

court of common pleas of the county wherein such subdivision is located, to the general fund of the subdivision.

* * * * *

Under the express terms of the above section, the unexpended balance in the library fund here under consideration which was raised by a special tax levy, may be transferred to the general fund, provided such money is not required to meet the obligations payable from the sinking fund or bond retirement fund of the subdivision. It follows from the express language of the statute that if there are any bonds of the subdivision outstanding or obligations payable from such funds, then a transfer from such funds to the general fund would be prohibited.

In view of the foregoing and in specific answer to your inquiry, I am of the opinion that the unexpended balance in a special tax levy fund of a subdivision may be transferred to the subdivision's general fund, provided such money is not required to meet the obligations payable from the sinking fund or bond retirement fund of the subdivision, and the transfer of the same has the approval of the court of common pleas of the county wherein such subdivision is located.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4423.

FOREIGN CORPORATION—NECESSITY OF COMPLYING WITH FOREIGN CORPORATION ACT—WHAT CONSTITUTES DOING BUSINESS IN OHIO.

SYLLABUS:

What constitutes doing business within the state for the purpose of qualification of foreign corporations within the state under the provisions of Sections 8625-1 to 8625-33, General Code, discussed.

COLUMBUS, OHIO, June 15, 1932.

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

DEAR SIR:—I am in receipt of your request for opinion as to whether when foreign corporations conduct their business as hereinafter delineated within the State of Ohio, such acts constitute doing business within the meaning of the foreign corporation act of Ohio, so as to necessitate compliance with such act on the part of such companies.

1. The D. F. Company, a foreign corporation, maintains no office in Ohio. Orders for its merchandise are procured through independent brokers, who send such orders to the main office of the company in the foreign state, for approval or rejection, after determination of the credit responsibility of such purchaser. Such orders, when accepted, are filled from stocks of merchandise maintained in three Ohio public warehouses. All orders are billed direct from the main office and collections made from there.

2. The M. S. Company, a foreign corporation, employs a number of salesmen in Ohio, who solicit orders for its merchandise subject to the confirmation of the main office without the state. The main office, upon approval of the orders, fills the same from stocks of merchandise maintained in warehouses in one of

the four cities in Ohio in which such corporation maintains stocks. No local sales are made from the warehouses. In addition to this method of doing business, this corporation ships goods on consignment to the D. Company, an independent broker.

The V. Company, Inc., a foreign corporation, employs agents in Ohio who solicit orders for its merchandise. All such orders are subject to the approval of the home office as to credit rating, etc. Its general practice is to fill all orders from the factory direct but an emergency stock is maintained in Ohio from which rush orders are filled.

4. The U. S. G. Company, a foreign corporation, has no office, maintains no bank account, keeps no books in Ohio. It however has some stocks of merchandise in Ohio for the purpose of deliveries to its customers. All invoices are rendered direct from the home office.

5. The D. R. Company, a foreign corporation, maintains three salesmen in Ohio who solicit orders for securities both at wholesale and retail. All orders are subject to approval or rejection by the home office. When the purchase price accompanies the order the securities are shipped direct to the customer, otherwise, to his bank, with draft attached. No deliveries or collections are made by salesmen. In one city the company maintains an office for its salesmen and at another it makes an allowance in lieu of office rent. No books, records or ticker service is maintained in either office and no bank account is maintained in Ohio.

6. The A. E. P. Company, a foreign corporation, maintained a corps of from one to four agents in Ohio for whom it maintained an office at C. The salesmen were paid through a drawing account and commission. A petty cash account was maintained in the name of the local manager, in a bank at C. This corporation, the correspondence accompanying your request shows, has ceased doing business in Ohio, but during the time it was operating in Ohio it had equipment, files and typewriters having a tax valuation of \$946.55.

7. The I. Company, a foreign corporation, maintains an office in Ohio, out of which salesmen solicit customers for the sale of books, pamphlets and correspondence instruction. Each agent is employed from the home office, is paid direct from there and is given the title of representative. All orders are forwarded to the home office for acceptance and all merchandise and instructions are mailed direct from the home office to the customer. All moneys collected are sent directly to the home office.

8. The M. S. Company employs agents to carry a stock of merchandise and deliver the same "on approval, to the customer." The merchandise is sent on consignment to the agent, except on large orders and in such case is sent direct to the customer. All moneys are remitted direct to the home office by the customer when the merchandise has proven satisfactory.

9. The B. Baking Company, a foreign corporation, from May 3, 1930, to February 13, 1932, maintained a distributing station in Ohio to which it delivered its merchandise in a large truck owned and operated by it. From the distributing station the merchandise was distributed to customers in four small trucks owned and operated by the company. On February 13, 1932, the distributing station was discontinued. The merchandise is now delivered direct to customers in Ohio, from the plant in a foreign state.

10. The F. & T. Manufacturing Company, a foreign corporation, employs a solicitor under written contract, by virtue of which such solicitor or representative agrees to maintain a corps of "salesmen" to canvass the territory allotted to the solicitor and solicit orders and demonstrate the operation of the company's

machines. Such solicitor further agrees to maintain a school for instruction in the operation of the company's machines, for which he may charge a tuition, the machines for use in the school being furnished by the company without charge and remaining the property of the company. All records and correspondence of the school, together with uncompleted contracts for instruction are to be the property of the school when the term of employment of the solicitor is terminated. The agent is furnished with sample machines which he is authorized to sell when the customer prefers the machine demonstrated to one shipped direct from the factory. As a general rule, the orders are sent to the main office for approval and goods are reshipped direct to the agent for inspection or approval prior to the delivery to the customer. The general practice adopted by this company, in merchandising its products, is to leave a machine with the customer for a trial period and, if, after trial, the customer should decide to become a purchaser, he signs an order which is subject to the approval of the home office. No bank accounts are maintained in Ohio by this company.

11. The R. Coal Company, a foreign corporation, has agents in Ohio whose business consists in supervising the purchasing of coal and the shipment thereof to the northwestern states where the company distributes the same to customers. This company maintains an office in C. All contracts for the purchase of coal are consummated by the home office.

12. The ——— Shares Company, a foreign corporation, procured a dealer's license in Ohio under the securities act. Its general business is the sale of ——— trust shares of which it is the depository through agents licensed under the Ohio Securities Act. All orders are subject to the approval or rejection of the home office. This company has no office in Ohio, owns no property in Ohio and maintains no direct agents here.

13. The C. T. Company, a foreign corporation, is a holding company owning all of the shares of capital stock of the C. T. Company, an Ohio corporation, owns no other assets in Ohio and maintains no office here.

14. The A. Company, a foreign corporation, organized not for profit, maintains offices in Ohio, from which agents collect information of value to the members of such corporation. The collection and dissemination of this information is the sole purpose of this corporation.

In determining whether or not a foreign corporation is subject to a franchise tax, the question arises as to whether the tax imposed is in conflict with the so-called interstate commerce provision of the Federal Constitution, in other words, Clause 3, Section 8, of Article I, of the Constitution of the United States, which clause grants to Congress the exclusive control of interstate commerce.

The foreign corporation act, enacted by the 89th General Assembly, now known as Sections 8625-1 to 8625-34, General Code, requires foreign corporations of the types not exempted by the provisions of such act to obtain a license before engaging in business within the State of Ohio, and provides for the collection of a license fee and for the imposition of a penalty in the event such foreign corporation does business in Ohio without complying with the provisions of such act. Section 8625-4, General Code, reads as follows:

"No foreign corporation not excepted from the provisions of this act shall transact business in this state unless it shall hold an unexpired and uncanceled license so to do, issued by the secretary of state. To procure and maintain a license, a foreign corporation shall file an application, pay a filing fee, file annual reports, pay a license fee in initial and additional installments, and comply with all other requirements of

law respecting the maintenance of such license, all as hereinafter provided."

Section 8625-27, General Code, also contained in such act, in so far as material to your inquiry, reads as follows:

"From and after sixty days after this act goes into effect, no foreign corporation organized not for profit shall exercise in the course of repeated and successive transactions its corporate privileges in this state until it shall have first procured from the secretary of state a certificate authorizing it so to do."

In the case of each of the corporations concerning which you request my opinion, there is no exemption from the necessity of qualifying under such act unless such corporations are not doing business within the State of Ohio, or are doing merely an interstate business.

In using the term "doing business" in this opinion, I use the term as engaging in business of such type as is construed under the law as intra-state business, that is, not inter-state business within the inhibition of the Federal Constitution.

In an opinion rendered by my predecessor, to the Tax Commission of Ohio under date of July 21, 1927 (Opinions of the Attorney General for 1927, page 1300) certain rules are laid down as to what constitutes doing business within the meaning of the Aigler Act or, in other words, for the purpose of the imposition of the franchise tax, and in such opinion inquiries similar to some of those presented by you, were considered.

An examination of the decisions throughout the United States as to what constitutes doing business within the state discloses considerable conflict between the decisions of the various states.

A number of these inconsistencies can be removed by considering the facts under which the decisions arose. The decisions can be classified under four general heads:

1. What constitutes doing business within the state for the purpose of service of process or summons.
2. What constitutes doing business for the purpose of qualification.
3. What constitutes doing business within the state for the purpose of taxation.
4. What constitutes doing business within the meaning of the Anti-trust Laws.

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, 9 L. R. A., N. S., 1214; *Toledo Commercial Company vs. The Glen Manufacturing Company*, 55 O. S., 217; *McClarren vs. Long-Brugar 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.

The first paragraph of the headnotes of the case of *Cheney Brothers Company vs. Commonwealth of Massachusetts*, 246 U. S., 147; 62 L. Ed. 147, reads as follows:

"1. A foreign corporation which maintains in the state a selling office with one office salesman and four traveling salesmen to solicit and take orders, subject to approval at the home office, from which the orders are filled, is not engaged in local business within the state so as to be liable to an excise tax, even though some of the orders handled through such office may be obtained in the state where the home office is located."

And, even though such agents maintain and display samples of the merchandise in such office such acts do not constitute doing business. This rule is set forth in *Smith vs. Dickinson*, 81 Wash., 465:

"A foreign corporation is not doing business in this state, within Rem. & Bal. Code Sections 3714 and 3715 requiring the payment of an annual license fee, and providing that no corporation can maintain any suit or action in any court of the state * * although the agent of the corporation maintained offices in this state *where he kept samples for exhibition when soliciting orders for the corporation*, a manufacturing corporation, and it appeared that the *agent had made resales of goods* shipped to customers, and had on *one occasion sold his samples* when a certain stock had been exhausted, which sales were subject to the approval of, and were closed by, the home office, and that the name of the corporation appeared in both the telephone and city directory together with the name of the agent as its representative; since the transactions of the agent were only incidental to the regular business of the corporation, which by taking orders through an agent in the state, subject to approval and shipment by the home office, was conceded to be interstate commerce, upon which the state could impose no burden." (Italics the writer's.)

See also, *Stratford vs. City Council of Montgomery*, 110 Ala., 691; *Dennison Mfg. Company vs. Wright*, 156 Ga., 769; *March Davis Cycle Company vs. Strowbridge*, 93 Ill., 557; *McClelland vs. Pedigrew*, 44 L. Ann., 356.

However, where the agents are clothed with greater authority than merely soliciting orders and the foreign corporation is transacting its regular business through them, it is "doing business" within the state. It is generally held that

when the agent has the power to make binding contracts in the name of a corporation, the foreign corporation is then doing business within the state *Priegge vs. Sitz Schwab Company*, 134 Minn., 245; *Westerly Shirt Company vs. Kauffman*, 145 N. Y. S., 68; *McCarthy Sheep Company vs. Silverman & Sons*, 290 Fed., 512; likewise, if the agents are authorized upon receipt of orders, to make deliveries from a stock on hand. *Paul vs. Paterson*, 210 Ala., 512; *Cheney Brothers Co. vs. Commonwealth*, 246 U. S., 147. And in *Grams vs. Idaho Harvester Company*, 152 Wash., 602, it was held that when a foreign corporation had an agent in the state who sold goods which were subsequently shipped to him for delivery and which sold parts to a local company on consignment, such foreign corporation was doing business within the state. Of similar effect is the second paragraph of the syllabus of the case of *Dalton Adding Machine Company vs. Linqvist*, 137 Wash., 375:

“A foreign manufacturing corporation is ‘doing business’ in this state, within Rem. Comp. Stat. Sections 3852-3854 where it has an agent in this state authorized to make sales of machines to whom it ships the machines in small lots, and who makes delivery on written contract in the form of orders to the company, subject to the approval of the home office; the business being intrastate and not interstate, because the machines are shipped to an agent in this state and thereafter sold there.”

Likewise, in the third paragraph of the headnotes of *Kansas City Structural Steel Company vs. Arkansas*, 70 U. S. L. ed., 204, 269 U. S., 148, the Supreme Court of the United States held:

“A foreign corporation contracting to construct a bridge within a state does an intrastate business so as to become subject to the state laws, where it makes the contract within the state and ships the materials for use by its subcontractor to itself within the state, and after the interstate transit is ended delivers them to the subcontractor to be used in the work.”

See also *City of Huntington vs. Mahon*, 142 Ind., 109.

In 9 Fletcher Cyc. Corps., Section 5924, page 9982, the following rule is laid down:

“According to the weight of authority, the consignment of goods by a federal corporation to factors or to merchants in a state for sale by them on commission is not a doing of business in the state within the meaning of a statute imposing conditions upon which foreign corporations may do business within the state.”

See *Mitchell Wagon Company vs. Poole*, 235 Fed., 817; In re. Monongahela Distillery Company, 186 Fed., 220. However, it is likewise held that when a foreign corporation sends its merchandise to its agents within the state on consignment, the company maintaining the control over the manner of sale and title of the merchandise until sold, such conduct constitutes doing business within the state. See *Kansas City Structural Steel Company vs. Arkansas*, *supra*.

It is also generally held that if a foreign corporation maintains a stock of goods in a warehouse within the state and sells from such stock it is doing

business within the state. See *Armour Packing Company vs. Vinegar Bond Lumber Company*, 149 Ala., 205; *City of Newport vs. Wagner*, 168 Ky., 641; *Cheney Brothers & Company vs. Massachusetts*, 246 U. S., 147; *Jenks vs. Royal Baking Powder Company*, 131 Minn., 335.

There appears to be a conflict of authority as to whether when a corporation which has agents within the state who merely solicit orders within the state, subject to the approval of the foreign corporation at its home office, after such approval fills such orders from a stock of goods maintained in public warehouses in Ohio, such acts constitute doing business within the state. However, the better reasoned opinions seem inclined to the view that interstate commerce ceases when such goods are shipped to, and stored in warehouses, and the act of making the sale after such delivery, is a new and distinct transaction and is therefore not a part of interstate commerce and such acts might be considered as doing business within the state.

It is generally held that the mere soliciting of orders, subject to the approval of the home office, which orders are subject to confirmation at the home office of the corporation even though accompanied by part or all of the purchase money which has been collected by the agent, does not constitute doing business within the state when the orders are filled directly from the home office. See *Funk and Wagnalls vs. Stamm*, 85 N. J. L., 301.

The courts, in construing the acts concerning the solicitation of purchases within the state by a foreign corporation through its agents, apply similar rules to those applied in the case of agents soliciting orders for the sale of its products, and hold generally, that when such agents have the authority merely to solicit prospective purchases, subject to confirmation or rejection of the home office when such purchases are made for the purpose of shipment without the state, such acts are part of interstate commerce. See *American Express Company vs. Iowa*, 257 U. S., 282; 66 L. Ed., 239.

Applying the foregoing principles to your inquiries it would appear that:

Both the D. F. Company, referred to in your inquiry No. 1 and the M. S. Company, referred to in inquiry No. 2, are doing business within the state, since in each of these cases the entire sale is made from products in warehouses within the state after interstate commerce has been completed.

It must be borne in mind that an incidental transaction does not determine whether or not a corporation is doing business within the state. Such fact must be determined from the general conduct of the business.

In the case of the V. Company, referred to in your inquiry No. 3, and also in the case of the U. S. G. Company, referred to in inquiry No. 4, it appears that the general practice of these companies is to maintain a stock of goods within the state for supplying emergency orders, and to such extent, these corporations would be doing business in Ohio.

In the case of the D. R. Company, referred to in inquiry No. 5, it appears that the only acts done within this state are the solicitation of orders, subject to the approval of the home office in a foreign state and the maintenance of an office for the use of its salesmen. Such acts would not constitute doing business within the state.

In the case of the A. E. P. Company, referred to in request No. 6, you do not state whether the office maintained by this company was for the use of the salesmen or was a general brokerage office. I therefore assume that it was maintained for its salesmen to meet their customers and solicit orders, to be filled direct from the foreign office, and this would not be doing business in this state.

Under the foregoing rules, the I. Company, referred to in inquiry No. 7, doing no business within the state except soliciting orders, subject to approval and receipt of initial payments under contract which were forwarded to the home office, along with the order for approval, would not be doing business within the state.

In the case of the M. S. Company, referred to in inquiry No. 8, in which the merchandise is sent on consignment to the agent for subsequent delivery, I am of the opinion that this company is doing business in Ohio.

With respect to the B. Baking Company, referred to in inquiry No. 9, it appears that this company, from May 3, 1930, to February 13, 1932, was clearly doing business within the state since such corporation was performing all of its merchandise functions within the state. If, after February 13, 1932, the facts disclose that the drivers of the four small trucks both solicited and delivered merchandise, this company would yet be doing business within the state. If, however, the facts disclose that these drivers did not solicit orders, but merely deliver merchandise which was ordered direct from the company at its foreign office, then this company would be merely making deliveries within the state from a foreign state, and such corporation would not now be doing business within the state.

With respect to the F. & T. Manufacturing Company, referred to in inquiry No. 10, this corporation, in effect, conducts a school in the operation of its product through its agent within the state and makes deliveries from merchandise on hand. Although in the enclosed contract form an Ohio representative is called a solicitor, I am of the opinion that he is a managing agent within the state and that under the foregoing rules, this corporation is doing business within the state.

With respect to the R. Coal Company, it appears that the only duties of the agent within the state is the supervising of the purchasing and shipping of coal for the purposes of interstate commerce, which orders are accepted at the home office of the foreign corporation. Such acts would not constitute doing business within the state, but would be rather a part of interstate commerce.

In the case of the ——— Shares Company, referred to in request No. 12, it appears that the only act that was done by this company is the qualification under the securities act and that no other business is done within the state. Under the rule laid down by the Supreme Court of Michigan, in the case of *Edwards vs. I. O. O. R.*, 207 Mich., 617, this company would not be doing business within the State of Ohio.

In the case of the C. T. Company, referred to in inquiry No. 13, which owns all of the shares of an Ohio corporation, the decisions are uniform, to the effect that when considering the question of qualification, such acts do not constitute doing business within the state. See *Herron Company vs. West Side Electric Company*, 18 Calif., 778; *Peoples Tobacco Company vs. American Tobacco Company*, 246 U. S., 79; *Toledo Traction, Light & Power Company vs. Smith*, 205 Fed., 201; *Commonwealth vs. Standard Oil Company*, 101 Pa., 119. However, there is some conflict among the decisions as to whether when the foreign corporation performs additional acts within the state, such as holding its directors' meetings or has its officers within the state looking after the interests of the foreign corporation such acts do not render such corporation liable to the Ohio tax as doing business within the state. The enclosed correspondence does not disclose whether these corporations of exactly the same name, have similar officers, or what other duties, if any, are performed by the foreign corporation within this state. I am therefore of the opinion that if

no other facts exist than those stated, such corporation is not doing business within the state.

The A. Company, mentioned in inquiry No. 14, a corporation not for profit, appears to be performing all of the functions for which it was incorporated within this state, bringing it within the provisions of Section 8625-27, General Code. This company in furnishing information of a local nature to a member who is a resident of the state, performs all of its functions within the state. In other cases it performs a part of all its corporate powers within the state, in collecting and disseminating news within the state to its members in the state. See *General Conference vs. Berkey*, 156 Calif., 466. I am therefore of the opinion that this company is doing business within the state of Ohio.

In determining whether or not corporations are doing business within the state when the facts tend to show that the contract of sale is merely solicited within the state, subject to the approval or rejection of the home office in the foreign state, the foregoing rules can only be applied when the transaction is bona fide. When the act of confirmation or rejection by the home office is merely a rubber stamp process, that is, a matter of form, for the purpose of evading the law, such corporation should be considered as doing business within the state.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4424.

APPROVAL, NOTES OF LAFAYETTE JACKSON VILLAGE SCHOOL DISTRICT, ALLEN COUNTY, OHIO, \$4,000.00.

COLUMBUS, OHIO, June 16, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4425.

APPROVAL, NOTES OF WASHINGTON RURAL SCHOOL DISTRICT, LOGAN COUNTY, OHIO, \$4,300.00.

COLUMBUS, OHIO, June 16, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4426.

APPROVAL, NOTES OF PLAIN TOWNSHIP RURAL SCHOOL DISTRICT, STARK COUNTY, OHIO, \$7,000.00.

COLUMBUS, OHIO, June 16, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.