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CORPORATIONS--FOREIGN CORPORATIONS--DOING BUSINESS BY AGENTS--COMITY

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CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS BY AGENTS—COMITY—The plaintiff, an Illinois corporation, offered correspondence courses in refrigeration and air conditioning. One of its agents solicited the defendant in Lincoln, Nebraska. The defendant signed a contract and promissory note for the tuition and made an advance payment, whereupon the agent forwarded the contract, note, payment and other papers to the home office of the plaintiff corporation in Chicago, Illinois. The plaintiff accepted the contract in Illinois. After six months, the defendant refused to proceed with the lessons or make further payments in accordance with the contract. The plaintiff sued for the balance due on the note. The Nebraska statute made it unlawful for a representative of any school, domestic or foreign, while soliciting in the state, to receive a note or contract for tuition unless the note had the words "Negotiable note given for tuition" written prominently thereon, or the contract was inscribed "Negotiable contract note given for tuition and scholarship." The statute, among other penalties, provided that a note or contract which failed to comply with its terms was void. The contract and note in question did not comply with this Nebraska statute. *Held,* although the contract may be considered an Illinois contract and perfectly valid by the laws of that state, the plaintiff may not enforce it in Nebraska. A foreign corporation under such circumstances possesses no greater rights than a domestic corporation, and when it solicits business in Nebraska contrary to its law, a contract growing out of such transaction, though finally consummated and valid in another state, if invalid in Nebraska, will not be enforced there as a matter of comity. *Refrigeration & Air Conditioning Institute, Inc. v. Hillyard,* (Neb. 1945) 18 N.W. (2d) 548.

A corporation sending agents into a foreign state to solicit is frequently met with that state's power to require the corporation to license its business, to tax the corporation or to subject it to service of process and to compel compliance with the local laws and policy. State statutes often apply simply to corporations "doing business within the state," making it important to such corporation to know when solicitation constitutes "doing business." The statutes do not as a rule

define the term or specify the transactions falling under it, and courts generally recognize that the answer to this question varies with the individual fact situation and the type of jurisdiction to be asserted.[1] Regarding this problem, Judge Learned Hand remarked, "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass." [2] Some principles seem clear, however. It is generally acknowledged that greater business activity is necessary to subject the foreign corporation to state taxation and licensing requirements than to service of process in the foreign state.[3] Mere solicitation, even accompanied by maintenance of a regular sales office, is not "doing business" such as will subject the foreign corporation to licensing requirements or to taxation. The corporation is doing an interstate business when soliciting in a foreign state subject to approval by the home office, and to apply the tax or license statutes to such a business might be considered placing an undue burden on interstate commerce.[4] A recent North Carolina case illustrates the small amount of activity that a court may say is "doing business" for purposes of serving process. The applicable statute covered "Every corporation having property or doing business in this state." The court held that the statute applied to a corporation operating coastwise steamers when one of its ships had made a single trip into the coastal waters of that state resulting in numerous transactions in a two-month period even after the ship had left the state.[5] Whether or not solicitation is "doing business" in such a way as to bring a foreign corporation within service of process statutes may depend on whether there are any other facts on which to base the jurisdiction of the state. Usually, single or isolated instances of solicitation are not regarded as doing business.[6] Some jurisdictions

[1] 17 FLETCHER, CYCLOPEDIA CORPORATIONS, § 8464 (1933).

[2] Hutchinson v. Chase & Gilbert, (C.C.A. 2d, 1930) 45 F. (2d) 139 at 142.

[3] Pergl v. U. S. Axle Co., 320 Ill. App. 115, 50 N.E. (2d) 115 (1943); Sperling v. McGee, (N.Y. S. Ct. 1944) 49 N.Y.S. (2d) 477; Isaacs, "An Analysis of Doing Business," 25 COL. L. REV. 1018 at 1045 (1925), "The business which must be transacted by a foreign corporation to permit service of process must be such as to warrant the inference that the corporation is present. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation is present but that it is active. In order that qualification be rendered necessary, the corporation must not only be present and active but its activity must be continuous." See also, 18 FLETCHER, CYCLOPEDIA CORPORATIONS, § 8712 (1933).

[4] 17 FLETCHER, CYCLOPEDIA CORPORATIONS, §§ 8482, 8494 (1933); International Textbook Company v. Pigg, 217 U.S. 91, 30 S. Ct. 481 (1910) (licensing); Crutcher v. Kentucky, 141 U.S. 47, 11 S. Ct. 851 (1891) (licensing); Coit & Co. v. Eli R. Sutton, 102 Mich. 324, 60 N.W. 690 (1894) (licensing); Wood & Selick v. American Grocery Co., 96 N.J.L. 218, 114 A. 756 (1921) (licensing); Cheney Bros. Co. v. Massachusetts, 246 U.S. 147, 38 S. Ct. 295 (1817) (taxation).

[5] State Highway & Public Works Commission v. Diamond S.S. Transp. Corporation, 225 N.C. 198, 34 S.E. (2d) 78 (1945).

[6] 17 FLETCHER, CYCLOPEDIA CORPORATIONS, § 8466, p. 470 (1933). "There is implied in the term "doing business" a continuity of act and purpose such as might be evidenced by investment of capital in the state, with the maintenance of an office for the transaction of its affairs and such incidental circumstances as attest the aim of the corporation to avail itself of the privilege of carrying on business in the jurisdiction. The general view seems to be that a foreign corporation is doing business in a state

hold that regular continued solicitation enables a court to say the corporation is "doing business" within the state and therefore amenable to process served in that state.[7] Others require more than mere solicitation for this purpose and look for additional facts such as maintenance of a regular sales office, company bank accounts or a stock of goods in the state.[8] Where a corporation is not "doing business" in the foreign state in such degree as is necessary for the tax, license, or process laws of that state to apply, the principal case indicates another hold the state may have on the foreign corporation soliciting in its jurisdiction. Since a corporation is an artificial creation of the law of the state which creates it, and the laws of that state have no extraterritorial effect, its capacity to do local business lawfully in another state depends on that state's consent.[9] A state may admit or exclude foreign corporations from doing local business on virtually any terms it chooses,[10] since a corporation is not a citizen within the meaning of the privileges and immunities clause of the Constitution. [11] On the other hand, states have considerably less freedom in regulating interstate transactions. It would seem fair that soliciting by a foreign corporation be subject to the same regulations as that of competing domestic corporations. This case may indicate an effective way to secure that competitive equality. A contract is the aim of solicitation, and where a corporation cannot secure enforcement of a contract in the state in which the other party resides, it may be practically unenforceable due to difficulty of obtaining process elsewhere. A similar policy was followed by the

only when it transacts therein some substantial portion of its ordinary corporate business."

[7] International Shoe Co. v. State, (Wash. 1945) 154 P. (2d) 801 at 807, "While it is probably true that most of the cases which hold the corporation was doing business in the state so as to make it amenable to process have some slight activity on the part of the agent in addition to the solicitation of orders resulting in a continuous flow of the corporation's products into the state, yet it seems to us the basic fact upon which the courts have determined that the corporation was doing business was the regular and systematic solicitation of orders by the agent. . . ."

[8] Sperling v. McGee, 49 N.Y.S. (2d) 477 (1944) (foreign railroad corporation soliciting business in state maintained freight office, held occasional directors meetings and maintained a bank account in state was held doing business for service of process); Rubin v. Consolidated Royal Chemical Corporation, 55 N.Y.S. (2d) 489 (1945) (maintaining a regular sales office in state held not enough in addition to solicitation to constitute doing business for service of process); Atlantic Coast Line R.R. Co. v. Goldberg, (D.C. Mun. Ct. App. 1944) 39 A. (2d) 563 (maintaining regular agents soliciting business and a sales office in state held doing business where in addition, the corporation's dining cars passed through the District regularly over the line of another railroad).

[9] Bank of Augusta v. Earle, 13 Pet. (38 U.S.) 519 (1839); 17 FLETCHER CYCLOPEDIA CORPORATIONS, § 8314 (1933).

[10] A state may not impose unconstitutional conditions precedent to a corporation's doing local business. International Textbook Company v. Pigg, 217 U.S. 91, 30 S. Ct. 481 (1910) (state may not interfere with interstate commerce); Terral v. Burke Construction Company, 257 U.S. 529, 42 S. Ct. 188 (1922) (state may not require a corporation to agree not to remove suits into federal court on grounds of diversity of citizenship).

[11] Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1868).

Wisconsin Supreme Court in *Presbyterian Ministers' Fund v. Thomas.*[12] The court, in dealing with an insurance contract, said, "We are aware of no rule of comity which requires our courts to enforce the contract of a foreign corporation with a resident of this state in conflict with the letter and policy of our laws, whether the contract was made in or out of the state." Observing that such a rule would put foreign corporations on a more favorable basis than domestic corporations the court said that the rule of comity did not go to such an extent.[13]

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[12] 126 Wis. 281 at 285, 105 N.W. 801 (1905).

[13] 17 FLETCHER, CYCLOPEDIA CORPORATIONS, § 8339, at p. 148 (1933), "In entering a foreign state to do business therein, a corporation impliedly agrees to become subject to its laws and is deemed to have notice of those laws. Consequently it cannot exercise powers or do acts contrary to the laws of the state whose comity it thus enjoys even though such powers or acts may be authorized by its own charter or by laws of its own state."