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WHAT CONSTITUTES DOING BUSINESS BY A FOREIGN CORPORATION?

By WILLIAM J. KINNALLY

In discussing the subject of what constitutes doing business by a foreign corporation, it is imperative that it first be shown why such a dissertation is pertinent and significant in the field of law and legal research.

It is manifest that whenever a corporation, acting through its officers or agents, purports or intends to transact business, and in other ways exercises the functions for which it was organized, there must be applied to such transactions a new set of regulations or rules which are predicated upon statutory enactments or the rule of comity among the several states. In such a manner the state is able to control (within the confines of its own boundaries) the status, rights, powers and liabilities of the foreign corporation.

While it is true that the legal existence, domicile, and citizenship of a corporation can be only in the state of its inception and creation, yet the ukase of Chief Justice Taney that “it must dwell in the place of its creation, and cannot migrate to another sovereignty,”¹ cannot be accepted as the determining principle applicable to all foreign corporations relative to their doing business outside the domestic state (the one of its creation). Exercising prerogatives analogous to those of a natural person, the corporation, through its agents, may contract and transact business in jurisdictions other than that of its inception. To construe Chief Justice Taney's statement in such a way as to make it applicable to the modern law of corporations, it might be said that while a corporation may transgress the boundaries of the state of its creation and migrate to another jurisdiction, yet it is constantly subject to the control of the former state, being unable to disregard the limitations and restrictions placed upon it by its charter.

While there might be confusion existing relative to the control states may exercise over foreign corporations, yet a consideration of the primary reason why suits should be permitted to be prosecuted against such corporations will tend to alleviate the situation. Since it appears to be only just and reasonable that these corporations should be subject to suits in places where they voluntarily do business, jurisdiction should obtain only where it is just and reasonable that the corporations should be held accountable.

Apropos to this phase of the question, it is requisite that the particular cause of action involved should be examined. It is apparent that corporations entering a state to conduct business therein can reasonably and justly be subjected to the forum of the particular jurisdiction relative to controversies resulting from business done therein; persons dealing with such corporations should not be forced to subject the dispute to adjudication by a foreign tribunal. But it must also be remembered that the mere fact that a corporation conducts a small part of its business in a foreign state is not conclusively indicative that it should be, ipso facto, subject to suits in that state, since expense and inconvenience would result of necessity from producing for trial witnesses and officials of the corporation.\(^2\)

The courts have resorted to various and sundry fictions and theories upon which they have predicated a state’s power and control over a foreign corporation. The earliest of these theories, the “consent” theory, devolved upon the proposition that since a state may either exclude or admit a foreign corporation for the purpose of transacting business therein, it was empowered to prescribe conditions of admission to which the corporation must submit before it could do business. It was believed that consent by the corporation to the application of the law of that particular forum was implied from the very fact that the corporation voluntarily engaged in activities in the jurisdiction.

The “presence” theory was later resorted to, under which it was believed that jurisdiction may obtain only when the

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\(^2\) 29 Col. L. R. 187 (1929).
corporation is in such a position as would indicate its presence within the state. It is submitted here that it is just as difficult to determine whether the corporation is "present" as it is to determine whether or not it was "doing business." It is apparent that a foreign corporation can be called "present," if at all, whenever its agent is within the jurisdiction upon a corporate mission. The conception that a corporation by coming into a state is thereby rendered amenable to the reasonable police power of the state, is supported by the "reasonable exercise of jurisdiction" or "submission" theory.³

It has been stated that, "In the last analysis it seems that a theory which takes into account the constitutional limitations and restraints upon the 'unlimited' power of a state over a foreign corporation must be based upon broad concepts of public necessity and convenience which render the exercise of judicial authority over a foreign corporation reasonable when its activity begins to have an important influence upon the residents, and of the theories proposed the 'reasonable regulation' basis seems to be the most realistic and the best adapted to withstand continuous attack."⁴

As pointed out in a recent case,⁵ "doing business" has a legal signification which differs with the particular type of case to which it might be applied. It is possible for a foreign corporation to be held to be doing business in a given state for one purpose, and not doing business for another purpose.

Consequently, in this treatise, the three general classes of cases which involve doing business must be distinguished: (1) those involving service of process upon a foreign corporation; (2) those involving taxation; and (3) those involving domestication or qualification under statutes regulatory of foreign corporations. The primary concern of many of the cases of the second and third classes is the nature and character of the business done, i.e., whether the business is interstate and thus beyond the power of the state to tax or regulate.

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⁴ Ibid., p. 378.
Doing business as such is determinable by legal tests which differ as the cases fall within one or the other of these three classifications; thus, precedents appropriate for one class are of little value when it is sought to apply them to another class.

In a discussion relative to the control a state may exercise over a foreign corporation, it must be kept well in mind that a corporation, in the eyes of the law, is a legal entity, a juristic person, so to speak. In the evolution of our modern corporate structure, it is interesting to perceive the early conceptions of the corporation, if it could then be denominated such.

In 1429 an action was prosecuted against the Commonalty of Ipswich and a man named Jabe; the defense propounded was that Jabe was a member of the Commonalty, and consequently was being named twice as defendant in the same action; so that if the defendants were found guilty of the charges alleged, Jabe would be charged not once, but twice; with the result that if the Commonalty were found guilty but Jabe was found not guilty, the inevitable conclusion would be that Jabe was both guilty and not guilty. This case is illustrative of a failure to recognize the personality of the Commonalty, and the failure to distinguish Jabe as a private individual from Jabe as a member of the Commonalty.6

It is submitted that it was not until toward the end of the Roman Republic that the conception of a collective, juristic person, as a possible subject of private rights, was developed; and this was in the form of that which we now call a public corporation, exercising governmental functions.

The features of the Roman juristic person are worthy of comment at this point. Three natural persons were required to form it; a majority was required to bind it; there had to be an agent to act for it, so that it could sue and be sued; its existence continued regardless of change among members; and it could acquire, hold and dispose of property, as distinguished from that of its members.7 It is readily seen that here we have the origin of our modern corporate structure.

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6 Bryant Smith, "Legal Personality," (1928), 37 Yale L. J. 283, 290.
The English corporations, in the thirteenth century, were either ecclesiastical or temporal, the former being more conspicuous and important because they included not only the churches and the abbeys, but also "groups of secular ecclesiastics, which were corporations aggregate not subject to the monarchial rule of an abbott," and possessed "personality." In the eighteenth century the corporation was actually a franchise, the limited liability of stockholders being the salient characteristic. Containing all of the arrangements, the charter was a contract between the state and the "corporation," between the stockholders and the "corporation," and between the stockholders themselves.  

Special charters were granted corporations in the early days of the United States, whereby the control of the state and the agreement contained therein sought to protect the interests of the public, creditors and shareholders. With the advent in 1837 of the general corporation laws in Connecticut, corporations were permitted to engage in any lawful business, and the strict supervision previously exercised by the state over corporate activities, through the legislature, was left in the hands of the secretary of state. The charters came to be drafted only by the incorporators and their attorneys, the contents and provisions thereof being known only to the clerks and incorporators.  

The contemporaneous legal conception of a corporation is that it is a real though artificial person, being substituted for the persons who obtained its creation, owning and disposing of its own property, and performing corporate acts in its corporate name through officers and agents. While it is true that the corporation as a legal entity exists separate and apart from the persons composing it, yet this conception may be disregarded by the courts if it is invoked in support of an end subversive to public policy or to lawful action; nor can an individual acting under the guise of a corporation organized

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8 Willis, Constitutional Law (1936), p. 858.
9 Ibid.
10 Metropolitan Holding Co. v. Snyder (1935), 79 F. (2) 263, 103 A. L. R. 912.
for that purpose, evade liability under his personal and
individual contract.

It is significant to note here that as concerns property rights,
a private corporation is a "person" within the meaning of
the Fifth and Fourteenth Amendments of the United States
Constitution, which provide that no person shall be deprived
of life, liberty, or property without due process of law. Nor
can a corporation be deprived, by a state, of equal protection
of the laws. While a corporation is not a "citizen" within
Article 4, Section 2, of the United States Constitution (which
provides that "the citizens of each state shall be entitled to all
the privileges and immunities of citizens in the several states"),
yet for jurisdictional purposes a corporation is regarded as a
"citizen" of the state of its creation within Article 3, Section 2,
of the Constitution, which confers jurisdiction in cases "be-
tween citizens of different states" on the federal courts.

In discussing the question of state control over foreign
corporations, it must be kept in mind that while the state has
power to exclude them entirely or to prescribe the terms and
conditions of admission to do business in the state, yet when
such foreign corporation is engaged in interstate commerce its
business pertaining thereto is protected from state regulation.
Many commercial activities were removed from the realm of
state control when the federal government took "commerce"
under its exclusive protection. Thus it has been said: "To
carry on interstate commerce is not a franchise or a privilege
granted by the State; it is a right which every citizen of the
United States is entitled to exercise under the Constitution
and laws of the United States; and the accession of mere
corporate facilities, as a matter of convenience in carrying on
their business, cannot have the effect of depriving them of
such right, unless Congress should see fit to interpose some
contrary regulation on the subject." Consonant with this
statement is the idea that there is in such a situation no
discrimination made between the corporation and the individual
as concerns the business carried on by one or the other. While
interstate commerce is protected by the commerce clause of

the Constitution, yet in order that such protection may obtain, it is first necessary to determine that business is actually being transacted, for until such determination there can be no commerce to be protected on the ground of being interstate.\textsuperscript{12}

One authority submits the proposition that a corporation is entitled to protection against legislation after it has been admitted to do business, including due process, respect for the obligation of contracts, and equal protection of the laws.\textsuperscript{13} A state cannot, in imposing conditions on the corporation as a prerequisite to admission, require that the corporate rights secured by the Constitution of the United States be infringed or violated.\textsuperscript{14} A succinct statement of corporate rights is found in Butler Bros. Shoe Co. v. U. S. Rubber Co.:\textsuperscript{15} "The Constitution of the United States and the acts of Congress in pursuance thereof are the supreme law of the land. Under that Constitution and those laws a corporation of one state has at least three absolute rights which it may freely exercise in every other state in the Union, without let or hindrance from its legislation, or action: (1) Every corporation, empowered to engage in interstate commerce by the state in which it is created, may carry on interstate commerce in every state in the Union, free of every prohibition and condition imposed by the latter. * * * (2) Every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or conditions imposed by the latter. * * * (3) Every corporation of each state has the absolute right to institute and maintain in the federal courts, and to remove to those courts for trial and decision, its suits in every other state, in the cases and on the terms prescribed by the acts of Congress. * * * Every law of a state which attempts to destroy these rights or to burden their exercise is violative of the Constitution of the United States and void."

\textsuperscript{13} Fletcher, Cyclopedia of Corporations, Vol 17, p. 240, Sec. 8390.
\textsuperscript{14} King Tonopah Min. Co. v. Lynch (1916), 232 Fed. 485.
\textsuperscript{15} (1907), 156 Fed. 1, 15.
Although a state may exclude a foreign corporation from admission, yet once such corporation is admitted to do business it is entitled to the same rights and protection as are domestic corporations.

While "doing business" of itself is a generic term, there are in fact various degrees of doing business, which are distinguishable by a differentiation predicated upon three legal purposes. "The least degree is that which will permit service of process in a suit against a foreign corporation. For this the business done must be of such a character as to warrant the inference that the corporation is present in the jurisdiction where service is attempted. A higher degree is necessary to subject such a corporation to a tax on its activity, namely, continued efforts in the pursuit of profit and gain, and such activities as are essential to these purposes. A still higher degree is the standard for the application of statutes requiring qualification in the state, as where the activities of the corporation indicate a purpose to regularly transact business."

The distinction between the business activities of a foreign corporation which render it amenable to service of process and those which require qualification in the state, was appreciated in *Knutson et al. v. Campbell River Mills, Ltd.*, wherein it was said: "Residence of an officer in his individual relation of itself does not give a corporation domiciliary status * * * 'Doing business,' to bring an alien corporation within the jurisdiction of the local courts, does not mean that the corporation must maintain such a relation to 'doing business' in the state as to bring it within the statutory provision requiring a license for such operation." Relative to the service of process, the tendency of the courts has been to interpret "doing business" in its broader sense, and to adopt a narrow standard as to the volume of business necessary to bring the corporation within the meaning of the term. It is submitted that it would be unreasonable and impracticable to hold that only the highest degree of doing business should be taken as the amount requisite for all legal purposes, and the

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16 Supra, footnote 12, p. 1024.
mere fact that a corporation is not doing sufficient business to require it to register or appoint an agent for service of process should not relieve it from service of process.

In *Tauza v. Susquehanna Coal Co.*\(^{18}\) the court recognized the differentiation between the degrees of doing business which were requisite for the purposes of taxation and of qualification when it said: "But a much broader meaning is said to be given to the words 'doing business' when used in a tax statute than is given to them when used in a statute which forbids a foreign corporation to do business in a state until it has complied with the conditions which the statute imposes."

While there is no exact and precise test of the nature or extent of the business which must be done relative to the question of service of process and the jurisdiction of local courts, suffice it to say that enough business must be transacted to indicate that the corporation is "present" in the state. Immunity from local jurisdiction, however, is not obtained from the mere fact that the business involved is interstate in character when considered as a whole. The case of *International Harvester Co. v. Kentucky*\(^{19}\) presented the question of the sufficiency of the service of process on an alleged agent of the Company in a criminal proceeding in the local court of a county in which an indictment had been returned against the Company for alleged violations of the anti-trust laws of the State of Kentucky. The Harvester Company appeared and moved to quash the return, principally upon the ground that service had not been made upon an authorized agent of the Company and that the Company was not doing business within the State of Kentucky; it was contended that any action under the attempted service would violate the due process and commerce clauses of the United States Constitution. In an affirmation of the finding by the State court that the service of process was such as would sustain the judgment, the Supreme Court of the United States, speaking through Mr. Justice Day, said: "We are satisfied that the presence of a corporation within a State necessary to the service of process

\(^{18}\) (1914), 216 Fed. 83, 88.

\(^{19}\) (1914), 234 U. S. 579, 589, 34 S. Crt. 944.
is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business transacted may be entirely inter-state in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the State."

It has been stated that: "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 also 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."\(^2\)

It is generally found that when the terms and conditions upon which foreign corporations shall be admitted to do business in a state are prescribed, there is neither a definition of the particular term employed nor a specification of the particular acts or transactions which fall within that term. Unless there is such a definition or specification, the question resolves itself into one of fact which requires judicial determination. Since the rule of jury cases in general are applicable to the ultimate determination of the problem, unless the evidence is so conflicting as to permit reasonable minds to draw different conclusions therefrom the question is one of law for the court alone. There must be a consideration of every circumstance and all the combined acts of the foreign corporation in the particular state, in order to arrive at a conclusion that the corporation purports to engage in some part of its regular business in the state.\(^2\) It has been held that payment by a foreign corporation of a state privilege tax while performing a single contract within the state, was not of itself such a conclusive indication of an intention to carry on business in the state as would subject it to local regulatory statutes.\(^2\)

\(^2\) Supra, footnote 12, p. 1045.
\(^2\) Supra, footnote 13, p. 466, Sec. 8464.
\(^2\) Richmond Screw Anchor Co. v. E. W. Minter Co., Inc. (1927), 156 Tenn. 19, 300 S. W. 574.
In considering the various elements and aspects involved in the question at hand, it cannot be said that the length of time a foreign corporation is in a state, or the volume of business it does therein, is determinative. Rather, the character of the business and the purposes for which the corporation entered the state are to be given the greater weight and credence. Thus it was stated in *Adjustment Bureau, etc. v. Conley*:

"It is not the length of time that a foreign corporation is here, nor the volume of business done while here,—it is the purpose for which it comes that determines whether compliance with the statute is necessary."

Next in order will be discussed the various forms and phases of doing business by a foreign corporation, and the judicial determinations as to whether or not local jurisdiction should be applicable to such corporation.

It seems to be the general rule that engaging in litigation does not constitute doing business, assuming that the latter term is understood as being a portion of the ordinary business of the corporation, as distinguished from single, isolated acts. In the case of *Comstock v. Droney Lumber Co.* it was stated by the court that: "The power to sue and make defense is incident to property and contract rights and the exercise thereof the vindication of such rights, and though attendant upon or included in the corporate franchise, the exercise of such power does not amount to a prosecution of corporate business in the ordinary sense of the term. Its continuance, after the right to do business or exercise the ordinary corporate powers has ceased, is necessary to the preservation of rights lawfully acquired and which the legislature cannot be deemed to have intended to destroy or leave unprotected by denying or withholding it."

The fact that the corporation is prosecuting the action to protect or gain possession of property does not affect or alter the general rule. The courts are in accord in holding invalid a service of process made upon an agent of a foreign corporation who comes into the state's jurisdiction solely for the

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23 (1927), 44 Idaho 148, 153, 255 Pac. 414.
24 (1911), 69 W, Va. 100, 103, 71 S. E. 255,
purpose of settling a claim or dispute which did not arise from business transacted in that jurisdiction. This is an equitable and just legal principle, since the alleged cause of action does not accrue as a result of the agent's entering the jurisdiction to settle the dispute.

In a treatment of the subject of ownership, acquisition and disposition of property in a state by a foreign corporation, it is requisite that the various phases and aspects of such subject be discussed individually.

When the corporation acquires real estate in another state for the purpose of pursuing its corporate objectives and as a part of its regular business, it is apparent that this acquisition can be denominated "doing business." In Greene v. Kentenia Corp. a Virginia corporation invested its capital in many thousands of acres of coal and timber land situated in Kentucky; the land was not used for mining, lumber or agricultural purposes, or otherwise. Nevertheless, it was held that the corporation was liable for the payment of a license tax for the privilege of engaging in business in Kentucky. It was said by the court: "When plaintiff invested its capital in the coal and timber land which it purchased in this state, it did so for one of two purposes—that of speculation by holding the land until it naturally increased in price, or to reap a profit from it by operating it either in the way of cultivation, mining, getting timber from it or otherwise, so as to make it profitable. It avers in its pleading that it is doing neither of the latter, and therefore it is not doing business in this state. But, according to our conception, the land need not be in actual use in order to constitute doing business. One of the definitions of 'invest,' as given by Mr. Webster, is 'to lay out (money or capital) in business with the view of obtaining income or profit,' and to employ capital by investing it in land and not using the land is, according to our view, doing business. As seen, plaintiff employed its capital by investing it in real estate situated within this state.

26 (1917), 175 Ky. 661, 669, 194 S. W. 820.
It then put its capital in motion, and as long as it remains so invested it is doing business for its owner."

However, the confusion arises when the corporation acquires, or receives, real estate only as an incident to its regular business practices and purposes. It cannot be said that a corporation is doing business within a state when, with no intent to pursue the ordinary corporate functions, a casual act or transaction happens to involve real estate in that state. The case of *Foore v. Simon Piano Co.* pertained to a situation wherein a foreign corporation, engaged in selling automatic music machines in the state, obtained a default judgment against a debtor, and execution was levied on the latter’s land—this was bid in by the corporation at the sheriff’s sale. In holding inapplicable the statute prohibiting a foreign corporation “doing business in this state” without first filing its articles of incorporation and designating an agent, the court said: “The mere purchase at execution sale of real property in satisfaction of a judgment procured on an interstate transaction is not in itself ‘doing business in this state.’

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The legislature has not undertaken to prohibit a corporation engaged in interstate business from taking title under judicial process in the collection of a debt where the corporation was not otherwise ‘doing business’ in this state within the meaning of the constitution and statute.”

It is apparent that if the sale of real estate is a portion of the business for which the corporation was organized, such disposition, or the taking of various steps to effect a disposition, would constitute doing business.

The requirements of doing business are not fulfilled by a foreign corporation when it participates in the mere purchase or acquisition of personal property. This rule prevails even where it is contemplated, as a part of the contract, that the articles are to be shipped out of the state. However, it has been held that there were elements and factors such as would constitute doing business in a case where a foreign corporation that had purchased standing timber moved a camping outfit

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27 (1910), 18 Idaho 167, 178, 108 Pac. 1038.
28 Supra, footnote 13, p. 523, Sec. 8485.
into the state and hired laborers to cut the timber.\textsuperscript{29} It is submitted that the court was undoubtedly influenced by the fact that the transaction entailed, in addition to the shipment of the timber, the operations necessary to cut it.

Consonant with the principles applicable to realty and the purchase of personalty, the sale of goods by a foreign corporation, pursuant to its regular course of business in the local state, will constitute doing business therein. While it is true that a state cannot burden interstate commerce, yet if in addition to the interstate transportation of the goods the corporation performs within the state acts of a purely local character which are non-essential to the consummation of the ultimate sales and delivery of the goods, such corporation can be said to be doing business within the state. This principle was applied in a case where an Illinois corporation sold shrubs and trees to a Wisconsin resident, the former agreeing to plant them as directed by a landscape architect; it was held that the planting of the shrubs and trees constituted a business wholly separate from interstate commerce, being a purely local act after the cessation of interstate commerce.\textsuperscript{30}

The courts are, as a whole, in accord with the principle that there is no doing of business when a foreign corporation owns stock in a domestic corporation, even though it is a controlling interest, provided, of course, that the latter corporation is responsible for its own contracts, and has its own property and officers. One qualification of this statement is that if the ownership of the stock and control of the domestic corporation form one of the direct purposes for the existence of the foreign corporation, the latter will be held to be doing business in the state of the former.\textsuperscript{31} The general rule is followed by the courts when the entities of the two corporations remain separate and distinct; but when the one corporation is organized only to hold the stock of and control the other, the domestic corporation in reality becomes the alter ego or agent

\textsuperscript{29} E. L. Bruce Co. v. Hannon (1926), Tex. Civ. App., 283 S. W. 862.
\textsuperscript{30} Phoenix Nursery Co. v. Trostel (1917), 166 Wis. 215, 164 N. W. 995.
\textsuperscript{31} Bankers' Holding Corp. v. Maybury (1931), 161 Wash. 681, 297 Pac. 740.
of the foreign holding company. However, the power of the latter to elect the directors of the other corporation, and thus dictate the election of officers and the determination of policy, will not of itself produce such a relation as to make the acts of the domestic corporation those of the holding company.\(^3\)

Having treated the subject of the ownership of stock, it will be apposite at this time to determine the judicial attitude toward stock subscriptions, i.e., whether the transactions involving stock subscriptions constitute doing business.

Generally it is held that constitutional and statutory provisions regulating the transacting of, or the doing of, business do not apply to a foreign corporation that is soliciting subscriptions of its capital stock within the state; nor does the acceptance therein by the corporation affect this rule. This principle is predicated upon the conception that the ordinary business for which the corporation is organized does not include such contracts or transactions. Thus, in *First Nat. Bank v. Leeper*,\(^3\) the court said: "The business of the corporation here involved was that of a telegraph and telephone company. That is a well known business, and the prosecution of such business does not consist in selling some of its stock to an individual. Such a transaction or such transactions, it is true, may occur, but they are not the usual, or customary, or ordinary business of a telegraph, or telephone company, nor is such a corporation organized for the transaction of such business." It has been held,\(^3\) also, that where a contract of a subscription agreement is signed in one state, and is subject to the approval of the home office in another state, the foreign corporation is not doing business in the former; the court, quoting from another case, stated: "In harmony with this basic doctrine are the adjudications in this state that when an order is signed by the vendee in this state, and then transmitted to the foreign corporation in another state, for acceptance or rejection, and is there accepted, the contract by such act is consummated in the foreign state."

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\(^{32}\) 75 A. L. R. 1242, 1243.

\(^{33}\) (1906), 121 Mo. App. 688, 693, 97 S. W. 636.

\(^{34}\) (1933), 112 N. J. L. 304, 306, 170 Atl. 619.
Two manifest exceptions to the general rule above stated are applied in cases where the sale of the stock, or the procuring of subscriptions therefor, is the business for which the corporation was organized; and where the sale of the stock cannot be considered as preliminary to the prosecution of the corporate business.\textsuperscript{35}

Keeping in mind the principle that interstate commerce is immune from transgression or burdens imposed by the states, and that the local business of a foreign corporation may be regulated by the states, the question of whether or not soliciting by agents constitutes doing business will be approached. In connection with this, it may be said that the courts do not distinguish between sales made by soliciting agents to dealers and those made to the consumers themselves. The agents stand before the law exactly as their principals would stand if they came on the same mission, and if one can be taxed or regulated, the other can, also.

While it has heretofore been held generally that the mere soliciting of business by the agents of a foreign corporation cannot be denominated "doing business," yet the judicial tendency has been to consider such agents as the representatives of their corporation, particularly with reference to the service of process. Where there is a continuous course of business carried on in the state, resulting from solicitations of orders within the state and the shipment thereto of goods from the state where the orders were accepted, it must be held that there is a doing of business in the former state.\textsuperscript{38} Of course, it must be remembered that at no time can the states impose a burden upon interstate commerce. Thus in \textit{Dakota Photo Engraving Co. v. Woodland}\textsuperscript{37} a foreign corporation solicited orders in the state through a traveling representative, and then shipped the goods so ordered to the purchasers from outside the state. It was held that shipping merchandise from one state to another upon such orders constituted interstate commerce, and that the foreign corporation was not subject to

\textsuperscript{35} 35 A. L. R. 625, 633.
\textsuperscript{36} Supra, footnote 19.
\textsuperscript{37} (1932), 59 S. D. 523, 241 N. W. 510.
conditions imposed by the local state as a prerequisite to its transacting business within the state.

The fact that the agent collects the purchase price of the goods sold in the state does not seem to change the general rule as to the interstate character of the transaction, nor does it amount to doing business. While it is usually held that there is no doing of business within the state even when the goods are shipped into the state to the agent, who delivers them to the purchaser himself, yet in a case where a foreign corporation shipped goods in carload lots from its home office, in one state, to its agent in Tennessee, who stored them in a warehouse to be distributed on orders he obtained within Tennessee, the court stated: "These facts show plaintiff was engaged in doing business in Tennessee, and that the business done with defendant was intrastate business, thus subjecting the plaintiff to the provisions of the Tennessee statute."

It is submitted that the facts of each particular case must be analyzed in order to determine whether or not any control or regulation by the local state would impinge upon the sanctity of interstate commerce.

One court succinctly stated that: "A soliciting agent, in this state, for a foreign corporation, may maintain an office or place of business on which the name of such corporation appears on the doors and windows, of such place, without making the corporation amenable to service of process; but if an essential corporate function, even though slight, is delegated to such agent, or if such agent, with the permission of the corporation, exercises such authority at such office or place of business, then the corporation is amenable to process served upon such agent."

While the maintenance of a local office in the state by a foreign corporation is of some significance relative to a determination of whether or not the corporation is doing business therein, such maintenance of itself is not all-conclusive. It is

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40 Supra, footnote 5, p. 472.
necessary to consider the character and purpose of the office, and the use to which it is put. Thus, in *Neely v. Philadelphia Inquirer Co.* a foreign newspaper corporation maintained correspondents in Washington, D. C., for the collection of news, such correspondents having only the duty and authority as would be directly and necessarily incidental to the gathering of news and the transmission of it to the main office of their newspaper. The rent for the rooms occupied by the correspondents and other expenses were paid by the corporation, and its name appeared on the door and in the telephone book as the tenant. It was held by the court that the corporation was not doing business in Washington, Judge Hitz stating that: "* * * each case is to be considered and decided upon its own facts and circumstances, though in a general way it may be said that the business done must be of such character and extent as to warrant the inference that the foreign corporation is present by its agent in the jurisdiction of the process, and has thereby subjected itself to the laws of that jurisdiction. So a foreign corporation may be doing business of a certain kind to a considerable extent, actually and obviously, and yet not be subject to such a statute, if its activities go no further than solicitation, though somewhat elaborately organized and advertised. * * * While if its activities include not only solicitation but the fulfillment thereof by shipment of goods and receipt of payments, the statute shall apply."

It is submitted that the court was no doubt influenced by the fact that the collection and dissemination of news from Washington is so significant and important, nationally, that to hold such transactions to constitute doing business would be transgressing the confines of the legislative intent of the statute involved.

It seems to be generally held that the mere solicitation of passenger or freight traffic by a foreign railroad corporation, even though a local office is maintained, does not constitute doing business, where the solicitors have no authority to contract in such a way as to bind the corporation or to receive

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41 (1932), 62 Fed. (2) 873, 874.
and collect money for transportation.\textsuperscript{42} While some courts have held that soliciting traffic within the state would permit the jurisdiction of that state to obtain, the courts in such cases considering factors such as discretionary powers of the agents to transact other business, the nature and character of the local office, method of payment, etc.; yet other decisions have held contra, presumably upon the ground that the solicitation was a mere incident of interstate commerce, the foreign corporation being considered as not actually doing business but merely attempting to secure business that would actually be done elsewhere. It is pertinent to say again that the facts of each particular case must be analyzed in order to determine whether or not there is a doing of business. If state regulation would impose an unreasonable burden on interstate commerce, it is conceded that the courts would be in accord in holding that the states' jurisdiction would not obtain. It has been stated by one authority\textsuperscript{43} that: "* * * it may be stated without fear of contradiction that if the statutes are broad enough, while a foreign railway corporation which is engaged solely in soliciting business within the state for its lines without the state, and not making contracts of shipment within the state, or doing other local business, is not subject to service of process within the state, since it is not doing business within the state within the requirement of the due process clause of the 14th Amendment; * * * if the soliciting agency goes beyond those things necessarily appertaining to the business of a soliciting agency, such as the issuing of bills of lading, settling claims, etc., it is doing business there and is amenable to the process of the courts * * * unless to subject the corporation to suit in a particular case works an unreasonable burden upon interstate commerce * * *." 

Courts are in accord in holding that when a foreign corporation advertises or solicits advertisements in another state there is no doing of business. In Krakowski \textit{v.} White Sulphur Springs, \textit{Inc.}\textsuperscript{44} it was held that a foreign corporation organized

\textsuperscript{42} Supra, footnote 13, p. 547, Sec. 8497.
\textsuperscript{43} 46 A. L. R. 570, 589.
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to conduct a hotel in another state was not engaged in doing business in the latter state merely because it advertised its business there, the court saying: "The business of advertising and getting custom, however, is a mere incident to the operation of a hotel and health resort, and is not a substantive part of the primary business for which the defendant was incorporated, so that, in my judgment, the defendant is not doing business within this State * * *." It has been held also that where a foreign publishing corporation sends agents into another state (where it circulates its periodicals by mail) for the purpose of soliciting advertisements at rates prescribed by the corporation, subject to the approval of the home office, such corporation is not doing business in the local state. 46

Relative to the execution of contracts by foreign corporations, the general rule is that the contracts made with residents of the local state, to be performed outside the latter state, do not constitute doing business, even if property located within the local state is involved. The criteria are the place of performance and the acts to be performed in the state pursuant to the agreement. In order to permit jurisdiction of the local state to apply, some other business of the corporation, in addition to the contract involved, must be transacted.

Cooper Mfg. Co. v. Ferguson 48 was a case in which an Ohio corporation, without filing the requisite certificate in Colorado, contracted in the latter State to manufacture machinery at its place of business in Ohio, and to deliver it in Ohio; the corporation had no intent or purpose of doing any other acts in Colorado. It was held that there was no carrying on of business in Colorado. The court, speaking through Mr. Justice Woods, said: "The Constitution requires the foreign corporation to have one or more known places of business in the State before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known

46 (1905), 123 Fed. 614.
48 (1885), 113 U. S. 727, 734, 5 S. Ct. 739.
47 (1924), 31 Wyo. 191, 224 Pac. 850.
places of business in the State. To have known places of business it must be carrying on or intending to carry on business. * * * The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado. * * * To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the State, would be unreasonable and incongruous."

As a corollary of the foregoing principle, the foreign corporation will be considered to be doing business in the local state when it transacts, under the particular contract, a substantial part of the business for which it was created, and this rule obtains even though the contract is entered into in another state or in the domiciliary state of the corporation.

Although there have been cases holding to the contrary, it has been held that there is no doing of business when a foreign corporation contracts with the domestic state, or one of its agencies, to facilitate the performance of a public duty imposed upon such state or agency. In State v. American Book Co., the Book Company had contracted with the state school-textbook commission to supply the schools of the state with certain text-books; after the Book Company had partially performed its part of the contract, and was proceeding to a full discharge thereunder, the state sought to cancel the contract. Among other things the court said: "The matter of procuring a corporation to supply needed books is purely a state affair; no private right attaches to it. Nor is the act one of ordinary trade or commerce, in which the state may divest itself of the attributes of sovereignty and conduct itself as an individual may do. The most distinctly sovereign prerogatives of the legislature, under the Constitution, are enlisted and concerned. Unable to attend to certain details of the work proposed, a special agent was created, and clothed with such authority as seemed necessary to accomplish the legislative design. The state text-book commission is a public agency created to aid

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48 (1904), 69 Kan. 1, 22, 76 Pac. 411.
in the assertion of a public right and the execution of a public power in the interest of the public welfare. Corporate power is withheld from it; it possesses no prerogatives personal to itself or its members, and the state alone can enforce the contracts it may negotiate. It is merely the arm of the legislature, and the character of the acts done by it cannot be distinguished from the character of governmental acts performed by the legislature itself."

The subject of insurance contracts presents an interesting array of questions, even though it is controlled by the general proposition that the foreign insurance corporation will be held to be doing business in the local state only when it transacts therein a substantial portion of the business for which it was created. The case of Palmetto Fire Ins. Co. v. Beha supports the legal principle that when, through correspondence or other means, a resident of the local state contracts with the foreign insurance company in its domiciliary state, there is no doing of business in the former state. In this particular case, the applications for the policies were obtained in the local state by agents of the corporation, and were then forwarded for acceptance or rejection to the company at a place outside the state. The court said: "The general rule is that a foreign corporation is not doing business in a state by entering into contracts with residents thereof, where the contracts are made and are to be performed elsewhere, although the contracts relate to property within the state; and where applications for insurance are obtained in a state by an agent of a foreign company, and forwarded by him for acceptance or rejection to a company at a place outside of the state, the company is not doing business in the state wherein the applicant resides by accepting and issuing policies in pursuance thereof at such outside office."

There is an apparent conflict of authorities concerning the question of whether or not the collection of premiums under existing policies constitutes doing business by the foreign corporation after it has withdrawn from the state.

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40 (1925), 13 Fed. (2) 500, 507.
While some cases have held that there is still a doing of business under such state of facts, yet others have held to the contrary. Thus in *State v. Connecticut Mutual Life Ins. Co.* a foreign insurance company ceased to solicit or take new policies, and withdrew its agents from the local state, thus compelling the payments of premiums to be made through the mail and express. In permitting the company to evade the payment of a privilege tax on gross premium receipts imposed on all foreign insurance companies, and to keep alive all of its old policies, the court stated: “We may admit that the receipt of premiums is doing business, but when such receipt is made in a foreign State it does not amount to doing business in Tennessee, but in such foreign State. When the premium is paid and the renewal made and completed in a foreign State, we are unable to see how any business is done in Tennessee. Neither the policy is renewed or continued, nor is the money paid in Tennessee, but both are in the foreign State. There is nothing done in Tennessee, no new business done or solicited, no agent there and no agency, no contract made, no money paid, no receipt for renewal given, and no business done of any character. The postal and express authorities are not the agents of the company, but of the insured, as the company’s policy stipulates that the premiums shall be paid at the home or foreign office.”

A view diametrically opposed to this is presented in *Conn. Mutual Life Ins. Co. v. Spratley*, a case wherein the facts were similar to those above set forth, supplemented with the one additional fact that payment of the premium was made directly to the agent residing in another State, who was once the agent in the State where the policyholders resided. The statement of the court was: “It cannot be said with truth, as we think, that an insurance company does no business within a State unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon

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50 (1917), 244 Fed. 863; (1919), 187 Iowa 507, 171 N. W. 711; (1899), 172 U. S. 602, 19 S. Crt. 308.
51 (1901), 106 Tenn. 282, 294, 61 S. W. 75.
52 (1899), 172 U. S. 602, 611, 19 S. Crt. 308.
such risks. Having succeeded in taking risks in the State through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another State, and who was once the agent in the State where the policyholders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon the subject."

There are numerous situations and cases where a foreign corporation enters an agreement to install fixtures or machinery, or to construct a building; and since it may never again enter the state, after the particular job undertaken has been completed, it does not choose to qualify to do business in the state of performance. Can such a single act or transaction be held to constitute the doing of business, so that the corporation is violating statutes requiring it to qualify before it can carry on business in the local state?

It is apparent that in most cases where the foreign corporation is to do construction work, it must hire laborers and sometimes rent equipment, purchase supplies and materials, and carry on various other transactions, with the result that such corporation can be said to be doing business in the state of performance.

The line of demarcation is not so lucid or apparent when, pursuant to a contract, the foreign corporation also agrees to install the equipment purchased. It might be said that the decisive question is not whether there is business being done, but whether the contract is protected as being considered interstate commerce. However, it cannot be baldly asserted that there is interstate commerce merely because, in the performance of the contract, material and labor are brought from outside the state. When the foreign corporation both manufactures and installs the apparatus or equipment, the solution of the problem devolves upon the question whether or not there has been a termination of interstate commerce, i. e., whether the work and labor within the state, rather than the
sale of the articles in interstate commerce, were involved; or whether the installation of the articles was merely incidental to the sale and delivery of such articles—in the former, the protection of the commerce clause will not obtain, while in the latter case it will.

One of the leading cases upon this question, wherein it was held that the work and labor within the state, rather than the interstate sale, were involved, is *Browning v. Waycross.* In this case an agent had solicited orders in the local state for lightning rods manufactured by a non-resident; the rods were then shipped to the agent, who erected them for the customer without further charge, since the purchase price included such service. It was held that such business of erecting the rods was subject to a license tax, since it was not in interstate commerce, and did not pertain either to delivery of the articles shipped in interstate commerce or to the completion of an interstate transaction—it was a purely local act performed after the complete termination of interstate commerce.

The other side of the question, i.e., where the installation of the article is merely incidental to the sale and delivery pursuant to an interstate transaction, so as to be protected by the commerce clause, is represented by the leading case of *York Mfg. Co. v. Colley.* There the contract of sale of an artificial ice plant by a foreign corporate vendor provided that the latter was to furnish an engineer to assemble the equipment at the point of destination, and before there could be a complete delivery a practical efficiency test was to be made. The court held that such provision was relevant and pertinent to the consummation of the interstate sale, with the result that payment of the purchase price could not be avoided on the ground that the corporation was carrying on local business without first having obtained the permit made requisite by statute as a condition precedent to the right of bringing suit in the local courts.

This case was followed in *Aeolian Co. v. Fisher,* which

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53 (1914), 233 U. S. 16, 34 S. Crt. 578.
55 (1930), 40 Fed. (2) 189.
involved a contract by a foreign corporation to furnish and install a pipe organ in another state; the court held that the agreement to install was not only relevant and appropriate to the interstate sale, but was essential if the organ, as distinguished from its parts, was to be sold at all.

In a case following *Browning v. Waycross*, it was stated by the court that: "The test is whether the business done in the state of destination involves a 'question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction,' or whether it concerns 'merely the doing of a local act after interstate commerce had completely terminated.' * * * In all cases bearing upon the subject the distinction is carefully drawn between situations requiring local work as essential to a complete delivery in interstate commerce, because of the peculiar nature of the subject-matter of the contract, and those in which the local work done is inherently and intrinsically intrastate."56

Transactions by foreign theatrical or booking corporations within another state are worthy of some consideration. It is apparent that there is a doing of business when the foreign company engages in some substantial portion of its corporate business in the local state. In *Interstate Amusement Co. v. Albert et al.*57 the plaintiff was an Illinois corporation, engaged in booking actors to play in various theaters, receiving from the theater owners a certain sum and commissions. For the purpose of enlarging its business, plaintiff sent agents into Tennessee, and made contracts with the theater owners, and had had extensive correspondence with the other parties. The particular contract involved in the instant case was finally signed and accepted by the defendant in Tennessee. It was held that this contract did not involve interstate commerce, but that the plaintiff was doing business in Tennessee, and consequently could not sue on the contract because of a failure to comply with the pertinent statute.

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56 (1934), Mandel Bros. v. Henry A. O'Neil, 69 F. (2) 452, 455.
57 (1913), 128 Tenn. 417, 161 S. W. 488.
It was held in *Rex Beach Pictures Co. v. Harry I. Garson Productions* that a foreign corporation was doing business in another state when it marketed its own motion pictures through the local distributors, who acquired no title to the films consigned to them under the contract; the contracts made by such consignees with various theaters in the state were subject to the approval of the foreign corporation.

It has been held that the business of providing public baseball games for profit between clubs of professional ball players in a league and between clubs of rival leagues, although necessarily involving the constantly repeated traveling of the players from one state to another, provided for, controlled and disciplined by the organizations employing them, was not interstate commerce. It was stated that: "The business is giving exhibitions of baseball, which are purely state affairs. * * * the transport (across state lines) is a mere incident, not the essential thing. * * * personal effort, not related to production, is not a subject of commerce."

While some states have held that foreign corporations conducting correspondence schools within the state were doing business, the Supreme Court of the United States has ruled otherwise, holding such business to constitute interstate commerce outside the realm of state control and regulation. Thus in *International Textbook Co. v. Pigg*, which decision reversed the finding of the Kansas Supreme Court (76 Kan. 328), Mr. Justice Harlan stated: "Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph. * * * If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the States,

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60 Illinois (149 Ill. App. 509); Kansas (76 Kan. 328, 91 Pac. 74—reversed in 217 U. S. 91, 30 S. Crt. 481); Missouri (229 Mo. 397, 129 S. W. 922); New York (67 Misc. 49, 124 N. Y. Supp. 603).
61 (1910), 217 U. S. 91, 106, 30 S. Crt. 481.
which no State may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mail, is commerce among the States within the meaning of the Constitution, especially where, as here, such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

Some interesting problems involving state and federal control have arisen as a result of the advent of the modern system of radio broadcasting.

In *Hoffman v. Carter* 62 a New York Broadcasting company was sued in New Jersey by a citizen of the latter State, for defamatory remarks originating in Pennsylvania and reaching New Jersey by means of wires which the defendant leased; the program was then broadcast over a station owned and operated by a New Jersey subsidiary of the defendant. It was held that the defendant was not doing business in such a manner as to subject it to service of process in New Jersey.

In such a case it seems as though the parent-subsidiary relationship alone should not suffice to make service of process effective, provided that there is a preservation of the corporate separation. It is manifest, though, that the foreign corporation should be held to be doing business when it is actively engaged in the operation of the local broadcasting facilities.

In the case of *City of Atlanta v. Atlanta Journal Co.*, 63 the City had imposed, by ordinance, an annual fee upon "local broadcasters" whose facilities were used to advertise merchandise or services of those doing business in the City, "to the general public residents of the City of Atlanta and the State of Georgia." The ordinance exempted radio stations that leased or sold their entire time or facilities for broadcasting or advertising matter brought to Atlanta by wire or wireless, and then rebroadcast from Atlanta, or for broadcasting advertisements intended entirely for the benefit of persons

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63 (1938), 186 Ga. 734, 198 S. E. 788.
non-residents of Atlanta and the State of Georgia. The particular broadcasting station in Atlanta involved herein devoted approximately two hours each day for the broadcasting of local advertisements originating in its own studio; all the revenue was procured through the ability of the station to broadcast programs and advertisements which could be heard both within and outside the State. It was found impossible to restrict the station’s messages so they would be received solely by people within the State, or to effect such a limited reception of programs emanating from the station. The Supreme Court of Georgia held that the particular station was not subject to the taxing fee.

It is interesting to note that in an earlier case in Georgia, where a college radio station was broadcasting commercial programs (the income of which was insufficient to meet operating expenses), but devoted most of its time to educational and self-sustaining programs, the taxing ordinance of the City of Atlanta was held to be applicable, the court stating that: “Even if it is true that some of its messages do go beyond the State lines, that does not make it interstate business, especially as there is nothing in the evidence to show that it has received or will receive messages to be transmitted beyond the State lines into another State. But even if it did receive such contracts, its business is certainly almost altogether intrastate; and its income is derived almost entirely, if not altogether, from what might be called intrastate business.”

The attitude of the federal courts relative to the imposition of taxes on broadcasting, by municipal ordinances, was enunciated in Whitehurst v. Grimes, wherein it was stated that: “Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the

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64 City of Atlanta v. Oglethorpe University (1934), 178 Ga. 379, 383, 173 S. E. 110.
65 (1927), 21 Fed. (2) 787.
United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance is void, as a regulation of interstate commerce."

It is submitted that this last statement is consonant and compatible with the contemporaneous viewpoint and trend in the law which dictates that those things which affect interstate commerce should themselves come under the federal regulation and control of such commerce.

One authority is of the opinion that "a radio broadcasting engaged in transmitting advertising programs from a station in one state to persons in other states, who 'listen in' through the use of receiving sets, does not differ in procedure from that employed in sending messages by wire across state lines which is interstate commerce and not subject to a state occupation tax based on gross receipts."

Relative to single, occasional or isolated acts or transactions of a foreign corporation within another state, the courts tend to hold that the corporation must carry on some substantial part of its ordinary corporate business, which must be continuous in the sense that it is distinguishable from merely casual or occasional transactions; the business must be such as to produce some form of a legal obligation. Generally, the corporation cannot be said to be doing business, as concerns a particular act, when it has no intention of repeating it, or of making the local state a basis for the performance of any part of its corporate business.

It is apposite at this point to devote some attention to a few of the Indiana statutes and cases pertaining to the doing of business by a foreign corporation.

It is interesting to note that the Indiana Corporation Act, as passed in 1929, requires each foreign corporation "admitted to do business in this state" to keep on file in the office of the Secretary of State an affidavit containing, among other things, the name of the resident agent on whom service of legal process may be had—the application for admission filed by the foreign corporation is deemed to be such an affidavit.

66 Marchetti, LAW OF STAGE, SCREEN AND RADIO (1936), p. 388.
67 Burns Ind. Statutes Annotated, 1933, Sec. 25-306.
But when the agent is removed or is in any way incapacitated, the foreign corporation must file a new affidavit.

In 1939 the Indiana General Assembly enacted a statutory provision for service of process on corporations not admitted to do business in the State. This statute provides, in substance, that the engaging "in any transaction or the doing of any business" in the State by a foreign corporation not previously licensed or admitted to do business therein, is deemed equivalent to an appointment of the Secretary of State as the true and lawful agent of the corporation upon whom may be served all lawful processes, writs, etc., arising out of any act or thing done by the corporation within the State. Such circumstances or set of facts shall signify the agreement of the corporation that any such process, writ, etc., against it, which is so served, shall be of the same legal force and effect as if it had been served upon a designated resident agent of the corporation. Provisions are then made for the mode of effecting such service.

It is obvious that the determination of what constitutes "engaging in any transaction," or "the doing of any business," is requisite before the statute can be applied to any given statement of facts.

In order to ascertain the attitude of the Indiana courts relative to what constitutes doing business, a review of a few of the cases pertaining to the subject will serve by way of elucidation.

In Lowenmeyer v. Natl. Lumber Co. a foreign corporation purchased real estate for use as a coal yard and so used the same in conducting a retail coal business within the State. The court held that such purchase of real estate was not an isolated transaction, and therefore fell within the prohibition against doing business. The court, through Judge Batsman, said: "Such question, therefore, is ordinarily a matter of judicial determination. The courts as a rule have held that, where a foreign corporation enters into a single contract, or engages in some other isolated business act within a par-

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68 Ibid., Sec. 25-316.
ticular state, with no intention to repeat the same therein, or make such state a basis for the conduct of any part of its corporate business, such corporation cannot be said to be 'doing business' or 'transacting business' within such state, within the meaning of the usual statutory provisions regulating the transaction of business by foreign corporations.

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In the instant case, however, it is evident that the act of purchasing the real estate in question does not fall within that class of cases denominated isolated transactions.

The case of *North Dakota Realty etc. Co. v. Abel et al.* involved a situation wherein a foreign corporation took a conveyance of a house and lot in Indiana as part payment for certain land which it then owned in North Dakota; and subsequently, for the purpose of disposing of the Indiana property, sold it and received therefor a certain amount in cash and a mortgage on other Indiana lots; when the owner of the lots was unable to pay the mortgage, the fee thereof was transferred to the foreign corporation, all of the business being transacted in another state. In holding that the corporation was not "transacting business" in Indiana, the court followed the *Lowenmeyer Case*.

Where a Florida corporation, organized to buy, sell and lease real estate, to collect rents, and to cultivate lands for agricultural purposes, took possession of Indiana land, rented some of it, and made hay and in other ways cultivated portions of it, the court held that the acquisition of the land and the cultivation thereof constituted a continuing act, and "if appellee (the foreign corporation) was not transacting business within the state, then it must be that farming is not a business."*71

In the "sale and installation" contracts by a foreign corporation, the Indiana courts are, on the whole, in accord with the majority rule on the proposition.

There was no interstate commerce, but rather the transaction of local business, in *U. S. Construction Co. v. Hamilton*.

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*70 (1927), 85 Ind. App. 563, 155 N. E. 46.
In that case a foreign corporation contracted to equip an Indianapolis manufacturing plant with a sprinkler system, which required the employment of labor for weeks in such construction, involving the building of a tower, a tank and other carpenter work, and the excavating and filling of trenches, with the use of material which was on the ground of, and the property of, the manufacturing company. The decision reached therein was predicated upon the case of *Browning v. Waycross*, the court saying: "* * we hold that the contract and transaction involved in this action was not interstate commerce, but that it was the transaction of local business in the state * * *." 

It was held in *Vilter Mfg. Co. v. Evans* that where a foreign corporation sells an ammonia compressor and other large and heavy machinery connected therewith to a dairy company in Indiana, and agrees to install such machinery, it is engaged in interstate commerce, and thus is not subject to the statute requiring registration as a prerequisite to a foreign corporation's doing business within the State, even though local laborers are employed as a means of effecting the installation of the equipment sold. The court distinguished that case from that of *U. S. Construction Co. v. Hamilton National Bank* by pointing out that the work in the latter case "required the employment of labor for weeks in such construction, required the building of a tower, a tank, and other carpenter work, and the excavating and filling of trenches, with the use of material which was on the ground of, and the property of, the manufacturing company, while, in the contract here involved, there was a simple sale of an ammonia compressor, and machinery and apparatus appurtenant thereto, with an agreement to install the same. * * * All of the work done was involved in the sale, and did not, as in the United States Construction Company case, involve digging trenches, erecting buildings," etc. To support its

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72 (1920), 73 Ind. App. 149, 158, 126 N. E. 866.
73 Supra, footnote 53.
74 (1927), 86 Ind. App. 144, 154 N. E. 677.
75 Supra, footnote 72, p. 147.
conclusion, the court quoted from *Browning v. Waycross*, wherein it was said: "Of course, we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one state to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction."

Various cases have arisen in Indiana concerning the power of municipalities to exercise their jurisdiction over itinerant peddlers.

The earliest of these cases was that of *McLaughlin v. The City of South Bend*. There it was held that an ordinance prohibiting traveling merchants or peddlers from selling, or offering to sell, any merchandise without having obtained a license, could not be enforced against a person who solicited orders for books which were in Illinois and were to be shipped to the customer in Indiana; the court felt that the ordinance in effect assumed to establish a regulation affecting commerce between the states.

This case was followed in *Martin v. Town of Rosedale*, wherein a similar ordinance was held to be void, on the same ground, as concerned non-residents engaged in selling, by samples, goods located in Illinois. In quoting from the *McLaughlin Case* it was said: "The negotiations concerned goods in another State, there owned and held for sale, and such negotiation must be regarded as affecting interstate commerce, and, thus regarded, it must be held that they can neither be prohibited nor regulated by the state or its municipalities."

The principles enunciated in these two cases were cited and applied to a similar case wherein the salesman solicited orders, by samples, for men's clothing.

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76 Supra, footnote 53.
77 (1890), 126 Ind. 471, 28 N. E. 185.
78 (1891), 130 Ind. 109, 112, 29 N. E. 410.
79 City of Rushville v. Heyneman (1917), 186 Ind. 1, 114 N. E. 691.
A different result was reached in *Town of Sellersburg v. Stanforth.* In that case the defendant was accustomed to solicit orders for groceries at the homes of his customers, and then to fill them with goods purchased in bulk from a Kentucky corporation, making his own deliveries, and the corporation looked only to the defendant for the purchase price of the merchandise. The municipal ordinance requiring the licensing of peddlers of merchandise was held applicable as concerned the defendant, the court saying: "If the appellee (defendant) became the owner of the goods in bulk when he received them from the company at its office it necessarily follows that he solicited purchasers of his own goods and was conducting a strictly intrastate business as a peddler. The fact that he took orders and then purchased the goods to fill the orders from a foreign vendor would not change the fact that his business was that of an itinerant retailer, whose method of doing business brought him within the purview of the ordinance and made him subject to the police regulations therein. * * * But if, as apparently found by the trial court, the defendant, throughout the entire transaction was acting as the agent of The Great American Tea Company then the company itself was engaging in intrastate business in Indiana through the medium of the peddling of the defendant."

The statute appertaining to foreign corporations doing business in Indiana was held inapplicable in *Mutual Mfg. Co. v. Alpaugh,* where the business transacted was the taking of orders in Indiana by salesmen of an Arizona corporation, for goods manufactured in Ohio, in which latter State delivery and payment were to be made also.

*Peter & Burghard Stone Co. v. Carper* pertained to a foreign corporation which made a contract in Indiana, and pursuant thereto transacted business within the State by furnishing material and labor in the construction of a building therein, before the corporation had complied with the statute

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81 (1910), 174 Ind. 381, 91 N. E. 504.
82 (1930), 96 Ind. App. 554, 172 N. E. 319.
regulating the admission of foreign corporations to the State. The court held that, upon subsequent compliance with the statute, the corporation could prosecute an action in Indiana to recover the contract price for the material and labor; since the contract was not void. It should be noted that this case overruled *U. S. Construction Co. v. Hamilton National Bank* so far as the latter conflicted with the instant decision.

While it is apparent that no precise definition of "doing business" can be obtained, so as to be applicable and pertinent to each and every situation concerning the problem, yet various courts have attempted to define the term.

The Supreme Court of Colorado has stated that: "Taking the language ('to do business') in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations, and acquires rights."84

In *Wilson v. Jetmore First State Bank* it was said: "The only rational meaning of 'doing business' is the carrying on of the operations of the corporation, or some portion of them, in the usual and regular course of the prosecution of the corporate enterprise for profit. Corporations are organized to run, not for the purpose of being brought to an end, and it is the ordinary display of corporate life which the statute covers, not the necessary functions attending corporate extinction. * * * The words 'doing business' mean the same whether the corporation be domestic or foreign."85

The Supreme Court of Oklahoma has stated that: "Section 9625, in using the term 'doing business in another county,' implies a continuity of conduct in that respect, such as might be evidenced by the investment of capital and with the maintenance of an office or place for the transaction of business,

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83 Supra, footnote 72.
85 (1908), 77 Kan. 589, 595, 95 Pac. 404.
86 Standard Paving Co. v. County Brd. of Equalization (1928), 135 Okla. 15, 21, 273 Pac. 201.
and those incidental circumstances which disclose and attest an intent on the part of the corporation or individual to avail itself of the privilege of carrying on a business there, such as will result in a portion of its property being incorporated in the bulk of the property of the county, and used for some substantial period of time in such a manner as other property of like character of the local taxing district is used."

In the case of Shambe v. Delaware & H. R. R. Co., it was held that: "The essential elements which constitute 'doing business,' as required by our laws, are the same as those necessary under the due process clause of the federal Constitution. We must ascertain if the following requisite essentials appear in this case: (1) The company must be present in the State, (2) by an agent, * * * (3) duly authorized to represent it in the state; * * * (4) the business transacted therein must be by or through such agent, * * * (5) the business engaged in must be sufficient in quantity and quality; * * * (6) there must be a statute making such corporations amenable to suit * * *. The term 'quality of acts' means those directly, furthering or essential to, corporate objects; they do not include incidental acts. * * * By 'quantity of acts' is meant those which are so continuous and sufficient to be termed general or habitual. A single act is not enough. * * * Each case must depend upon its own facts, and must show that the essential requirement of jurisdiction has been complied with."

After a consideration of these attempted and abortive definitions, it is manifest that it is difficult and perhaps impossible to determine whether a foreign corporation is doing business within a state such as would subject it to regulation and control therein. The obvious lack of harmony among the decisions of the various courts might be attributable, to some extent, to the fact that the pertinent statutes of the several states differ in their phraseology, and thereby admit of different constructions and interpretations.

Since the question is one of fact, it is to be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules.

It was stated by Mr. Justice Day, in *St. Louis S. W. Ry. Co. v. Alexander*, that: "This court has decided each case of this character (whether a foreign corporation is doing business within the district in such a sense as to subject it to suit therein) upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

88 (1913), 227 U. S. 218, 227, 33 S. Ct. 245.