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"ARISING OUT OF BUSINESS DONE IN THE STATE"

BY GEORGE E. OSBORNE*

IF a foreign corporation doing business in a state authorizes some person in the state to receive service of a process, jurisdiction over it is not confined to obligations arising out of the business there done.¹ If such a corporation gives no actual authorization to anyone to receive service, but a responsible agent² of the corporation is served in the state, it is an unsettled question whether it can be held subject to the state's jurisdiction on obligations which did not arise out of business done in the state.³ If there is no consent to anyone receiving service and service is made on a state official designated by statute but having no connection with the corporation it is clear that jurisdiction is restricted to cases in which the obligation arose out of the business⁴ done in the state.⁵ The scope

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¹*Bagdon v. Philadelphia and Reading Coal Co.*, (1916) 217 N. Y. 432, 111 N. E. 1075, L.R.A. 1916F 407, Ann. Cas. 1918A 389; *Smolik v. Philadelphia and Reading Coal Co.*, (1915) 222 Fed. 148; *Gold Issue Mining Co. v. Penn. Fire Ins. Co.*, (1917) 243 U. S. 93, 61 L. Ed. 610, 37 S.C.R. 344. In this last case the defendant had filed consent to service upon a public official; contra, *Sawyer v. No. Am. Life Ins. Co.*, (1874) 46 Vt. 697. For a collection of cases see L.R.A. 1916F 410 note.

²"Whether process served on a member of the corporate group can be the foundation of a judgment...turns on...whether the particular person on whom the writ was served was a sufficiently responsible member of the intelligent portion of the group to make it moderately certain that guiding officers will be apprised of the suit." Henderson, *The Position of Foreign Corporations in American Constitutional Law* 171. See also Henderson op. cit. pp. 91-92 and cases cited, particularly *Connecticut Life Ins. Co. v. Spratley*, (1898) 172 U.S. 602, 610, 43 L. Ed. 569, 19 S.C.R. 308.

³*Fry v. Denver, etc., R. Co.*, (1915) 226 Fed. 893 and *Takacs v. Philadelphia and Reading Ry. Co.*, (1915) 228 Fed. 728 hold there can be no jurisdiction. There are contrary decisions: *Atchison, etc., Ry. Co. v. Weeks*, (1918) 248 Fed. 970; *Reynolds v. Missouri, etc., Ry.*, (1917) 228 Mass. 584, 117 N.E. 913; *Lagergren v. Penn. R. Co.*, (1915) 130 Minn. 35, 152 N.W. 1102; *Rishmiller v. Denver, etc., R. Co.*, (1916) 134 Minn. 261, 159 N.W. 272; *Merchants Elevator Co. v. Chesapeake & Ohio R. Co.*, (1920) 147 Minn. 188, 179 N.W. 734; *Callaghan v. Union Pacific R. Co.*, (1921) 148 Minn. 482, 182 N.W. 1004; *Farmers' Co-operative Equity Co. v. Payne*, (1921) 150 Minn. 534, 186 N.W. 130; *Tauza v. Susquehanna Coal Co.*, (1917) 220 N.Y. 259, 115 N.E. 915; *El Paso and Southwestern Co., v. Chisholm*, (Tex. Civ. App. 1915) 180 S.W. 156. No case has yet been carried to the United States Supreme Court, the ultimate arbiter of the question.

⁴The term "business" may be used in two senses. It may mean a business transaction or agreement. It may also mean an establishment with a fixed location, stock in trade, staff of workers and managers, etc. It is not clear which meaning the courts give it. See quotations in note 5, post.

of the limitation in this last case has never been thoroughly analysed.

Starting with the assumption that the foreign corporation is doing business in the state within the meaning of these service statutes,⁶ that business may be conducted in at least two different

⁵Old Wayne Mut. Life Assn. v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236; Simon v. Southern R. Co., (1914) 236 U.S. 115, 59 L. Ed. 492, 35 S.C.R. 255.

The courts have stated this restriction in varying language. Pertinent extracts from the decisions on this point follow:

"Conceding...the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania... While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it...we do not imply such assent as to business transacted in another state, although citizens of the former state may be interested in such business.

As the suit in the Pennsylvania court was upon a contract executed in Indiana...we hold that the judgment in Pennsylvania was not entitled 'to full faith and credit in another state.'" Old Wayne Mut. Life Ass'n v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236.

"But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made, and suits for torts wherever committed might be drawn to the jurisdiction of any state in which the foreign corporation might at any time be doing business...the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states." Simon v. Southern R. Co., (1914) 236 U.S. 115, 59 L. Ed. 492, 35 S.C.R. 255.

"This power is limited to instances where the action is based upon transactions had or business done within the jurisdiction of the state wherein the service is had...such assent [to service] may be only implied...in actions founded on contracts originating within the state of service...it must appear that the cause arose from the business there done." Fry v. Denver, etc., R. Co., (1915) 226 Fed. 893.

"...it [i. e., service on the designated state official] could be good only in causes of action arising out of the business of the corporation in the state..." Atchison, etc., Ry. Co. v. Weeks, (1918) 248 Fed. 970. Almost identical language is used in Smolik v. Philadelphia and Reading Coal & Iron Co., (1915) 222 Fed. 148.

"Causes of action arising out of business and transactions transpiring within the state." El Paso and Southwestern Co. v. Chisholm, (Tex. Civ. App. 1915) 180 S.W. 156. In Reynolds v. Missouri, etc., Ry. Co., (1917) 228 Mass. 584, 117 N.E. 913, practically the same phraseology was employed.

"Causes of action arising in the state where the action is brought." Rishmiller v. Denver, etc., R. Co., (1916) 134 Minn. 261, 159 N.W. 272.

"The cause of action sued upon has no relation in its origin to the business here transacted." Tauza v. Susquehanna Coal Co., (1917) 220 N.Y. 259, 115 N.E. 915.

⁶"Business may be sufficient to subject the foreign corporation that does it to the service of process, and yet insufficient to require it to take out a license." International Text Book Co. v. Tone, (1917) 220 N.Y. 313, 318, 115 N.E. 914. See Tauza v. Susquehanna Coal Co., (1917) 220 N.Y. 259, 268, 115 N.E. 915.

ways. A local business plant or organization, having a fixed habitation with activities radiating out from it as a center, may have been established. A branch store of any kind would be an example. On the other hand, the headquarters of all the business done by the corporation and the corporation itself may be located in the foreign state, but it is possible that, by regularly entering into a great many separate business transactions within the state it would be held to be doing business there.⁷ A foreign manufacturing corporation making sales and deliveries within the state through travelling agents will serve as an illustration.⁸

Where the business is conducted in the first described manner several cases may be imagined.⁹ First, the contract may be entered into and the breach of it occur in state A where the business is carried on.¹⁰ In such a case both the primary and second-

⁷"Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction... This... constituted a doing of business there." *International Harvester Co. v. Kentucky*, (1913) 234 U.S. 579, 584, 58 L. Ed. 1479, 34 S.C.R. 944. *Duluth Log Co. v. Pulpwood Co.*, (1917) 137 Minn. 312, 163 N.W. 520; *Fleischman Const. Co. v. Blauners*, (1919) 190 App. Div. 95, 179 N.Y.S. 193, accord. The recent case of *Massey v. Norske Lloyd Ins. Co.*, (Minn. 1922) 189 N.W. 714, apparently falls within this class.

⁸*International Harvester Co. v. Kentucky*, (1913) 234 U.S. 579, 58 L. Ed. 1479, 34 S.C.R. 944.

⁹"A method of service is insufficient when, although it may have a tendency to give notice to the defendant, yet there is another way obviously better calculated to give notice. [Thus] service by publication is insufficient when personal service is possible (*Bardwell v. Collins*, (1890) 44 Minn. 97, 46 N.W. 315) or where the defendant had left the state but his family remained at his last place of abode. *McDonald v. Mabee*, (1917) 243 U.S. 90, 61 L. Ed. 608, 37 S.C.R." Scott, *Business Jurisdiction over Non-residents*, 32 Harv. L. Rev. 871, 875 note 25. Under this principle it would seem that service on a state official designated by statute would not be good if there could be service upon a real agent of the corporation in the state. This would always be possible so long as it continued to do business in the state in this way. The problem under discussion could arise, therefore, only when, after the corporation has ceased to do business in the state, suit is brought on a cause of action arising prior to the withdrawal. Where a foreign corporation doing business in the state had consented to service on a state official it was held that the state might validly provide for such service after the corporation had ceased to do business, at least as to "controversies growing out of that business." *Mutual Reserve Life, etc., Ass'n v. Phelps*, (1903) 190 U.S. 147, 47 L. Ed. 987, 23 S.C.R. 707. *Tucker v. Ins. Co.*, (1919) 232 Mass. 224, 122 N.E. 285, accord. *Semble, McCord Lumber Co. v. Doyle*, (1899) 97 Fed. 22. Cf. *Hunter v. Mutual Reserve Life Ins. Co.*, (1910) 218 U.S. 573, 54 L. Ed. 1155, 31 S.C.R. 127.

¹⁰E.g., a contract made in the state to deliver goods in the state and a failure to deliver the goods.

For the sake of simplicity it will be assumed throughout this paper that the law of the state where the contractual agreement is consummated governs the creation of the contractual obligations; and that the law where the contract is to be performed governs the creation of the obligations growing out of the breach. On the general question of what law governs

ary¹¹ obligations arise in that state. Second, the contract may be made in state B where the corporation is not doing business and is not incorporated but the breach may occur in state A.¹² Third, the contract may be made in state A but the breach occur in state B.¹³ Fourth, both the primary contractual obligation may be created and the remedial obligation arise in state B.¹⁴ A fifth problem can be raised by supposing in situations two to four that the foreign corporation also does business in state B through another branch plant. The question then would be whether, by serving the state official named by statute, the corporation can be sued in state B on an obligation incurred through dealings with the branch business organization in state A though the legal obligation, either primary or secondary, or both, was created by the law of state B. In all of these situations the obligations arose out of activities emanating from the business located in state A.

the creation and performance of contracts see Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 1, 79, 194, 260; Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 Yale L. Jour. 565, 655, 31 Yale L. Jour. 53; 3 Beale, *Cases on Conflict of Laws* 540-544. Most of the same problems could be raised under other theories as to what law controlled by varying the facts of the hypothetical cases.

¹¹"The first division, primary rights, includes all the rights created by law and existent in the ordinary proper course of events, unaffected by illegal interference. The second division, secondary rights, includes rights which arise upon the violation of primary rights by the wrong of some responsible human actor; they are created by law in order that reparation may be made for the wrongful destruction of each primary right." Beale, *A Treatise on the Conflict of Laws*, Vol. I, Part I, p. 165.

"The entire legal relation—the *vinculum juris*—resulting from that [contractual] agreement may be called a primary, contractual obligation."

"Let it be assumed, however, that X, without excuse fails to perform... In such a case a new legal relation—a secondary, or remedial, obligation arises between A and X. The latter, as a consequence of the breach of his primary duty, is now under a remedial duty to make... reparation..." Hohfeld, *Nature of Stockholder's Individual Liability for Corporation Debts*, 9 Col. L. Rev. 285, 293.

¹²E.g., the "business" in A sends an agent with full power to contract into B where an agreement is made to ship goods in A. There is a failure to ship.

Some of the language in the quotations in note 5, *supra*, from *Old Wayne Ins. Co. v. McDonough*, *Simon v. Southern R. Co.*, and *Fry v. D. & R. G. R. Co.* would exclude this case. None of the actual decisions are on the point, however, and other language in the same cases and in other decisions would indicate that the only obligation which need arise in the state is the secondary obligation, e.g., see the quotation from *Rishmiller v. Denver, etc., R. Co.*, *supra*, note 5. "Cause of action" as there used apparently means the obligation arising from the breach of the primary obligation. Look also at last sentence in the quotation from *Simon v. Southern R. Co.*

¹³E.g., the agreement is entered into in A to deliver goods in B and there is a failure to deliver: See the quotation from *Fry v. Denver, etc., R. Co.*, *supra*, note 5. See also, *Fletcher v. Southern Colonization Co.*, (1921) 148 Minn. 143, 146, 181 N.W. 205.

¹⁴E.g., the same facts as in note 12, *supra*, except the agreement is to deliver goods in state B.

In the case of torts the secondary obligation always must be created by the same law which fixes the primary in rem right which is violated.¹⁵ Consequently only the secondary obligation need be taken into account and the second and third problems above could not arise.¹⁶ However, a tort occurring in state B as the result of activities having their directing source in a business in state A could be regarded, in a natural sense, at least, as arising out of that business.¹⁷

If the "doing business" in the state were of the second kind described, the fourth problem need not be considered. If the agreement were both made and fulfilled outside of state A, even though the corporation be considered to be "doing business" in that state, there is nothing in either the ordinary business sense or in legal contemplation which could be regarded as connected with any business organization of any business transaction there.¹⁸

The same is true in the case of torts. Further, assuming that the business transaction took place partly in state A where the corporation was "doing business" and partly in state B, and that, in the course of carrying out that part of the transaction which occurred in state B, the corporation committed a tort, it is difficult to conceive of a situation in which the tort could have had any connection with that part of the transaction occurring in state A.¹⁹ Hence it would seem that the tort always must be committed in the state where the corporation is "doing business" in this manner in order to say it arose out of the business done there.

Having narrowed the field of inquiry to enumerated situations in which, in one sense or another, the obligation can be said to be connected with the business carried on in the state, the further

¹⁵*LeForest v. Tolman*, (1875) 117 Mass. 109, 19 Am. Rep. 400. See *Fry v. Denver, etc., R. Co.*, (1915) 226 Fed. 893, 894.

¹⁶Probably the same is true of quasi-contractual obligations. As to the nature of quasi-contractual obligations see Woodward, *Quasi-Contracts*, sec. 3, 1. See also, Corbin, *Quasi Contractual Obligations*, 21 Yale L. J. 533.

¹⁷E.g. the business in state A agrees to deliver a truck in state B. While the truck is being driven from state A to its destination in state B, it injures a person in state B as a result of the driver's negligence.

A quasi-contractual obligation arising in some similar manner could be regarded as connected up with the business in state A, e.g., overpayment by mutual mistake in state B.

¹⁸Apparently this was the situation in *Old Wayne Ins. Co. v. Mc-Donough*, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236.

¹⁹It is arguable that an exception exists in the case of deceit. It may be possible to say that an act which results in injury, induced in state B by reason of an agreement fraudulently obtained in state A, is linked up with the part of the whole transaction which took place in state A.

question remains whether all of them fall within the terms of the legal limitation on jurisdiction. Clearly the first case put does so under any interpretation of its purpose. Whether the others do so depends upon the rationale of the restriction. The fundamental reason for some kind of limitation is the obvious fact that this kind of process is necessarily unsatisfactory and ordinarily insufficient.²⁰ It ought to be restricted in its operation so far as possible and yet not allow the corporation to elude those who should be able to hold it accountable within the state. The test of jurisdiction, that the obligation must arise out of some business done in the state, would appear to be a groping for some rule to designate who these persons should be.²¹ It is submitted, a reasonable

²⁰"The method of service on a statutory officer is open to serious abuse, and it may be justified only as a necessary protection to residents of the state." Henderson, Position of Foreign Corporations in American Constitutional Law 99. Should the United States Supreme Court hold that service in the state upon an agent of the corporation is valid only as to obligations arising out of business done in the state (see note 3, supra) it would be difficult to sustain this reasoning.

Another reason suggested is the hardship upon the corporation in being compelled to defend a suit in a state far from the place where the transaction out of which it grew took place. See *Rishmiller v. Denver, etc., R. Co.*, (1916) 134 Minn. 261, 265, 159 N.W. 272; *Simon v. Southern Ry. Co.*, (1914) 236 U.S. 115, 130, 59 L. Ed. 492, 35 S.C.R. 255. This is a factor which has some weight; but if it were the basic reason for the limitation it would apply equally where service was on an actual agent of the corporation. That it would apply in such a case however, seems improbable. See note 3, supra. Further, as the Massachusetts court has expressed it, "the argument *ab inconvenienti* urged on behalf of the defendant is met by one of equal force on the side of the plaintiff" if he has to go to the home of the foreign corporation to sue. *Reynolds v. Missouri, etc., Ry. Co.*, (1917) 228 Mass. 584, 588, 117 N. E. 913.

²¹See *Hunter v. Mutual Reserve Life Ins. Co.*, (1906) 184 N.Y. 136, 144, 76 N.E. 1072, 30 L.R.A. (N.S.) 677, 6 Ann. Cas. 291, *affd.* 218 U. S. 573, 54 L. Ed. 1155, 31 S.C.R. 127, 30 L.R.A. (N.S.) 686, where the court says statutes like these were "primarily designed for the protection of the citizens of the state." For similar statements see *Mutual Reserve, etc., Ass'n v. Phelps*, (1902) 190 U.S. 147, 158, 47 L. Ed. 987, 23 S.C.R. 797; *Sawyer v. North American Life Ins. Co.*, (1874) 46 Vt. 695, 706. Cf. last line of the first paragraph quoted from the *Old Wayne Case*, supra note 5.

A possible explanation of the reason for the usual terms of the restriction is the doubtful constitutionality of a state statute saying that only citizens of that state might sue the foreign corporation there. *Barrell v. Benjamin*, (1819) 15 Mass. 354; *State v. North American Land & Timber Co.*, (1902) 106 La. 621, 31 So. 172; *Reeves v. Southern Ry. Co.*, (1905) 121 Ga. 513, 49 S.E. 594. Cf. *So. Carl & Ga. R. Co. v. Eietzen*, (1897) 101 Ga. 730, 732, 29 S.E. 292. Of course, no doubt would exist if the plaintiff were a foreign corporation. See 70 L.R.A. 514 for a collection of cases. But even if such a rule were constitutional, the general policy, certainly, is to allow citizens of another state to sue on the same terms as citizens of the state where the action is brought. That is true, even though the statute allowing the action was primarily for the benefit of citizens of the state. *Johnston v. Trade Ins. Co.*, (1882) 132 Mass. 432. It would violate no constitutional provision, however, to say that only obligations arising out of business done in the state could be sued upon. In most cases such obli-

interpretation of the test is that anyone who has dealings within the state²² with the corporation should be able to hold the corporation there. The word "dealing" is meant to include, not merely the entering into a transaction but also its performance and the consequences thereof. Hence, if either the primary or secondary obligation arose within the state where the corporation was doing business, the corporation should be held accountable there. Further, if the business dealing out of which a contractual obligation grew was with a business organization, then, even though both the primary and secondary rights arose in another state, the corporation should be liable to suit where its business branch, the actual entity dealt with, was located. In such a case reasonable expectations²³ were raised that the corporation could be reached and held accountable where the "business" with which the transactions were entered into was located. Those expectations ought to be realized in spite of the unsatisfactory character of the service. There seems to be, however, no such reason in the case of torts.²⁴ The business carried on in one state can scarcely be said to have created reasonable expectation in a tortfeasor in another state, that, if he were injured he could sue the corporation in the first state.

In a recent Minnesota case²⁵ this whole problem was ignored. In that case a foreign insurance corporation was carrying on busi-

gations would run to residents of the state and thus the desired result would be achieved without violating either the constitution or good policy.

²²See *Hunter v. Mutual Reserve Life Ins. Co.*, (1910) 218 U.S. 573, 590, 54 L. Ed. 1155, 31 S.C.R. 127, 30 L.R.A. (N.S.) 686. This rule would operate to protect residents of the state, the ones for whom the state has primary concern, since they will be the ones in all ordinary cases who will have dealings within the state with the foreign corporation. Further, it does not impose on the corporation the duty of defending at a place away from where the transaction occurred.

²³Jural Postulate III. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence (a) will make good reasonable expectations which their promises or other conduct reasonably create." Pound, *Outline of a Course on the History and System of the Common Law* 44. Dean Pound framed this postulate with reference to the enforceability of obligations. It seems, however, equally applicable to a situation like this.

²⁴Again, an exception may exist in the case of deceit. If the "business" in state A fraudulently induces a person in B to enter into a transaction whereby he is damaged it is arguable that, on entering into the agreement he may have anticipated, not merely a breach of contract, but that the whole transaction was a fraud upon him. In such a case he may be said to have relied upon being able to reach the corporation in state A if the deal did turn out to be a deceit upon him. See Pound, *op. cit.*, note 23.

The same reasoning would apply to most quasi-contractual obligations, e.g. by mutual mistake in settling accounts there is an overpayment in state B to the "business" operating in state A.

²⁵*Massey S. S. Co. v. Norske Lloyd Ins. Co.*, (Minn. 1922) 189 N.W. 714.

ness in the second described manner. A Minnesota corporation took out an insurance policy on a ship having its situs in Minnesota.²⁶ The insurance contract was entered into in Wisconsin, or, at any rate, not in Minnesota.²⁷ The loss occurred in Michigan territorial waters.²⁸ It did not appear where the policy was payable. The court held that the insurance corporation was doing business in the state and therefore was subject to the jurisdiction of Minnesota courts through service on the state insurance commissioner although no consent to his receiving service had been given. The court did not even consider the question whether the obligation sought to be enforced arose out of the business done in Minnesota. If the contract were to be performed in Minnesota the result on this point seems correct, for the secondary obligation at least would have arisen in Minnesota.²⁹ If the policy was payable in Wisconsin, the decision is open to doubt.

²⁶The case in this respect appears indistinguishable from *Old Wayne Life Ins. Co. v. McDonough*, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236. There, an insured person was within the state; here, insured property was within the state.

The law of the situs of insured property generally is held to have, as such, no effect upon the insurance contract. See 63 L.R.A. 833, 855 for a collection of cases.

²⁷The insured corporation sent its order for the policies from its office in Superior, Wisconsin, to a Chicago insurance broker. The broker obtained the policies from the insurance corporation. The policies were signed outside the state of Minnesota. On receiving them, the brokers forwarded them to the insured at Superior.

There are different theories as to when a contract of insurance is completed, but under any of them it is clear that on these facts it was not entered into in Minnesota. See Patterson, *The Delivery of a Life Insurance Policy*, 33 Harv. L. Rev. 198. See also, 63 L.R.A. 833; 23 L.R.A. (N.S.) 968; 52 L.R.A. (N.S.) 275. Indeed, the Minnesota court went on the assumption that the contract had not been executed in Minnesota.

²⁸The court correctly decided that this did not have any bearing upon the question at issue. See 63 L.R.A. 833, 855.

²⁹This would distinguish the case from *Old Wayne Ins. Co. v. McDonough*, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236. There the contract of insurance was not only made outside the state but was payable where made.

On the question whether the law of the place of performance should govern the secondary obligation arising upon failure to perform see Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 31 Yale L. Jour. 53, 66-72.