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legislatures and state and local bar associations in providing for legal counsel for all criminal defendants who could not otherwise afford this distinct advantage.⁴⁶

R. Bruce LaBoon

The Constitutional Problem of Providing Venue Classification for Foreign Corporations in Texas

A state can refuse to permit a foreign corporation to conduct business within the state;¹ consequently, it can provide conditions which must be complied with to obtain admittance.² Although wide discretion is given a state legislature in making different classifications and in placing restrictions on those classes,³ the surrender of constitutional rights cannot be the price of admission.⁴ In providing con-

⁴⁶ Allison & Hassett, *Counsel for the Indigent Defendant*, 41 J. Am. Jud. Soc'y 102 (1957).

¹ This is so because the transaction of *intrastate* business within a state is only a privilege and not a right of the corporation. In *Atlantic Ref. Co. v. Virginia*, 302 U.S. 22 (1937), the corporation conceded that the federal constitution does not confer upon it the right to engage in intrastate commerce in Virginia unless it has secured the consent of the state. Whether the privilege should be granted to a foreign corporation is a matter of state policy. In *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U.S. 361 (1933), the corporation contested a provision allowing substituted service on foreign corporations in the event it withdrew from the state. The court said that the state need not have admitted the corporation to do business within its borders at all. The state's prohibition of any intrastate public service business was upheld in *Railway Express Agency, Inc. v. Virginia*, 282 U.S. 440 (1931). A state tax provision taxing foreign corporations more than domestic corporations of the same class was declared unconstitutional in *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926), because the foreign corporation was not placed on the same basis as a similar domestic corporation once the foreign company obtained admittance. In *Paul v. Virginia*, 8 Wall. 168 (1868), it was held that a corporation was a legal creation of a state, and therefore had no legal existence outside the state. Hence, the recognition of its existence by other states depends entirely on the comity of those states, dependent on their own interests. There is no absolute right of recognition and they may therefore be excluded. Also, in *State v. State Mut. Life Assur. Co.*, — Tex. —, 353 S.W.2d 412 (1962), it was held that the state could prevent an insurance corporation from doing business in the state if it performed certain acts which the state prohibited, *viz.*, the insurance company was excluded for writing certain types of insurance. The state's right to exclude a corporation and its successor for violation of the state anti-trust law was upheld in *Pierce Oil Corp. v. Weinert*, 106 Tex. 435, 167 S.W. 808 (1914).

² *Atlantic Ref. Co. v. Virginia*, *supra* note 1; *Hanover Fire Ins. Co. v. Harding*, *supra* note 1; *Looney v. Crane Co.*, 245 U.S. 178 (1917); *New York Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28 (1900); *General Motors Acceptance Corp. v. McCallum*, 118 Tex. 46, 10 S.W.2d 687 (1928); *Pierce Oil Corp. v. Weinert*, *supra* note 1; *State Mut. Life Assur. Co. v. State*, 345 S.W.2d 325 (Tex. Civ. App. 1961), *rev'd on other grounds*, 163 Tex. 240, 353 S.W.2d 412 (1962).

³ *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *State Mut. Life Assur. Co. v. State*, *supra* note 2.

⁴ *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931).

ditions for admittance, a state may not make such arbitrary restrictions that the foreign corporation is denied equal protection of the laws.⁵

Legislatures can provide different classifications so long as they are pertinent to the subject with respect to which the classification is made⁶ and have a *rational* relationship to the legislative policy.⁷ The classification must rest upon some ground of difference having a *real* and *substantial* relation to the subject of the legislation.⁸ If the classification is neither *capricious* nor *arbitrary* and rests upon some *reasonable* consideration of difference or policy, there is no denial of the equal protection of the law.⁹ That a statute discriminates against a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy.¹⁰

Different classifications of persons for venue purposes are commonly made by state legislatures. The classifications pertinent to the present discussion fall into four broad categories: residents, non-residents, domestic corporations, and foreign corporations. Since non-residents may be and always have been treated differently from residents, such a classification is generally valid.¹¹ Moreover, there is an obvious difference between a corporation and an individual person that allows different statutory treatment.¹² Various state statutes provide a separate classification of domestic and foreign corpora-

⁵ Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1932); Ohio *ex rel.* Clarke v. Deckenbach, 274 U.S. 392 (1927); National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71 (1922); Terral v. Burke Constr. Co., 257 U.S. 529 (1922); Looney v. Crane Co., 245 U.S. 178 (1917); Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910). See Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926), for a catalogue of illegal conditions provided by states which have been declared unconstitutional.

⁶ Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935); Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927).

⁷ Metropolitan Cas. Ins. Co. v. Brownell, *supra* note 6.

⁸ Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927).

⁹ Allied Stores of Ohio, Inc. v. Bowers, *supra* note 8; State Board of Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931); Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

¹⁰ Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

¹¹ Bain Peanut Co. v. Pinson, 282 U.S. 499 (1931); Conner v. Willer, 265 Ala. 319, 91 So. 2d 225 (1956); Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., 190 Ga. 633, 10 S.E.2d 46 (1940); State *ex rel.* Ferrocarriles Nacionales De Mexico v. Rutledge, 331 Mo. 1015, 56 S.W.2d 28, *cert. denied*, 289 U.S. 746 (1932); Wilson & Co. v. Hickey, 186 Okla. 324, 97 P.2d 564 (1939); State *ex rel.* Blackledge v. Latourette, 186 Ore. 84, 205 P.2d 849 (1949).

¹² Bain Peanut Co. v. Pinson, *supra* note 11, upheld subdivision 23 against the contention that it was unconstitutional because it provided a wider venue for actions against corporations than was provided for actions against an individual. *Accord*, Grayburg Oil Co. v. Powell, 118 Tex. 354, 15 S.W.2d 542 (1929).

tions,¹³ although they are sometimes treated as one class for venue purposes.¹⁴

The leading decision on discriminatory venue provisions, *Power Mfg. Co. v. Saunders*,¹⁵ was decided by the Supreme Court of the United States in 1927. An Arkansas statute allowed a foreign corporation (whether or not authorized to do business in the state) to be sued in *any* county of the state on a transitory cause of action. A domestic corporation could be sued only in counties wherein it was doing business or was maintaining an office, officer, or agent. The majority¹⁶ of the United States Supreme Court stated that there *were* subjects as to which foreign corporations could be classified differently from domestic corporations, but that such differences in classification must rest on differences pertinent to the subject in respect of which the classification is made.¹⁷ Here the Court decided: "So far as their situation [*i.e.*, foreign corporations authorized to do business in Arkansas having a fixed place of business and an authorized agent on whom process may be served] has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals."¹⁸ Consequently, the statute was held to be invalid because the classification and discriminatory treatment of foreign corporations was without reasonable basis and was essentially arbitrary.¹⁹

The *Saunders* case provided the basis for attacks on foreign corporation venue statutes. In order for the state venue provision to be struck down, the difference in the classification of foreign and domestic corporations must be arbitrary and unreasonable²⁰ and must

¹³ *E.g.*, Ga. Code Ann. §§ 3-206 (1962), 22-1509, 22-1511, 22-1601 (Supp. 1963); Minn. Stat. Ann. §§ 542.09-.10 (1945); Miss. Code Ann. §§ 1433, 1437, 5342 (1956); Mo. Rev. Stat. §§ 508.010, 508.040 (1949); Ohio Rev. Code Ann. §§ 2307.36, 2307.38 (Page 1953); Pa. Stat. Ann. tit. 12, § 1309, and Pa. R. Civ. P. 2078, 2079.

¹⁴ *E.g.*, Cal. Civ. Proc. Code § 395; Ill. Rev. Stat. ch. 110, §§ 5, 6 (1955), in which domestic and foreign corporations authorized to do business in the state have the same residence. A foreign corporation not authorized to do business is considered a nonresident; Mich. Comp. Laws §§ 600.1621, 600.1625 (1948); Miss. Code Ann. §§ 1433, 5342 (1956), which provide identical venue for qualified foreign corporations and domestic corporations; N.Y. Civ. Prac. § 503(c), which abrogated the case law with respect to foreign corporations and treats foreign corporations authorized to do business in the state as residents of the county wherein their principal office is located.

¹⁵ 274 U.S. 490 (1927), hereinafter referred to as *Saunders*.

¹⁶ Mr. Justice Holmes and Mr. Justice Brandeis dissented. See note 19 *infra*.

¹⁷ *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493 (1927).

¹⁸ *Id.* at 494.

¹⁹ *Ibid.* Mr. Justice Holmes, dissenting: "A foreign corporation merely doing business in the state and having its works elsewhere will be more or less inconvenienced by being sued anywhere away from its headquarters, but the difference to it between one county and another is likely to be less than it will be to a corporation having its headquarters in the state." *Id.* at 498.

²⁰ *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927); see also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), which considered an Ohio statute that classified domestic and foreign corporations differently for a particular tax purpose.

have no reasonable state policy supporting it. However, state courts have been very reluctant to strike down venue provisions; thus, the *Saunders* case frequently has been distinguished.²¹

Several of the cases²² that have distinguished *Saunders* dealt with nonresident statutes. The reasons for classifying nonresidents differently from residents, either individuals or corporations, are not applicable to foreign corporations which have submitted to the state laws and have registered and established an office or designated agents in the state. Such a corporation, although technically a foreign corporation, has a domicile in the state, a residence in the state,²³ or an agent on whom service may be made as authorized by state laws, and it is therefore much more amenable to suit than a nonresident who has no domicile or residence in the state. The *Saunders* case dealt exclusively with the foreign corporation authorized to do business in the state.²⁴

In other cases that have distinguished *Saunders*,²⁵ the party contended that a particular statute allowed a change of venue for one party but not for another and therefore denied equal protection of the law. These cases are not directly on the point of available original forums; they turn on the right to transfer a case from a proper venue. The leading case on statutes of this type, *Cincinnati St. Ry. v. Snell*,²⁶ was decided prior to *Saunders* and established a broad rule considered determinative by several courts²⁷ that have distinguished *Saunders*. The rule is:

²¹ Metropolitan Cas. Co. v. Brownell, 294 U.S. 580 (1935); Panzram v. O'Donnell, 48 F. Supp. 74 (S.D. Minn. 1942); Conner v. Willet, 265 Ala. 319, 91 So. 2d 225 (1956); Long v. General Petroleum Corp., 11 Cal. App. 2d 708, 54 P.2d 1147 (Dist. Ct. App. 1936); Greyhound Corp. v. Rosart, 124 So. 2d 708 (Fla. 1960); Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., 190 Ga. 633, 10 S.E.2d 46 (1940); Hercules Powder Co. v. Tyrone, 155 Miss. 90, 124 So. 74 (1929); Schwarting v. Ogram, 123 Neb. 76, 242 N.W. 273 (1932); Wilson & Co. v. Hickey, 186 Okla. 324, 97 P.2d 564 (1939); Phillips Petroleum Co. v. Smith, 177 Okla. 539, 61 P.2d 184 (1936); State ex rel. Mass. Bonding & Ins. Co. v. Updegraff, 171 Ore. 246, 141 P.2d 251 (1943).

²² Conner v. Willet, 265 Ala. 319, 91 So. 2d 225 (1956); Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., *supra* note 21; Wilson & Co. v. Hickey, *supra* note 21.

²³ See note 45 *infra*.

²⁴ Power Mfg. Co. v. Saunders, 274 U.S. 490, 494 (1927). The Oregon Supreme Court correctly distinguished *Saunders* on the simple fact that foreign and domestic corporations were treated alike under the Oregon venue statutes. State v. Updegraff, 171 Ore. 246, 141 P.2d 251 (1943); see also Greyhound Corp. v. Rosart, 124 So. 2d 708 (Fla. 1960). Neither relied upon *Saunders*.

²⁵ Hercules Powder Co. v. Tyrone, 155 Miss. 90, 124 So. 74 (1929); see also Witort v. Chicago & N.W. Ry., 178 Minn. 261, 226 N.W. 934 (1929).

²⁶ 193 U.S. 30 (1904), *distinguished in* Power Mfg. Co. v. Saunders, 274 U.S. 490, 495 (1927).

²⁷ Conner v. Willet, 265 Ala. 319, 91 So. 2d 225 (1956); Long v. General Petroleum Corp., 11 Cal. App. 2d 708 (Dist. Ct. App. 1936); Phillips Petroleum Co. v. Smith, 177 Okla. 539, 61 P.2d 184 (1936); see also Schwarting v. Ogram, 123 Neb. 76, 242 N.W. 273 (1932), and Empire Oil & Ref. Co. v. Fields, 181 Okla. 231, 73 P.2d 164 (1937), the former relied on *Snell* without distinguishing *Saunders*, and the latter distinguished *Saunders* and relied on Phillips Petroleum Co. v. Smith, *supra*.

[I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.²⁸

A *domestic* corporation in the *Snell* case contended that it was denied equal protection of the laws because an *individual* plaintiff had the right to transfer an action to another county although the corporate defendant had no such right. The action properly was begun in the county wherein the corporate defendant did its principal business and had its principal office; the statute allowed transfer to another county upon plaintiff's claim and affidavits that he could not get a fair trial in the county of suit. The statute allowed such transfer by the plaintiff if the corporate defendant had fifty stockholders or more. The sole contention was that equal protection was denied because equal opportunity to transfer the cause was not afforded the corporate defendant. The right to be sued in the county wherein the corporation did its principal business was not questioned; the statute was challenged because the corporation had no power to transfer the action elsewhere, *i.e.*, away from the county wherein it did its principal business. The Missouri Supreme Court²⁹ succinctly expressed the *Snell* decision as follows:

The opinion holds that classification made as to corporations having 50 stockholders or more was not unreasonable, and that it was in the power of the Ohio Legislature to provide that a plaintiff in a suit against a corporation having 50 stockholders or more, which was pending *in the county where the corporation keeps its principal office or transacts its principal business*, may change the venue to some other county if he shall make an affidavit that he cannot have a fair trial in the county where the suit is instituted³⁰

²⁸ 193 U.S. 30, 36 (1904). The Court concluded: "It follows that the mere direction of the state law that a cause under given circumstances shall be tried in one forum instead of another . . . can have no tendency to violate the guarantee of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails." *Ibid.*

²⁹ *McClung v. Pulitzer Publishing Co.*, 279 Mo. 370, 214 S.W. 193 (1919), which foreshadowed the *Saunders* decision holding the Arkansas venue statute unconstitutional. See also *Grocers' Fruit Growing Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120 (1907).

³⁰ *McClung v. Pulitzer Publishing Co.*, *supra* note 29, at 198.

The *Snell* decision expresses the unanimous belief that a state may make different classifications of individuals and corporations. No distinction between foreign and domestic corporations was involved, but the broad rule established by *Snell*³¹ has since been applied to differences in classifications of foreign and domestic corporations.³²

On the other hand, decisions that have relied upon *Saunders* appear to fall into two categories. The venue statute is either declared unconstitutional³³ or construed so that domestic and foreign corporations receive the same treatment thereunder.³⁴ In either situation the courts generally have dealt with a statewide venue provision.³⁵ There seems to be no justification for allowing statewide venue against foreign corporations if they are authorized to do business in the state, are *not* considered as nonresidents,³⁶ and have a designated or registered office therein, unless the same provision is available for suits against domestic corporations.

The Texas venue statute commences with the general rule: "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile. . . ."³⁷ The words "domicile" and "inhabitant" have been interpreted to mean "residence" or "resident."³⁸ The remainder of the venue statute is thirty-four subdivisions or exceptions to this general rule.

If a plaintiff commences an action in a county that is not the county of residence of the defendant, the defendant has the right to

³¹ See note 28 *supra* and accompanying text.

³² *Conner v. Willet*, 265 Ala. 319, 91 So. 2d 225 (1956) (the rule was applied to residents and nonresidents); *Long v. General Petroleum Corp.*, 11 Cal. App. 2d 708, 54 P.2d 1147 (Dist. Ct. App. 1936); *Schwartz v. Ogram*, 123 Neb. 76, 242 N.W. 273 (1932); *Phillips Petroleum Co. v. Smith*, 177 Okla. 539, 61 P.2d 184 (1936).

³³ *Fisher Packing Co. v. Mattox*, 262 Ky. 318, 90 S.W.2d 70 (1936); *State ex rel. Twin City & So. Bus. Co. v. District Court*, 178 Minn. 72, 225 N.W. 915 (1929); *Windham v. Pace*, 192 S.C. 216, 6 S.E.2d 270 (1939); *Maryland Cas. Co. v. Torrez*, 359 S.W.2d 559 (Tex. Civ. App. 1962) *error dismissed w.o.j.*; *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358 (Tex. Civ. App. 1959).

³⁴ *Bohn v. Better Biscuits, Inc.*, 26 Cal. App. 2d 61, 78 P.2d 1177 (Dist. Ct. App. 1938); *Smith v. Utah Home Fire Ins. Co.*, 234 Minn. 169, 47 N.W.2d 785 (1951); *Witort v. Chicago & N.W. Ry.*, 178 Minn. 261, 226 N.W. 934 (1929); *State ex rel. Oakland Motor Car Co. v. District Court*, 176 Minn. 78, 222 N.W. 524 (1928); *Sandford v. Dixie Constr. Co.*, 157 Miss. 626, 128 So. 887 (1930); see also *Hercules Powder Co. v. Tyrone*, 155 Miss. 90, 124 So. 475 (1929), *distinguished by Sanford v. Dixie Constr. Co.*, *supra*; *State ex rel. Mass. Bonding & Ins. Co. v. Updegraff*, 171 Ore. 246, 141 P.2d 251 (1943).

³⁵ See notes 33, 34 *supra*; see also *Wilson & Co. v. Hickey*, 186 Okla. 324, 97 P.2d 564 (1939), which distinguished *Saunders* because of the statewide venue provision.

³⁶ See *Long v. General Petroleum Corp.*, 11 Cal. App. 2d 708, 54 P.2d 1147 (Dist. Ct. App. 1936), in which a foreign corporation authorized to do business in the state of California was considered a nonresident for venue purposes.

³⁷ Tex. Rev. Civ. Stat. Ann. art. 1995 (1950).

³⁸ *Oakland Motor Car Co. v. Jones*, 29 S.W.2d 861 (Tex. Civ. App. 1930), *mand. ref.*, 121 Tex. 405, 48 S.W.2d 982 (1932); 14 Tex. Jur. 2d *Corporations* § 471 (1960); see also *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926); *Pearson v. West*, 97 Tex. 238, 77 S.W. 944 (1904).

file a plea of privilege to be sued in his county of residence,³⁹ which, if sustained, will cause the action to be transferred to defendant's county of residence.⁴⁰ To maintain venue in the county in which the action is pending, a plaintiff must file a controverting plea alleging that the defendant resides there or that some subdivision of article 1995 authorizes venue.⁴¹ At a venue hearing preceding the actual trial,⁴² the plaintiff must plead and prove the applicable venue facts that allow suit under one of the thirty-four subdivisions to the general venue rule.⁴³ If he sustains this burden of proof, the action can be maintained properly in the county of suit, and the plea of privilege is overruled.

A domestic corporation is considered a person⁴⁴ under the Texas venue statute and is a resident for venue purposes in the county in which its registered office is located.⁴⁵ A foreign corporation authorized to do business in Texas is a resident of the county, for venue purposes, wherein its principal office is situated.⁴⁶ Doing business in Texas without a permit does not preclude a foreign corporation from urging a plea of privilege to be sued in the county of its principal office.⁴⁷ Doing business in the state together with the maintenance of an office appear to make a foreign corporation a resident

³⁹ Tex. R. Civ. P. 86.

⁴⁰ Tex. R. Civ. P. 89.

⁴¹ Tex. R. Civ. P. 86.

⁴² Tex. R. Civ. P. 87.

⁴³ *Jefferies v. Dunklin*, 131 Tex. 289, 115 S.W.2d 391 (1938); *Crawford v. Sanger*, 160 S.W.2d 115 (Tex. Civ. App. 1942).

⁴⁴ *Evans v. American Publishing Co.*, 118 Tex. 433, 13 S.W.2d 358 (1929); *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926).

⁴⁵ *Ward v. Fairway Operating Co.*, ___ Tex. ___, 364 S.W.2d 194 (1963), noted in 17 Sw. L.J. 340 (1963), in which the county of the registered office was held to be the statutory residence of the corporation. Prior to the *Ward* case, the county of residence was considered the county in which the principal office was located. *United States Furniture Corp. v. Twilite Mobile Homes Mfg. Co.*, 355 S.W.2d 851 (Tex. Civ. App. 1962), in which the court said the legislature intended that the designation of a registered office should have the effect, for venue purposes, of designating the principal office. In *Magnolia Petroleum v. Broussard*, 340 S.W.2d 366 (Tex. Civ. App. 1960) *error disp. w.o.j.*, the court stated that the residence of a domestic corporation is the place or places designated in the charter as the principal office or the place where the principal office is in fact located; *Southwestern Indem. Co. v. Texas Employers' Ins. Ass'n*, 310 S.W.2d 399 (Tex. Civ. App. 1958), in which the county wherein the corporation's principal office was maintained was considered as its residence. See note 75 *infra* and accompanying text.

⁴⁶ A foreign corporation authorized to do business in the state is a resident for venue purposes. *American Fid. & Cas. Co. v. Windham*, 59 S.W.2d 259 (Tex. Civ. App. 1933); *Oakland Motor Car Co. v. Jones*, 29 S.W.2d 861 (Tex. Civ. App. 1930); it is a resident of the county wherein its principal office is located. *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926). In *International Harvester Co. v. Faris*, 360 S.W.2d 864 (Tex. Civ. App. 1962), it appears that the court considered residence to be in the county wherein the principal office was located, although it made no clear distinction between the county of residence, county of principal office, and county of registered office. See also *Jaques Power Saw Co. v. Womble*, 207 S.W.2d 206 (Tex. Civ. App. 1947).

⁴⁷ *Mergenthaler Linotype Co. v. Herrmann*, 211 S.W.2d 633 (Tex. Civ. App. 1948); *McMullen v. Burton Auto Spring Corp.*, 138 S.W.2d 823 (Tex. Civ. App. 1940).

for venue purposes.⁴⁸ However, if the foreign corporation does not have a residence,⁴⁹ then it cannot take advantage of the general venue provision to be sued in its county of domicile (residence).⁵⁰

Foreign and domestic corporations have been classified separately by the Texas legislature. Domestic corporations may be sued under subdivision 23,⁵¹ and foreign corporations doing business in Texas are subject to suit under subdivision 27.⁵² If a foreign corporation is sued under subdivision 27, the plaintiff has a wider choice of counties in which to commence suit than does a plaintiff suing a domestic corporation under subdivision 23. Subdivision 27 provides this wider venue by allowing suit "in any county where such [foreign corporation] may have an agency or representative. . . ."⁵³ A similar provision was deleted from subdivision 23 by amendment in 1943.⁵⁴ Prior to this amendment, subdivisions 23 and 27 were practically identical, both allowing suit in any county wherein a corporation had an agency or representative.⁵⁵ In its present form subdivision 23

⁴⁸ *Mergenthaler Linotype Co. v. Herrmann*, *supra* note 47, at 635.

⁴⁹ *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926); *International Harvester Co. v. Faris*, 360 S.W.2d 864 (Tex. Civ. App. 1962); *Jaques Power Saw Co. v. Womble*, 207 S.W.2d 206 (Tex. Civ. App. 1947). From these cases it appears that the residence of a foreign corporation authorized to do business in Texas is the county wherein the principal office is located. However, the court in *International Harvester* seems to equate registered office and principal office as the corporation's residence.

⁵⁰ *Mergenthaler Linotype Co. v. Herrmann*, 211 S.W.2d 633 (Tex. Civ. App. 1948); *Aviation Credit Corp. v. University Aerial Serv. Corp.*, 59 S.W.2d 870 (Tex. Civ. App. 1933) *error dismissed w.o.j.*

⁵¹ Tex. Rev. Civ. Stat. Ann. art. 1995, § 23 (1950):

Corporations and Associations. — Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. . . .

⁵² Tex. Rev. Civ. Stat. Ann. art. 1995, § 27 (1950):

Foreign corporations. — Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside.

But see *Shamrock Oil & Gas Corp. v. Price*, 364 S.W.2d 260 (Tex. Civ. App. 1963), which found that subdivision 23 applied to both foreign and domestic corporations.

⁵³ *Ibid.*

⁵⁴ Texas Acts 1943, 48th Legislature, ch. 228. The purpose of the amendment as stated therein was to clarify existing law and remove the uncertainty and confusion as to the venue of suits against certain classes of corporations and certain classes of causes of action.

⁵⁵ Subdivision 23 was originally passed in 1874. Texas Acts 1874, ch. 34, § 8 Gammel, Laws

allows suit in the county of plaintiff's residence if the corporation has an agency or representative therein, or if not, then in the nearest county in which the corporation has an agency or representative.⁵⁶ Moreover, the 1943 amendment introduced the requirement of proving a cause of action at a venue hearing against a domestic corporation if the suit is brought outside the county wherein the principal office is located.⁵⁷ Subdivision 27 does not require such proof for an action commenced in a county in which the foreign corporation has an agency or representative,⁵⁸ thereby making it easier for a plaintiff to sustain venue.

Subdivision 27 was declared unconstitutional in *Fireman's Fund Ins. Co. v. McDaniel*⁵⁹ in so far as it provided a wider venue in suits against foreign corporations than subdivision 23 provided in suits against domestic corporations. The court of civil appeals traced the legislative history of subdivisions 23 and 27, recognized the inequalities between the provisions—notably the necessity of plaintiff's proving a cause of action by the preponderance of the evidence in order to maintain venue against a domestic corporation, while no such necessity exists to maintain venue against foreign corporation—and held that the subdivision was discriminatory and unconstitutional as a matter of law.⁶⁰ Subdivision 27 is not as broad as the Arkansas statute⁶¹ considered in the *Saunders* case; however, foreign corpora-

of Texas 32 (1874). It subsequently became Tex. Rev. Civ. Stat. art. 1198, § 21 (1879), and was carried forward without substantial modification into Tex. Rev. Civ. Stat. Ann. art. 1995, § 23 (1925). Subdivision 27 was enacted in 1885 and is essentially the same as first enacted, with the exception of the deletion of a service clause. See Texas Acts 1885, ch. 83, § 9 Gammel, Laws of Texas 699 (1885). See also *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358 (Tex. Civ. App. 1959), which traces the legislative history of both exceptions. See also *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926), in which the court found there was no distinction made for venue purposes between domestic and foreign corporations.

⁵⁶ See note 51 *supra*.

⁵⁷ *Jackson v. Hall*, 147 Tex. 245, 214 S.W.2d 458 (1948); *East Tex. Motor Freight Line v. Jackson*, 216 S.W.2d 686 (Tex. Civ. App. 1948); see also *Furr's, Inc. v. Behringer*, 340 S.W.2d 125 (Tex. Civ. App. 1960); *Lary v. American Indem. Co.*, 297 S.W.2d 357 (Tex. Civ. App. 1956); *Texas Employers' Ins. Ass'n v. Wagner*, 288 S.W.2d 882 (Tex. Civ. App. 1956). Prior to 1944, proof of a cause of action was not essential when the plaintiff relied upon the location of an agent or representative in the county of suit. The 1943 amendment, therefore, increased the plaintiff's burden under this exception. 1 McDonald, *Texas Civil Practice* § 4.30, at 397 (1950).

⁵⁸ *Andretta v. West*, 318 S.W.2d 768 (Tex. Civ. App. 1958) *error ref. n.r.e.*; *Pacific Fin. Corp. v. Ramsey*, 305 S.W.2d 297 (Tex. Civ. App. 1957); *Southwestern Greyhound Lines, Inc. v. Day*, 238 S.W.2d 258 (Tex. Civ. App. 1951).

⁵⁹ 327 S.W.2d 358 (Tex. Civ. App. 1959), followed in *Maryland Cas. Co. v. Torrez*, 359 S.W.2d 559 (Tex. Civ. App. 1962) *error dism. u.o.j.*, noted in 14 Sw. L.J. 390 (1960).

⁶⁰ 327 S.W.2d 358, 365-68 (Tex. Civ. App. 1959).

⁶¹ *Crawford & Moses Digest* § 1174 (1921). The Arkansas statute allowed a suit against a foreign corporation on a transitory cause of action to be brought in any county in the state. The Texas provision in question, Tex. Rev. Civ. Stat. Ann. art. 1995, § 27 (1950), allows a plaintiff to sue in any county in which the foreign corporation has an agency or representative.

tions in Texas still may be sued in more counties than may domestic corporations.⁶² The wider venue, coupled with the lack of the necessity of proving a cause of action on the venue hearing in order to sustain venue in the county of suit against a foreign corporation, appears to be discriminatory on its face. Assuming that it is discriminatory, is it unreasonable and arbitrary to require proof of a cause of action against domestic corporations and not foreign corporations in order to maintain venue outside the county of residence?

In *Commercial Ins. Co. v. Adams*⁶³ a Texas court was again faced with the question of the constitutionality of subdivision 27. In this case suit was commenced against a foreign corporation in the county in which the plaintiff resided and in which the corporation was doing business and had an office and an authorized agent.⁶⁴ The defendant corporation admitted it was a foreign corporation doing business in Texas with an agent in Harris county. However, the corporation filed a plea of privilege to be sued in its county of residence, wherein its principal office was located, and challenged the constitutionality of the statutory provision allowing the plaintiff to sue in a county wherein the corporation had only an agency. The district court overruled the plea of privilege; the court of civil appeals affirmed⁶⁵ and held subdivision 27 not to be so arbitrary or unreasonable as to be unconstitutional. The supreme court agreed with the decision of the court of civil appeals and refused the writ of error.⁶⁶

The court of civil appeals set forth a standard to be applied in determining the validity of a discriminatory classification.⁶⁷ A court must consider: (1) whether the difference does injustice to the class generally in that the same and equal laws are not applicable and administered in the forum provided; (2) whether the difference is pertinent to the subject with respect to which the classification is made; and (3) whether the discrimination is founded upon any reasonable distinction or difference in state policy.⁶⁸ The discriminatory provision of subdivision 27 to which these rules were applied allows suit in any county in which the foreign corporation has an

⁶² The degree of the discrimination should have no effect if the provision violates the fourteenth amendment to the Constitution of the United States. *Patton v. United States*, 281 U.S. 276 (1930); *Looney v. Crane*, 245 U.S. 178 (1917). See also 11 Am. Jur. *Constitutional Law* § 88 (1938).

⁶³ 366 S.W.2d 801 (Tex. Civ. App. 1963) *error ref. per curiam*, —Tex.—, 369 S.W.2d 927 (1963).

⁶⁴ The court never reached the question whether venue might be sustained under subdivision 23, which allows a corporation to be sued in the county of the plaintiff's residence when the corporation has an agency or representative therein. 366 S.W.2d at 809.

⁶⁵ *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801 (Tex. Civ. App. 1963).

⁶⁶ —Tex.—, 369 S.W.2d 927 (1963).

⁶⁷ 366 S.W.2d at 807.

⁶⁸ *Ibid.*

agency or representative. The absence of such a provision in subdivision 23, applicable to domestic corporations, was the basis for contesting the validity of subdivision 27.⁶⁹ The contention was that subdivision 27 was unconstitutional in so far as it allowed a wider venue for actions against a foreign corporation than was afforded for actions against a domestic corporation under subdivision 23. The same argument was advanced in the *Fireman's Fund* case.

Three reasons were given by the court of civil appeals that go to the policy for establishing the venue class of foreign corporations doing business in Texas: (1) the difficulty of a plaintiff in locating the principal office of a foreign corporation not authorized to do business in the state, (2) the possibility of an authorized foreign corporation designating as its principal office a county remote from its actual business operations, and (3) the problem of securing service on a foreign corporation.⁷⁰

These reasons seem to apply to the problem of locating and serving a foreign corporation rather than to the proper venue of an action against a foreign corporation. They offer no basis for a distinction between the different venue rules applicable to foreign and domestic corporations. A plaintiff need not locate the principal office of a foreign corporation not authorized to do business in the state in order to bring suit. Service may be obtained by serving the Secretary of State under article 2031b⁷¹ if service cannot be made on an agent of the corporation. The problem of service seems to be obviated by such provision. Moreover, the proper venue is not necessarily the county in which the foreign corporation's principal office is located, as subdivision 27 provides other alternatives.⁷²

Under the Texas Business Corporation Act an authorized foreign corporation does not designate a principal office, as the court of civil appeals states,⁷³ but rather designates a registered office.⁷⁴ The registered office apparently is its statutory place of residence for venue purposes according to a recent Texas Supreme Court case.⁷⁵ Although

⁶⁹ 366 S.W.2d at 808.

⁷⁰ *Ibid.*

⁷¹ Tex. Rev. Civ. Stat. Ann. art. 2031(b) (1959); see also Tex. Rev. Civ. Stat. Ann. art. 2031(a) (1950).

⁷² See note 51 *supra*.

⁷³ 366 S.W.2d at 808.

⁷⁴ Tex. Bus. Corp. Act Ann. art. 8.08 (1955).

⁷⁵ *Ward v. Fairway Operating Co.*, ___ Tex. ___, 364 S.W.2d 194 (1963), noted in 17 Sw. L.J. 340 (1963). Although the court held that the registered office established the statutory residence of the corporation for venue purposes, it did not say that this was the *only* residence for venue purposes. However, it is questionable whether a domestic corporation still has a residence in the county wherein its principal office is located. See *Ricks-Maguire Co. v. Oliver*, 373 S.W.2d 269 (Tex. Civ. App. 1963), in which the court held that a domestic corporation's residence for venue purposes was the county in which its

that case dealt with the residence of a domestic corporation, there appears to be little reason why the designation of the registered office of a foreign corporation should not also establish a statutory residence for a foreign corporation. However, no Texas court has ruled on the matter as yet.

Assuming that the court of civil appeals meant that an authorized foreign corporation may designate its registered office in a county in which it does little or no business, and which is far from its actual business, the court's reasoning can similarly be applied to a domestic corporation. There is no necessity that the registered office and the principal office be in the same county.⁷⁶ A domestic corporation may designate its registered office far from its actual business. However, it seems unlikely that a foreign corporation would establish its principal office in a remote county. Such action would appear to be economically unfeasible for either a domestic or foreign corporation.

Generally, the original reason for making a distinction between domestic and foreign corporations was that a domestic corporation was incorporated in the state in which it did its principal business, whereas a foreign corporation usually had only casual contacts with the state. State legislatures therefore made it easier to sue a foreign corporation. However, under present conditions many corporations that do their principal business in one or more states may incorporate in another to take advantage of the corporate law of that state. Small corporations which do their business principally in one state may be excepted. To consider corporations that incorporate in one state but do their principal business in one or more other states as foreign corporations in the states wherein they do their principal business appears to be unsound. These corporations are not foreign in the sense that they have only casual contacts with the states in which they do business; they are foreign only in the sense that they have incorporated in another state to take advantage of the difference in the corporate law of the state of incorporation and the states in which they do business. The reason for making the original distinction appears to have less force under present conditions, particularly with respect to authorized foreign corporations.

An authorized foreign corporation doing business in Texas is a resident for venue purposes of the county in which its principal office is located.⁷⁷ It must designate a registered office and an agent

designated registered office was located, even though the corporation's principal office had been moved to another county, and cited the *Ward* case, *supra*, as authority that a corporation's domicile is the county of its registered office.

⁷⁶ Tex. Bus. Corp. Act Ann. art. 2.09 (1955).

⁷⁷ See note 45 *supra*.

upon whom service may be made.⁷⁸ It is subject to the same rules as domestic corporations under the Texas Business Corporation Act.⁷⁹ Thus, an authorized foreign corporation is similar in most respects for venue purposes to a domestic corporation, although the venue statute clearly discriminates against the authorized foreign corporation by allowing suit in any county in which it has an agency or representative.

A provision allowing a wider venue for actions against foreign corporations does not in itself appear to be unreasonable or arbitrary. However, there is another factor present, *viz.*, no cause of action must be proved against a foreign corporation to sustain venue in a county in which the foreign corporation has an agency or representative as must be proved against a domestic corporation under subdivision 23 if sued outside its county of residence.⁸⁰ There seems to be no valid reason to require proof of a cause of action against a domestic corporation in order to sustain venue when there is no such requirement of proof against a foreign corporation. However, the court of civil appeals merely notes⁸¹ the consideration of the problem by the *Fireman's Fund*⁸² case and does not itself discuss it. It is submitted that this combination of inequalities, *viz.*, a wider venue as well as the absence of any requirement of proof of a cause of action to sustain venue, caused subdivision 27 to be held unconstitutional in the *Fireman's Fund* case.

A state cannot exercise the degree of control over foreign corporations which have not been authorized to do business in the state that it can over domestic corporations. This seems to require, or at least to allow, a separate classification that may be discriminatory. A wider venue for actions against such corporations does not seem unreasonable or arbitrary. However, to discriminate against the defendant corporation by requiring no proof of a cause of action at a venue hearing on a plea of privilege does appear unreasonable. The degree of control a state may exercise over foreign corporations seems to have little relation to the lack of a requirement of proving a cause of action to sustain venue, unless the provision is considered as a restriction to which a foreign corporation must submit if it fails to obtain a certificate of authority to do business in the state.

The degree of effective control a state has over an authorized foreign corporation is not comparable to that capable of being exer-

⁷⁸ See note 74 *supra*.

⁷⁹ Tex. Bus. Corp. Act Ann. art. 8.02 (1955).

⁸⁰ See note 57 *supra* and accompanying text.

⁸¹ 366 S.W.2d at 803.

⁸² 327 S.W.2d 358 (Tex. Civ. App. 1959).

cised over a foreign corporation not authorized to do business in the state. The authorized foreign corporation clearly appears to be discriminated against unreasonably by subdivision 27 in comparison with subdivision 23 and domestic corporations.

A distinction should be made between foreign corporations which have obtained a certificate of authority to do business in the state and those merely doing business without state authorization. They have dissimilar characteristics for venue purposes. An authorized foreign corporation and domestic corporation should be afforded substantially similar venue treatment.⁸³ Under the present law all foreign corporations doing business in Texas (whether or not they have obtained a certificate of authority) may be sued in any county in which they have an agency or representative. In addition no cause of action need be proved to sustain venue therein. This combination seems an unreasonable and arbitrary discrimination against *authorized* foreign corporations as compared to domestic corporations because these two classes of corporations are so similar.

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⁸³ For an example of such a classification, see Ill. Rev. Stat. ch. 110, §§ 5-6 (1955).

§ 5: Except as otherwise provided in this Act, every action must be commenced (a) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him and not solely for the purpose of fixing venue in that county, or (b) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. If all defendants are nonresidents of the State, an action may be commenced in any county.

§ 6: For purposes of venue, the following definitions apply: (1) Any private corporation or railroad or bridge company, organized under the laws of this state, and any foreign corporation authorized to transact business in this state is a resident of any county in which it has its registered office or other office or is doing business. A foreign corporation not authorized to transact business in this state is a nonresident of this state.

A similar provision would appear to be appropriate for Texas.