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WHAT CONSTITUTES DOING BUSINESS IN VIRGINIA

At Common Law in the absence of consent, jurisdiction could not be acquired over a foreign corporation, even though it was doing business within the state.¹ However, consistent with their power to exclude foreign corporations, most states have provided for in personam proceedings against them. The basis for this type of proceeding is the doing of business within a state by the foreign corporation. It is the purpose of this note to review the rules laid down in the more important decisions in Virginia with the view of furnishing a guide as to what constitutes the transacting of business in this state.

The mere fact that a defendant is a non-resident does not oust courts of general jurisdiction of their jurisdiction over him, if the defendant is found and served with process within the territorial limits of such courts' jurisdiction. A foreign corporation, however, can not be said to be found within a jurisdiction in which it does no business and has neither agent nor property. Thus, the domestic courts have no power to render judgements against them without voluntary appearance.²

The general rule is, that when a foreign corporation transacts some substantial part of its ordinary business in a state, it is doing, transacting, carrying on, or engaging in business therein within the meaning of the particular state statute under consideration.³ The Restatement⁴ gives a short, concise definition, as follows: "Doing of business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing of a single act for such a purpose with the intention of thereby initiating a series of such acts."

It is held in most jurisdictions that a single act of business in a particular state does not constitute the doing of business so as to bring a foreign corporation within the jurisdiction of its courts.⁵ If, however, this single transaction is the first of a series to be carried on, then the regular rule of acquiring jurisdiction applies.

In *Walton v. Commonwealth*,⁶ an embalmer and funeral director, who was licensed under the laws of Tennessee, prepared for burial a body brought to him in Tennessee from Virginia and thereafter took charge of the funeral and burial in Virginia. An important issue of the case was whether the funeral director was doing business within this state. The court held that doing business or conducting a business, for licensing purposes, requires doing more

than one act; there must be a performance of a continuous series of acts, the idea of continuity or sustained activity being implicit in the terms.

Is the purchasing of land on which there later will be built a business corporation, the doing of business and what if this purchase is made outside of Virginia but affects Virginia realty? These points make up the body of *Goldberry v. Carter*.⁷ The plaintiff sued the former director of a foreign corporation that owed the plaintiff a sum of money, the defendant being a responsible party because of his directorship. Failure to appoint an agent for purposes of service on a foreign corporation doing business within the state,⁸ made officers, agents and employees of the foreign corporation liable for debts of the said corporation.⁹ From the evidence it seemed that the defendant was a director from May 19, 1897 until August or September of that year, during which time, the land on which the corporation later built tracks and started mining activities was purchased. The purchase and sale of the land took place in West Virginia.

Was this single act during the defendant's directorship, which placed the company in business here later on, the doing of business within this state so as to support a suit of this nature under the above named sections of the Code?

The court said it was not, leaning heavily on the fact that the sale was made out of this state and the prohibition in the statute is against doing of business here, and not against doing of business abroad which related to property in this state.

It is possible to draw the inference that had the contract been local the court might have held otherwise, if it would have connected this so called single act with the others which made the corporation a going concern.

Do the words, doing business, have reference to the exercise of some commercial or manufacturing enterprise exclusively? The Virginia view is that they do not.¹⁰ The Knights of the K.K.K., chartered under the laws of Georgia as a benevolent and eleemosynary society, without capital stock, to conduct a patriotic, secret, social order, were held to be doing business in Virginia by establishing local klans, receiving and transmitting initiation and membership fees and hence subject to fine¹¹ for failing to obtain the certificate required.¹²

After *International Harvester Company of America v. Commonwealth of Kentucky*,¹³ it became the general rule that even though the business transacted within a state may be entirely inter-

state in nature, a foreign corporation may, nevertheless, be deemed present for purposes of service by the nature of its business conducted within that state. Two Virginia decisions involving interstate commerce still tended to regard and separate inter and intrastate activities when dealing with this problem. The Virginia Supreme Court based its decisions in both cases on the fact that the intrastate activities were sufficient to make the corporation amenable but it seemed to regard purely interstate activities as immune.

In *General Railway Signal Co. v. Commonwealth*¹⁴ a foreign corporation, for lump sums, made and performed contracts to furnish completed automatic railway signal systems in Virginia. The materials, supplies, machinery devices and equipment were brought from without, but their installation as structures permanently attached to the soil required the employment of local labor, digging of ditches, construction of concrete foundations and painting. The court held that local business was involved, separate and distinct from interstate commerce, and that the foreign corporation was subject to the licensing power of the state. The defendants argued to no avail that it was impossible to establish a complete signal system without some incidental hiring of labor in Virginia and that such an attempt by the State was the height of injustice.

A case substantially in accord with the above, in which there was an attempt to point out a safe role that might be played by foreign corporations in activities of this mixed nature, is *Commonwealth ex rel. Corporation Commission v. Western Gas Construction Co.*¹⁵ A foreign corporation made a sale out of state calling for the installation and erection of certain gas machines and equipment in this state, involving extensive construction work. It was held that this constituted the doing of business in the state and rendered the corporation liable¹⁶ for having failed to take out a license therefor, the essence of the undertaking being the construction engaged in; the sale of machines and equipment being incidental thereto.

The Court held that there were two lines of activity that might be pursued by the foreign corporation. After the corporation completed the sale of the article it might send an engineer to oversee the installation, the responsibility for which was to be in the hands of the buyer; that is to say, it might supervise the erection of and make a test of the completed plant without entering into activities involving the employment of local labor, or it might choose the method actually pursued in this case, namely, assume the entire responsibility for all the details. In choosing the latter course a foreign corporation localizes its activities, thus bringing itself within the doing of business doctrine.

In the case of drummers and traveling salesmen and the like, whose activities are confined to the soliciting of orders, the rule seems to be generally accepted that this activity is not the doing of business.¹⁷ This rule rests upon the theory that the orders taken for the goods by traveling salesmen in the employment of a foreign corporation do not constitute the contract itself, and the contract has existence only from the time of confirmation of the order. There is, however, a situation called by some,¹⁸ solicitation plus. In this type of situation the agent goes further than just the solicitation; he may perform services, resell articles, employ local labor, and many other activities. By engaging in this increased activity the agent or corporation many times renders itself amenable to the jurisdiction of the state's courts under the doing of business theory. The landmark case in Virginia in regard to this type of activity is *Dalton Adding Machine Co. v. Commonwealth*.¹⁹

An Ohio corporation, Dalton Adding Machine Co. did an annual business in Virginia totaling \$18,000. Its agents took orders for machines which were sent to the home office and if accepted, the machines were sent to the buyer or the agent for delivery to the buyer. In addition to this the corporation carried on other activities: (1) it accepted other machines as trade-ins and disposed of them as best it could, (2) maintained servicing units with spare parts for machines and hired a local mechanic to do repairs, (3) it rented certain machines, and then if the lessee wanted to buy that machine the rent was abated from the purchase price.

The Corporation Commission fined the company for violating the Virginia statute,²⁰ claiming the company was doing business without getting the required license. The defendant appealed, claiming its activities were interstate commerce. The court held that a substantial part of the company's transactions were fundamentally of an intrastate nature, and for that reason the courts will not allow the guise of interstate commerce to be used to cover these activities so as to prevent the state from enforcing its jurisdiction and licensing fine for the failure to comply with its statute.²¹

A foreign cooperative marketing association was held to be doing business in Virginia, when it performed such acts as assisting farmers in the preparation of their cattle within the state, and also engaged in the sale to Virginia buyers of cattle from out of state.²²

A foreign insurance corporation issuing a policy of insurance to a domestic corporation through an agent in another state wants to collect certain assessments by virtue of that insurance contract. There are specific statutes regulating the activities of foreign in-

surance corporations which the insurance company ignored, resting on the idea that its activities were strictly interstate. Under these circumstances may it have access to the Virginia courts? In *Issac Fass, Inc. v. Pink, Superintendent of Insurance of State of New York*,²³ it was held that the policies required the company to perform certain acts in this state such as investigation, adjustment and the settlement of claims against the insured, and the defense of suits which might be brought against the latter. These acts constituted the doing of business in this state, and since the business was carried on in violation of the provisions of the statutes the State had a right to deny the use of its courts.²⁴

How long is a foreign corporation doing business in a state? A foreign corporation, which in the past has done business in Virginia, is doing business in Virginia as long as it has contracts in the state unperformed. The mere leaving of the jurisdiction or ceasing present activities does not withdraw the corporation from the jurisdiction of the state because the courts still regard the corporation as doing business, and thus retaining it within the scope of the state's jurisdiction.²⁵

Two recent decisions highlight the doctrine, where the business is being conducted on a federal reservation within the state. In the *Chamberlain Hotel Case*,²⁶ where a guest sued the hotel for a tort injury, it was held that the doing of business by a foreign corporation within a military reservation in Virginia has the same effect so far as submitting itself to process is concerned as doing business elsewhere within the state, where the state has reserved the right of service of process.

In *Hercules Powder Company v. Ruben*,²⁷ there was an action by a former employee for breach of contract involving \$350 against a Delaware corporation doing business on a federal reservation. Virginia had granted the Federal government exclusive jurisdiction reserving the right to serve process in civil and criminal suits. The Supreme Court of Appeals held that although the federal lands were within the county, the county's jurisdiction stopped where the reservation began. Since this cause of action arose on a federal reservation the service of process was held invalid. The clause was intended to prevent the reservation becoming a sanctuary for debtors and criminals as to causes of action arising outside of the reservation and did not affect exclusive jurisdiction of the United States government as to causes arising within the reservation.

These two cases involving the same problem of service are in direct conflict. The holding in the latter case seems unfortunate because it would make it necessary for an injured party who has

a small claim, to go to a foreign state, in the *Hercules* case, Delaware, in order to get service on the corporate wrong-doer. It thrusts upon foreign courts the duty of trying a cause happening solely in Virginia. Also, the person harmed must undergo increased expense in order to obtain justice. The reasoning of Judge Parker in the *Knott* case is sound and would permit a more just result. He says, "Corporations doing business on the reservation come into contact with the citizens of Virginia and do business with them in the same way as foreign corporations doing business elsewhere within the state and there is the same reason for making them amenable to process in the local courts. Since the state has retained the right to serve process on foreign corporations as well as others within the reservation and has the power to say what shall constitute such service, it follows that any act which may be legally taken as an acceptance of service elsewhere within the state may be so taken within the reservation. This reservation means that the doing of business by a foreign corporation within the reservation has the same effect so far as submitting itself to local jurisdiction for the service of process is concerned, as doing business elsewhere within the state." It would be far better to follow this decision and allow the local courts to try causes of this nature.

If the case be one in which the defendant non-resident might be unwittingly carrying on business (which might arise in a part of the state where the borderline is in dispute), the courts will carefully scrutinize the process itself and the circumstances under which it was issued and served, in contravention of his natural right to be sued at home.²⁸

A foreign corporation which in every practical aspect owns a domestic corporation may be held to be doing business within the state where the domestic corporation is located.²⁹

In conclusion it must be noted that whether a corporation is doing business in a state in such a way as to render it subject to the jurisdiction of the courts thereof, depends upon the facts of each particular case. Cases of mere solicitation and single acts of business are generally held not within the doctrine, but where the activities have become substantially localized the courts have little reluctance in finding that the corporation has rendered itself amenable, in order to protect the rights of its citizens.

ROBERT C. STACKHOUSE

FOOTNOTES

1. *St. Clair v. Cox*, 106 U. S. 350 (1882).
2. *Deatrick v. State Life Insurance Co.*, 107 Va. 602, 59 S. E. 482 (1907).

3. VA. CODE §§13-217, 13-218 (1950); *Dalton A. Co. v. Commonwealth*, 118 Va. 563, 88 S. E. 167 (1916); *General Ry. S. Co. v. Commonwealth*, 118 Va. 301, 87 S. E. 598 (1916); 20 CORPUS JURIS SECUNDUM 1829.
4. RESTATEMENT, CONFLICT OF LAWS, §167, comment a, p. 244 (1934).
5. *Walton v. Commonwealth*, 187 Va. 275, 46 S. E. 2d 373 (1948); *Goldberry v. Carter*, 100 Va. 438, 41 S. E. 858 (1902); 8 Va. L. Rev. 279; cf. *Cooper v. Ferguson*, 113 U. S. 727 (1884).
6. 187 Va. 275, 46 S. E. 2d 373 (1948).
7. 100 Va. 438, 41 S. E. 858 (1902).
8. VA. CODE §1104 (1887), §§13-8, 13-21 (1950).
9. VA. CODE §1105 (1887), §§13-21, 13-218 (1950).
10. *Knights of the K. K. K. v. Commonwealth*, 138 Va. 500, 122 S. E. 122 (1924); See Note, 37 A. L. R. 1284 (1925).
11. VA. CODE §3848 (1926), §§13-211, 13-218 (1950).
12. VA. CODE §3847 (1926), §§13-8, 13-211 (1950).
13. 234 U. S. 579 (1914).
14. 118 Va. 301, 87 S. E. 598 (1916), *aff'd*, 246 U. S. 500 (1918).
15. 147 Va. 235, 136 S. E. 646 (1927).
16. VA. CODE §3448 (1910), §§13-211, 13-218 (1950).
17. See BURKS, PLEADING AND PRACTICE, §43 (3rd ed. 1934); *Fitchley v. Summar*, 86 F. Supp. 39 (1949); cf. 6 Va. L. Reg. (N. S.) 534 (1920).
18. 6 Va. L. Reg. (N. S.) 534, 537 (1920).
19. 118 Va. 563, 88 S. E. 167 (1916).
20. VA. CODE §1105 (1887), §§13-211, 13-218 (1950).
21. Cf. *Commonwealth v. Imperial Coal Sales Co.*, 161 Va. 718, 167 S. E. 268 (1933).
22. *Eastern Livestock Cooperative Assoc. v. Dickerson*, 107 F. 2d 116 (1936).
23. 178 Va. 357, 17 S. E. 2d 379 (1941).
24. See VA. CODE §§38-32, 38-34, 38-35 (1950).
25. *Express Co. v. Fleischmann*, 149 Va. 200, 141 S. E. 263 (1928); *accord*, *Conn. Mutual Life Ins. Co. v. Duerson*, 28 Gratt. 630 (1877).
26. *Knott Corporation v. Furman*, 168 F. 2d 199 (1947).
27. 188 Va. 694, 51 S. E. 2d 149 (1949).
28. *Bluefield Waterworks v. Sanders*, 63 F. 333 (1894).
29. *Atlantic Greyhound Lines v. Metz*, 70 F. 2d 166 (1934).