

Michigan Law Review

Volume 52 | Issue 3

1954

Corporations - Effect of Domestication Statute on Foreign Corporations

J. David Voss S.Ed.

University of Michigan Law School

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Recommended Citation

J. D. Voss S.Ed., *Corporations - Effect of Domestication Statute on Foreign Corporations*, 52 MICH. L. REV. 448 (1954).

Available at: <https://repository.law.umich.edu/mlr/vol52/iss3/9>

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CORPORATIONS—EFFECT OF DOMESTICATION STATUTE ON FOREIGN CORPORATIONS—Plaintiff brought suit to enjoin the collection of a state tax on intangibles consisting of stocks held by plaintiff in domesticated foreign corporations. The lower court enjoined the defendant, a county treasurer, from collecting the tax. On appeal, *held*, reversed, three judges dissenting. A foreign corporation which has complied with the Nebraska domestication statute is a

foreign corporation for purposes of the Nebraska intangibles tax. *Omaha Nat. Bank v. Jensen*, (Neb. 1953) 58 N.W. (2d) 582.

When a foreign corporation enters a state to carry on business, the state acquires a legal jurisdiction over the corporation. The state may utilize one or more of three methods to give a practical meaning to this jurisdiction. (1) A state may require the corporation to register and to pay certain fees and taxes, and in return the corporation is licensed to do business within the state. (2) A state may require or allow the corporation to comply with a "domestication" statute.¹ (3) In some instances, the corporation incorporates anew.² A great deal of confusion has resulted from attempting to distinguish between a domestic corporation, organized under the law of a state, and a foreign corporation which has domesticated by complying with a domestication statute. That such a distinction exists, however, is now well recognized.³ The mainspring of this confusion is the ambiguous language found in most domestication statutes. For example, the Georgia domestication statute confers upon a complying foreign corporation "the same powers, privileges, and immunities as similar corporations created under the laws of this State," and subjects them to "the same obligations, duties, liabilities and disabilities as if originally created under the laws of this State. . . ."⁴ This statute has been held not to incorporate or create a new corporation, but only to confer certain powers, privileges and immunities, and to impose certain obligations, duties and liabilities on a complying foreign corporation.⁵ The Nebraska domestication statute provides that a complying foreign corporation shall "become and be a body corporate of this state."⁶ The Nebraska court has held that this statute confers certain powers and privileges and imposes certain duties and obligations on the corporation, but that the corporation is not to be regarded as a "domestic corporation."⁷ The result is to give the state a potent tool for regulating foreign corporations. When the question arises whether a domesticated foreign corporation is to be treated as a domestic corporation, the court is free to go in either direction, its decision

¹ In some states, the term "domestication" is applied to mere licensing. The term is used here as distinctive from licensing.

² In Nebraska, a foreign corporation that has complied with the domestication statute may incorporate under the laws of Nebraska, provided it surrenders its foreign corporate charter.

³ 17 FLETCHER, *CYC. CORP.*, rev. ed., §8310 (1933). See also 126 A.L.R. 1503 (1940).

⁴ Ga. Code Ann. (1935) §22-1601.

⁵ *Forrester v. Continental Gin Co.*, 67 Ga. App. 119, 19 S.E. (2d) 807 (1942).

⁶ Neb. Rev. Stat. (1943) §21-1,150.

⁷ In *re Estate of Sautter*, 142 Neb. 42, 5 N.W. (2d) 263 (1942). In this case, the court held that a domesticated foreign corporation did not fall within a tax exemption granted to domestic corporations. It is interesting to note that the Nebraska domestication statute is the result of a historical expedient. In 1888 the court held that a foreign railroad corporation could not exercise the right of eminent domain or acquire a right of way, since the state constitution provided that no railroad corporation could exercise such rights unless it was a body corporate of the state. *State v. Scott*, 22 Neb. 628, 36 N.W. 121 (1888). To escape this impasse, the legislature in 1889 passed a statute allowing a foreign corporation to become a "body corporate of this state." The present domestication statute is the result.

depending on whether the court feels the power or obligation in dispute is among those intended to be conferred or imposed by the statute. In addition, the legislature may expressly indicate in which category a domesticated foreign corporation falls for the purposes of a certain statute. In the principal case, the question was whether stock held in domesticated corporations should be taxed as stock in corporations organized under the law of Nebraska or as stock in foreign corporations. The difference was in the method of assessing and collecting the tax.⁸ The court, following an earlier decision,⁹ decided the stock was to be treated as stock in a foreign corporation. This case has firmly settled the law of Nebraska on the point, and foreign corporations entering Nebraska should be wary of domesticating there. Since the advantages of being a "body corporate" in that state would seem to be few, merely qualifying for a license to do business should suffice for most corporate purposes.¹⁰ The disadvantage in domesticating is that often a Nebraska statute covering domestic corporations will expressly bring domesticated foreign corporations within the purview of that statute.¹¹ Before entering a state which offers such a disarming but pit-fall-ridden pattern of regulation, a foreign corporation should examine with care the legal effects of domestication compared with mere qualification for a license to do business within the state.¹²

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⁸ The Nebraska statutes involved provided: "The value of the shares of stock of corporations organized under the laws of this state shall be determined for the purpose of taxation by deducting from the actual value of the paid-up capital stock, surplus and undivided profits of such corporation available for stock dividends, the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state and the actual value of the property of the corporation outside of this state. . . . The corporation shall pay the tax assessed upon its stock or shares, and shall have a lien thereon for the tax paid." Neb. Rev. Stat. (1943, 1950 reissue) §77-706. "If any foreign corporation is taxed in this state upon any tangible or intangible property, then the value of its gross shares of stock shall be ascertained by deducting from the actual value of the foreign corporation's paid-up capital stock, surplus and undivided profits, the assessed value of its property taxed in this state; and thereafter the taxing officials of counties in which shares of stock of any such foreign corporation may be owned, shall determine, in relation to such net value of the gross shares of stock, the value for assessment and taxation purposes of any such individual shares of stock in the hands of the resident owners." Neb. Rev. Stat. (1943, 1950 reissue) §77-722.

⁹ In re Estate of Sautter, note 7 supra.

¹⁰ A foreign corporation may transact business in Nebraska without domesticating by complying with the licensing statute. See Neb. Rev. Stat. (1943) §21-1201.

¹¹ E.g., an occupation tax in Nebraska is levied against a domesticated foreign corporation as if it were a corporation organized under the law of Nebraska. Neb. Rev. Stat. (1943, 1951 Cum. Supp.) §21-303.

¹² Shortly after the principal case was decided, the Nebraska legislature amended Neb. Rev. Stat. (1943, 1950 reissue) §77-706, quoted in note 8 supra, to include domesticated corporations. The result is to counteract the principal case to the extent of its holding on the particular tax involved.