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Helen W. Munsert

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"DOING BUSINESS" IN A STATE FOR THE  
PURPOSE OF SERVICE OF PROCESS ON  
A FOREIGN CORPORATION

HELEN W. MUNSERT

**T**HE SUPREME COURT of the United States has frequently decided that as a mere legal entity, no corporation can have any legal existence beyond the dominion of the state by which it is created.<sup>1</sup> Any recognition which is given to it extraterritorially depends solely upon comity. How an injured person may obtain service of process upon such foreign corporation, if the state wherein he is injured or wherein he resides is not the state of incorporation, is a common problem. In order successfully to sue the corporation there must be valid service of process which can give the court jurisdiction. The rule at common law was that foreign corporations could not be served with process by any of the law courts, nor could their property in the jurisdiction be attached. Any authority for valid service resulted only from special custom or statutory provisions,<sup>2</sup> and originally the courts did not favor suits against foreign corporations. But the marked tendency of modern legislation and judicial decisions, is to make it easy to obtain jurisdiction of a foreign corporation. A statement by the United States Supreme Court, although made nearly forty years ago, is more than ever applicable: "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."<sup>3</sup> And since at common law one may be sued on a transitory cause of action wherever he can be served, the same is true of a corporation.

<sup>1</sup> *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274 (1839); *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. Ed. 896 (1858); *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130 (1862).

<sup>2</sup> *Clarke v. New Jersey Steam Navigation Co.*, Fed. Cas. No. 2859, 1 Story 531.

<sup>3</sup> *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964 (1898).

What, then, amounts to personal service on a foreign corporation in order to obtain a valid and binding judgment in personam? There are two absolute requisites laid down by all decisions, apart from any statutory regulations at all: first, the foreign corporation must be doing business in the state wherein service is sought to be made; second, service must be had upon an authorized agent of the corporation, present in that state.<sup>4</sup>

The question may be asked why a foreign corporation should be subject to jurisdiction in a state just because it is doing business there, with or without a license. The answer is that by coming in the state and using the protection of its laws, it has made itself liable to such service, and to deny that the state court had jurisdiction would be a great injustice.<sup>5</sup> Each state has a right to enact laws for service of process on foreign corporations not authorized to do business in such state.<sup>6</sup> In an opinion by the Supreme Court of Illinois, it was said:

If a foreign corporation does business in the state through agents, it may be sued there by obtaining service on the agent. . . . If it avails itself of the privilege of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to such service will be implied, . . . but the foreign corporation must have entered the domestic state for the purpose of carrying on its business there.<sup>7</sup>

The doctrine of allowing service on a foreign corporation, which subsists as an artificial entity by courtesy of the state,<sup>8</sup> has its origin in the Federal Constitution. The historic case of *Paul v. Virginia*,<sup>9</sup> cited many times since its decision over sixty-five years ago, is the foundation of the rule that a corporation is not a citizen within the meaning of the equal privileges and immunities clause of

<sup>4</sup> *Pembleton v. Illinois Commercial Men's Assn.*, 289 Ill. 99, 124 N. E. 355 (1919); *Sartain v. Avery Co.*, 217 Ill. App. 286 (1920); *Craig v. Sullivan Machinery Co.*, 344 Ill. 334, 176 N. E. 353 (1931); *Bull & Co. v. Boston & Maine R. Co.*, 344 Ill. 11, 175 N. E. 837 (1931).

<sup>5</sup> *Knutson v. Campbell River Mills*, 300 F. 241 (Dist. Ct., W. D. Wash., N. D., 1924).

<sup>6</sup> *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28 (1928).

<sup>7</sup> *Booz v. Texas & Pacific Ry. Co.*, 250 Ill. 376, 95 N. E. 460 (1911).

<sup>8</sup> *Fietsam v. Hay*, 122 Ill. 293, 13 N. E. 501 (1887).

<sup>9</sup> 8 Wall. 168, 19 L. Ed. 357 (1869).

the Federal Constitution, so that a state may lay down any restrictions against foreign corporations that it desires, and may even entirely exclude it. So also the state may hold it amenable to process even though it is not incorporated therein and has no license or certificate of authority from that state. Further, the members of a corporation are presumed to be citizens of the state in which the corporation was created, and where only it had legal existence; nor can the presumption be controverted in order to defeat the jurisdiction of a court, although all the members in fact live elsewhere.<sup>10</sup> The doctrine, therefore, is seen to be extremely old, and a long line of decisions in the United States Supreme Court has established that the fact necessary to render a foreign corporation amenable to service of process is that the corporation be transacting business in the state to such an extent as to subject it to the jurisdiction and laws thereof.<sup>11</sup> The first of those cases was decided in 1856, and one of the latest reaffirmances was in 1933.<sup>12</sup> Since jurisdiction of a state court involves the problem of due process under the Federal Constitution, the decisive cases come from the United States Supreme Court. That court has held that the requirement of due process can be met in an action against a foreign corporation only by service of process upon an officer or agent within the state where the corporation is doing business.<sup>13</sup>

<sup>10</sup> *Louisville, Cincinnati & Charleston R. R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353 (1844); *Marshall v. The Baltimore & Ohio R. R. Co.*, 16 How. 314, 14 L. Ed. 953 (1853); *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. Ed. 896 (1858); *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130 (1862).

<sup>11</sup> *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451 (1856); *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222 (1882); *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517 (1895); *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122 (1903); *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841 (1907); *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272 (1910); *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U. S. 496, 56 L. Ed. 857 (1912); *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486 (1913).

<sup>12</sup> *Consolidated Textile Corp. v. Gregory*, 289 U. S. 85, 77 L. Ed. 1047 (1933).

<sup>13</sup> *Sipe v. Copwell*, 59 F. 970 (C. C. A., 1894); *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569 (1899); *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 F. 259 (C. C., 1903); *Grant v. Cananea Consolidated Copper Co.*, 117 App. Div. 576, 102 N. Y. S. 642 (1907); *Wold v. J. B. Colt Co.*, 102 Minn. 386, 114 N. W. 243 (1907); *North Wisconsin*

Cases on what constitutes doing business in a state by a foreign corporation will fall into one of three groups, each distinctly different.<sup>14</sup> The first of these groups contains cases involving the question of compliance with statutory requirements in order to obtain a license from the state to transact business therein. Such statutes usually demand that a statement be filed with the secretary of state showing the location of its agent, the names of its officers, etc., as a condition precedent to doing business in the state. Where such restrictions exist, contracts made in violation of them are treated as entirely void, voidable at the option of the other party, or merely unenforceable by the corporation. Also into this class of actions fall suits brought by unlicensed corporations, since most states forbid the bringing of suits by such foreign corporations doing business in the state, although they may allow suits on contracts made while the corporations are unlicensed, provided a license is acquired before suit.

The second group concerns suits regarding the state power of taxation over foreign corporations. As a general rule, the property of such corporations owned or used within the state is the only proper subject of such taxation. The difficulty arises in determining when the tax is valid and when it is unconstitutional either because of a tax directly on interstate commerce, or because it is a tax on property outside of the jurisdiction of the state. But if the state finds the foreign corporation is doing business within the state, it may even tax that part of capital which it determines is being used within the state.

The third class of cases involves the degree of doing

*Cattle Co. v. Oregon Short Line R. Co.*, 105 Minn. 198, 117 N. W. 391 (1908); *Booz v. Texas & Pacific R. Co.*, 250 Ill. 376, 95 N. E. 460 (1911); *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917); *Vicksburg, S. & P. Ry. Co. v. De Bow*, 148 Ga. 738, 98 S. E. 381 (1919); *Hall v. Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 760 (1927); *State v. Ruledge*, 331 Mo. 1015, 56 S. W. (2d) 28 (1932).

<sup>14</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479 (1914); *Kendall v. Orange Judd Co.*, 118 Minn. 1, 136 N. W. 291 (1912); *Atkinson v. U. S. Operating Co.*, 129 Minn. 232, 152 N. W. 410 (1915); *Knutson v. Campbell River Mills*, 300 F. 241 (Dist Ct., W. D. Wash., N. D., 1924).

business which is sufficient to allow service of process, and it is that class which is herein considered. The gradation as to the extent of business done is distinct in theory but hazy in practice. In general, the fullest extent of presence is required as to obtaining a certificate, a less degree as to sustaining the state's power to tax, and the slightest as to subjection to service of process.

In view of the three classes, it must be remembered in connection with the subject at hand that those sets of facts brought up for taxation purposes or for qualifying to sue or obtain a certificate from the state must be discarded. The concern here is only with the amount of business done in the state which will allow service on the defendant foreign corporation. The distinction is important.

It does not follow that statutes fixing the conditions under which a foreign corporation may engage in business in a state are to have the same construction as statutes permitting a foreign corporation to be served in a state where it may be found. In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action. The tendency is to hold that whatever is reasonably effective for the purpose is a good service.<sup>15</sup>

Cases on the question of "doing business" should be scrutinized to determine whether the question raised is one of lack of jurisdiction because the foreign corporation was never present in the state. Most of the decisions in the courts involve lack of a state license and its attendant disabilities, and hence are not in point.

The United States Supreme Court has definitely refused to formulate any hard and fast rule which could be used to measure the facts in each case. That court has repeatedly said that each case is to be decided on its own facts and no all-embracing rule can be laid down. In a general way, it is said that the business must be of such a character and extent as to justify the inference that the foreign corporation has in fact subjected itself to the laws and jurisdiction of the state in which it is served,

<sup>15</sup> *Beach v. Kerr Turbine Co.*, 243 F. 706 (Dist. Ct., N. D. Ohio, 1917).

and in which it is bound to appear when properly served through an agent in the state and there engaged in its business. Any transactions which bring the corporation within a state will render it subject to the jurisdiction by service on an agent.<sup>16</sup> Each state may determine for itself whether a foreign corporation is doing business within the state under its own laws,<sup>17</sup> and the Supreme Court, in *Kansas City Structural Steel Company v. Arkansas*,<sup>18</sup> said, "We accept the decision of the Supreme Court of Arkansas as to what constitutes the doing of business in that state within the meaning of its own laws."

Many states have statutes on the subject, and most of them are similar to the one in Illinois,<sup>19</sup> but statutes are unnecessary, for the doctrine is one well established both by custom and by judicial decisions. Some states hold that service may be had if a foreign corporation owns any property in the state, whether it is doing business or not.<sup>20</sup> But since a suit in attachment, or any action in rem can be brought where a court has jurisdiction of the property, that is really beside the point here considered. For a valid judgment in personam, service in personam must be had. The new Illinois Corporation Act has not changed the former acts on the same subject, and in Section 111 it is distinctly said, "Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law."<sup>21</sup>

The Illinois Civil Practice Act provides that civil actions may be commenced against any private corporation or against a railroad or bridge company in the county in

<sup>16</sup> *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486 (1913); *Consolidated Textile Corp. v. Gregory*, 289 U. S. 85, 77 L. Ed. 1047 (1933).

<sup>17</sup> *Halpen v. North American Refractories Co.*, 151 Misc. 764, 272 N. Y. S. 393 (1934).

<sup>18</sup> 269 U. S. 148, 70 L. Ed. 204 (1925).

<sup>19</sup> Ark. Comp. Stat. (1921), sec. 1830; Cal. Civil Code (1933), sec. 406a; Conn. Gen. Stat. (1930), sec. 3491; Jones' Ill. Stat. Ann. (1934), Ch. 32, sec. 114; Ohio Code (1929), sec. 11290.

<sup>20</sup> N. C. Corp. Code (1922), sec. 29, Consolidated Stat., sec. 1137.

<sup>21</sup> Jones' Ill. Stat. Ann. (1934), Ch. 32, sec. 114.

which such corporation has its principal office or is "doing business," and against any insurance corporation "doing business" in the state, in any county where the plaintiffs reside.<sup>22</sup> Again, the statutes in other jurisdictions are similarly worded.<sup>23</sup> All are based in some way or other on the question of doing business, founded on the doctrine now so well established. To arrive at it anyhow, seems to be the aim of the statutes. In order to reach any helpful conclusions, the cases themselves must be classified in various divisions as to what circumstances constitute doing business and what do not. The principle to be kept always in mind is that the problem is a factual one, and each case depends on its own facts.<sup>24</sup>

As is frequently the case with terms of elastic meaning, "doing business" takes form as its antitheses describe its boundaries. Concerning the cases wherein the service of process was held bad because the foreign corporation was not "doing business" in the state, the first and foremost proposition is that, although a corporation engaged solely in interstate commerce is not doing business in a state so as to be subject to its jurisdiction to require a license,<sup>25</sup> some states hold that, since a less degree is necessary for service of process, interstate commerce gives valid ground for service within the state. The general rule is, however, that the presence of a company engaged in interstate commerce solely, is not sufficient to allow service. An example is seen in the following case. The Dollar Steam Ship Lines was a corporation organized in Delaware but doing most of its business in California. It operated steamships for passenger traffic only, and had no property in Minnesota. In a suit against

<sup>22</sup> Cahill's Ill. Rev. Stat. (1933), Ch. 110, sec. 136.

<sup>23</sup> District of Columbia Code (1929), T. 24, sec. 373; Ida. Code (1932), sec. 5-507, subd. 3; Iowa Code (1931), sec. 8432, 11072; Mo. Stat. Ann. (1931), sec. 4596, 4598, Rev. Stat. (1929), sec. 728; S. C. Code (1932), sec. 434, 436.

<sup>24</sup> People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 62 L. Ed. 587 (1918).

<sup>25</sup> International Text-book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678 (1910); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 66 L. Ed. 239 (1921); Lemke v. Farmers' Grain Co., 258 U. S. 50, 66 L. Ed. 458 (1922); Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 F. 1 (1907); Yerxa, Andrews & Thurston v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S. W. 20 (1926); Yarbrough v. W. A. Gage & Co., 70 S. W. (2d) 1055 (Mo., 1934).

the company for personal injury, an employe of the Travel Bureau of the First National Bank of St. Paul, Minnesota, was served. The Travel Bureau had obtained business for the company through personal solicitation and advertisements of several steamship lines, only passenger business being solicited. It did not even supply tickets from its own office, but obtained the tickets from the defendant's Chicago office when ordered and paid for by the patrons. The court said, concerning the plaintiff's contention that defendant was doing business in the state by the Travel Bureau as its agent, "Viewing the ocean passenger traffic of all these companies as a whole, it is quite clear that such a holding would impose an unreasonable burden on both interstate and foreign commerce."<sup>26</sup>

Most other states likewise refuse to interfere with interstate commerce by holding the corporation engaged therein subject to service of process. Yet in an Illinois case decided in 1920, the state appellate court flatly said, "The law that exempts interstate commerce corporations from the need of a state license does not exempt them from service of process issued by a state court; they have no such immunity."<sup>27</sup>

That case involved a suit against a cigar company for slander. The defense was that it was a Pennsylvania corporation, that it never had engaged in business in Illinois and that therefore service on its salesman was ineffective. The business was held purely interstate commerce and no contracts were completed in the state, yet the company was held to have been doing business because the salesman had a drawing account and traveling expenses, sold both to retailers and wholesalers, and made allowances to jobbers for advertising material. The company did a good business in Chicago, and they had furnished the salesman with stationery as representing them, and also had paid his stenographer and home-office expenses in part. It would seem more in harmony with the other decisions to hold

<sup>26</sup> *Gloeser v. Dollar Steamship Lines*, 256 N. W. 666 (Minn., 1934).

<sup>27</sup> *Lamont v. S. R. Mess Cigar Co.*, 218 Ill. App. 435 (1920).

that this business was not wholly interstate, rather than to say that the corporation was nevertheless subject to be served with summons.

It is generally held that single or isolated acts in a state cannot be held to be doing business, for the reason that the very meaning of the phrase is a continued course of action. To say that a foreign corporation is subject to local jurisdiction as to any single transaction performed in a state, is to hold it suable on all causes of action arising in the state regardless of any other business done in the state.<sup>28</sup> There are many Illinois cases involving single acts where the corporation had no license, but those involve only the necessity for the certificate<sup>29</sup> and are not pertinent. But the single acts of making one contract or settling one claim where such in no sense is the ordinary business for which the corporation is formed, are excluded from the rule, and isolated transactions are held not to be doing business.<sup>30</sup> The same is true of bringing suit, and where a foreign corporation under the rules of the state allowing it to do so, brings suit, it cannot be held to be doing business in the state by that act alone.<sup>31</sup> In *Alpena Portland Cement Co. v. Jenkins and Reynolds Company*,<sup>32</sup> the Illinois Supreme Court said that the words "doing business" have come to have a settled and well-recognized meaning, referring only to carrying on the ordinary business for which the corporation was formed, and they do not include those extraordinary acts such as instituting and prosecuting suits in courts.

<sup>28</sup> *Hunau v. Northern Region Supply Corp.*, 262 F. 181 (Dist. Ct., S. D. New York, 1920).

<sup>29</sup> *Journal Co. of Troy v. F. A. L. Motor Co.*, 181 Ill. App. 530 (1913); *Watson Fireproof Window Co. v. Rysdon*, 189 Ill. App. 134 (1914); *Ebinger v. Breese et al.*, 240 Ill. App. 80 (1926); *Automotive Co. v. Metal Products Corp.*, 327 Ill. 367, 158 N. E. 698 (1927); *Industrial Acceptance Corp. v. Haering*, 253 Ill. App. 97 (1929).

<sup>30</sup> *Booz v. Texas & Pacific Ry. Co.*, 250 Ill. 376, 95 N. E. 460 (1911); *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 P. 87 (1916); *Home Lumber Co. v. Hopkins*, 107 Kan. 153, 190 P. 601 (1920); *Bankers' Holding Corp. v. Maybury*, 161 Wash. 681, 297 P. 740 (1931).

<sup>31</sup> *Spry Lumber Co. v. Chappell*, 184 Ill. 539, 56 N. E. 794 (1900); *Pressed Radiator Co. v. Hughes*, 155 Ill. App. 80 (1910).

<sup>32</sup> 244 Ill. 354, 91 N. E. 480 (1910).

Another well-settled principle is that mere solicitation of orders by an agent without authority to complete the contracts himself, as where all orders must be sent to the main office before the sale can be consummated, is not doing business in the state, even though the agent has an office in the state.<sup>33</sup> In effect, such an agent is an instrument of interstate commerce. Difficulties arise here, particularly in connection with actions against railroads. It is a distinct advantage, since injuries by the railroads occur frequently, for the plaintiff to be able to sue in the state in which he resides. But the railroad lines may not run through that state at all. Can the plaintiff sue there because a ticket agent is located in the state? In one suit in the Supreme Court of the United States, the question was fairly well settled. In *Philadelphia and Reading Railway Company v. McKibbin*,<sup>34</sup> the defendant, a foreign railway company whose lines were wholly outside the state of New York, had no dock there, nor did it have a freight or passenger ticket office or any other office or agent or property therein (except freight cars used in interstate commerce). However, a certain local carrier in New York sold the customary through coupon passenger tickets at his ferry terminal, and at that terminal, signs were placed which bore the name of the foreign railway company. The name of the company also appeared in the phone book opposite the number of the local carrier's phone. The plaintiff claimed the defendant was subject to the jurisdiction of the New York court because it was doing business there, but the court held that it was not doing business in the state, because the mere solicitation by an agent can never amount to a carrying on of the regular course of business by the corporation.

<sup>33</sup> *Green v. C. B. & Q. R. R. Co.*, 205 U. S. 530, 51 L. Ed. 916 (1907); *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479 (1914); *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587 (1918); *Strain v. Chicago Portrait Co.*, 126 F. 831 (1903); *William Grace Co. v. Martin Brick Mach. Mfg. Co.*, 174 F. 131 (1909); *Cone v. New Britain Machine Co.*, 20 F. (2d) 593 (1927); *Pembleton v. Ill. Comm. Men's Assn.*, 289 Ill. 99, 124 N. E. 355 (1919); *Pacific Lumber Co. v. Jamison Lumber, etc. Co.*, 213 Mo. App. 111, 247 S. W. 225 (1923); *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28 (1928).

<sup>34</sup> 243 U. S. 264, 61 L. Ed. 710 (1917).

Foreign and alien railway and steamship corporations which maintain offices in a state for obtaining business are not doing business.<sup>35</sup> And the rule has been extended to the cases of newspapers maintaining news-gathering agencies,<sup>36</sup> to corporations selling merchandise to local dealers for resale, and to the ordinary traveling salesman.<sup>37</sup> These situations are held not to constitute doing business. The difficulty lies in distinguishing between cases where the agent is merely soliciting orders, and where he has power to complete contracts and transact the main business for the corporation, such as settling claims. Also, while soliciting subscriptions to, or selling corporate stock, like other acts preliminary to the prosecution of the work for which the corporation was formed, is not doing business,<sup>38</sup> if that is the business and purpose of the corporation, it is doing business within the state.<sup>39</sup> Here again it is difficult to draw the line.

The mere presence of an agent temporarily in a state and not carrying on regular work, is not sufficient to authorize service on him,<sup>40</sup> and the same is true as to officers and directors of the corporation,<sup>41</sup> even though they are in the state on some business of the corporation other than settling claims, as to make a single purchase. The designation of a place in a state, named in the coupons and bonds issued by a foreign corporation, as the place where the coupons and bonds are payable, is

<sup>35</sup> *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 54 F. 420 (1892); *Maxfield v. Canadian Pacific Ry. Co.*, 70 F. (2d) 982, cert. den. 55 S. Ct. 140, reh. den. 55 S. Ct. 212 (1934); *U. S. v. Pacific Forwarding Co.*, 8 F. Supp. 647 (1934).

<sup>36</sup> *Layne v. Tribune Co.*, 71 F. (2d) 223, cert. den. 55 S. Ct. 83 (1934).

<sup>37</sup> *State v. W. T. Rawleigh Co.*, 172 S. C. 415, 174 S. E. 385 (1934); *Douglas v. Frigidaire Sales Corp.*, 173 S. C. 66, 174 S. E. 906 (1934); *Dowe v. Debus Mfg. Co.*, 175 S. E. 676 (Ga. App., 1934).

<sup>38</sup> *Meir v. Crossley*, 305 Mo. 206, 264 S. W. 882 (1924).

<sup>39</sup> 35 A. L. R. 633 note.

<sup>40</sup> *Schillinger Bros. Co. v. Henderson Brewing Co.*, 107 Ill. App. 335 (1903); *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048 (1910).

<sup>41</sup> *Silsbee v. Quincy Hotel Co.*, 30 Ill. App. 204 (1889); *Darling & Co. v. Rauh & Sons' Fertilizer Co.*, 242 Ill. App. 375 (1926); *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U. S. 119, 71 L. Ed. 569 (1927); *First Cent. Trust Co. v. Gelvin, Inc.*, 272 Ill. App. 241 (1933).

in no sense a transacting of business.<sup>42</sup> The purchasing of supplies by an agent is not doing business so as to subject the foreign corporation to legal process as to any transitory actions maintainable against it in the state where the supplies are bought, notwithstanding the fact that the foreign corporation keeps an office and a supply and forwarding agent there, to facilitate obtaining the goods;<sup>43</sup> but there is authority to the contrary.<sup>44</sup> And the fact that the subject matter of an important and essential contract, made outside the state, chances to be within the state, is not sufficient to bring the corporation under the jurisdiction of the state courts.<sup>45</sup>

Having seen what is not enough to bind the corporation by process, the next step is to come to cases wherein the foreign corporation is held to have been doing business in the state. The very meaning of the words "doing business" is that the corporation is engaged in the kind of business transaction, or any act thereof, for which it was organized.<sup>46</sup>

The case of a bus company is an illustration. In *Atlantic Greyhound Lines v. Metz*,<sup>47</sup> the plaintiff was injured while on one of the busses of the defendant, a West Virginia corporation with license to operate up to the Virginia state line. The Blue and Gray Transit Company was a Virginia corporation holding a license from Virginia to operate busses over roads therein, but owned no property. All the busses run over its lines were owned by the defendant and were operated from Charleston in West Virginia to Lexington, Virginia, without change of bus or driver. The drivers were paid by the defendant, and stations were rented under a contract made by defendant and its subsidiaries. Tickets were sold

<sup>42</sup> Toledo Railways & L. Co. v. Hill, 244 U. S. 49, 61 L. Ed. 982 (1917).

<sup>43</sup> Macario v. Alaska Gastineau Mining Co., 96 Wash. 458, 165 P. 73 (1917).

<sup>44</sup> L. R. A. 1917E, 1159 note.

<sup>45</sup> Equitable Trust Co. v. Central Trust Co., 145 Tenn. 148, 239 S. W. 171 (1922).

<sup>46</sup> Home Lumber Co. v. Hopkins, 107 Kan. 153, 190 P. 601 (1920); Meir v. Crossley, 305 Mo. 206, 264 S. W. 882 (1924); State v. Knights of Ku Klux Klan, 117 Kan. 564, 232 P. 254 (1925).

<sup>47</sup> 70 F. (2d) 166 (C. C. A., 1934).

by agents in Virginia who remitted the proceeds, less commissions, to the defendant in Charleston. The two corporations had a common directorate, and the offices of both were in West Virginia. The same person was comptroller of both. The Blue and Gray Company's only business seemed to be the keeping of books in its office. The court held that the defendant was carrying on the business for the Blue and Gray Transit Company, perhaps as its agent, but nevertheless the business was done by the defendant, so it was amenable to service of process in Virginia. The court distinguished the case from those such as *General Investment Company v. Lake Shore and Michigan Southern Railway Company*,<sup>48</sup> in which railroad companies were held not to be doing business in a state by reason of the fact that agents of other companies sold through tickets good over their lines. Here the tickets were sold by an agent who remitted the money to the defendant, which was acting as agent for the company holding the local franchise. It was also pointed out that the case at hand differed from *Cannon Manufacturing Company v. Cudahy Packing Company*,<sup>49</sup> where it was held that a foreign corporation employing a subsidiary domestic corporation as a means of doing business within the state, was not on that account held to be doing business within the state. The facts here showed it was not a foreign corporation doing business through a domestic corporation, but a domestic corporation doing business through a foreign corporation. The courts will see through such attempts to evade responsibility within the state and hold the outsiders to be within the jurisdiction and capable of being served. A foreign corporation, actually present through its agents, and doing business within a state, is not, of course, exempted from the jurisdiction because it is acting on behalf of a domestic corporation.

As to foreign railroads again, since it has already been pointed out that mere solicitation by agents is not doing business, it is to be expected that where the foreign rail-

<sup>48</sup> 260 U. S. 261, 67 L. Ed. 244 (1922).

<sup>49</sup> 267 U. S. 333, 69 L. Ed. 634 (1925).

road company's local representatives make binding contracts and undertake to act for and represent it, the courts will hold that such corporation is doing business in the state.<sup>50</sup> The fact that subsidiary companies of a railroad do business in a state does not warrant the conclusion that the principal company is doing business there.<sup>51</sup>

Other examples of an open transaction of business for which the corporation was organized are the shipping of liquor into a state by a foreign distillery corporation to be held in the state liquor control board's warehouse as the company's property until purchased by the board, then released after payment of customs duties and delivery of invoices through the company's state representatives to whom checks were mailed;<sup>52</sup> the repeated purchasing of paper in the state by a representative maintained there solely for that purpose;<sup>53</sup> maintenance of a state office with subordinate salesmen constantly active in the state, with resulting large quantities of goods being shipped into the state and delivered without home office's prior approval;<sup>54</sup> employment of an agent who is allowed a drawing account and expenses, who sells both to wholesalers and retailers, is allowed expenses for advertising, and who collects accounts.<sup>55</sup>

Another close question concerns ownership of stock. Mere ownership of stock in a domestic corporation is not doing business in the state,<sup>56</sup> but where the foreign corporation is a holding and promoting company exercising its powers in the state, it is doing business there.<sup>57</sup>

<sup>50</sup> *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486 (1913); *Central of Georgia Ry. Co. v. Eichberg*, 107 Md. 363, 68 A. 690 (1908).

<sup>51</sup> *Philadelphia and Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710 (1917).

<sup>52</sup> *U. S. v. Pacific Forwarding Co.*, 8 F. Supp. 647 (1934).

<sup>53</sup> *Boise Flying Service v. General Motors Acceptance Corp.*, 36 P. (2d) 813 (Idaho, 1934).

<sup>54</sup> *Halpin v. North American Refractories Co.*, 151 Misc. 764, 272 N. Y. S. 393 (1934).

<sup>55</sup> *Lamont v. S. R. Moss Cigar Co.*, 218 Ill. App. 435 (1920).

<sup>56</sup> *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587 (1918).

<sup>57</sup> *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 62 L. Ed. 632 (1918).

The corporation's selling its stock, in general, is like any other preliminary act necessary to a corporation's organization, and as heretofore discussed does not constitute doing business, but the circumstances of a particular case may change matters. In *Atkinson v. U. S. Operating Company*,<sup>58</sup> the defendant, a Maine corporation, with its place of business in Illinois, sent agents into Minnesota to sell its own corporate stock. One of those agents sold stock to the plaintiff in Minnesota, and during the sale made false representations, for which suit was brought. The defendant's secretary and general manager came several times to Minnesota for the purpose of adjusting this and other claims, and did adjust some there. The president lived in Minnesota and performed occasional official acts there. Service of summons was made on the president, and the court held it valid on the theory that the corporation had brought itself within the state by its acts.

Although isolated acts are usually held not to be doing business, they may sometimes be sufficient to amount to it, as where a foreign corporation sells and agrees to install or erect an article on the buyer's premises. Some courts hold this to be incidental to interstate commerce and therefore not doing business,<sup>59</sup> while others hold it is not an essential part of the contract of sale and for that reason is a state transaction and subject to local laws.<sup>60</sup> In *Beach v. Kerr Turbine Company*,<sup>61</sup> where a foreign corporation had contracted to supply, set up, and install three turbine pumps for the waterworks department of the city of Youngstown, Ohio, the pumps being made at defendant's factory outside the state, and the foundation built by the city, the putting of the pumps

<sup>58</sup> 129 Minn. 232, 152 N. W. 410 (1915).

<sup>59</sup> *Milan Milling & Mfg. Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971 (1894); *Flint & Walling Mfg. Co. v. McDonald*, 21 S. D. 526, 114 N. W. 684 (1908); *Western Gas Construction Co. v. Virginia, ex rel. Corp. Com.*, 276 U. S. 597, 72 L. Ed. 723 (1928).

<sup>60</sup> *Browning v. Waycross*, 233 U. S. 16, 58 L. Ed. 828 (1914); *Phoenix Nursery Co. v. Trostel*, 166 Wis. 215, 164 N. W. 995 (1917); *General Ry. Signal Co. v. Virginia, ex rel. Corp. Com.*, 246 U. S. 500, 62 L. Ed. 854 (1918).

<sup>61</sup> 243 F. 706 (Dist. Ct., N. D. Ohio, 1917).

in place, making the necessary connections and seeing that they performed the functions for which they were installed, was determined to be doing business in Ohio. The agent sent from defendant's plant hired three local men. Plaintiff was one of them and was injured in the course of his employment. The question was whether the agent was such a managing agent in the state as to be properly served, and it was held he was. The court said,

It is true, we are dealing only with a single contract or sale; but the terms thereof required the foreign corporation to come into the state with its agents and employes and perform certain acts—in other words, to do business. After arriving in the state, and while performing its contract of installation, it was not engaged in an act of interstate commerce. During the time it is thus performing these necessary acts, it is entitled to police protection and to the privileges of a citizen of the state of Ohio.<sup>62</sup>

Because the corporation makes use of the privileges of the state, it has submitted itself to the jurisdiction thereof.

The converse of the general rule that isolated acts cannot subject the foreign corporation to service of process, is the proposition that a continuous course of business or a series of repeated transactions will constitute doing business. For example, where an agent of a foreign corporation had a definitely prescribed territory in the state with many regular customers whom he visited regularly, and also solicited new customers for his company's products, referring them to local dealers for attention, even though all orders were subject to approval of the corporation at its home office, and all deliveries were made f. o. b. Kansas City, Missouri, the Iowa court held that the corporation was doing business in the state, because it had been for years engaged in a continuous and systematic course of business in the solicitation of orders and delivery of goods.<sup>63</sup> Illinois has gone so far as to hold that a foreign corporation, by receiving land in

<sup>62</sup> *Ibid.*, p. 711.

<sup>63</sup> *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28 (1928).

the state by devise, with power to sell and dispose of the same, and with power to lease it and to collect the rents and profits therefrom, and the assertion in this state of ownership, with use of the power to convey it, and bringing suits in the courts of Illinois in respect to such land, must be held to be doing business in the state;<sup>64</sup> and this in spite of the fact that a corporation, not organized to deal in real estate, could buy that land as an investment or to settle a debt and not be held to be transacting business. In the absence of provisions in the statutes that a foreign corporation with property in the state may be served, the mere purchase of land is generally held not to be carrying on the ordinary work of the corporation, save, of course, where the corporation is organized for that purpose.

It is seen throughout the cases that the words "generally held" or "usually construed" are often employed. The reason is that the same court which holds one way on one set of facts may decide exactly the opposite on another set differing only just perceptibly. And in a neighboring state the courts may disagree diametrically, since each state has the right to determine for itself what constitutes a doing of business in its borders, provided it does not infringe on the Federal Constitution. But after a finding by the court of a state that a foreign corporation is doing business, and a judgment is rendered upon service of process based on such finding, the courts of any sister state are bound to give that judgment full faith and credit, although decided under a rule adverse to their own decisions.<sup>65</sup>

The difficulty lies in the failure of many courts to perceive the distinction in the three types of cases involving the question of doing business. Often the courts do not cite cases in point, and although the matter brought up before them involves service of process, they compare holdings of cases involving taxation or qualification to

<sup>64</sup> *Pennsylvania Co. v. Bauerle*, 143 Ill. 459, 33 N. E. 166 (1892).

<sup>65</sup> *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522, 75 L. Ed. 1244 (1931).

do business within the state.<sup>66</sup> Some courts say the same test can be applied for all purposes,<sup>67</sup> but this seems to ignore the purpose of allowing service of process when a corporation is engaged in a very slight amount of business—to provide adequacy of remedy. In two New York cases, the least possible evidence of doing business was held sufficient, one alleging that the foreign corporation was present when its representative in charge of a hotel exhibit took orders,<sup>68</sup> and the other holding service good on the buyer who placed orders while attending an exhibit and convention in the state.<sup>69</sup>

What rules can be deduced from this maze of conflicting cases? One must keep in mind that generally "business" means some profitable activity undertaken by the corporation on its own account.<sup>70</sup> The rules as to when service cannot validly be had are as follows:

First, a foreign corporation engaged solely in interstate commerce is generally not amenable to process.

Second, single or isolated acts, unless such as to bring the corporation within the state, or unless the corporation was formed solely for such act, are not doing business in the state.

Third, mere solicitation of orders by an agent is not doing business.

In order that summons left with an agent be valid, the corporation must appear to be within the state in such a sense as to have subjected itself to the state's laws and jurisdiction by reason of its use of the privileges of protection by the state. The agent in the state must be in fact an agent of the corporation and be doing business for it. The rules as to valid service are:

First, the corporation must be engaged in the usual kind of business for which it was formed, not extraordinary acts.

<sup>66</sup> *Auto Trading Co. v. Williams*, 71 Okla. 302, 177 P. 583 (1919).

<sup>67</sup> *Van Schuyler & Co. v. Breedman*, 5 Alaska Rep. 260 (1915).

<sup>68</sup> *Bogert & Hopper v. Wilder Mfg. Co.*, 197 App. Div. 773, 189 N. Y. S. 444 (1921).

<sup>69</sup> *Natl. Furniture Co. v. Spiegelman & Co.*, 198 App. Div. 672, 190 N. Y. S. 831 (1921).

<sup>70</sup> *Edwards v. Chile Copper Co.*, 5 F. (2d) 1014 (1925).

Second, the acts done are usually in the nature of a continuous course of business, as contrasted with a single act.

Third, the acts are done under the authority and in pursuance of instructions from the foreign corporation itself, not simply orders from a domestic subsidiary of the foreign corporation.

With these main points in mind, it should be possible in a given instance, with particular regard to the facts in the cases, to determine whether one may validly serve an apparent agent of a foreign corporation, or whether resort must be had to another state. Proper consideration of this matter, before suit is filed, and a thorough investigation of all the circumstances, will save time and money, and avoid clogging the courts with useless litigation which will be dismissed for lack of jurisdiction of the defendant.