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Problems in the Field of State Securities Regulation: A Preview of Western Air Lines I

Jerome E. Weinstein
PROBLEMS IN THE FIELD OF STATE SECURITIES REGULATION: A PREVIEW OF WESTERN AIR LINES I

by

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STATEMENT

A troublesome problem in the field of state securities regulation is the extent to which any particular "blue sky law" does regulate, and, in fact, constitutionally can regulate a so-called "transaction effected without entering the state." This problem has become particularly acute recently because of the decision of the California Superior Court in Western Air Lines, Inc v. Stephenson, Comm'r., a decision which has far-reaching implications.

The transactions to be analyzed are grouped into two categories. The first category involves the problem of whether an offer or sale effected in a state solely via the mails, or some interstate facility, by a foreign issuer or broker, is covered by that state's securities law; and, if so, whether that statute is constitutional. The second category involves this question: where a foreign corporation amends its certificate of incorporation to change the rights of its shareholders, and where all or nearly all of the steps necessary to accomplish this change are effected beyond the borders of the state which seeks to regulate, can that state demand that the corporation apply for and be granted a permit before such a change is finally

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adopted on the ground that there are resident shareholders to protect? In *Western Air Lines* the change which the Delaware corporation sought to adopt was an elimination of cumulative voting. In *Western States Petroleum Co.* the Delaware corporation sought to effectuate a plan of merger. In both cases, all or nearly all of the steps necessary to effect the change culminating in the charter amendment occurred outside California, and in both cases the commissioner of corporations demanded a permit. Thus, in both categories the inquiry will be directed first at a construction of the statute to see whether in its terms these transactions are covered; and, second at the constitutional problems involved when a state statute is so interpreted to permit regulation.

The purpose of this article is not to examine the case of the sale or exchange of securities with contacts in two or more states, and the conflicts problem of what law governs the validity of that sale. Furthermore, it is not necessary to consider whether a state can regulate where the vendor or offeror enters the state and carries on negotiations leading to a sale either within that state or elsewhere; this seems to be constitutionally permiss-

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*File No. LA-16541, Calif. Div. of Corps., Dec. 8, 1959. This case did not reach the courts since the permit was issued.

*There was proxy solicitation in California in *Western Air Lines*; the effect of this on the power of California to regulate will be examined below.


There is some authority for choosing the law of the place of performance to govern: Persen v. National City Co., 129 F.2d 326 (2d Cir. 1942); *In re Motor Products Mfg. Corp.*, 90 F.2d 8 (9th Cir. 1937); Los Angeles Fisheries, Inc. v. Crook, 47 F.2d 1031 (9th Cir. 1931); Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42 (1937); Jones v. Re-Mine Oil Co., 47 Cal. App. 2d 852, 119 P.2d 219 (1941); *Restatement, Conlicts of Laws*, § 332, comment b. (1934).

There is also some authority for fixing the law of the place of the offer as the governing law: Intermountain Title Guaranty Co. v. Egbert, 52 Idaho 402, 16 P.2d 390 (1932); Lewis v. Bricker, 235 Mich. 656, 209 N.W. 832 (1926); Streissguth v. Chase Securities Corp., 198 Minn. 17, 268 N.W. 638 (1936); or, the law having the most "contacts" with the contract: Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716 (2d Cir. 1956); W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); *Westlake, Private International Law* § 212 (7th ed. 1925).
ble. The real problem is that situation where a foreign corporation never enters the regulating state, and yet effects either an offer or a sale there, or some change in the rights of resident shareholders.

This problem concerns the power to regulate transactions without entering the state, and is to be distinguished from the problem of enforcement—topics which are often confused. Although the recent decisions on the question of enforcement by substituted process on the non-resident indicate a broadening concept of state jurisdiction, it is wise at the outset to separate the due process tests sustaining substituted service, and the constitutional tests sustaining a power to regulate. The problem of enforcement by extradition as well as by substituted service is beyond the scope of this article.

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Footnotes:


3. See Traveller's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950), in which the majority confuses the two problems. The dissenting opinion did attempt to distinguish them: "We are not dealing here with the power of Virginia to regulate the transaction of insurance business with its citizens, as was the case in Osborn v. Ozlin . . . and Hooper Co. v. Cullen. . . . In the case at bar we are only concerned with how Virginia may enforce such power as it has." Id. at 659.


5. The extradition clause of the Constitution, U.S. Const. art. IV, § 2, cl. 2, provides that "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice and be found in another State, shall on Demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime." If the person was not in the State at the time the crime was committed he would not be a fugitive from justice under the clause: Hyatt v. Corkran, 188 U.S. 691 (1903); Ex parte Shoemaker, 25 Cal. App. 551, 144 Pac. 985 (1914); Ex parte Heath, 87 Mont. 370, 287 Pac. 636 (1930). This problem may not prove fatal since nearly all of the states have passed the Uniform Criminal Extradition Act. For example, Ala. Code tit. 15 §§ 48 to 75 (1940): "The governor of this state may also surrender on demand of the executive authority of any other state, any person in this state charged on indictment found in such other state with committing an act in this state intentionally resulting in a crime in such other state, and the provisions of this article not otherwise
RELEVANT CONSTITUTIONAL CONSIDERATIONS

There are at least four clauses of the Constitution which are relevant in determining whether a state can regulate a transaction effected within the state, where the defendant issuer or broker, as the case may be, has never entered the state. These clauses are the contract clause, the commerce clause, the due process clause, and the full faith and credit clause.

The Contract Clause

It has been held in the case of a common-law sale within the regulating state (sale A) that the securities law is not constitutional within the purview of the contract clause. The transactions to be examined here also include a sale within the state, and at least in the first category to be examined, a contract in the common law sense of an offer, acceptance and consideration; but effected in such a way that the issuer or dealer does not enter the state (sale B). In an effort to discover on what constitutional grounds regulation of sale B might be attacked, it is perhaps not enough to say either that it is different from sale A or that sale B, and not sale A, is within the protection of the contract clause. Where it is necessary to distinguish between sales made in the state, any constitutional argument must advance the reasons why sale B should be immune from state regulation. One such reason is that the state seeking to regulate does not have a sufficient "governmental interest" or contact with the transaction; i.e., it belongs to Congress (commerce clause) or to another state (full faith and credit clause) to regulate; or whoever can regulate, state X can not (due process). The other clauses are necessary to supply the added constitutional ballast to weigh in the scales against the police power, to attempt a differentiation between sale A and sale B, and to explain why the latter and not the former may be constitutionally protected. Most of the cases inconsistent shall apply in such cases notwithstanding that the accused was not in that state at the time of the commission of the crime, and has not fled therefrom." See Timbers and Pollack, *Extradition from Canada to the U.S. for Securities Fraud: Frustration of the National Policies of Both Countries*, 16 Fed. B. J. 31 (1956). For a general discussion of the enforcement problems arising out of *Traveller's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n*, 188 Va. 877, 51 S.E.2d 263 (1949), aff'd, 339 U.S. 643 (1950), see Note, 64 Harv. L. Rev. 482 (1951).

In *Traveller's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 651 (1950), mention is made in the majority opinion of a constitutional argument based on an infringement of the federal control of the mails. However, since that argument was not included in appellant's brief on submission of the case, the Court did not address itself to that point. It is suggested, however, that the clause on the mails adds little, if anything, to an argument based on the commerce clause. The argument based on the mails was specifically rejected by the Supreme Court of Virginia: *Traveller's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n*, 188 Va. 877, 51 S.E.2d 263 (1949).

which involve prohibitions on the state for "reaching out" beyond its jurisdiction in an area not competent for it to legislate, and which contain references to the contract clause, also contain references to full faith and credit and due process.\footnote{Bayard v. Traders General Ins. Co., 99 F.Supp. 343 (W.D.La. 1951); Holderness v. Hamilton Fire Ins. Co. 54 F.Supp. 145 (S.D.Fla. 1944). See also Aetna Life Ins. Co. v. Dunkin, 266 U.S. 389 (1924). For a detailed examination of the contract clause see Hale, The Supreme Court and Contract Clause, 57 Harv. L. Rev. 512, 621, 852 (1944).}

The Commerce Clause

The commerce clause is also of doubtful assistance in developing a constitutional argument against regulation of transactions without entering the state. Whenever a state is held incompetent to apply its law to an interstate transaction on the ground of the commerce clause, it is not because the law of another state is applicable, but because the law of no state is applicable—"regulation of inter-state commerce being committed by the Constitution to the Federal Government."\footnote{Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 Minn. L. Rev. 161, 165 (1931).}

In considering whether a transaction without entering the state is the type of transaction which can only be regulated by the federal government, it should be noted that Congress in five out of the six statutes administered by the SEC has made specific provisions preserving the blue sky laws.\footnote{Securities Act § 18, 48 STAT. 85 (1933), 15 U.S.C. § 77r (1958); Securities Exchange Act § 28(a), 48 STAT. 903 (1934), 15 U.S.C. § 78bb(a) (1958); Public Utility Holding Company Act § 21, 49 STAT. 834 (1935), 15 U.S.C. § 79u (1958); Trust Indenture Act § 326, 53 STAT. 1177 (1939), 15 U.S.C. § 77zzz (1958); Investment Company Act § 30, 54 STAT. 846 (1940), 15 U.S.C. § 80a-49 (1958). The Interstate Commerce Act § 20a, 41 STAT. 494 (1920), 49 U.S.C. § 20a (1958), gives the ICC exclusive power to regulate the issuance of securities by any carrier subject to its jurisdiction. Mr. Cowett states that this pre-emption in the latter act has not been followed, because some states for some unknown reason require registration of securities of carriers subject to the ICC. Cowett, supra note 1, at 764.}

Moreover, even before these specific provisions were enacted, the Supreme Court in a series of cases decided that the commerce clause did not impede a state from regulating securities transactions within the state, even though in one case the securities dealer merely directed offers into the state by means of interstate facilities, and never himself entered the state.\footnote{Merrick v. N. W. Halsey & Co., 242 U.S. 568 (1917). The foreign partnership in this case was one of a number of complainants seeking to enjoin the enforcement of the Michigan blue sky law. The court sustained the constitutionality of the statute without expressly dealing with the special problem raised by the type of business in which this partnership was engaged. Moreover, the decision from this point of view is even less satisfactory since the court merely said: "Answer to the contention that the statute is an interference with inter-state commerce we leave to our opinion in [Hall v. Geiger-Jones Co., 242 U.S. 539 (1916)]." Id. at 590.}

Therefore, although the federal statutes do not in so many words say that the states are left with the power to regulate the transaction without
entering the state, blue sky laws are preserved generally, and there is at least one decision—although without reasoning on the point—holding that state regulation of this transaction is not contrary to the commerce clause. Moreover, even in the second category of transactions effected by charter amendments, the competition would appear to be between two or more state schemes of regulation, rather than competition between a state and the federal government. Thus, this article will examine in greater detail the implications of the due process and the full faith and credit clauses as to both categories.

**Due Process and Full Faith and Credit**

The test which appears to be applied when due process is argued in a case involving legislative jurisdiction is as follows: does the forum have a sufficient "governmental interest" to justify its action; or, as one distinguished commentator has phrased it: "Does the state have a legitimate interest in the application of its policy?" This point of view has considerable case law support.

The more troublesome question today, however, is whether the full faith and credit clause says any more than the due process clause. There are, for example, a number of commentators who think that the same test applies to both. They say that the full faith and credit clause and the due

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17 See Traveller's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n, 188 Va. 877, 51 S.E.2d 263 (1949), aff'd, 339 U.S. 643 (1950). But see two unofficial opinions of the securities commissioners of Idaho and South Carolina who believe that if this type of offer or sale is covered by any of the statutes administered by the SEC, then their respective state statutes cannot be applied. Letter from R. U. Spaulding, Commissioner of Finance, State of Idaho, to the author, Jan. 22, 1960; Letter from R. L. Kelly, Securities Commissioner, State of South Carolina, to the author, March 16, 1960. All correspondence to the author has been turned over to the Harvard Law School Library.


process clause complement each other in choice of law situations involving the statute law of sister states. Thus, if a state with no "governmental interest" applies its own statute to a transaction, it is a denial of due process; and, if at the same time they refuse to apply the statute of a sister state which is based on a sufficient "governmental interest", it is a denial of full faith and credit. Other writers have taken the position that the full faith and credit clause requires the court to weigh the relevant national and state interests and to choose the law of that state with the superior interest. Although a reading of the relevant decisions in this area does not provide a clear answer to this problem, the majority of the cases can be explained on the first test. In one area, in particular, although the courts give "lip service" to the "weighing of interests" test, it is becoming increasingly clear that the courts will allow the forum to apply its own law, simply on a showing that the forum has a sufficient interest in the transaction in question; this is in the area of workmen's compensation.

The Supreme Court and Full Faith and Credit, 29 Va. L. Rev. 557, 609 (1943); Hilpert and Cooley, supra note 19, at 41-43. See STUMBERG, PRINCIPLES OF CONFLICTS OF LAWS 67-68 (2d ed. 1951).

See note 21 supra. It is important to remember that "Full Faith and Credit shall be given ... to the public acts, records and judicial proceedings of every other State." U.S. CONST. art. IV, § 1. This has been interpreted to mean that full faith and credit will be given to the statute-law of a sister state: Smithsonian Institution v. St. John, 214 U.S. 19 (1909); 62 STAT. 947 (1948), 28 U.S.C. § 1738 (1958). Moreover, there is a growing body of opinion which says that full faith and credit must also be given to the decisional law of a sister-state: Currie, supra note 19, at 15-16 cf. Holden v. Hamilton Fire Ins. Co., 54 F. Supp. 145 (S.D. Fla. 1944). Similarly, writers have felt that a state may deprive a party of due process by applying the common law of any state having no interest in the matter: Hilpert and Cooley, supra note 19, at 54-58; Currie, supra note 19, at 16; cf. Young v. Masci, 289 U.S. 253 (1933). These last two problems will not present any difficulties here, since the categories of cases to be discussed will involve only statutory law, and it is settled that due process will upset an improper application of the statutory law of the forum and full faith and credit will upset a failure to apply the properly controlling statute of a sister-state. See note 20 supra and note 24 infra.

Reese and Kaufman, supra note 1, at 1132; Comment, Full Faith and Credit to Statutes, 45 Yale L. J. 339 (1935); Holt, Full Faith and Credit—A Suggested Approach to the Problem of Recognition of Foreign Corporations, 89 U. Pa. L. Rev. 453, 478 (1941); see Coleman, Corporate Dividends and the Conflict of Laws, 63 Harv. L. Rev. 433, 437-8 (1950); Jackson, Full Faith and Credit—the Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 27 (1945).


In Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932), a New Hampshire court was compelled to give full faith and credit to a Vermont workmen's compensation act, although the injury was caused in New Hampshire. In Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935), it was held where the contract of employment was entered into in California, the injury occurring in Alaska, notwithstanding that the contract recited that the employee was to be bound by the Alaska compensation statute, that due
There are two other areas in which the full faith and credit clause has been applied. Neither of these is clearly explicable on the first test; that is, in both areas it would appear that the courts are first considering the legitimate concern of the forum and the sister-state, as well as a national concern for uniformity; second, weighing them, and last, choosing the law representing the superior interest. In the first line of cases, it has been held that full faith and credit demands that the liability of a shareholder of a corporation for corporate debts, and the manner in which it may be enforced, are governed solely by the statutes of the state of incorporation. Such liability cannot be increased, nor a different remedy given, by the statutes of any other state in which the corporation may do business. Unfortunately, the authority of these cases has been lessened somewhat by a series of contrary decisions permitting application of shareholder liability statutes of states other than that of incorporation.

The second line of cases has consistently held that the rights of members of a fraternal and beneficiary society must be determined by the law of the state of the society's incorporation. These cases have been heavily

process and full faith and credit were not violated by an application of California law. The court (Id. at 547-8), however, applied a "weighing" test. Bradford was distinguished in Pacific Ins. Co. v. Industrial Acc. Com'n, 306 U.S. 493 (1938) where it was held that California did not have to give full faith and credit to a Massachusetts compensation statute where the injury occurred in California. In Carroll v. Lanza, 349 U.S. 408 (1955), it was similarly held that the state where the worker was injured could award him damages although the compensation act of the state where the contract of employment was made and the parties resided purported to give an exclusive remedy. See Watson v. Employers Liab. Corp., 348 U.S. 66 (1954); Mr. Currie in an examination of these cases, supra note 19, at 26-27, distinguishes Bradford from the subsequent cases by saying that the former case was one of wrongful death and the latter were cases of personal injury, and he argues that in Bradford New Hampshire had no interest in the application of its wrongful death statute. This effects a harmonization of this case with the first test, but it is admitted to be a "latter-day rationalization."


Thomas v. Matthiessen, 232 U.S. 221 (1914); Pinney v. Nelson, 183 U.S. 144 (1901). See Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 Pac. 942 (1910). In Thomas v. Matthiessen, supra at 235, the court did not apply the rule that the liability of a stockholder is to be determined solely by the charter and laws of the incorporating state. The court said that since the corporation was authorized to do business in California, the shareholder must be deemed to have given his consent to its doing business there. "He knew that California had laws and he took his risk of what they might be, when . . . he gave his assent to doing business there." In Coleman, supra note 23, at 478, the author attempts to reconcile the cases on a "weighing of interests" approach: " . . . the cases are . . . consistent with the theory that a state other than that of incorporation is under a duty to give full faith and credit to the immunity from personal liability granted a shareholder by the statute of the state of incorporation, unless some interest is shown in imposing personal liability that is superior to the interest of the state of incorporation in granting immunity from such liability."

criticized by those advocates of the first test;\(^\text{29}\) and, it is true both that the most recent decision embodying the rule for beneficiary societies was a 5-4 decision of the Supreme Court;\(^\text{30}\) and that the rule was successfully avoided by a decision in the sixth circuit.\(^\text{31}\) However, Wolfe, and the cases which it followed, are significant for the purposes of this study for this reason: they demonstrate that the Supreme Court, when faced with the problem of whether a state should be compelled to give full faith and credit to the statutes of another state, will, in certain types of transactions, consider the national concern for the application of a uniform law, and will, when the occasion calls for it, direct all states to apply that uniform law.

**OFFERS AND SALES EFFECTED IN A STATE VIA THE MAILS**

*The Case Law*

In *Merrick v. Halsey & Co.*\(^\text{32}\) the question presented was the validity of the Michigan blue sky law. The persons bringing the suit to enjoin the enforcement of the statute consisted of a considerable number of corporations, partnerships and individuals. These complainants alleged that the statute was unconstitutional as contrary to due process and to the commerce and cruel and unusual punishment clauses; and that the statute consisted of an unconstitutional delegation of power to the Michigan Securities Commission.\(^\text{33}\) Among those contesting was Remick, Hodges Company, a partnership. Remick and Hodges were both residents of New York, and March, a third partner, was a resident of New Jersey. Their office was in New York City, and they were engaged in the business of buying and selling stock, bonds and other securities. They carried on business in New York and elsewhere through agents and by means of the mails. The partnership had no place of business in Michigan and were not at the time of this suit sending agents into the state. However, they had been offering and were offering securities for sale to customers in the state of Michigan by mail, telegraph or telephone.\(^\text{34}\) The court held (Mr. Justice McReynolds dissenting) that the Michigan blue sky law was a valid exercise of the police power of the state, and was not unconstitutional under the four-
teenth amendment, the commerce clause, or as an unconstitutional delegation of power."

No consideration was given to the special problem raised by the New York partnership. The case, therefore, amounts to a blanket validation of the Michigan blue sky law even as applied to offers effected in a state solely by use of the mails or other interstate facilities. Although the court did not give any special attention to this transaction, it was believed by a number of practitioners at that time, that the court definitely meant what it was saying. For example, the opinion of counsel, referred to above, states:

Our conclusion on this point, therefore, is that if the Blue Sky Laws were constitutional in their entirety and as they seem to be construed by the State officials, the offering of securities by mail or telegraph, or even by telephone, from outside the State would constitute a violation of the law and be indictable and punishable as such in the State.

The opinion also refers to the problem of advertisements:

The conclusion above stated necessarily applies to advertisements in papers published in the Blue Sky State, the papers being in legal effect a medium through which the offering is made to the investor. It would seem also to apply though with manifest difficulties in its application, to advertisements in papers or magazines published in other States and circulating in the Blue Sky States. We say with manifest difficulties in its application, because in a criminal prosecution it would, we hope, be impossible to convict a dealer for an advertisement in a Springfield, Illinois, paper, a few copies of which without his knowledge, or intent, found their way into Iowa. On the other hand, an advertisement in a Chicago paper made with knowledge of its wide circulation in Michigan . . . would seem to constitute an intended offering of the security in those states, as would also an advertisement in a national magazine known to circulate in all or most of the states.

Wrigley Pharmaceutical Co. v. Cameron was decided nine years

88 Id. at 589-590. See note 16 supra on the special problem raised by the commerce clause.
89 See note 34 supra.
90 ELLIOTT, op. cit. supra note 34, at 38.
91 See note 37 supra.
92 16 F.2d 290 (M.D. Pa. 1926); Klagsbrunn, Regulation of Interstate Security Sales— A Recent Report, 1 U. Chi. L. Rev. 88, 89. See also Duke v. Olson, 240 Ill. App. 198 (1926). This was a suit brought to enforce double liability of a stockholder of a bank under a Washington statute. The defendant contended, inter alia, that the stock was sold to him in violation of the blue sky law of Illinois. The facts were that one J., saw a circular in his office at Chicago, soliciting sales of securities, inquiries to be directed to Tacoma, Washington. J. induced the defendant to buy, defendant agreed, and J. wired the bank for fifteen shares (five for himself and ten for defendant). The bank acknowledged receipt and sent subscription blanks to J.; J. was not an agent of the bank. The court merely said, as to this point, "Under similar circumstances, it was held that there was no violation of the Blue Sky Law. People v. Hill Top Metals Min. Co., 300 Ill. 564." Id. at 206. An examination of People ex rel. Brundage v. Hill Top Metals Mining Co., 300 Ill. 564, 133 N.E. 303 (1921), indicates that the court in Duke treated this transaction as a sale made in Washington; and, on the majority view that the validity of a contract is determined by the law of the place of contracting, Illinois law was inapplicable; it was merely the place where the sale was solicited. The court is not saying, however, that an offer to sell securities directed into Illinois would not be a violation of the statute, even though via the mails.
later. The plaintiff in that case was a Delaware corporation with an office in Atlantic City, New Jersey. The president of the corporation was a citizen of Pennsylvania and an inhabitant of Philadelphia. The defendants were the commissioner of banking and the attorney-general of Pennsylvania. Wrigley had been engaged in the sale of tooth paste and treasury stock to inhabitants of Pennsylvania by use of circulars sent through the mails from Atlantic City to the Pennsylvania residents. When the commissioner of banking issued a subpoena to the president and vice-president, requiring their presence for an examination pursuant to the Pennsylvania securities law, the officers refused to appear, and instead filed a bill to restrain the defendants from prosecuting any civil or criminal action under the statute because it was in violation of the commerce clause of the Constitution.\textsuperscript{40} The court dismissed the action as premature, for the reason that it was impossible to determine that it was the intention of the authorities of Pennsylvania to undertake any direct interference with interstate commerce.\textsuperscript{41} However, the court did express itself on how it would probably treat the case, if it were not premature. Citing \textit{Merrick}, it said that "... it is clear that the Pennsylvania Securities Act cannot be attacked on the ground that it is an unlawful interference with interstate commerce."\textsuperscript{42}

This case is vulnerable for three reasons: (1) The statement of the court as to the constitutionality of the statute amounts only to a dictum. (2) It is not entirely clear from the opinion whether the mail order business was carried on solely via the mails (the president and vice-president were both citizens of Pennsylvania). (3) The court, as in \textit{Merrick}, did not address itself to the specific problem of offers effected in the state solely via the mails. However, the implication of the decision is that the statute covered this type of transaction (assuming it was carried on solely via the mails), and that there was no constitutional objection.

Then in \textit{Bartlett v. Doherty},\textsuperscript{43} the court dealt separately with two transactions. In the first transaction, the plaintiffs had given orders in New Hampshire for the purchase of stock from the defendant, having been solicited by an agent of the defendant who was physically in the state. In the second transaction one of the plaintiffs, Bartlett, called the defendant's Boston office by telephone for information concerning some stock previously purchased. The call was referred to the New Hampshire agent who at that time was present in the Boston office. The agent urged Bart-

\textsuperscript{40}\ 16 F.2d at 291.
\textsuperscript{41}\ Id. at 296.
\textsuperscript{42}\ Ibid.
lett to buy more stock. The plaintiff agreed and mailed a check to the Boston office. The stock was delivered and accepted by the plaintiff in New Hampshire." The action arose when the plaintiffs sought to recover money paid for the stocks which they alleged were sold in violation of the New Hampshire blue sky law. That law provided: "No salesman or agent shall in this state, in behalf of any dealer, sell, offer for sale or invite offers for or inquiries about securities unless registered . . .." (Emphasis added.) It was alleged that the New Hampshire agent was not registered. The district court decided in favor of the plaintiffs in each case and the defendants appealed.

As to the first transaction the court affirmed the decision of the district court. The court said that, "If an unregistered salesman or agent sold or took orders for stock in violation of such statutes and his illegal acts cannot be ratified by his principal, a purchaser, on offering to return his stock and any benefit received therefrom, is entitled to recover the purchase price." However, the court reversed the district court and held the second transaction covered by the securities act. The court said:

The decision seems to indicate that to be a violation of the statute there must be an offer or sale in New Hampshire. There was an offer in this case, but that offer, the court held, was made in Massachusetts, not in New Hampshire. This interpretation of the law runs counter to the view that a proposal is not an "offer" until it is received. The view that the proposal is not an offer until receipt points to the place of receipt as the place where the offer is "made". But here we are left with a rather strict interpretation of the statute; that is, an offer can only be made in New Hampshire when the offeror is physically present in that state. The court said that "no contract of sale . . . was entered into by (the agent) while in New Hampshire." (Emphasis added.) Thus, the statutory phrase "in

44 81 F.2d at 921-922.
45 See N.H. REV. STAT. ANN. 421:18 (1955) which makes the same provision as stated in the text. It was admitted that the defendant was registered as a dealer under the statute. See N.H. REV. STAT. ANN. 421:7 (1955).
46 81 F.2d at 927.
47 Id. at 928.
48 RESTATEMENT, CONTRACTS § 23 (1932).
49 The UNIFORM SECURITIES ACT § 414(c) solves the problem by saying that an offer is "made in this state" either if it "originates from this state" or if it "is directed by the offeror to this state."
50 81 F.2d at 928.
this state", not only modifies "... sell, offer for sale ...", but also "... salesman or agent ...", so that in order to violate the New Hampshire statute a salesman must actually enter the state and carry on his negotiations there.\textsuperscript{61}

It must be remembered that this is a federal court decision construing the New Hampshire statute. Even if New Hampshire still places this restrictive interpretation on her blue sky law—binding only those defendants who make sales or offers when physically present in the state—this does not mean that a broader interpretation would be unconstitutional. There is no indication in the case that the court was interpreting the statute so as to make it constitutional.

Before turning to the leading case on this subject, reference might be made to \textit{Hardy v. Musicraft Records, Inc.}\textsuperscript{62} In that case, the plaintiff, at his Los Angeles residence, received a letter forwarded from New York from the predecessor of the defendant corporation. The letter enclosed a purchase commitment letter for the plaintiff's use in confirming an agreement to buy shares of the predecessor corporation. The plaintiff signed the purchase commitment letter and sent it by mail from Los Angeles to the corporation in New York. Certificates representing 5,000 shares in the corporation were forwarded from New York to the California Bank in Los Angeles and were eventually delivered to the plaintiff. When the plaintiff discovered that no permit had been procured by the corporation for the sale of its shares, this action was brought to recover the purchase price.\textsuperscript{63} The court held that since the contract was made in California by mailing the purchase commitment letter there, the validity of that contract was governed by California law. The California statute, as it then provided, stated that, "Every security issued by any company without a permit of the commissioner authorizing the same then in effect, shall be

\textsuperscript{61}Two points should be kept in mind: first, whether the words "in this state" appear in the statute, or not, any offer or sale which \textit{does not} occur within the state cannot be constitutionally regulated by a statute of that state; at least in this sense a statute can have no extra-territorial effect. See, e.g. \textit{People v. J. O. Beckman & Co.}, 347 Ill. 92, 97, 179 N.E. 435, 437 (1932). This proposition will be examined more fully in connection with the second category of transactions to be analyzed. It is only necessary here to point out that while in \textit{Merrick} it was both assumed that the offers via the mails occurred within the state and that the statute covered those offers, and held that the statute was constitutional, in \textit{Doherty} it was held that the offer did not occur within the state, and hence, was not covered by the statute. Second, most of the blue sky laws contain the phrase "in this state," but, as will be seen, the majority of blue sky administrators do not imply the same physical presence qualification into their provisions as did the \textit{Doherty} court into the New Hampshire statute.


\textsuperscript{63}\textit{Id. at} 700, 209 P.2d at 840.
The court then said that since the sale was made in violation of the statute the transaction was void and the plaintiffs were entitled to recover their money. This is another decision following *Merrick* but without a reasoned opinion.

The discussion of the case law on this subject ends with *Traveller's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n.*

The following is a statement of facts:

The appellant Traveller's Health Association was incorporated in Nebraska as a nonprofit membership association in 1904. Since that time its only office has been located in Omaha, from which it has conducted a mail-order health insurance business. New members pay an initiation fee and obligate themselves to pay periodic assessments at the Omaha office. The funds so solicited are used for operating expenses and sick benefits to members. The Association has no paid agents; its new members are usually obtained through the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office. The appellant Pratt in Omaha mails solicitations to these prospects. He encloses blank applications which, if signed and returned to the home office with the required fee, usually result in election of applicants as members. Certificates are then mailed, subject to return within 10 days if not satisfactory. Traveller's has solicited Virginia members in this manner since 1904, and has caused many sick benefit claims to be investigated. When these proceedings were instituted it had approximately 800 Virginia members.

The Virginia Corporation Commission, determining that the activities of Traveller's violated the state blue sky law—requiring those selling or

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84 ANN. CAL. CODES, CORPORATIONS CODE § 26100 (1955) now provides: "Every security of its own issue sold or issued by any company without a permit is void." In spite of the language which is found in the cases that stock issued in violation of the securities act is "void," it is well settled that such securities are merely voidable at the behest of innocent purchasers or subsequent assignees: Eberhard v. Pac. Northwest Loan & Mortgage Corp., 215 Cal. 226, 130 P.2d 302 (1942); Robbins v. Pac. Eastern Corp., 8 Cal.2d 241, 65 P.2d 42 (1937); Western Oil & Refining Co. v. Venago Oil Corp. 218 Cal. 733, 24 P.2d 971 (1933); Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.2d 104 (1932); Dahlquist, *Regulation and Civil Liability Under the California Corporate Securities Act: II*, 34 Calif. L. Rev. 344, 352-353 (1946).


86 Mention may be made of a point which is often overlooked in discussing B. C. Turf & Country Club, Ltd. v. Daugherry, 94 Cal.App.2d 320, 210 P.2d 760 (1949), a proceeding to compel the commissioner of corporations to rescind an order directing petitioners, a Canadian corporation, to cease and desist from further sale of stock within the state. The decisive question was whether there was a solicitation of a sale in violation of the California statute. The court laid heavy stress on certain incidents which in their view did not amount to "solicitation." However, they ignored an incident which occurred after the plan to sell stock had been put into operation: "A Mr. Gilmore, a client of Fraser's [the principal promoter] telephoned Fraser [who was in Canada] from San Francisco and asked about the deal, and was told by Fraser about the procedure to be followed." *Id.* at 325, 210 P.2d at 763. Was the court treating this as de minimus, or is something being said about the application of the California statute?


88 339 U.S. at 645-646.
offering securities to obtain a permit— instituted cease and desist proceedings against the insurance company and its treasurer.69

The Virginia court first asks whether "the activities of the appellants in the Commonwealth of Virginia have been such as to subject them to the State's regulatory power."66 The court stressed the following activities taking place in Virginia: solicitation of new members by old members, investigations, remittances in payment of benefit claims being received and accepted in the Commonwealth, and the sales actually being made there. If the court had continued along this line of inquiry, a more satisfactory reasoning for the result might have been obtained. Unfortunately, the court mixed the question of the power to regulate with the power to enforce, and it did not carefully segregate its authorities under one or the other of the two issues.61 However, despite this, the court did make a clear state of its holding:

We hold, in view of the authorities referred to, that the evidence in possession of the State Corporation Commission constituted good cause to conclude that the appellants had been engaged in selling securities in Virginia through the United States mail without complying with, and in violation of, the provisions of the applicable laws of the state.68

It is assumed that the offers or solicitations made by the association occurred within Virginia (contrary to the Doherty approach). The court held that the sales occurred within Virginia, and apparently that these acts within Virginia constituted violations of the blue sky law.

The opinion of the Supreme Court, delivered by Mr. Justice Black, is unsatisfactory for the same reason noted above with respect to the Virginia decision. The court said that the basic contention "... is that all their activities take place in Nebraska and that consequently Virginia has no power to reach them in cease and desist proceedings to enforce any part of its regulatory law."68 (Emphasis added.) However, the court went on to speak of what constitutes "doing business" justifying regulation, and cited Osborn v. Oslin,44 and Hoopeson Co. v. Cullen,65 distinguishing Min-
nesota Ass'n v. Benn,

for the proposition that "... a state's power to regulate need not be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.'" Yet, at the same time the court cites the landmark, substituted service case of International Shoe Co. v. Washington,

and lumping all these cases together the court concludes that "... the contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justify subjecting appellants to cease and desist proceedings under §6." (Emphasis added.) Further, the court says: "We hold that Virginia's subjecting of this Association to the jurisdiction of that State's Corporation Commission in a §6 proceeding is consistent with 'fair play and substantial justice', and is not offensive to the Due Process Clause." (Emphasis added.)

The opinion indicates that these solicitations and sales occurred within Virginia. Is is assumed that the Virginia blue sky law, as construed, covers these transactions. Further, it is assumed—in view of the fact that the opinion stresses the power to enforce to such an extent—that Virginia constitutionally (presumably under the due process clause) has the power to regulate these transactions. The thrust of the opinion seems directed at disposing of the constitutional objections to the ability to enforce such power as Virginia is assumed to have.

Mr. Justice Douglas, in a separate concurring opinion, said that "The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to appellant." Furthermore, he disposed of the objection based on the case where a policy-holder seeks to sue the foreign company in Virginia: "His ability to sue is not necessarily the measure of Virginia's power to regulate." He said that, "Whether such

which insured against fire and related risks might be constitutionally made subject to a New York registration law. Except for the possibility that agents might be used to investigate risks in New York, the business of the company was carried on through the mails. The Court held that the statute was valid and not unconstitutional under the fourteenth amendment. This case is distinguishable from Traveller's on the ground that, among other things, the insurance covered property situated in New York, and the Court said that, "The states have long had great authority over property within their borders." 318 U.S. at 318. On the other hand, this is a case involving regulation and not enforcement, and it does indicate how far the courts are willing to go in permitting the states to regulate business carried on via the mails.

261 U.S. 140. See note 61 supra.
399 U.S. at 648.
326 U.S. 310 (1945).
339 U.S. at 648.
Id. at 649.
Id. at 652.
Id. at 653. This distinction was also drawn in the Virginia court, where an attempt was made to distinguish the Benn case, which involved a "pecuniary civil judgment," and Traveller's, which was an inquiry "quasi-criminal in its approach." 188 Va. at 889, 51 S.E.2d at 267.
solicitation is isolated or continuous, it is activity which Virginia can regu-
late. Hence, Mr. Justice Douglas held that it was not a violation of due process for Virginia to regulate sales and offers made within the state via the mails.

Mr. Justice Minton, joined by Mr. Justice Jackson, dissented on the ground that the appeal was premature. He said: "I would answer the question of due process when Virginia has attempted to apply its process to appellants in a proceeding that has consequence of a nature which entitles a person to the protection of the Due Process Clause." However, he voiced an opinion as to the matter of substituted service, and said that for such purpose, he would not hold that appellants were "present" in Virginia. He made it clear, however, that he was discussing the power to enforce and not the power to regulate. Mr. Justice Reed and Mr. Justice Frankfurter, agreed with the Court in reaching the merits, and on the merits joined the dissent.

The case is not satisfactory for a number of reasons: (1) As has been noted throughout the discussion of the case, the problem of regulation and enforcement are lumped together. (2) Possibly the decision only represents that line of cases recognizing the state's special interest in regulating the insurance business. (3) There may be some factual distinctions, such as the fact that the association relied on the activities of old members to solicit new members or the fact that investigations might be made in Virginia by the company. The Supreme Court opinion, nevertheless, is strong authority for the proposition that a state doing a substantial amount of business in the state has the power at least under the due process clause to regulate offers and sales made within the state, effected by use of interstate facilities.

Administrative Opinions

A number of attorney general opinions have been written on the issue of whether the particular blue sky law in question was broad enough to cover an offer or sale effected in the state solely by use of the mails. Those opinions vary, and many of them probably do not represent current thinking among the present securities commissioners and administrators.  

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"339 U.S. at 654.
"Id. at 655.
"Id. at 657.
"See note 8 supra.
"339 U.S. at 659.
"In Osborn v. Ozlin . . . we recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the state action may have repercussions beyond state lines. . . ." Id. at 647.
"In Ops. OHIO ATT'Y GEN. 1423 (1955) it was thought that newspapers published
Perhaps a more realistic indication of how blue sky law administrators construe their statutes was obtained by a private survey conducted by the author. The following questionnaire was sent to forty-eight administrators:

A. Do you believe that your Blue Sky Law is broad enough to cover an offer or sale (or both) of securities in your state, solely via the mails or some interstate facility, by a person in another state?

B. This question covers not only the case of the individual contract, but also the situation involving advertisements from out-of-state newspapers, radio and television stations and the like. Whatever your answer, it would be helpful if the section or sections upon which you rely were cited.

Replies were received from forty-two states. Three states to date have solved the problem by adopting section 414 of the UNIFORM SECURITIES ACT. Twenty-six state administrators answered "yes" to the entire question, and of those twenty-six, sixteen referred to specific sections of their statutes. Four administrators believe that the answer to part "A" is "yes", but that their respective statutes do not cover the case of out-of-state newspapers, radio and the like. Again, of those four, three referred

out of state containing advertisements of securities did not violate the statute, and in Ops. ORE. ATT'Y GEN. 688 (1940) it was said that where Oregon residents address inquiries about stocks to a New York corporation and where negotiations are carried on through the mails culminating in a sale in New York, the New York corporation is not violating the Oregon act. In Ops. CONN. ATT'Y GEN. 350 (1932) the writer believed that a broker located out of state, offering or selling securities to persons located within the state, solely via the mails was subject to the securities act. The New Mexico Attorney General, Ops. N.M. ATT'Y GEN. 38 (1933), although believing that sales via the mails within the state were "technical" violations of the statute, did not believe that the state could exercise effective control over these transactions. An earlier opinion in Ops. MICH. ATT'Y GEN. 621 (1955) was over-ruled in a later opinion in Ops. MICH. ATT'Y GEN. 465 (1957), where it was held that non-resident dealers or brokers might not legally solicit persons in Michigan by mails without being licensed as a securities dealer under the Michigan blue sky law. A position similar to that of the Michigan Attorney General was taken in 23 Ops. MD. ATT'Y GEN. 138 (1938) and in 17 Ops. CAL. ATT'Y GEN. 217 (1951).

Delaware and Nevada, which have no blue sky law, excepted. All correspondence and other data relating to this survey have been turned over to the Harvard Law School Library.
to specific sections of their statutes. Seventy administrators answered "no" to the entire question, and four of the answers pointed to particular sections of their codes. The Iowa administrator believed that although the act seemed broad enough to cover interstate solicitations and sales, there was considerable doubt about the ability to enforce such violations. The North Dakota statute relating to securities registration omits the words "offer to sell", but the dealer section reads, "No dealer or salesman shall offer for sale or sell any securities. . .". In any event the North Dakota blue sky administrator would answer "yes" to both parts of the question, but only as to out-of-state newspapers having a "substantial circulation" in the state, as to television offers.

The results, then, suggest that a large majority of the administrators are in favor of a construction of their statutes which would first, indicate that offers directed into the regulating state are made in that state, and second, that the offers and sales so made in the state are covered by their blue sky laws.

Conclusion.

There are a number of analogies which can be and have been drawn in support of the state's power to regulate offers and sales of securities.

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86 N.D. Rev. Code § 10.0404 (Supp. 1957). This is to be corrected at the present session of the North Dakota legislature, according to a letter from C. L. Hughes, Securities Commissioner, to the author, March 21, 1960.
90 Loss & Cowett, Blue Sky Law 215-221 (1958). For example, the authors point to the criminal law analogies: It is generally held, assuming that the facts otherwise disclose an offense committed within the jurisdiction, that the court is not deprived of jurisdiction by mere absence of the defendant from the state at the time the offense was committed: Ford v. United States, 273 U.S. 593 (1927); Lamar v. United States, 240 U.S. 60 (1916); Strassheim v. Dailey, 221 U.S. 280 (1911); In re Palliser, 136 U.S. 257 (1890); United States v. Steinberg, 62 F.2d 77 (2d Cir. 1932), cert. denied, 289 U.S. 729 (1933); Ex parte Hedley, 31 Cal. 108 (1866); State v. Tickle, 238 N.C. 206, 77 S.E.2d 632 (1953), cert. denied, 346 U.S. 938 (1953). See also Restatement, Second, Conflict of Laws § 43F(1) (e), comment at 30 (Tent. Draft No. 3, 1956). In the law of torts, the conflict principle is that the court must look to the law of the state where the last event necessary for liability takes place: Aetna Freight Lines v. R. C. Tway Co., Ky., 298 S.W.2d 293 (1956); Restatement Conflict of Laws §§ 377-379 (1934). Finally, the provisions of the SEC statutes on registration of securities and broker-dealers apply to offers sent from a foreign country into the United States by use of the mails; Loss, Securities Regulation 1172-1173 (1951).
Perhaps, though, the problem is not as troublesome as it once was. In the first place, there is the problem of where the offer was made. All but one of the cases in this area have assumed that where the offer is made via the mails or the telephone, it was made in the state where it was received. It is submitted that Doherty may be distinguished in future cases, possibly on the ground that it was the customer, and not the broker, who took the initiative in that case. Second, while nearly no state blue sky law expressly so provides (with the exception of those states which have adopted section 414 of the UNIFORM SECURITIES ACT), the cases appear to either assume, or hold, that such offers or sales made within the state come within the purview of that state's securities law. Third, while none of the cases above raised the point, it seems clear that the offering and selling of stock by a foreign corporation within a state does not come under the so-called "internal affairs" rule, a rule which says that a state has no "visitorial" powers over foreign corporations and that its courts will not interfere in their internal affairs and management.

Last is the constitutional issue. In spite of the uncertainties which might still exist on this question, it is submitted that today there are no constitutional objections when a state seeks to regulate interstate solicitations and sales, made within its boundaries. If a straight "governmental interest" test is adopted, that test appears to be satisfied. It is well settled that a state has a sufficient concern to protect its citizenry from "speculative schemes which have no more basis than so many feet of 'blue sky'" or "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations." Moreover, it does not seem likely that, even on the "weighing of interest" test, a different result would be reached. There does not seem to be any need for the application of a single law in this instance. It has been suggested that

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93 London, Paris & American Bank v. Aronstein, 117 Fed. 601, 609 (9th Cir. 1902), cert. denied, 187 U.S. 641 (1902). "It is true the courts in California cannot control the internal affairs of any foreign corporation. Such matters are to be conducted in pursuance of and in compliance with the provisions of the charter of the foreign corporation and the laws of the country where it was created; but in the management and method of its business affairs in California with the citizens and residents thereof, in the sale or disposition or transfer of the shares of stock, it must conform to the laws of California in relation to such matters, . . ." (Emphasis added.) See also Williams v. Gaylord, 186 U.S. 157 (1902); Gillis v. Pan American Western Petroleum Co., 3 Cal.2d 249, 44 P.2d 311 (1935); Biddle v. Smith, 148 Tenn. 489, 256 S.W. 453 (1923).


there is no reason why, when a corporation is performing an act that an individual is also capable of performing (e.g. offering and selling stock to the public), the purchaser's rights ought not to vary depending on the state in which he deals with the corporation.99

Therefore, if the proposition is accepted that a state has a sufficient interest in the protection of its citizens with respect to stock schemes, that interest ought constitutionally to support its regulating offers and sales via the mails; and, logically, that power ought to extend even to the case of the single offer, or the isolated sale, no matter what the medium may happen to be.99 As the survey shows, a great majority of the state administrators construe their statutes to reach these limits. In considering this proffered opinion, however, it might be remembered that the Supreme Court has only sustained statutes in the cases of companies which carried on a continuous selling effort in the regulating state.

*The Uniform Securities Act.*99

The Act, in section 414, provides that an offer is "made in this state" both when the offer "originates from this state" or "is directed by the offeror to this state."99 This solves the uncertainty of the question of where the offer is "made", pointed up especially by Doherty. The section puts a special emphasis on the interest of the individual in compliability and fairness, when it excludes from its definition of "offer" newspapers published outside the state, and radio and television program originating outside the state.100 However, it is still possible for the newspaper or the television station to violate the statute if it accepts an "offer to buy"—made as a result of the advertisement—"in this state".101 The section represents a maximizing both of the state's interest in regulation and protection, and the individual's interest in certainty and a "just" application of the law.102

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99 The case of Hardy v. Musicraft Records, Inc., 93 Cal.App.2d 698, 209 P.2d 839 (1949), which appear to be an instance of an isolated sale, may support this proposition.

99 Loss & Cowett, op. cit. supra note 90 at 224-229.

99 § 414(c).

100 § 414(e).

101 § 414(d).

102 See *Uniform Securities Act* § 401(c)(4) which excludes from the definition of "Broker-Dealer" any person "who has no place of business in this state if . . . during any period of twelve consecutive months he does not direct more than fifteen offers to sell or buy into this state . . . whether or not the offeror or any of the offerees is then present in this state." and § 401(f)(6) which makes the same exclusion for "Investment adviser," fixing the number at five, instead of fifteen, and using the term "business communications" instead of "offers to sell or buy." These two sections have been adopted by: ALASKA COMPILED LAWS ANN. §§ 35-6-21(c), 35-6-21(f) (Supp. 1959); ARK. STAT. §§ 67-1247(c), 67-1247(f) (Supp. 1959); REV. LAWS HAWAII §§ 199-1(c), 199-1(f) (1955); OKLA. STAT. ANN. §§ 2(c) 2(f) (Supp. 1959). CODE VA. § 13.1-501(c) (1950), adopts with some changes, § 401(c); and, N.M. STAT. § 48-18-17(h) (Supp. 1959), adopts with only a slight change, § 401(f).