-resident, individual, firm, or corporation".

99 Doherty v. Goodman, supra note 95.
be adequate. In at least one case, a non-resident motorist law has been applied to a foreign corporation without objection being raised on the ground that it was not suable in the state because not doing business there.

If such statutes are reasonable and constitutional as applied to non-resident individuals, there seems to be nothing that would make them unreasonable as applied to foreign corporations. They represent situations not visualized at the time the courts enunciated the broad rule that there was no jurisdiction over a corporation not doing business in the state although service was on a corporate agent or official within the state and suit arose out of the very transaction in which he was then engaged. The old cases do not stand as authority on this new development. They were not decided under statutes which attempted to assert (and at the same time limit) jurisdiction as to causes of action arising out of the particular act done. They were attempting to assert a general personal jurisdiction based on the doing of business as a contact sufficient to support it.

The distinction must be drawn between jurisdiction based on "doing business" (in the sense of a continuous course of transactions, establishing offices, etc.) which reasonably may be held to give power to adjudicate any transitory cause of action (or at least any cause arising within the state), and jurisdiction based on the doing of an act (or several acts not amounting to "doing business") with jurisdictional power limited to causes arising out of that very act (or acts). There has been no consideration of the latter as applied to corporations, at least with the distinction clearly in mind. The only authority is in the cases dealing with individuals. The question of its extension to corporations must be answered by determining whether it is unrea-

100 Cf. Grote v. Rogers, 158 Md. 685, 149 A. 547 (1930).
101 Poti v. New England Machinery Co., 83 N. H. 238, 140 A. 587 (1928). Cf. Goodrich, op. cit. supra note 12, 178-179; observe that the Maryland statute as amended by Laws 1937, Ch. 504, provides that nothing therein is meant to limit the applicability of Md. Code, Art. 56, Secs. 190, A and B, of the Non-resident Motorists law. Md. Code, Art. 23, Sec. 105. This would indicate that if 118 (d) fails for any reason, the application of the non-resident motorists law to a foreign corporation is contemplated. The reasoning of the text of this article is pertinent to that law also.
102 Supra notes 18-24.
reasonable to subject the foreign corporation to similar control. It is not apparent why such assertion of power is any less reasonable as applied to corporations than as applied to individuals.

Granting the validity of such jurisdiction, however, in the case of certain acts (such as dealt with in non-resident motorist laws or blue-sky laws), a question might be raised as to whether it may extend to any kind of act done within the state. Section 85 of the Restatement of Conflict of Laws, apparently based on the above cases dealing with natural persons, says:

"If a State cannot, without violating the Constitution of the United States, make the doing of certain kinds of acts within the state illegal unless and until the person doing the acts or causing them to be done has consented to the jurisdiction of the courts of the State as to causes of action arising out of such acts, the State cannot validly provide that the doing of acts shall subject him to the jurisdiction of the courts of the State."

This language is somewhat difficult to construe, but if it is meant to allow the extension of jurisdiction only as to acts which the state may prohibit, we must disagree with it, despite some language in the cases which might tend to support it.103 Recent comment would indicate that the section was purposely left indefinite, so as to care for further development (such as occurred after publication of the Restatement in the case of Doherty & Co. v. Goodman), but that there is some limit on the state’s power (it cannot extend to all acts). This idea of some limit is drawn from the language of the two Supreme Court cases. Mr. Justice Butler in Hess v. Pawloski mentioned the peculiar dangers involved in motor vehicle regulation, and Mr. Justice McReynolds in the Goodman case spoke of the special regulations applicable in Iowa to sellers of corporate securities.

However, that the language of a case restricts its holding to the facts in hand would not indicate that the principle

103 Flexner v. Farson, 248 U. S. 239, 39 S. Ct. 97, 63 L. ed. 250 (1919); Hess v. Pawloski, and Doherty v. Goodman, both supra note 95.
involved cannot extend to cover other situations. What should be avoided is the too-narrow crystalization of the principle at its inception. It should be remembered that the earliest assertions of jurisdiction over foreign corporations were justified on the basis of the power to exclude and yet that power to exclude was not a necessary jurisdictional factor in the later developments. It happened to be the most convenient tool within reach. The same might be the situation as to the court's first treatment of jurisdiction based upon the doing of acts. Accordingly, it would be preferable to admit that the doing of an act within the state may be the basis for the assertion of personal jurisdiction over a foreign corporation (or individual) as to causes of action arising out of such act to the extent that it is reasonable exercise of the state's regulatory control under all of the facts involved.

Such an approach faces squarely the problem of whether the making of an ordinary contract in the state by a foreign corporation (or non-resident individual) with a citizen of the state could be made the basis of securing personal jurisdiction over the non-resident as to a suit arising out of such contract.\(^{104}\) Much could be said by way of social justification for such a result. First, it is one that has been accepted in other civilized countries.\(^{105}\) Secondly, the state, from the point of view of conflict of laws in seeking such a jurisdiction has two interests involved: (a) a jurisdictional interest to allow its own citizen the convenience of litigating in his own state a dispute arising out of a contract made with him in his own state; (b) from the choice-of-law angle, to take jurisdiction so as to be certain that the contract is controlled by the law which it feels is applicable. Thirdly, from the standpoint of reasonableness, convenience to the resident plaintiff should weigh as heavily as the inconvenience to the foreign corporation, and the scales should be tipped in favor of due process when we

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\(^{104}\) It is to be observed that the cases to date have dealt only with causes of action arising in tort. See: Cheatham, Dowling, and Goodrich, op. cit. supra note 95, 99-106; note (1938) 38 Col. 1060, 1078.

\(^{105}\) Cheatham, Dowling, and Goodrich, op. cit. supra note 95; Culp, Process in Actions Against Non-residents Doing Business Within a State (1934) 32 Mich. L. Rev. 909.
consider along with the convenience to the plaintiff the fact that the defendant corporation came to the jurisdiction to contract with the plaintiff. The last would seem to be a controlling factor to support any jurisdiction based on the doing of an act, and the limits of past or present conceptualism should not blind the courts to it.

Since conceptualism does play a large part in judicial decision, it might be observed that one conceptualistic attack on the "doing of an act" basis of jurisdiction as applied to individuals is not available against it when used for a corporation engaged in intra-state business. It has been stated in judicial opinion, and approved elsewhere, that since the individual may not be excluded from contracting (doing business) in a state, his contract may not be made the basis of a jurisdiction otherwise absent. This argument cannot apply to corporations, because it is granted, since the earliest decisions, that the state does have power to exclude.

It is submitted, that whatever the theoretical or conceptual argument that may need to be raised to support it, subdivision (d) represents a sound social policy and should be sustainable against the due process objection.

Sec. 118(d), Commerce Clause Objection.

As for the commerce clause objection, the road is even less charted than in the due process field. The answer lies in an analysis of the cases referred to earlier for subdivisions (a), (b), and (c); and, in the application of the rule that on the facts of each case it must be determined whether the convenience to the resident plaintiff and the fact that the cause of action arose out of a transaction in the state out-weighs the burden imposed by the inconvenience to the corporation engaged in interstate commerce of being forced to defend where it has no offices and does no regular business. It would seem, though, that interstate commerce should not be encouraged to the extent of allowing corpora-

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tions to act where they are unwilling to answer in the courts for such acts. If that be true, and if our reasoning on the due process side is sound, subdivision (d) should be entirely sustainable. However, there should be more definite segregation of the jurisdiction over corporations engaged in interstate commerce as against those engaged in intra-state commerce.\textsuperscript{107}

\textbf{SECS. 105-109—NOTICE PROVISIONS}

The means of service on the foreign corporation\textsuperscript{108} are set forth in sections 105-109, as amended. They would seem to raise little problem of doubtful constitutionality, although there may be some question whether the sections are drafted so as to care adequately for the type of jurisdiction provided for in section 118 (d). The provisions are substantially as follows:

1. Service may be made upon the ‘resident agent’ appointed for receipt of service by the foreign corporation as called for by section 119.\textsuperscript{109}

2. If an unsuccessful attempt to serve the resident agent has been made, or if there is no resident agent, service may be made upon “the president, manager, secretary or treasurer of such corporation, or upon any director, vice president, assistant secretary or assistant treasurer thereof, and if none of the above resides in this state, such process may be served upon any agent or other person expressly or impliedly authorized to accept such service.”\textsuperscript{110}

\textsuperscript{107} And possibly segregation of causes of action arising in tort from causes of action arising in contract, since on the cases dealing with individuals only the former have received recognition; see supra note 104.

\textsuperscript{108} Space has not permitted a comparison with the former means of service. The comment by Mr. Myerberg, supra note 1, does this and it may be done by placing the old code section beside the new.

\textsuperscript{109} Sec. 105 (a).

\textsuperscript{110} Sec. 105 (b). This and succeeding provisions of the law seem to eliminate the problem raised by those cases which held that where the statute calls for the appointment of an agent and the corporation complies, service on some other person would be insufficient; see: Oland v. Agricultural Ins. Co., 69 Md. 248, 14 A. 669 (1888); Beale, op. cit. supra note 12, Sec. 91.3. The Maryland case just cited may still be law on its particular holding as applied to insurance companies, or any companies given similar special treatment and not covered by the general corporation law.
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3. If two unsuccessful attempts have been made to serve the resident agent, or there is no resident agent, service may be made upon the State Tax Commission, which service shall be deemed to be "equivalent to personal service upon a resident agent or other agent or officer of such corporation," with the duty imposed on the state tax commission "to forward by registered mail" etc. However, this mode of service seems to be limited to "any corporation of this State, or any foreign corporation required by any statute of this State to have a resident agent." 

4. If there is no resident agent, or after two unsuccessful attempts to serve process upon the resident agent, proceedings may be had by way of attachment the same as against a non-resident individual.

So far as they go, these provisions for notice seem to be carefully drawn and in the eyes of the writer raise no valid constitutional objection. It is clear that in the absence of "consent" to the exercise of jurisdiction without notice, a form of notification reasonably calculated to reach the defendant must be used to obtain good jurisdiction over an individual or a corporation. The Maryland statute, however, would seem definitely to stay within the requirements of what is reasonable. The service on the State Tax Commission method may be used only after two unsuccessful attempts to find the resident agent, or in the absence of the appointment of a resident agent, and even so the commission must take steps to notify the defendant by registered

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111 The statute should be referred to for the details of this. A proper approach is taken to the notice problem in proceeding from the type of notice most likely to reach the defendant through intermediate means to that least likely to reach him. McDonald v. Mabee, 243 U. S. 90, 37 S. Ct. 343, 61 L. ed. 608, L. R. A. 1917 F. 458 (1917).

112 Sec. 105 (d).

113 Sec. 105 (d), which, when read along with Sec. 11 of Ch. 504 of Md. Laws 1937 (repealing and reenacting Code Art. 9, Sec. 2) has the effect of establishing the only means of attachment proceeding against a foreign corporation, contracting the old law for foreign corporations, although extending the means of attachment against domestic corporations). Cf. Myerberg, op. cit. supra note 1.

114 Such consent may clearly be given as an express consent, Wagner v. Scurlock, 166 Md. 284, 170 A. 539 (1934); Restatement, Conflict of Laws, and Maryland Annotations, Secs. 75, 81. It would seem that the doctrine of unconstitutional conditions, supra note 16, might impose some limitation upon forcing such consent as a condition of entry to do business.

115 Restatement, Conflict of Laws, Secs. 75, 87 (b).
This method of notification has been approved for individuals and would seem to be sufficient for corporations.

In the section allowing for service on the President, Secretary, Treasurer, etc., after one attempt to serve the resident agent, there would seem to be no defect. This type of notice would be good without any requirement of serving the resident agent first and hence would seem to lose nothing because made a secondary method of giving notice. The only quaere would be whether the statute, in its wording, allows service to be made on such a minor agent of the company that notice to him would not be deemed to be notice to the company, and so there would result a violation of due process. It would seem that the statute itself precludes this when it says "any agent or other person expressly or impliedly authorized to accept service." The statute naturally would be construed to exclude from "impliedly authorized to accept service" those employees a service upon whom would violate due process.

But while the statute in its provisions for notice is probably constitutional, it would seem that the draftsmen have left it extremely doubtful whether there is a means of service sufficient to care for the important type of jurisdiction allowed by section 118 (d) (jurisdiction based on the doing of an act). It would seem that the usual case where a plaintiff would want to use section 118 (d) would be one where the foreign corporation would not have appointed a resident agent and where it would not be likely to have a responsible corporate agent in the state. Accordingly,

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116 The statute (Secs. 108, 109) makes no provision as to what is to be the effect of a refusal of the corporation to receipt for the registered mail or of a failure of the postal service to find the Company at the mailing address. The effect of the sections read together, however, would seem to be that the forwarding of the registered mail is sufficient. Some due process quaere might be raised. For the effect of similar provisions in non-resident motorists laws, see Culp, *Recent Developments in Actions Against Non-resident Motorists* (1938) 37 Mich. L. Rev. 58, and the earlier article (1934) 32 Mich. L. Rev. 325.


119 Beale, op. cit. *supra* note 12, 91.5; Central of Georgia R. Co. v. Eichberg, *supra* note 118.
the plaintiff would have to look for some other means of service under our statute, the only other means of service being through the State Tax Commission.

However, section 105 (d), in providing for service upon the State Tax Commission, limits itself to foreign corporations "required by any statute of this state to have a resident agent." If this means what it says, there is no means of service provided to cover the type of case that is most likely to arise under 118 (d), unless the provision of section 119 dealing with when corporations must appoint resident agents is construed to cover all corporations doing any act in Maryland. This construction of section 119 would seem unlikely because its terminology refers only to corporations "doing business" in Maryland, which term has generally been held to mean more than the doing of a single act.  

Also, it would seem of doubtful constitutionality to require qualification of corporations for the doing of a single act in the state although it might be justifiable to assert control over them through the courts.

Accordingly, it is suggested that the service provisions should include a statement to extend the forms of notice allowed for specifically to cover corporations subject to control under 118 (d), even though they are not corporations which need qualify under section 119.

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120 Supra, notes 19-21.

121 It is clearly possibly that to require the burden of qualification and effects thereof because of the doing of a single act would be unreasonable and violate due process, although allowing jurisdiction in the courts would not be.