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CORPORATIONS-PURCHASE OF NOTES AND MORTGAGES AS "DOING BUSINESS"

CORPORATIONS—PURCHASE OF NOTES AND MORTGAGES AS "DOING BUSINESS"—*C* was engaged in loaning money in Idaho. He sold many of the notes and mortgages which he thus received to the plaintiff, a foreign corporation. It was his practice, nevertheless, to collect the interest on these notes and remit it to the plaintiff. The actual sales of the notes and mortgages occurred in Chicago. In this manner the plaintiff acquired the note of the defendant, a resident of Idaho, and his mortgage on Idaho land. The Idaho statute forbids a foreign corporation "doing business" in the State to sue in its courts without taking certain qualifying steps.[1] The plaintiff, who had not taken these steps, brought this action to foreclose the mortgage. The lower court found as a matter of fact that the plaintiff was not loaning money in Idaho through *C*. *Held*, the suit was maintainable as the plaintiff was not "doing business" in the State. *Continental Assurance Co. v. Ihler*, 53 Idaho 612, 26 Pac. (2d) 792 (1933).

Whether a corporation is doing business within a State so as to come within the provisions of a regulatory statute is, of course, primarily a matter of statutory interpretation.[2] There are, however, certain more fundamental considerations. No matter how explicit a statute may be it cannot apply to a corporation over which the State has no jurisdiction.[3] Moreover, such a statute must not

[1] Idaho Code (1932), secs. 29-501 to 29-510. See also sec. 29-602.

[2] "Doing business" is not the only phrase used. Other expressions are "do any business," "carry on its business," "carry on any business," "transacting business," "transact any business," "establishing business," "attempting to do business." Clearly a difference in wording may indicate a difference in legislative intent. However, many courts have been overanxious to reconcile conflicting decisions on differences in statutory phrases when such phrases were really synonymous.

Some statutes attempt to define "doing business" more explicitly. In view of the numerous interpretations placed upon all these phrases, such a definition would seem to be highly desirable.

For valuable digests of statutes and cases see the pamphlet of the Corporation Trust Company, WHAT CONSTITUTES DOING BUSINESS (1933); United States Dept. of Commerce, Bureau of Corporations, "Report of Commissioner of Corporations on State Laws Concerning Foreign Corporations" (1915).

[3] To be sure it is sometimes said that a State has jurisdiction over a foreign corporation *if* it is "doing business" in the State. However, the more carefully considered statements of the Supreme Court are to the effect that a State has jurisdiction over a foreign corporation if it is doing business in such manner as to warrant the inference that it has consented to the local jurisdiction, or (in the more recent cases) that it is present there. People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233 (1918); Philadelphia & Reading Ry. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280 (1916). "Doing business" has so many different meanings that to use it as the basis for determining jurisdiction, at least without further definition, is only to invite confusion of thought. See Chattanooga National Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630 (1903), and Reynolds v. Missouri, Kansas & Texas Ry., 228 Mass. 584, 117 N. E. 913 (1917), affirmed *per curiam* 255 U. S. 565, 41 Sup. Ct. 446 (1921) where service was upheld though the foreign corporation clearly would not have been "doing business" so as to come under most service of process statutes. 6 MINN. L. REV. 309 (1922) criticizes this.

The question of jurisdiction of course becomes a "due process" question in the federal courts. This should be distinguished from the constitutional question here

violate the federal Constitution either by putting unreasonable restraints on interstate commerce or by imposing unreasonable conditions on admittance and thus depriving the corporation of property without due process of law.[4] With jurisdictional and constitutional objections out of the way, the interpretation of the statute will depend not only on the precise words used by the legislature, but also on the type of statute involved. Some, but by no means all, courts have distinguished the "doing business" necessary for three different situations—service of process, taxation, and qualification.[5] Constitutional questions may have some bearing on this classification.[6] Yet as to any one type and form of statute the courts have consistently said that the whole problem was one of fact, and that each case should be decided independently.[7] The present case involves the repeated purchase for investment of Idaho notes and mortgages. As a fact situation this should be clearly distinguished from the situations in which notes and mortgages are taken as security for past indebtedness or as part of the purchase price of some article sold—both only incidental to the corporate business.[8] The Idaho court perhaps failed to do this.[9] Yet as the court held itself

referred to as due process and which involves the rule that only reasonable conditions may be imposed upon a foreign corporation entering the State.

On the general question of jurisdiction see Scott, "Jurisdiction Over Non-residents Doing Business Within a State," 32 HARV. L. REV. 871 (1919); Fead, "Jurisdiction Over Foreign Corporations," 24 MICH. L. REV. 633 (1926); Cahill, "Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory," 30 HARV. L. REV. 676 (1917); 29 COL. L. REV. 187 (1929).

[4] Davis v. Farmers' Co-operative Equity Co., 262 U. S. 312, 43 Sup. Ct. 556 (1923); Terral v. Burke Construction Co., 257 U. S. 529, 42 Sup. Ct. 188 (1922).

[5] Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917); Anderson v. Morris & E. R.R., (C. C. A. 2d, 1914) 216 Fed. 83; Atkinson v. United States Operating Co., 129 Minn. 232, 152 N. W. 410 (1915); Isaacs, "An Analysis of Doing Business," 25 COL. L. REV. 1018 (1925); 36 HARV. L. REV. 327 (1923).

[6] Requirements of qualification would usually be considered an unreasonable restriction on interstate commerce. International Text-book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481 (1910). Yet submission to service of process would not always be so considered. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944 (1914); but see Davis v. Farmers' Co-operative Equity Co., 262 U. S. 312, 43 Sup. Ct. 556 (1923).

Similarly, the due process clause permits the imposition of only reasonable restrictions on persons actually within the State. If the State has jurisdiction, submission to service would certainly be reasonable. Qualification provisions discriminating between foreign and domestic corporations or amounting to virtual expulsion probably would not be.

[7] International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944 (1914).

[8] This case should also be distinguished from the purchase of a single note and mortgage. Single transactions and incidental transactions do not usually come within any definition of "doing business." Caesar v. Capell, (C. C. W. D. Tenn. 1897) 83 Fed. 403; Ockenfels v. Boyd, (C. C. A. 8th, 1924) 297 Fed. 614. BEALE, FOREIGN CORPORATIONS, sec. 204 (1904).

[9] The court seems to treat the giving of the note and mortgage as merely inci-

conclusively bound by the finding of the lower court that the plaintiff was not engaged in loaning money in Idaho, through *C* as an agent, the decision that the plaintiff was not "doing business" in Idaho is almost solidly supported by precedent.[10] If the actual purchase of the notes or the loaning of the money had taken place in Idaho instead of in Illinois, most courts would probably say that the plaintiff was "doing business" in Idaho.[11] That by principles of conflict of laws the law of Illinois would govern one transaction while that of Idaho would govern the other has often been considered an important factor in this result.[12] Yet in substance there is no difference between the two transactions. A finance corporation can easily avoid the effect of the latter type of decision, as is usually done, by making the formal purchase of the notes and mortgages outside the State. Jurisdictional and constitutional grounds may have influenced the courts in making this distinction, but it is submitted that neither would be fatal to a contrary holding.[13] If this be true, the question remains solely one of legislative

dental to the loan and the collection of interest as merely incidental to the enforcement of the debt instead of looking at the whole as one transaction.

[10] Involving mortgages on realty: Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933); People's Bldg., Loan & Saving Ass'n v. Berlin, 201 Pa. 1, 50 Atl. 308 (1901); Norton v. Union Bank & Trust Co., (Tenn. Ch. App. 1898) 46 S. W. 544; Sullivan v. Sheehan, (C. C. Minn. 1898) 89 Fed. 247.

Involving mortgages on chattels: Equitable Credit Co. v. Rogers, 175 Ark. 205, 299 S. W. 747 (1927); Industrial Acceptance Corp. v. Haering, 253 Ill. App. 97 (1929); Jones v. General Motors Acceptance Corp., 205 Ky. 227, 265 S. W. 620 (1924); Commercial Investment Trust v. Gaines, 193 N. C. 233, 136 S. E. 609 (1927); General Motors Acceptance Corp. v. Shadyside Coal Co., 102 W. Va. 402, 135 S. E. 272 (1926).

[11] Hemphill v. Orloff, 277 U. S. 537, 48 Sup. Ct. 577 (1928), affirming 238 Mich. 508, 213 N. W. 867 (1927); Wash. Nat. Bldg., Loan & Investment Ass'n v. Stanley, 38 Ore. 319, 63 Pac. 489 (1901); People's Bldg., Loan & Savings Ass'n v. Markley, 27 Ind. App. 128, 60 N. E. 1013 (1901). There are, of course, always other factors present in these cases. However, the cases on both sides of this point put much stress on the place where the purchase or loan occurred.

[12] At least the place of acceptance need not be determinative. Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630 (1903); British-American Mortgage Co. v. Jones, 77 S. C. 443, 58 S. E. 417 (1907).

"Counsel has discussed at some length the situs of contracts and by the law of what place their obligation is determined. We think, however, that the discussion is not relevant. It withdraws our consideration from the constitution and statute of Alabama. . . . " Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 189 U. S. 408 at 415, 23 Sup. Ct. 630 at 632 (1903).

[13] The purchase of the Idaho mortgage and the collection of the interest is sufficient presence or consent for jurisdiction. Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630 (1903); Reynolds v. Missouri, Kansas & Texas Ry., 255 U. S. 565, 41 Sup. Ct. 446 (1921). There is no interference with interstate commerce, as dealing in notes and mortgages does not constitute commerce. Hemphill v. Orloff, 277 U. S. 537, 48 Sup. Ct. 577 (1928). The plaintiff would not be deprived of due process of law by being required to qualify according to the Idaho statutes before purchasing the notes and mortgages. Hemphill v. Orloff, supra; York Business College v. Kost, 53 S. D. 590, 221 N. W. 673 (1928); Chattanooga

intent. Did the legislature intend to distinguish between these two similar situations? Did the legislature clearly intend to deprive any foreign corporation, purchasing such notes and mortgages either within or without the State, of the right to enforce the notes in its courts—and so of the substantial value of its contract? [14]

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Nat. Bldg. & Loan Ass'n v. Denson, supra. But see *contra*, Eastern Bldg. & Loan Ass'n v. Bedford, (C. C. W. D. Tenn. 1898) 88 Fed. 7.

[14] Clearly this may involve an extremely harsh result. For a case influenced by this see Caesar v. Capell, (C. C. W. D. Tenn. 1897) 83 Fed. 403.

Perhaps fundamentally the problem becomes a social and economic one. Does a State wish to encourage or discourage loans of foreign capital to its residents?