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Corporations: Service of Process: Foreign Corporations Doing Business Without a License

John Burke

a date is fixed within which the company is bound to pay up the "shares," and whether it appears that the parties intended that the interests of the "shareholders" be subordinated to the interest of the creditors at large in case the company should become insolvent. *Kidd* v. *Puritan Cereal Food Co.,* 145 Mo. App. 502, 122 S.W. 784 (1909). Where no time is fixed when the principal shall become due and payable, the certificate itself cannot create a debt. *Jefferson Banking Co.* v. *Trustees of Martin Institute,* 146 Ga. 389, 91 S.E. 463 (1917). It has been held that the fact that certificates provide that they "shall be a preferred lien on the assets of the Company" does not make the holder a creditor, when it is manifest from the certificate construed as a whole that the corporation never intended to make him one, but merely to give him a lien on the assets of the corporation when in liquidation, over the common stockholders. *Weaver Power Co.* v. *Elk Mountain Mill Co.,* 154 N.C. 76, 69 S.E. 747 (1910).

In the instant case there was a definite promise to pay a fixed sum within a fixed period. The separate instruments apparently contained all the essential elements of promissory notes. In a case where the promotion scheme was comparable to the one carried out in the instant case and where the participating "operation certificates" were secured by a trust deed on all the premises, the court held that the holders were profit-sharers and co-adventurers. *United States and Mexican Oil Co.* v. *Keystone Auto Gas and Oil Service Co.,* 19 F. (2d) 624 (W.D. Pa. 1924). It is important to notice that in the latter case no fixed date for payment was prescribed in the certificates. And in the latter case the controversy developed between holders of the certificates and a receiver representing general creditors over the fund which had been built up from percentage contributions out of gross sales. In the instant case the controversy was not one between the certificate holders and general creditors. The corporation had been adjudged a bankrupt. The properties had been sold by the trustee in bankruptcy. At the time no issue between certificate holders and general creditors with respect to recourse against the company's assets or the proceeds from the sale had been raised. The purchaser from the trustee took with notice of the asserted encumbrance. It does not appear how much the purchaser paid. It is submitted that the equities are with the certificate holders as against a purchaser like the one in the instant case who probably paid little more than enough to carry the costs of the bankruptcy administration. But the court's apparent willingness to decide this case according to its "interpretation" of the instruments may be hard to explain if the court ever has to decide a case just like the *Keystone Gas Co.* case.

EDWARD J. KULIG.

CORPORATIONS—SERVICE OF PROCESS—FOREIGN CORPORATIONS DOING BUSINESS WITHOUT A LICENSE.—The defendant, an automobile manufacturer, pleaded in abatement to the jurisdiction of the court on the ground that no valid service was made as it was not present or found in the state. Prior to November, 1935, the defendant had a Boston distributor who contacted all the dealers. The sales were understood to be made at Detroit and the distributor was not an agent. The distributor went out of business in November and a district manager took over the duties so the local dealers could get automobiles. His office was in a building which was owned by a corporation and the stock of such corporation was owned entirely by the defendant. The defendant sent him its own stationery to use. He sent all the dealers' orders on to Detroit. He arranged for the show-

ing of defendant's automobiles at the current auto show; he stored some of the cars after the show for the defendant until they could be shipped to another dealer; he sold automobiles of the defendant which were owned by finance companies to another dealer; and he signed new dealers. The court held that when the service was made on the district manager the defendant was doing business in the state and had submitted itself to the jurisdiction of the state. *Atlantic Nat'l. Bank of Boston* v. *Hupp Motor Car Corp.*, (Mass. 1937) 10 N.E. (2d) 131.

The question of whether an unlicensed foreign corporation is under the jurisdiction of the state court is two sided: can it sue in the court [see (1937) 21 MARQ. L. REV. 94], and is it subject to the process of the court? Whether a foreign corporation not licensed to do business in the state has subjected itself to the process of the state for a personal action depends on the peculiar facts of each case, but the courts have laid down certain rules which act as guides in determining this question. Where a railroad was not licensed to do business in the state, and it had no line through the state, but had an agent in the state for the solicitation of passengers and freight in interstate commerce, and where the cause of action did not arise out of such solicitation, it was held that the railroad was not doing business within the state so as to give jurisdiction; but the question was mooted whether solicitation alone would be enough to confer jurisdiction under the light of a statute, in an action growing out of the solicitation and where the cause of action arose within the state. *Thurman* v. *C. M. & St. P. Ry.*, 254 Mass. 569, 151 N.E. 63, 46 A.L.R. 563 (1926). Where an agent of a New Jersey newspaper had an office in New York, and merely solicited orders for the paper, the agent having nothing to do with the contracts relating to the machinery, equipment, the editorial policy, the gathering or publishing of news, the court held that service on the agent was invalid. *Laurucella* v. *Evening News Publishing Co.*, 15 F. Supp. 671 (E.D. N.Y. 1936). It also appears that where the business is nothing more than an isolated transaction, and not one of many, the unlicensed foreign corporation has not made itself amenable to the process of the courts of that state where the isolated transaction took place. *Keokuk & Hamilton Bridge Co.* v. *Curtin-Howe Corp.*, (Iowa, 1937) 274 N.W. 78. There must be a continuous course of business, and even though the action arose out of the isolated transaction, the Iowa court held that service on the Secretary of State, which was allowed under statute, was invalid. The mere fact that a foreign corporation has a subsidiary in the state where the action is brought does not make the corporation amenable to process. *Peterson* v. *C. R. I. & P. Ry. Co.*, 205 U.S. 364, 27 Sup. Ct. 513, 51 L.ed. 841 (1907). Nor would the fact that a bank located in one state with correspondent banks in New York, the correspondent bank paying the drafts drawn against the letters of credit issued by the foreign bank, receiving and delivering securities from brokers for the foreign bank, and carrying out the general duties of a bank, make the foreign bank subject to the jurisdiction of the New York courts. *Bank of America* v. *Whitney Central National Bank*, 261 U.S. 171, 43 Sup. Ct. 311, 67 L.ed. 594 (1923). It is also held that the mere presence of an officer of a foreign corporation in a state is not sufficient presence so that it can be said that he has brought the corporation with him for the purposes of subjecting it to the jurisdiction of the court. The officer must intend to bring the corporation into the state for that purpose, and even though the officer is present for one isolated piece of business service cannot be made. "The business carried on to bring the corporation within the state must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and

is by its duly authorized agents, present within the state where service is attempted." *State,* ex rel. *Consolidated Textile Corp.* v. *Gregory,* 289 U.S. 85, 88, 53 Sup. Ct. 529, 77 L.ed. 1047 (1933), reversing a decision of the Wisconsin Supreme Court. *Cf. People Tobacco Co. Ltd.* v. *American Tobacco Co.,* 246 U.S. 79, 87, 38 Sup. Ct. 233, 62 L.ed. 587, 590 (1918). Nor can a state burden interstate commerce by using its process on foreign corporations engaged in such commerce, but this fact alone, that they are engaged in such commerce, does not render the corporation immune from the ordinary process of the courts of the state. *International Harvester Co.* v. *Kentucky,* 234 U.S. 589, 34 Sup. Ct. 944, 58 L.ed. 1479 (1914). In Wisconsin see *American Food Produce* v. *American Milling Co.,* 151 Wis. 385, 138 N.W. 1123 (1912), where there was a dispute as to the service on the defendant foreign corporation, and where the court held that it was immaterial whether the officer served was in the state on the business of the corporation, since the corporation owned property within the state, and such service was allowed by statute; and *Tetley, Sletter & Dahl* v. *Rock Falls Mfg. Co.,* 176 Wis. 400, 187 N.W. 204 (1922), where the agent of the foreign corporation served had been soliciting orders in the state for four years, and where the corporation was engaged in interstate commerce, and where the court held that mere presence of the agent in the state was not sufficint to give the court jurisdiction, but that the fact that the corporation carried on interstate commerce through duly authorized agents did not exempt it from suit within the state; and the recent case, *Petition of Northfield Iron Co.,* (Wis. 1938) 277 N.W. 168, where the court held that the foreign corporation was doing business within the state and could be served with process through its agent whom it had appointed to carry out a contemplated continuous course of sales, although the agent had effected only two sales when service was made upon him.

JOHN BURKE.

COURTS—PROHIBITION—WHERE SIMILAR ACTION IS PENDING IN FEDERAL COURT.—One John Clancy, a resident of Illinois, brought an action in federal court in Illinois against one Louis Phelan, a resident of Wisconsin. The action was to recover money alleged to be due by reason of a sale by Phelan to Clancy of an interest in an invention. After the action was at issue and set down for an early trial, Clancy commenced an action in the Circuit Court of Rock County, on the same cause. He also subpoenaed Phelan to appear at an adverse examination and to produce a great number of papers and documents. A similar examination had been taken in the suit in federal court. Phelan moved for an order to stay all proceedings in the state court pending the trial in federal court. The Wisconsin circuit court refused to stay any of the proceedings, and Phelan petitioned the Supreme Court of Wisconsin for a writ of prohibition. *Held,* the writ of prohibition issues. "Where an action similar in all respects, involving the same issues and the same parties, is pending in a court of the United States, which action is at issue and set down for an early trial and where the action in the state court has been commenced after the commencement of the action in the federal court, in the absence of a showing that it is reasonably necessary for the protection of some substantial right of a party that proceedings be also had in a court of this state, the state court should unquestionably defer to the jurisdiction of the federal court and stay all proceedings in the action in its court, unless the action in the federal court be dismissed, leaving the state court free to proceed without conflicting with the jurisdiction of the federal court." In re *Phelan,* (Wis. 1937) 274 N.W. 411.