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CORPORATIONS - FOREIGN CORPORATIONS - SERVICE OF PROCESS BASED UPON SOLICITATION

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COMMENTS

CORPORATIONS — FOREIGN CORPORATIONS — SERVICE OF PROCESS BASED UPON SOLICITATION — The question of just when a foreign corporation is amenable to process for an in personam action¹ has long troubled the courts. To one who is seeking a clear and applicable formula, the cases in this field offer but little aid because of the confusion created by the multitude of decisions upon the problem.² The decisions of the United States Supreme Court itself are of no great assistance in deriving such a formula.³ Many attempts have been made by legal writers to define a working rule for this problem as a whole.⁴ However, the present writer will endeavor only to point out certain factors which have influenced decisions in the cases where a foreign corporation was merely soliciting business within the state.

I.

To obtain a clear view of the factors involved in these situations, it is necessary to view the problem in the light of its historic approach.⁵ It always has been a simple matter to find the basis for jurisdiction of a state over a corporation created by it; the power of creation gives to the state the power to control.⁶ The case of a foreign corporation is,

¹ A foreign corporation may consent to jurisdiction by the state. If it owns property within the state it is subject to an "in rem" or "quasi in rem" action.

² See collection of cases in U. S. BUREAU OF CORPORATIONS, REPORT OF COMMISSIONER OF CORPORATIONS ON STATE LAWS CONCERNING FOREIGN CORPORATIONS 156 (1915); and *Frink Co. v. Erikson*, (C. C. A. 1st, 1927) 20 F. (2d) 707 at 711, where Judge Morris, after citing a paragraph of cases, said, "From these cases we have tried, without success, to discover some salient circumstance or point common to all that might be held to be determinative of the instant case." See also, *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, 60 A. L. R. 986 (1928); *Knapp v. Bullock Tractor Co.*, (D. C. Cal. 1917) 242 F. 543 at 549.

³ Cf. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944 (1914), with *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233 (1918).

⁴ Stimson, "Jurisdiction over Foreign Corporations," 18 ST. LOUIS L. REV. 195 (1933); Farrier, "Jurisdiction over Foreign Corporations," 17 MINN. L. REV. 270 (1933); 29 COL. L. REV. 187 (1929).

⁵ For a good discussion of the historical development of this subject, see HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, c. 5 (1918).

⁶ "The foundation for jurisdiction is physical power." Holmes, J., in *McDonald v. Mabee*, 243 U. S. 90 at 91, 37 S. Ct. 343 (1917).

however, very different. In an earlier period of our law, a foreign corporation was not considered to be amenable to process in an in personam action.⁷ The theory was, as expressed by Justice Taney⁸ in his now famous dictum, "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." This result could not long be tolerated because it soon became obvious that corporations were acting outside their own states and were entering into transactions with residents of these states. To hold that such a corporation could not be sued within the state without its consent worked a severe hardship upon the residents of that state. Plaintiffs were oftentimes obliged to go great distances in order to sue the corporation. This created the burden of getting witnesses to attend a distant trial. An additional hardship was the fact that many times the corporation had no attachable property in its home state.⁹ To remedy this situation, statutes were passed providing for service of process upon foreign corporations which were "doing business" within the state. Many of these statutes were passed prior to the Fourteenth Amendment.¹⁰ However, even after that amendment was passed, the statutes were upheld because it was said that doing business within a state was a reasonable basis of jurisdiction and so satisfied the "due process" clause.¹¹ The factor of "doing business" within a state was not recognized as establishing a new basis for jurisdiction but was explained upon the theory of consent.¹² The reasoning was that since the state had the power to refuse admission of foreign corporations which were not agents of the Federal Government or corporations engaged in interstate commerce,¹³ the state could as an implied con-

⁷ HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, c. 5 (1918); *Peckham v. North Parish in Haverhill*, 16 Pick. (33 Mass.) 274 (1834).

⁸ *Bank of Augusta v. Earle*, 13 Pet. (38 U. S.) 519 at 588, 10 L. Ed. 274 (1839).

⁹ *Railroad Co. v. Harris*, 12 Wall. (79 U. S.) 65 at 83, 20 L. Ed. 354 (1870). Also Farrier, "Jurisdiction over Foreign Corporations," 17 MINN. L. REV. 270 at 273 (1933).

¹⁰ The first statute expressly providing for personal service upon a foreign corporation was passed in Florida in 1829, followed by Maryland in 1834.

¹¹ *St. Clair v. Cox*, 106 U. S. 350, 1 S. Ct. 354 (1882); *Goldey v. Morning News*, 156 U. S. 518, 15 S. Ct. 559 (1894); *Riverside Mills v. Menefee*, 237 U. S. 189, 35 S. Ct. 579 (1915).

¹² The consent theory was first proposed by Justice Thompson sitting in circuit in the unreported case of *Warren Mfg. Co. v. Aetna Ins. Co.*, (Conn. 1837), where the Maryland statute of 1834 was upheld. This theory was adopted by the Supreme Court in *Lafayette Ins. Co. v. French*, 18 How. (59 U. S.) 404, 15 L. Ed. 451 (1855). See HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, c. 5 (1918), for a development of this doctrine.

¹³ *Pembina & Con. Silver Min. & Milling Co. v. Pennsylvania*, 125 U. S. 181,

dition to the corporation's entering the state make a foreign corporation amenable to process there. The corporation's consent to the statutory condition was implied upon its entering the state. Later another theory, called the "actual presence" theory, was developed.¹⁴ Under this theory it was said that if a corporation was "doing business" in a state it must be present in that state. The use of these two fictional theories, which extended the law of natural persons to make it adaptable to corporations, is largely responsible for the confusion occurring in this field.¹⁵

During this same period the states, in order to gain more control over foreign corporations acting within the state, used the concept "doing business" not only as a basis for service of process but also as a basis for taxation and qualification of corporations to act therein. It has been pointed out by many legal writers that these three powers of the state are different and that the requirement of "doing business" necessary to support them is likewise different in each case.¹⁶ The requirement of "doing business" necessary for service of process upon a corporation is the least exacting of the three.¹⁷

2.

While the theories of "implied consent" and "actual presence" serve to adapt the "doing business" concept to the old jurisdictional principles governing natural persons, it is well to bear in mind that they are, after all, fictions, and are of no help in determining when a foreign corporation is doing business within the state.¹⁸ The "implied

8 S. Ct. 737 (1887). The clause of the Constitution which declares that citizens of each state are entitled to the privileges and immunities of the citizens of the several states does not apply to corporations. *Paul v. Virginia*, 8 Wall. (75 U. S.) 168, 19 L. Ed. 357 (1868); *Ducat v. Chicago*, 10 Wall. (77 U. S.) 410, 19 L. Ed. 972 (1870); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (77 U. S.) 566, 19 L. Ed. 1029 (1870). In general, for discussion of power of state to exclude foreign corporations, see HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, c. 6 (1918).

¹⁴ *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218, 33 S. Ct. 245 (1913); *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944 (1914); *Philadelphia & Reading Ry. v. McKibben*, 243 U. S. 264, 37 S. Ct. 280 (1916); *Louisville & N. R. R. v. Chatters*, 279 U. S. 320, 49 S. Ct. 329 (1928).

¹⁵ For a discussion of the piling up of precedents upon valid distinctions and questionable analogies, see 29 *COL. L. REV.* 187 at 189, note 12 (1929).

¹⁶ Isaacs, "An Analysis of Doing Business," 25 *COL. L. REV.* 1018 at 1024 (1925); Farrier, "Jurisdiction over Foreign Corporations," 17 *MINN. L. REV.* 270 at 293 (1933); BALLANTINE, *PRIVATE CORPORATIONS* 854 (1927); Munsert, "'Doing Business' in a State for the Purpose of Service of Process on a Foreign Corporation," 13 *CHICAGO-KENT L. REV.* 328, 331 (1935)

¹⁷ Isaacs, "An Analysis of Doing Business," 25 *COL. L. REV.* 1018 (1925).

¹⁸ BALLANTINE, *PRIVATE CORPORATIONS*, § 291 (1927); 29 *COL. L. REV.* 187 at 188 (1929).

consent" theory is not only a useless tool in this regard but is apt to be misleading.¹⁹ Likewise, the "actual presence" theory should be discarded as a means of determining what the courts mean when they say a corporation is doing business.²⁰ A corporation itself is a fictional entity. It can manifest itself to our senses only through its officers and servants. To say that the corporation is present every time an agent or servant acts for the corporation in a foreign state may be logically sound, but it is an unreasonable interpretation of the statutory phrase of "doing business" and is not borne out by the decisions.²¹ For a more reasonable interpretation of the requirement of "doing business," it is better to look to the practical reasons underlying the practice of allowing foreign corporations to be sued in the state. Such a realistic approach requires one to balance the hardships and injustice of requiring a plaintiff to go great distances to sue the corporation, especially upon actions occurring within the state, with the requirement of due process or the reasonableness of compelling corporations to stand suit in that state.²² These two conflicting interests cannot be balanced in an abstract formula and so we find the courts refusing to lay down an express rule as to what constitutes "doing business." They have preferred to rest each decision upon the facts of that case.²³ Likewise, very few of the states have by statute attempted to lay down any specific definition, but have been content merely to use the phrase "doing business."²⁴ While it is impossible to define "doing business," the decisions in the solicitation cases seem to be hammering out the boun-

¹⁹ For a criticism of the consent theory, see Farrier, "Jurisdiction over Foreign Corporations," 17 MINN. L. REV. 270 at 278 (1933); Stimson, "Jurisdiction over Foreign Corporations," 18 ST. LOUIS L. REV. 195 at 201 et seq. (1933).

²⁰ Fead, "Jurisdiction over Foreign Corporations," 24 MICH. L. REV. 633 (1926); BALLANTINE, CORPORATIONS, § 291, p. 464 (1927); 29 COL. L. REV. 187 at 288 (1929).

²¹ Service of process upon an official whose presence in the state is not for corporation business is invalid. *Riverside Mills v. Menefee*, 237 U. S. 189, 35 S. Ct. 579 (1915); *Philadelphia & Reading Ry. v. McKibben*, 243 U. S. 264, 37 S. Ct. 280 (1916). For sporadic and occasional acts within the state as not justifying process, see *infra*, note 39.

²² 29 COL. L. REV. 187 (1929); Farrier, "Jurisdiction over Foreign Corporations," 17 MINN. L. REV. 270 (1933); *St. Clair v. Cox*, 106 U. S. 350, 1 S. Ct. 354 (1882); *Railroad Co. v. Harris*, 12 Wall. (79 U. S.) 65, 83 (1870); *Davis v. Farmers' Co-Op. Equity Co.*, 262 U. S. 312, 43 S. Ct. 556 (1923).

²³ *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218, 33 S. Ct. 245 (1913); *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233 (1918). Attempts by the Supreme Court to lay down a general rule are cited in *Knapp v. Bullock Tractor Co.*, (D. C. Cal. 1917) 242 F. 543 at 549.

²⁴ For review of state statutes up to 1915, see U. S. BUREAU OF CORPORATIONS, REPORT OF COMMISSIONER OF CORPORATIONS ON STATE LAWS CONCERNING FOREIGN CORPORATIONS 48 (1915). See also Iowa Code (1924), §§ 11072, 11079.

dary inclosing this concept. As yet the line is so roughly drawn that cases apparently alike are falling upon each side. Such being the state of affairs, it is well to consider the factors which have been influencing the courts in making their decisions.

3.

An important factor, yet one rarely expressly mentioned in the opinions, is the nature of the cause of action being sued upon.²⁵ It is frequently said that mere solicitation is not the doing of business so as to justify service of process.²⁶ While not the first case, perhaps the most frequently cited to sustain this position, is *Green v. Chicago, Burlington & Quincey R. R.*²⁷ In this case an Iowa corporation maintained an agency in Philadelphia, which solicited both freight and passenger business, but sold no tickets. It was held that this was not doing business so as to make the corporation amenable to process in a suit for personal injuries suffered in Colorado. While the decision was said to be limited to its facts by the same court in *International Harvester Co. v. Kentucky*,²⁸ it is the law today for such cases. The decision seems to be a reasonable solution for this type of "ticket agency" case, where the carrier may have such agencies scattered far and near. In such cases it would be unfair to the railroad to make it be ready to stand suit upon any cause of action arising in any state.²⁹ A Minnesota statute which provided that the establishing of such an agency by a corporation made it amenable to service was held unconstitutional. Such a statute created a burden upon interstate commerce because it allowed nonresidents to serve the corporation in Minnesota, though the cause of action arose elsewhere.³⁰ Another good illustrative case is that of *Loeb v. Star & Herald Co.*³¹ In that case a Panama newspaper maintained a small office in New York for the solicitation of advertising. It was held that the corporation could not be served in New York in an action for libel occurring in Panama. If, in either of the above cases, the cause of action had been one arising out of the solicitation itself, it would seem more reasonable to hold that the

²⁵ Discussed in 29 Col. L. Rev. 187 (1929).

²⁶ *Philadelphia & Reading Ry. v. McKibben*, 243 U. S. 264, 37 S. Ct. 280 (1916); *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233 (1918); *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, 60 A. L. R. 986 (1928).

²⁷ 205 U. S. 530, 27 S. Ct. 595 (1907).

²⁸ 234 U. S. 579, 34 S. Ct. 944 (1914).

²⁹ See opinion by Justice Brandeis in *Davis v. Farmers' Co-Op. Equity Co.*, 262 U. S. 312, 43 S. Ct. 556 (1923). Also, *Louisville & N. R. R. v. Chatters*, 279 U. S. 320, 49 S. Ct. 329 (1928).

³⁰ *Davis v. Farmers' Co-Op. Equity Co.*, 262 U. S. 312, 43 S. Ct. 556 (1923).

³¹ 187 App. Div. 175, 175 N. Y. S. 412 (1919).

foreign corporation could be served in the foreign state.³² As was said by Judge Rose in *Frey & Sons v. Cudahy Packing Co.*,³³ "Whether a nonresident corporation is doing business specially, so as to subject it to suit at the instance of a particular defendant, may depend in part upon the relation of the things it is doing to the cause of action asserted."

A second factor to be considered in the balancing of the convenience to the corporation and the hardship to the plaintiff is the volume of business.³⁴ The famous *International Harvester* case³⁵ is often cited for holding that at least in some cases solicitation is "doing business." In that case the foreign corporation maintained a group of agents in Kentucky soliciting orders and collecting money for the company. It was held that this conduct was sufficient to make it amenable to process in Kentucky. A few courts³⁶ have construed this case to mean that soliciting, combined with collecting money, is "doing business" within the state. There is ample language in the opinion upon which this distinction may be based.³⁷ However, the New York court has taken a different view of the *International Harvester* case. Relying heavily upon that case, the New York court held in the leading case of *Tauza v. Susquehanna Coal Co.*³⁸ that it is the *quantity* and *continuity* of the solicitation that is decisive, not the mere additional factor of collecting money. In the *Tauza* case, a Pennsylvania coal company maintained a large office in New York, employing about twelve salesmen, together with several stenographers. All orders were approved by the corporation at its home office. The court held that because of the large volume of solicitation which resulted in a continuous flow of coal into New York, the Pennsylvania company was doing business in New York. It is reasonable to weigh the quantity of solicitation occurring in the state in determining the reasonableness of compelling the

³² *La Porte Heinekamp Motor Co. v. Ford Motor Co.*, (D. C. Md. 1928) 24 F. (2d) 861; *Davis v. Farmers' Co-Op. Equity Co.*, 262 U. S. 312, 43 S. Ct. 556 (1923).

³³ (D. C. Md. 1915) 228 F. 209 at 213.

³⁴ *Shambe v. Delaware & Hudson Ry.*, 288 Pa. St. 240, 135 A. 755 (1927); *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917); *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, 60 A. L. R. 986 (1928); *Frey v. Cudahy Packing Co.*, (D. C. Md. 1915) 228 F. 209.

³⁵ 234 U. S. 579, 34 S. Ct. 944 (1914).

³⁶ *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233 (1918); *Lauricella v. Evening News Pub. Co.*, (D. C. N. Y. 1936) 15 F. Supp. 671.

³⁷ 234 U. S. 579 at 585-586: "The agents not only solicited such orders in Kentucky but [they] might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the State in our judgment constituted a doing of business there. . . ."

³⁸ 220 N. Y. 259, 115 N. E. 915 (1917), discussion in 60 A. L. R. 994 at 1035 (1928).

corporation to stand suit there. To illustrate with an extreme case, suppose a corporation was formed whose entire business was to solicit orders in a foreign state. Can anyone say that it would be unreasonable to compel that corporation to stand suit there? Should that corporation be able to harass people dealing with it by compelling them to sue in its home state?

Perhaps more courts recognize that the quantity of business is a factor in the converse situation. It is usually held that occasional or sporadic acts within a foreign state do not make the corporation amenable to process within that state.³⁹

The type of business conducted by a foreign corporation within the state is a third important factor to be considered in determining whether it is reasonable to compel foreign corporations to stand suit in the state.⁴⁰ Perhaps the best illustration of this is the case of *St. Louis S. W. Ry. v. Alexander*.⁴¹ In that case a Texas corporation maintained a ticket agent in New York, who solicited passenger and freight business, but made no contracts and collected no money. It appeared, however, that the agent was accustomed to enter voluntarily into the preliminary negotiation of claims. It was held in this case that the corporation was doing business in New York. While the factual situation of this case is not entirely clear, if the corporation had machinery to investigate claims in New York even though such machinery is incidental to solicitation, it should be suable there.⁴² This would cause no great inconvenience to the corporation compared to the hardship placed upon the New York shipper if he were compelled to sue in Texas.

Although for the purpose of this discussion the above factors have been treated as independent of each other, they are all usually present to a greater or lesser degree in each case.⁴³ The interrelation of these

³⁹ *Holzer v. Dodge Bros.*, 233 N. Y. 216, 135 N. E. 268 (1922); collection of cases in U. S. BUREAU OF CORPORATIONS, REPORT BY COMMISSIONER OF CORPORATIONS ON STATE LAWS CONCERNING FOREIGN CORPORATIONS 156 et seq. (1915); 10 L. R. A. (N. S.) 693 (1907). In *Lauricella v. Evening News Pub. Co.*, (D. C. N. Y. 1936) 15 F. Supp. 671, the solicitation was continuous but was on such a small scale that the court held it was unreasonable to hold that the corporation subjected itself to suit in that state.

⁴⁰ This factor is usually combined with the quantity of business factor. See Farrier, "Jurisdiction over Foreign Corporations," 17 MINN. L. REV. 270 at 293 et seq. (1933).

⁴¹ 227 U. S. 218, 33 S. Ct. 245 (1913).

⁴² Thus in a case where an insurance company solicited business in a foreign state and had agents there adjusting losses, the company was held to be doing business in that state. *Pennsylvania Lumberman's Mut. Fire Ins. Co. v. Meyer*, 197 U. S. 407, 25 S. Ct. 483 (1905).

⁴³ However, the quantity of business factor seems to be sufficient in itself. In *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259 at 268-269, 115 N. E. 915 (1917),

factors is well illustrated by a recent Iowa case⁴⁴: (1) A foreign corporation maintained no offices in Iowa, but solicited orders through traveling salesmen. The cause of action arose out of the activities of the company in Iowa. It was a suit for personal injuries caused by a salesman negligently driving a company car. (2) The foreign corporation had a staff of salesmen continually soliciting business in Iowa. This resulted in a large quantity of sales. (3) The salesmen drove company cars, and so the company could reasonably expect such suits. Upon all these factors the court rested its decision that the company was doing business in Iowa.

In conclusion, it must be recognized that the decisions in this field cannot all be harmonized. Due to the vagueness of the concept "doing business," it is not to be expected that the courts would arrive at identical conclusions as to what is and what is not doing business. This is especially true in the solicitation cases which mark the borderline of the concept "doing business." The general approach to the problem by the courts is that mere solicitation is not doing business within the state but that very little else is needed to give the courts of that state jurisdiction.⁴⁵ An attempt has been made here only to point out a few more important factors which, if present in a case involving solicitation, have led the courts to hold the foreign corporation was doing business. The influence of these factors has been felt by all courts. Whether or not they have been expressly recognized depends a good deal upon whether the court treats the problem as one of the reasonableness of requiring the corporation to stand suit or whether the court is still under the influence of the "implied consent" or "actual presence" theories of jurisdiction.

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Cardozo, J., reasoned that the quantity of business made the corporation actually present in the state and so he said, "The essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action."

⁴⁴ *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, 60 A. L. R. 986 (1928).

⁴⁵ For collection of cases, see 9 L. R. A. (N. S.) 1214 (1907); 23 L. R. A. (N. S.) 834 (1910); L. R. A. 1916E 236; 60 A. L. R. 994 (1929), and *supra* note 2.