

of said village, of record in the office of County Recorder, at Lancaster, Ohio, which point is thirty (30') feet west of the center line of The New York Central Railway, formerly The Toledo and Ohio Central Railway Company, and running thence westerly along the south lines of original lots numbers 63 and 64 of said original plat, to a point that is one hundred ten (110') feet, west of the center line of the main track of The New York Central Railway Company; thence southerly, parallel to and eighty (80') feet west from the westerly line of the railway company's westerly right-of-way line, three hundred (300') feet; thence easterly, eighty (80') feet, parallel with the first line described to the west line of the railway company's right-of-way; thence northerly, parallel to the center line of the railway company's main track and thirty (30') feet westerly therefrom, three hundred (300') feet to the point of commencement, and containing 24,000 square feet, more or less."

On examination of the transcript of your proceedings relating to the proposed sale of the above described parcel of canal lands, I find that said proceedings in and by the recitals and findings of fact therein noted, and otherwise, are in conformity not only with the general provisions of section 13971, General Code, relating to the sale of canal lands, but also with the provisions of House Bill No. 144 enacted by the 88th General Assembly, April 5, 1929, 113 Ohio Laws, 524, which act makes special provision for the sale or lease of canal lands between the flume at Buckeye Lake in Fairfield County, Ohio, and Little Walnut Creek in Pickaway County, Ohio.

Apparently the parcel of land here in question is contiguous to lands within the corporate limits of the village of Millersport, Ohio. As to this it is noted, however, that said village as well as all other corporations and persons having on the enactment and effective date of the act prior rights with respect to the purchase of this property, have waived such rights by failure to make application for the purchase of this property within the time limited by the act of the legislature above noted.

No legal objection of any kind is noted to the sale of this property to the grantee above named for the sum of money representing the appraised valuation of the property, which is the sum of \$100.00.

I am accordingly approving the transcript of your proceedings relating to the sale of this property as well as the deed submitted, which is found to be in proper form, all of which is evidenced by my approval noted upon said transcript and the duplicate copy thereof, as well as upon the deed form, and all of which I herewith return.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3076.

CORPORATION—FOREIGN CORPORATION DOING BUSINESS IN
THIS STATE WITHIN PURVIEW OF FOREIGN CORPORATION
ACT WHEN.

SYLLABUS:

1. *When a foreign corporation, whose sole business is that of soliciting sub-*

scriptions for magazine publishers, solicits through its agents, subscriptions for magazines, delivers the first copy of such magazine at the time of taking such subscription, collects not less than one-twelfth of the subscription price at such time, and later, such company collects the balance of such subscription price through its agents or through its branch offices maintained in this state, such corporation is doing business in this state within the purview of the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code), even though such subscriptions are subject to confirmation by the home office of the foreign corporation.

2. A foreign manufacturing corporation which maintains a quantity of its products in public warehouses in this state, from which it fills orders which it receives at the home office from soliciting agents in this state after they have been confirmed by it, is, to such extent, doing business within this state within the purview of the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code.)

3. Where a foreign corporation for a period of ten years has maintained in a warehouse in this state quantities of its products for the purpose of filling orders of its customers within this state, such corporation should be considered as doing business within this state for the purposes of the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code), even though annual contracts are solicited by its agents requiring them to purchase a minimum amount of such products, and even though a portion of its orders are filled by shipments in interstate commerce.

4. When a foreign corporation maintains a warehouse in Ohio, from which it fills orders:

- (a) Solicited by salesmen in Ohio and sent direct to the warehouse, or
- (b) Solicited by salesmen in this state, which are subject to confirmation at the home office, or
- (c) Which the customer in Ohio sends direct to the home office, such corporation should be considered as doing business within the state for the purpose of qualification under the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code).

5. When a corporation maintains a stock of goods in a warehouse, located in Ohio, from which it fills orders:

- (a) Solicited by soliciting agents in another state, but sent to the Ohio warehouse to be filled, or
- (b) Solicited by agents in another state, and after confirmation at the home office, sent to the Ohio warehouse to be filled, or
- (c) Sent by the customer from another to the home office and sent by the home office to the Ohio warehouse to be filled, such corporation should not be considered as doing business within this state for the purposes of qualification under the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code).

COLUMBUS, OHIO, August 24, 1934.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion as to whether the following corporations are "doing business" in the state of Ohio, within the meaning of that term as used in the "Foreign Corporation Act of Ohio" (Sections 8625-1 to 8625-33, General Code) and, as such, should be required to procure a license before legally transacting business within this state:

First: The P. P. S. Bureau, Inc., is a foreign corporation, not a publisher of news magazines or periodicals, which maintains a corps of solicitors in the state for the purpose of soliciting subscriptions for various magazines. An examination of the subscription agreement shows that the solicitor collects not to exceed one-twelfth of the subscription price, and that the remaining subscription price is payable either to the company's solicitor in the state of Ohio, or to one of its two branch offices in this state. The foreign corporation, from its home office, enters into an agreement or has already a contract with the publishers of various magazines by virtue of which such publishers agree to fill such magazine subscriptions when accepted by the P. P. S. Bureau, Inc., for a consideration, such bureau company bearing the risk of all defaulted collections.

Second: The Manufacturer is a foreign corporation which maintains a corps of salesmen in Ohio to solicit orders for its products and furnishes such salesmen with automobiles for use in their business, owned by the foreign corporation, also maintains an office for such sales force within the state. The orders when obtained by the salesmen in Ohio, are subject to confirmation and acceptance at the home office of the company. This foreign corporation, from time to time maintains in warehouses in Ohio, small amounts of its product from which orders are filled. It also ships to a large chain grocery store large quantities of its product on consignment or to be stored in the grocery company's warehouse, to be withdrawn as needed by such customer. While so stored, the foreign corporation carries insurance on its product and pays personal property tax thereon.

Third: The E. Company is a foreign corporation, having its principal business office in the City of New York. This foreign corporation is a manufacturer of color pigments. It engages as its agent the W. Company, to solicit orders for the purchase of its pigments in the state of Ohio. The W. Company is an Ohio corporation, which is also the agent for various pigment and paint manufacturers and dealers. Orders are solicited by the W. Company for a yearly contract for color pigments for the purchase of the E. Company manufacturer. The order is sent to the foreign corporation at New York City. If approved, the contract for the sale of the pigments is then sent by the foreign corporation to the agent corporation company which procures the signature of the purchaser thereto and returns the same to the New York corporation for its signature. The contract requires the purchaser to accept a minimum amount of the foreign corporation's pigments during the ensuing year. The orders or contracts of purchase in terms do not require the maintenance of a supply of pigments in the state from which the orders are to be filled, but the company has during the last ten years, maintained a stock of pigments in a public warehouse in the city of "C", in the name of the E. Company. When the customer desires a shipment of pigments, the foreign corporation communicates with the W. Company, which thereupon authorizes the warehouseman to release and ship the order from the Ohio warehouse. The delivery ticket or receipt of the purchaser for the delivery is then forwarded to the office of the foreign corporation by the agent corporation. After receipt of payment of such order, so filled, the foreign corporation forwards to the agent corporation the amount of its commission earned.

Fourth: An Illinois corporation, having its principal office at Chicago, ships its products to a central warehouse in Ohio, in which the goods are stored. Thereafter:

(a) Salesmen solicit orders in Ohio, and send them directly to the warehouse in Ohio, to be filled by shipment therefrom.

(b) Salesmen send the orders solicited in Ohio to a foreign state for acceptance; the home office, upon acceptance, orders the warehouse in Ohio to fill the order.

(c) The Ohio customer sends his order direct to the home office in a foreign state without solicitation, which the foreign corporation fills from the warehouse in Ohio.

(d) Salesmen solicit orders in a foreign state, which are filled from the Ohio warehouse upon order from the soliciting agent.

(e) Salesmen send the foreign state orders to the home office, which thereafter fills the orders from the Ohio warehouse.

(f) The customer of a foreign state sends his unsolicited order direct to the home office, which fills the order from the Ohio warehouse.

In an opinion rendered by my immediate predecessor in office, the several questions as to what constituted doing business within the meaning of the "Foreign Corporation Act", were discussed. (1932 Opinions of the Attorney General, page 771). In such opinion, at page 774, my predecessor observed:

"It will be noted from the decisions that the courts have not applied the same rules in all of these classes. That is, under the decisions, a corporation may or may not be doing business within the state for the purpose of taxation, and yet may or may not be doing business for the purpose of the service of process; or, may not be doing business within the state as that term is used within the meaning of the anti-trust laws and may yet be doing business within the state for other purposes. So that we must disregard all decisions of the courts in which the court sought to determine whether a corporation was doing business for the purpose of service of summons or for the purpose of considering a violation of anti-trust legislation when we are determining whether it is doing business for the purpose of qualification.

For the purpose of requiring qualification certain acts of a corporation have been fairly well established as not doing business within the state. It is generally held that the mere soliciting of orders, subject to the acceptance by the home office, by agents of a foreign corporation, is not such doing business within the state. *Berger vs. Pennsylvania Railway Company*, 69 Atl. 261, L. R. A., N. S., 1214; *Toledo Commercial Company vs. The Glen Manufacturing Company*, 55 O. S., 217; *McClarren vs. Long-Bruger Company*, 24 O. A., 434.

It is also generally held that the mere maintaining of an office in the state by a foreign corporation does not alone constitute doing business. *Advance Lumber Company vs. Moore*, 126 Tenn. 313; *Hovey vs. DeLong Hook & Eye Company*, 211 N. Y., 420. Nor does the maintaining of an office out of which salesmen solicit orders, subject to the approval of the home office, constitute doing business."

In an opinion rendered by another of my predecessors in office (1927 Opinions of the Attorney General, pages 1300 to 1306) the following rules were laid down:

"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."

From the decisions of various courts I believe it may be stated as a general proposition, that when the agents of a foreign corporation limit their activities in this state to the soliciting of orders, subject to confirmation by the home office of the corporation, and in fulfillment of such orders, goods or merchandise is later shipped into the state by the seller, direct to the customer, such acts of the agent are a part of interstate commerce and do not render the foreign corporation which has not complied therewith, liable for the penalties imposed by the Foreign Corporation Law as having done business within the state without such compliance.

International Trust Co. vs. Leschen & Sons Rope Co., 41 Cal., 299;

Lehigh Portland Cement Co. vs. McLean, 245 Ill., 326;

Comw. vs. Read Phosphate Co., 113 Ky., 32;

McClarran vs. Logdin Brugger Co., 24 O. App., 435;

Toledo Commercial Co. vs. Glenn Mfg. Co., 55 O. S., 215.

However, it would appear that when an agent of an unlicensed foreign corporation is clothed with greater authority than that usually accorded so-

liciting agents, the corporation is, through them, carrying on its regular business in the state and is deprived of the protection of the interstate commerce clause of the Federal Constitution. Thus, in *Kulaszewica vs. George Kilhen & Son, Inc.*, 16 Fed. 2nd, 940, the court held that when the agent is authorized to close the contract without the approval of the home office, and accept payments thereon, such corporation was "doing business." See also, *Western Shirt Co. vs. Kaufman*, 145 N. Y. S., 68; *McCarthy Sheep Co. vs. Silberman & Sons*, 290 Fed., 512; *Wheeler vs. Boyer Fire Apparatus Co.*, (N. D.) 248 N. W., 521.

It might be stated that as a general rule, when the action done or thing done within a state is merely incidental to interstate transportation or commerce between the states by a corporation located in another state, the foreign corporation is not to be considered as doing business within such state, but that where the acts performed are more than incidents to such commerce between the states and constitute a part of or one of the principal businesses of the corporation it is to be considered as doing business within the state.

The term "commerce" usually connotes the transportation of something, either persons or property or both; the sale or exchange of commodities. *Mobile Co. vs. Kimball*, 102 U. S., 691; *Glouster Ferry Co. vs. Pennsylvania*, 114 U. S., 196.

In a note appearing in 10 A. L. R., 512, it is stated that:

"There are two elements involved in the idea of commerce, viz., trade and transportation. Commerce has been defined to be 'a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities, between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states' * * * *Wilton vs. Missouri*, 91 U. S., 275."

An examination of the cases which hold that a soliciting agent is not to be considered as doing business within the state, reveals that in each case the court considered the solicitation as a mere incident to the subsequent transportation of the wares for which orders were received in interstate commerce. However, in the first question presented by you, the foreign corporation does not even contemplate making any shipments of any kind by means of interstate commerce or otherwise. The whole contemplation of the parties is that the foreign corporation will cause the orders to be received by the publishers of the magazines subscribed for and accepted by them. If the publisher of the magazine happens to be located in Ohio, the magazines will be mailed from Ohio, if not, from such other place as the publisher may be located.

The foreign corporation in question is not incorporated for the purpose of publishing or distributing magazines. Its whole purpose is to obtain subscriptions for magazines published by other corporations or individuals and to cause them to be accepted by the publishers thereof. From the facts set forth in the papers accompanying your first inquiry, it would appear that most, if not all of the powers which it has are performed in Ohio.

First, the subscriptions in question are solicited and obtained in Ohio.

Second, the collections are made in Ohio.

Third, at least the first copy of the magazine is delivered by the agent in Ohio, from a stock shipped to him previous to the sale.

Fourth, the sale of the subscriptions to such of the magazines as are published in Ohio may be consummated in Ohio to the publishers who are in Ohio.

Fifth, many publishers of magazines published outside of Ohio may have agents in Ohio authorized to purchase the subscriptions obtained by the foreign corporation in question.

From an examination of the information submitted, concerning the "Service Bureau" in question, it would appear that if there is any interstate commerce in connection with its business it is more incidental to the other business done within Ohio than the Ohio business is incidental to the interstate commerce, if any. Since the principal business of such bureau is obtaining subscriptions for publishers of magazines rather than for itself as a publisher of magazines, I am unable to form the opinion that it is engaged principally in interstate commerce, and therefore must rule that such corporation as mentioned in your first inquiry is subject to qualification under the foreign corporation laws.

When wares are shipped in interstate commerce, to a purchaser on consignment, the fact that the title to such merchandise delivered in the state, is retained by the seller, is not of itself, sufficient to constitute the foreign corporation "doing business" in this state for the purposes of qualification.

Chase-Hackley Piano Co. vs. Griffin, 149 N. Y. S., 998;

Allen vs. Tyson-Jones Buggy Co., 91 Tex., 22, 9 Flecher Cyc. of Corps., page 9982.

In your second inquiry in addition to shipping to the chain grocery on consignment, the corporation stored merchandise in general warehouses from which orders obtained subsequently, were filled in the course of successive and repeated transactions. As such merchandise, the interstate shipment or commerce ceased prior to the sale.

Armour Packing Co. vs. Vinegas Bond Lumber Co., 149 Ala., 205;

Chency Bros. & Co., vs. Mass., 246 U. S., 147.

It would therefore appear that at least to the extent that the corporation referred to in your second inquiry, makes sales from goods located in Ohio warehouses, it is doing business within this state.

Your third inquiry differs but slightly from the second. If the stock of goods is maintained in Ohio, and the orders are taken and filled from such stock already in the state, there is little question but that to such extent the corporation would be doing business in Ohio. From the statement of facts submitted with your request, it would appear that the company for a period of ten years has regularly maintained a stock of pigments in a general warehouse from which it made deliveries. It also appears that the sales agreement solicited by the agent is of an illusory type at least as to the amount of merchandise to be purchased. The purchaser agrees that it will purchase not less than a certain amount of pigment during the year, but the vendor is obligated to furnish as much more at the same price as the customer may desire. The contract solicited by the agent does not provide that any quantity of pigment is to be delivered at any particular time, but rather when and as ordered by the customer. It is difficult to perceive by what line of reasoning this method

of doing business can be distinguished from a shipment of merchandise into the state to be subsequently sold. The merchandise at the time it is shipped into the state, is not sequestered to fill orders earlier procured through orders accepted in another state. The merchandise is kept in Ohio for the purpose of filling orders when and as procured.

I am therefore of the opinion that the corporation referred to in your third inquiry is "doing business in Ohio" within the purview of the Ohio Foreign Corporation Act."

In view of my opinion as herein set forth, as to your second and third inquiries, it is evident that my answers to questions set forth in paragraphs (a), (b) and (c) of your fourth inquiry are that such corporations are doing business within the provisions of the Foreign Corporation Act. Such queries are substantially the same as inquiries two and three.

With respect to your inquiries set forth in paragraphs (d), (e) and (f) of your fourth inquiry, it would appear that the only business done in Ohio is to store in, and ship from Ohio, certain merchandise. In so far as the right of the state to tax the merchandise so stored is concerned, it has been repeatedly held that such right is not prevented by the commerce clause of the Federal Constitution. *Southern Pac. Co. vs. Arizona*, 249 U. S., 472, and cases above cited.

The mere intention of the shipper to ultimately continue the shipment in interstate commerce, does not make the storage interstate commerce. *Southern Pac. Co. vs. Arizona*, *supra*. It would appear that even though there were two shipments of the products in question, the storage in the State of Ohio for the purpose of sale and ultimate subsequent reshipment in interstate traffic, is not a part of interstate business.

It is probably true, under the facts that may be fairly assumed from your inquiries 4 (d) 4 (e) and 4 (f), that the business done by such corporation in Ohio is more in the nature of warehousing than merchandising, that such warehousing is not in the nature of general warehousing, but merely as an incident to the company's general business of merchandising. If such be the fact, and no merchandising is done in Ohio, from the conclusions of my predecessor in office (1927 O. Atty Gen. pp. 1300-1306 quoted above) it would appear that such business was incidental merely to the general business of the corporation and was insufficient to render such corporation "doing business" within the meaning of the taxation statutes of Ohio.

I am therefore of the opinion that your questions, as set forth in your fourth inquiry sub-paragraphs (a), (b) and (c) should be answered in the affirmative and in sub-paragraphs (d), (e) and (f) in the negative.

Specifically answering your inquiries it is my opinion that:

1. When a foreign corporation whose sole business is that of soliciting subscriptions for magazine publishers, solicits through its agents subscriptions for magazines, delivers the first copy of such magazine at the time of taking such subscription, collects not less than one-twelfth of the subscription price at such time, and later such company collects the balance of such subscription price through its agents or through its branch offices maintained in this state, such corporation is doing business in this state within the purview of the Foreign Corporation Act (§§ 8625-1 to 8625-33, both inclusive, General Code), even though such subscriptions are subject to confirmation by the home office of the foreign corporation.

2. A foreign manufacturing corporation which maintains a quantity of its products in public warehouses in this state from which it fills orders which it receives at the home office from soliciting agents in this state after they have been confirmed by it, is to such extent doing business within this state within the purview of the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code.)

3. Where a foreign corporation for a period of ten years has maintained in a warehouse in this state quantities of its products for the purpose of filling orders of its customers within the state, such corporation should be considered as doing business within this state for the purposes of the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code), even though annual contracts are solicited by its agents requiring them to purchase a minimum amount of such products, and even though a portion of its orders are filled by shipments in interstate commerce.

4. When a foreign corporation maintains a warehouse in Ohio, from which it fills orders:

- (a) Solicited by salesmen in Ohio and sent direct to the warehouse, or
- (b) Solicited by salesmen in this state, which are subject to confirmation at the home office, or

(c) Which the customer in Ohio sends direct to the home office, such corporation should be considered as doing business within the state for the purposes of qualification under the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code).

5. When a corporation maintains a stock of goods in a warehouse, located in Ohio, from which it fills orders:

(a) Solicited by soliciting agents in another state, but sent to the Ohio warehouse to be filled, or

(b) Solicited by agents in another state and after confirmation at the home office, sent to the Ohio warehouse to be filled, or

(c) Sent by the customer from another to the home office and sent by the home office to the Ohio warehouse to be filled, such corporation should not be considered as doing business within this state for the purposes of qualification under the Foreign Corporation Act (§§8625-1 to 8625-33, both inclusive, General Code).

Respectfully,

JOHN W. BRICKER,

Attorney General.

3077.

SCHOOL—REOPENING OF SUSPENDED SCHOOL—PROCEDURE—DEFINITION OF "ENROLLED IN SCHOOL" FOR PURPOSES OF PETITION.

SYLLABUS:

1. *Children who are "enrolled in school" within the meaning of that expression, as used in Section 7730 General Code, wherein certain requirements are set up for a valid and effective petition which may be filed with a Board of Educa-*