753.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND GUSTAV HIRSCH, COLUMBUS, OHIO, FOR CONSTRUCTION OF LOW TENSION SYSTEM, REVAMPING WIRE MAINS, KENT STATE NORMAL SCHOOL, KENT, OHIO, AT AN EXPENDITURE OF $10,600.00—SURETY BOND EXECUTED BY THE COMMERCIAL CASUALTY INSURANCE COMPANY.

COLUMBUS, OHIO, July 20, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, for and on behalf of the Board of Trustees of Kent State Normal School, and Gustav Hirsch, of Columbus, Ohio. This contract covers the construction and completion of General Contract for Low Tension System, Revamping Wire Mains, Kent State Normal School, Kent, Ohio, and calls for an expenditure of ten thousand six hundred dollars ($10,600.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a contract bond upon which the Commercial Casualty Insurance Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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754.

CORPORATION—FRANCHISE TAX—WHEN FOREIGN CORPORATION IS HELD TO BE "DOING BUSINESS" UNDER SENATE BILL No. 22, 87th GENERAL ASSEMBLY.

*SYLLABUS:*

*When foreign corporations held to be "doing business" in Ohio, within the provisions of Enacted Amended Senate Bill No. 22.*

COLUMBUS, OHIO, July 21, 1927.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

"An incomplete investigation made by this commission reveals the fact that a large number of foreign corporations make personal tax returns and pay personal property taxes in some of the counties in the state and yet have not been admitted to do business in Ohio nor do they report and pay under the franchise act. It is the thought of the commission that it should make a census of these companies and in order that the employe, who may have personal charge of this work, may be fully advised regarding their legal status we are taking the liberty of submitting to you some typical cases such as he has already encountered and ask that you advise us as to the liability of each of them to assessment under the Aigler Act.

Type I. A foreign corporation maintains selling agency in Ohio. Head agent resides in Columbus; does business at his residence; three agents who travel over the state send all orders to him by whom they are transmitted to New York office from which place goods are shipped to Ohio customers.

Type II. Same general facts as above except that each traveling agent is furnished by his company with an automobile which is used by such agent when soliciting orders. Title to the automobile is in the company who pays license fee therefor and personal tax thereon.

Type III. Foreign corporation with selling agency in Ohio. Company rents office for head agent and furnishes and owns furniture therein. Orders collected at office and transmitted to New York office from which goods are shipped.

Type IV. Foreign corporation manufacturing agricultural machinery maintains selling agency in Ohio, also keeps at the office of such agency a stock of spare parts to supply the wants of persons who have purchased machines and who purchase such parts at the local office.

Type V. Foreign corporation maintains a force of salesmen in Ohio, also keeps stocks in warehouses of storage companies located in this state, from these stocks of goods are delivered to Ohio customers sometimes as a result of orders mailed into the head office in New York and sometimes on direction of an Ohio salesman to fill an order taken by him.

Type VI. Foreign corporation manufacturing and selling typewriter, maintains agent in charge of sales in Ohio, keeps a number of machines in agent's office. Sales and deliveries are sometimes made from local stock and sometimes deliveries are made from outside the state on orders mailed from local office.

Type VII. Foreign corporation maintains salaried agent in Ohio, agent rents room in his own name and owns sample stock of goods, takes orders for goods, which orders are mailed subject to approval at the home office in New York.

Type VIII. Foreign corporation which conducts an interstate business in machinery, maintains salaried agent in Ohio to inspect and render service in connection with machines sold here. It furnishes this agent with an automobile to which it keeps title but which he uses in the business of the company."

The said Aigler Act is Enacted Amended Substitute Senate Bill No. 22 and became effective May 13, 1927, and is entitled "An act to provide for the determination, charging and collection of a corporation franchise tax for the privilege of exercising the corporate franchise and of doing business within this state * * *."

Section 1 of said act reads in part as follows:

"The tax provided by this act for * * * foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable"

Section 2 of this act provides:

"For the purposes of this act * * * foreign corporations shall be considered admitted to do business in Ohio when the statement for admission has been filed with the secretary of state or upon obtaining from such secretary a certificate of compliance with the laws of Ohio * * * Each foreign corporation shall similarly report and pay in and for the calendar year immediately succeeding its admission."

You submit a list of certain types of corporations that are paying property taxes in Ohio, with certain facts as to the property of said corporations and a statement of certain business done by said corporations within this state. You then inquire regarding the liability of each of said corporations to assessment of the franchise tax.

Cooley on Taxation, Vol. 2, Section 920, states:

"* * * the tangible property of a foreign corporation located in the state is subject to taxation there without regard to whether the corporation is carrying on or doing business in the state. But it is different, in case of a tax on the business as distinguished from the property, as in case of a license, excise, franchise, or whatever it may be called, tax which is not a property tax. In such a case no tax other than a property tax can be imposed unless the corporation is carrying on or doing business in the state; * * * The question as to what constitutes doing business in a state by a foreign corporation arises in connection with various matters in addition to those relating to taxation; and it must be remembered that a foreign corporation may be 'doing business' for one purpose and not 'doing business' for another purpose. * * *

What constitutes doing business, so far as the power to tax is concerned, is often a troublesome question. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Not only must the foreign corporation, in order to be taxable, be doing dusiness, but also business for the doing of which it was incorporated, it has been held; * * * Whether a foreign corporation is doing business in the state must be determined from the character of the business carried on, and not from the existence of any unexercised powers reserved to it by its contracts. It is not important that the business activities of a corporation in the state are small. A corporation is 'carrying on' or 'doing' business in a particular state if it is doing some of the work or is exercising some of the functions for which it was created; but transactions collateral thereto and incidental only, although they may be business, are not the business referred to in the tax statutes. Whether a corporation is doing business within the state is a question of fact not necessarily depending solely upon a single act, or on the effect of single acts, but on the effect of all the combined acts which it may perform in the state. * * * All the business of a corporation need not be done in the state, in order to do business in the state. But an isolated or occasional sale or other business transaction is not sufficient, nor is the

> mere maintenance of an office, or the sale of goods through an agent subject to approval by the home office; * * * So the mere consignment of goods to a resident commission merchant for sale does not constitute doing business. * * * And a foreign corporation is taxable as doing business where it has a branch office in the state or a sales agency to which its goods are consigned and from which they are sold and the proceeds there banked."

A foreign corporation can do business in this state only on such terms and conditions as the state may impose, and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state; *So. Gum Company* vs. *Laylin*, 66 O. S. 578.

The mere solicitation of business by agents of the foreign corporation is not such a "doing business" within the state as to subject the foreign corporation to the jurisdiction of the courts of the state in which the business is solicited. *Berger* vs. *Pennsylvania R. Co.*, 65 Atl. 261; 9 L. R. A. (N. S.) 1214.

An employer, living in another state, sending a man over to Kansas to make contracts with implement dealers in the state and sending agents to the state to settle accounts and receive cash on notes in settlement thereof is doing business in Kansas. *Elliott* vs. *Parlin, et al.*, 81 Pac. 500.

The sale of goods by a foreign corporation and the delivery of the merchandise and the collection of the price is not a doing business within the statutes prescribing the conditions of doing business in such state or territory. *Bruner* vs. *Kansas Moline Plow Co.*, 168 Fed. Rep. 218.

A foreign corporation that manufactures farm machinery in another state and sells and ships the same to citizens of the state on orders to be approved by it taken by an agent. if the contract is approved, is not "doing business" within the state. *Belle City Mfg. Co.* vs. *Frizzell*, 81 Pac. 58.

Where a person in this state orders two car loads of iron of a corporation located in another state, to be delivered in a place in this state the contract is made in the other state, and the iron is sold and delivered and the delivery to the carrier was the delivery of the iron and therefore the corporation did not do "business in this state" within the meaning of the law regulating foreign corporations doing business in this state. *National Rolling Mills Co.* vs. *Rubenstein*, 147 Ill. App. 84.

Whether a corporation which has an office or place of business in a state can be said to be doing business therein depends upon the facts of each particular case.

In the case of *Singer Manufacturing Company* vs. *Adams, State Revenue Agent, et al.*, decided in 1909, 165 Fed. Rep. 877, it was held that:

> "Where a nonresident corporation had one or more local agencies in Mississippi in control of salesmen, selling sewing machines throughout a limited number of counties and reporting to such local agency, which in turn reported to a district agency in another state, the corporation during such period was doing business within the state and taxable on credits, as provided by Rev. Code, Miss. 1880, Sec. 497, but not so during a period when it had neither office, store nor managing salesmen in the state, and did business only through traveling salesmen, who transmitted all cash collected and contracts arising from the disposition of machines to agencies outside the state."

At page 879 it is stated in said opinion that:

> "During all the period in question the Singer Manufacturing Company was a nonresident corporation to a certain extent doing business in the state of Mississippi; that is, it had traveling agents going through the state making sales of sewing machines for cash and on time, the latter being conditional

sales, in which for security for the price the Singer Manufacturing Company retained the ownership until full payment. * * *

During the same period through other counties of the state the Singer Manufacturing Company had traveling salesmen selling and disposing of sewing machines for cash and on time; but this business was not managed by any agency in the state, but all the accounts and proceeds, moneys, contracts, and leases were weekly reported to agencies outside and were weekly transported out of the state. As to this part of the business, therefore, it seems that the Singer Manufacturing Company was in no taxable sense doing business in the state of Mississippi.

From April 1, 1895 until 1901, it is agreed that the Singer Manufacturing Company had no office, store, or managing salesmen in the state of Mississippi, but did have traveling salesmen in the several counties of the state, and all cash collected and all contracts arising from the disposition of machines were remitted and forwarded to agencies outside of the state. Under the construction given by the Supreme Court to the taxing act, it seems reasonably clear that during this period the Singer Manufacturing Company was not carrying on and doing any business in the state of Mississippi that was taxable in that state.

From January 1, 1901, to the bringing of this suit the Singer Manufacturing Company had located and maintained agencies in charge of its business covering the state. * * * and to which all traveling men reported, at seven different points in Mississippi, * * * and the business was conducted at, and reports and remittances made to, said places, and at each of these places a stock of sewing machines was kept constantly on hand, from which sales made by traveling salesmen were filled. At these offices a full record was kept, and weekly returns were made to the Singer Manufacturing Company at New Orleans, and in all cases balances of money and contracts and leases were transmitted with the returns to New Orleans. Under this state of facts, it seems that the Singer Manufacturing Company was doing business in the state of Mississippi * * *."

In *Southern Cotton Oil Co.* vs. *Wemple*, 44 Fed. Rec. p. 24, it is held that:

"A foreign manufacturing company which maintains an established location and an agent in New York City for the purpose of selling its products or facilitating their sale, and which keeps funds in New York City to maintain its place of business and to enable its agent to carry on his operations, is 'doing business within the state' within the meaning of Laws, N. Y. 1885 cc 359, 501, which provide that every foreign corporation 'doing business within this state' shall be subject to a tax on its corporate franchise or business, to be computed on the basis of the amount of capital stock employed within the state."

And also on page 26, it is stated in said opinion that:

"In construing the statute regard must unquestionably be had to the nature of the transactions which it is competent for the state to regulate, and it should not receive a construction which would defeat its validity by extending its operation to subjects which are beyond the taxing power of the state. The state could not lay a tax upon the mere privilege of soliciting orders here for goods in behalf of sellers doing business in other states, because it would be one upon interstate commerce, and amount to a regulation of commerce which belongs solely to Congress. * * * The statute ought

not to be interpreted as taxing a privilege of that description. But a foreign corporation, which establishes a business domicile here, and brings its property within this jurisdiction, and mingles it with the general mass of commercial capital, is taxable here; and the power of the state is ample to tax its property directly or to lay a tax upon its privilege of doing business, whether the property consists of funds deposited in banks or of goods sent here from other states, not in transit merely but to remain here till used or sold. * * * Reasonably interpreted, the statute means by 'doing business within this state' using this state as a business domicile for transacting any substantial part, even though a comparatively small part, of the business which the company is organized to carry on, and in which its capital is embarked. It would seem that a manufacturing company which maintains an established location here, and an agent, for the purposes of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here; and if it keeps funds here for maintaining its place of business and to enable it to carry on the operations of its agent, such a foreign company would seem to be taxable under the statute. Certainly it cannot matter that the volume of business done is small, or that the location, instead of being a warehouse or shop, is an office or sample room."

In the case of *United States vs. Bell Telephone Co., et al.* 29 Fed. Rep. 17 (this case arose under the Ohio statutes), it is stated in No. 9 of the headnotes:

"Whether a foreign corporation is carrying on business in a state must be determined by what it has done, or is doing, rather than by what it may hereafter do, under powers reserved to it in existing contracts, but not yet exercised. For one person to supply the means to another to do business with or on is not the doing of that business by the former."

It is stated in the 10th headnote that:

"Transactions such as the American Bell Telephone Company has had with the licensee corporations of Ohio, at its place of business in Boston, and not elsewhere, is not the carrying on of business by it in Ohio; nor are such licensee corporations its 'managing agents'."

And No. 12 of said headnotes states:

"The term 'managing agent' implies the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same within the limits of the state, for and on account of the foreign corporation."

A foreign corporation is not doing business within the state, by making a contract within the state, no sales being made or other business being done. *Commercial-Wood & Cement Co.* vs. *Northern Portland Cement Co.*, 84 N. Y. Supp. 38.

The words "doing business in this state" in the statute limiting the powers of foreign corporations, refer to the business for which the foreign corporation is organized and not to its doing with its own members or its resort to the courts to enforce liabilities. *Mandel* vs. *Swan Land Co.*, 154 Ill. 177.

In the case of *The Toledo Commercial Co.* vs. *The Glen Mfg. Co.* 55 O. S. 217, the syllabus reads:

> "The act of May 19, 1894 (91 Ohio Laws, 355–6), which provides 'that no foreign stock corporation, other than a banking and insurance corporation shall do business in this state without first having procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state,' etc., and that no such 'corporation doing business in this state without such certificate, shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate,' etc., does not apply to a foreign corporation whose business within the state consists merely of selling through traveling agents, and delivering goods manufactured outside of the state."

In an opinion of this department (Opinions, Attorney General, Vol. II, page 995, for the year 1920), in defining the term "doing business" it was held that:

> "The provisions only apply to a foreign corporation which does business in this state and which owns or uses a part of its capital or plant in the state and that said statutes impose no obligation on a foreign corporation which does not do business in the state and does not use a part or all of its capital or plant in the state in the transaction of its business."

From the foregoing it may be concluded that:

1. Not only must a foreign corporation in order to be taxable for doing business, be doing business, but also business for the doing of which it was incorporated.

2. Whether a foreign corporation is doing business in the state must be determined by the character of the business carried on, and not from the existence of any unexercised powers reserved to it by its contracts.

3. It is not important that the business activities of a corporation in a state are small.

4. A corporation is carrying on or doing business in a particular state if it is doing some of the work or is exercising some of the functions for which it was created; but transactions collateral thereto and incidental only, although they may be business, are not the business referred to in the tax statutes.

5. Whether a corporation is doing business within the state is a question of fact not necessarily dependent solely upon a single act, or upon the effect of a single act, but upon the effect of all the combined acts which it may perform in the state.

6. All the business of a corporation need not be done in the state in order to do business in the state, but an isolated or occasional sale or other business transactions is not sufficient, nor is the mere maintaining of an office or the sale of goods through an agent subject to approval by the home office.

7. A foreign corporation is taxable if doing business where it has a branch office in the state, or a sales agency to which its goods are consigned and from which they are sold and the proceeds banked.

8. A foreign corporation selling its manufactured goods in this state to citizens of said state on orders taken by its agents and to be approved by it, is not "doing business" within the state, within the provisions of the tax statutes.

The state could not lay a tax upon the mere privilege of soliciting orders here for goods in behalf of sellers doing business in other states because it would be one upon interstate commerce, and amounts to regulation of commerce which belongs solely to congress.

A foreign corporation which establishes a business domicile here, and brings its property within this jurisdiction and mingles it with its commercial capital, is taxable here.

Applying the foregoing to the various types submitted, it is my opinion that as to:

Type I. There is nothing herein to show that the head agent does anything except to solicit orders and receive and forward to New York orders taken by the other three traveling agents. This is interstate commerce and is not subject to a franchise tax.

Type II. The furnishing of an automobile to the agent is not "doing business" in Ohio.

Type III. The mere renting of an office and furnishing the same for a soliciting agent, all orders being sent to the New York office for approval and shipment is not "doing business" in Ohio.

Type IV. This foreign corporation maintains selling agency from which spare parts are actually sold and delivered. It is "doing business" in Ohio and is subject to a franchise tax.

Type V. This type of foreign corporation not only maintains a force of salesmen here but also ships and stores its stock of goods here and deliveries are made from warehouses here. Its stock of goods is not in transit but is to remain here until sold It is therefore "doing business" in Ohio, a part of its ordinary business, and is taxable here.

Type VI. This type is similar to Type V and same reasoning applies.

Type VII. This is an example of soliciting business by agent and cannot be taxed as it is interstate commerce.

Type VIII. This type is similar to Types I and II, and is not "doing business" in Ohio within the provisions of the tax statute.

However, I am not advised as to the amount or kind of service that the agent renders in this state and additional facts might justify a different answer as to this type.

In this connection your attention is called to the case of *Phillips Company vs. Everett* 262 Fed. 341. The Phillips Company, a Wisconsin corporation, with its principal place of business in Chicago, Illinois, entered into a contract with the Springfield Realty Company, a Michigan corporation, to equip a manufacturing company in Detroit with a system of automatic fire sprinklers for which it was to receive $31,776. Later additional equipment was ordered making a total of $32,224. The Phillips Company filed a mechanic's lien on the property for this amount. This claim was resisted on the ground that the contract for the installation of the equipment was void, because the corporation had not taken out a license to do business in Michigan. This contention was upheld by the Court and this holding was affirmed by the U. S. Circuit Court of Appeals. The Court in part says:

> "In view of the evidence offered on behalf of the appellant, it is clear that the installation of this automatic sprinkler system was not merely an incident to its sale and purchase, for the appellant was not manufacturing sprinkler systems, and had none of its own either to sell or to install. Its contract with the Springfield Realty Company comprised the whole scope of the business for which it was organized. It could have done no more in the State of Wisconsin. The fact that it employed a Michigan corporation to perform a part of this contract for it, and that this Michigan corporation brought some raw materials from other states to be used in its factory in the manufacture of its finished product can in no wise affect the appellant's

relation to the transaction further than to show that it was not selling to the Springfield Realty Company an automatic sprinkler system manufactured by itself in its home state, or in any other state. * * * This contract, however, contemplated by its terms performance by the Phillips Company within the State of Michigan, and the evidence relating to that company's method of performance clearly shows that no part thereof was merely incident to the main transaction, but rather that the contract, in its entirety, was a business transaction, local in its nature and indivisible in character."

While this is not a tax case, nevertheless it shows the reasoning of the Court in determining what is "doing business" within the state.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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755.

CORPORATION—CHANGING AUTHORIZED CAPITAL STOCK CONSISTING OF COMMON AND PREFERRED STOCK TO COMMON STOCK OF PAR VALUE.

*SYLLABUS:*

*Outline of the necessary certificates by which a corporation having an authorized capital stock of* $950.000.00, *consisting of* $400,000.00 *of common stock, all issued and outstanding, and* $550,000.00 *of preferred stock, of which* $546,000.00 *has been issued, and* $28,200.00 *of which has been redeemed and canceled, may change its authorized capital stock to* $500,000.00 *of common stock, consisting of* 5000 *shares of the par value of* $100.00 *each.*

COLUMBUS, OHIO, July 21, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your request for my opinion as to the certificates and other papers necessary to be filed under the following state of facts:

An Ohio corporation had an authorized capital stock of $950,000, consisting of 4000 shares of common stock of the par value of $100.00 each and 5500 shares of preferred stock of the par value of $100.00 each. The entire $400,000 of common stock was issued and outstanding and $546,000 of the preferred stock was issued and outstanding, leaving $4000 of unissued preferred stock, or a total of $946,000 of stock issued and outstanding. The corporation proceeded, under the authority contained in its articles of incorporation to redeem and cancel 282 shares of the preferred stock. This left the corporation with an outstanding capital stock of $917,800, of which $400,000 was common stock and $517,800 was preferred stock issued and outstanding.

The corporation now desires to so amend its articles of incorporation and reduce its stated capital so that it will have $500,000 of authorized capital stock consisting of 5,000 shares of the par value of $100.00 each. This is to be accomplished by the surrender by the stockholders of all of the outstanding preferred stock and the issuance in lieu thereof to such stockholders of $414,240.00 of common stock, i. e., on the basis of eight shares of common