

1944

The Industrial Commission of Utah v. Kemmerer Coal Company : Brief of Defendant in Support of Motion to Quash Service of Alternative Writ of Mandate

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THE INDUSTRIAL COMMISSION
OF UTAH,

Plaintiff,

vs.

KEMMERER COAL COMPANY, a
corporation,

Defendant.

Case
No. 6650

DEFENDANT'S BRIEF
IN SUPPORT OF MOTION TO QUASH SERVICE
OF ALTERNATIVE WRIT OF MANDATE

MAHLON E. WILSON,

*Attorney for Defendant, specially
appearing in support of defen-
dant's motion to quash service.*

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In the
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THE INDUSTRIAL COMMISSION
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KEMMERER COAL COMPANY, a
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Case
No. 6650

**DEFENDANT'S BRIEF
IN SUPPORT OF MOTION TO QUASH SERVICE
OF ALTERNATIVE WRIT OF MANDATE**

STATEMENT

This proceeding is original in character, brought by the Industrial Commission of the State of Utah against the Kemmerer Coal Company, a Wyoming corporation, to obtain from this Court a writ of mandamus compelling the defendant corporation to secure payment of compensation for industrial accidents for three of its employees who reside in the State of Utah.

The defendant Kemmerer Coal Company has made a special appearance and moved to quash the service of the

alternative writ issued by this Court. In substance the defendant contends, first, that it is a foreign corporation, and that as such under its charter it has no power to do business in this state, and, second, it has not done any business and is not doing any business in the State of Utah.

For these reasons it contends that this Court has no jurisdiction over this corporate defendant; and, further, that to construe the statutes of the State of Utah so as to permit service upon the defendant company by delivering a copy of the alternative writ of mandate to a mere solicitor of orders is (a) to violate Section 8 of Article I of the Constitution of the United States, which provides that the Federal Congress shall have power to regulate commerce among the several states; and (b) to deny equal protection of the laws as guaranteed by the Constitution of the United States; and (c) to violate the Fourteenth Amendment to the Constitution of the United States by abridging the privileges and immunities of the defendant and depriving said defendant of liberty and property without due process of law.

The facts as they are shown by the record are contained in affidavits of L. M. Pratt and R. E. Davis. These affidavits set forth in full the character of the defendant and the manner in which it has done and is now doing its business. An attempt has been made in these affidavits to make a complete statement of all facts which either party to this proceeding has deemed in any wise relevant. These facts will be referred to specifically in a consideration of the points herein presented.

POINT I

THE DEFENDANT KEMMERER COAL COMPANY HAS NO POWER TO COMPLY WITH THE PEREMPTORY WRIT PRAYED FOR BY THE PLAINTIFF BECAUSE SAID DEFENDANT IS RESTRICTED BY ITS CORPORATE CHARTER FROM DOING BUSINESS, OR HAVING A PLACE OF BUSINESS, IN ANY OTHER STATE THAN THAT OF WYOMING.

This corporation was organized under the laws of the State of Wyoming August 11, 1897. At that time and ever since the laws of that state required the articles of every private corporation to state, among other things, the name of the town and county in which the operations of said company shall be carried on (Sec. 28-101 of the Revised Statutes of Wyoming, 1931), and further required that "if any company shall be formed under this article for the purpose of carrying on any part of its business in any place outside of the state, the certificate shall so state." (The certificate means articles.) (Sec. 28-116, Revised Statutes of Wyoming, 1931.)

These sections of the Wyoming statute authorizing the creation of corporations under the laws of that state were in full force and effect as early as the year 1887, and have not been altered or amended since Wyoming became a state in 1890. (See Section 3034, Revised Statutes of Wyoming, 1899.)

Such statutes and the articles of incorporation, or, as they are often called in the State of Wyoming, the certificate of incorporation, constitute the corporate charter. When-

ever the articles and the statute conflict, the statute, of course, controls.

The articles of incorporation of this Kemmerer Coal Company are in accord with such statutes. Article 6 provides:

“Sixth: The principal place of business of the said corporation shall be at Kemmerer, Uinta County, Wyoming, and the business of said corporation shall be carried on in Uinta County, Wyoming, and at such other places in the State of Wyoming as the trustees shall designate.”

(In the Wyoming statutes, particularly those of early date, the word “trustees” is used synonymously with the word “directors.”)

It is generally fundamental that a corporation has no legal existence beyond the territorial limits of the state where it was organized. Its power to carry on its business outside of the state may be conferred by the express terms of its charter, or, in the absence of any statutory stipulation to the contrary, it may be implied from such express terms. Where, however, it is restricted to the state creating it, then such restriction must be obeyed. Under the plain terms of these statutes a corporation organized in Wyoming cannot carry on any part of its business in any place outside of Wyoming unless its articles or certificate so provide.

As early as 1839, thirty years before Wyoming became even a territory, Mr. Chief Justice Taney of the United

States Supreme Court announced a fundamental rule as follows :

“And if the law creating a corporation does not by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.”

Bank of Augusta v. Earl, 13 Peters, 519; 10 L. Ed. 275 (1839).

As early as 1856, Mr. Chief Justice Jeremiah S. Black stated the fundamental rule as follows :

“This case requires us to give a construction to the charter of a private corporation. The frequency of such cases excites some surprise, when we reflect that an act of incorporation is and always must be interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do; beyond that, all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the attorney general, or anybody else, should complain against a company that keeps itself within bounds, which are always thus clearly marked, and equally strange that a company which has happened to transgress them should come before us with the faintest hope of being sustained. In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for

nothing else can possibly avail you. *A doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation.*" (Italics inserted.)

Commonwealth v. Erie & Northeast R. R. Co.,
27 Pa. St. 339; 67 Am. Dec. 471 (1856).

It is the contention of the defendant that Article 6 above quoted is in all respects the legal equivalent of an express restriction. Especially is this true when it is read in connection with the sections of the Wyoming statute above quoted. This article gives the directors power to establish places of business "at such other places in the State of Wyoming as the trustees shall designate." This article does not give such directors power to designate any place outside of the State of Wyoming as a place of business; in fact, the article, without the aid of the Wyoming statutes, is a negation of any power or powers in the directors to establish a place of business for this corporation outside of the State of Wyoming. The article, in connection with the statutes above quoted, needs no "inferential reasoning" to establish that the corporation cannot carry on its business, or any part of that business, in any place beyond the boundaries of Wyoming. As Justice Black said, "ingenuity has nothing to work with."

Under such circumstances it would appear to be unnecessary to cite authorities, but in order that the Court may have the benefit of the research of counsel, the defendant cites:

Stickle v. Liberty Cycle Co., 32 Atl. 708; Court of Chancery of New Jersey, 1895.

This case does not appear to have been officially reported. It involved the granting of a motion for a preliminary injunction restraining the removal of a manufacturing plant from the State of New Jersey. Mahlon Pitney, Esquire, afterwards Justice Pitney of the United States Supreme Court, appeared in support of the motion.

The certificate of the corporation involved in that case provided that the business of the company could be carried on outside of the State of New Jersey to the extent of selling the manufactured products of the company. The statute of New Jersey provided that "it shall be lawful for any corporation of the state to conduct its business out of the state, though not provided for in the certificate of incorporation."

(It will be noticed that the New Jersey statute is the antithesis of the Wyoming statute,—New Jersey making it lawful for the corporation to conduct its business outside of the state without any express provision being contained in the charter of the corporation, whereas, Wyoming makes such an express provision necessary.)

Vice-Chancellor Emery said:

"The parties to the incorporation certificate have, if they so choose, the right to the protection of the property and plant of the company, and of their interests in it as shareholders, either as a going concern or in liquidation, under the laws of New Jersey, rather than those of other states or countries; and where, as here, the certificate provides for the location of the manufacturing plant and business within this state, and specifies that the business to

be carried on without the state is the sale of the manufactured articles, the removal of the manufacturing plant and business out of the jurisdiction of the state seems to be a material and fundamental change in the object and purpose of the company." (32 Atl. 709.)

In Wyoming, if any company is formed for the purpose of carrying on any part of its business in any place outside of Wyoming, the certificate shall so state. (Revised Statutes of Wyoming, Sec. 28-116.) This is the language of the Wyoming statute and that statute is a part of the charter of this Kemmerer Coal Company. Its terms are too clear for construction. No argument can be tolerated as to its meaning.

Bank of United States v. Dandridge, 12 Wheat. 64; 6 L. Ed. 552 (1827) ;

Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; 35 L. Ed. 55 (1891) ;

Tucker v. Alexandroff, 183 U. S. 424; 46 L. Ed. 264 (1902) ;

State v. Portland General Electric Co., 52 Ore. 502; 95 Pac. 722 (1908) ;

Schwab v. Potter Co., 194 N. Y. 409; 87 N. E. 670 (1909) ;

Prairie Slough Fishing Co. v. Kessler, 252 Mo. 424; 159 S. W. 1080 (1913) ;

Connellsville Ry. Co. v. Markleton Hotel Co., 247 Pa. 565; 93 Atl. 635 (1915) ;

People v. Wiersema State Bank, 361 Ill. 75; 197 N. E. 537 (1935) ;

Radalj v. Union Savings & Loan Assn., 138 Pac. (2d) 984 Wyo. (1943) (not yet officially reported).

These nine cases, ranging chronologically from 1827 to 1943 and geographically from the Atlantic to the Pacific, illustrate the rule that the express mention of one thing or one mode of action in a statute or written instrument excludes all other things or modes of action, even though there may be no negative words expressly prohibiting such other things or such modes of action.

In 1827, in the *Dandridge* case above cited, Mr. Justice Story said:

“And it may be safely assumed that a corporation can make no contracts and do no acts, either within or without the state that creates it, except such as are authorized by its charter, and those acts must also be done by such officers or agents and in such manner as the charter authorizes.”

In 1891, in the case of *Central Transportation Co.*, above cited, Mr. Justice Gray said:

“The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental.”

In 1902, in the case of *Tucker v. Alexandroff*, above cited, Mr. Justice Brown said:

“Upon general principles applicable to the construction of written instruments the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter.”

In 1908, in the case of *State v. Portland Electric Co.*, above cited, Mr. Justice Eakin quoted Mr. Justice Taney as follows:

“Now it is the well settled doctrine of this court that a corporation created by statute is merely a creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence.”

At another place in the same opinion Justice Eakin said:

“The corporation has no rights of property except those derived from the provisions of the charter; nor can it exercise any powers over the property it holds except those with which its charter has clothed it.”

In 1909, in the case of *Schwab v. Potter Co.*, above cited, Mr. Justice Vann said:

“Corporations cannot resort to ingenious and original methods of action with the freedom of individuals, for they are confined to those expressly authorized by statute and such as are incidental thereto and necessary to carry them into effect.”

And again in the same opinion he said:

“Whatever is done by a corporation without authority is done in violation of law, for all action, not authorized directly or indirectly, is prohibited.”

In 1913, in the case of *Prairie Slough Fishing Co. v. Kessler*, above cited, Mr. Justice Williams said:

“It is a well-settled rule that when the organic or statutory law specifies the powers a given corporation may exercise, or the property it may hold, such

specification by implication excludes all other powers or rights, except such incidental or subordinate rights and powers as may be necessary to an exercise of the powers and rights expressly given."

In 1915, in the case of *Connellsville v. Markleton*, above cited, Mr. Justice Mestrezat said:

"There are certain fundamental principles which should not be overlooked in construing the charter of a corporation. If a particular power is omitted from those enumerated in the charter, it is to be taken as a prohibition against its exercise, unless there is an imperative implication of its inclusion. What is not given by express words or by necessary implication is withheld."

In 1935, in the case of *People v. Wiersema*, above cited, Mr. Justice Jones said:

"The rule that the expression of one thing or one mode of action in an enactment excludes any other, even though there may be no negative words prohibiting it, has been the settled law of this state since 1852."

In 1943, Mr. Justice Blume, speaking for the Wyoming Supreme Court, quoted with approval from Mr. Fletcher on Corporations as follows:

"This rule is expressed in the maxim, *expressio unius est exclusio alterius*. * * * If a particular power is omitted from those enumerated in the charter, it is to be taken as a prohibition against its exercise unless there is an imperative implication of its inclusion." (7 Fletcher, Sec. 3648.)

In concluding his discussion of this maxim, Mr. Fletcher says :

“In other words, an enumeration of corporate powers implies the exclusion of all other powers except such as are essential to corporate existence and to the enjoyment and exercise of powers expressly conferred.”

7 Fletcher's Cyclopedia Corporations, Sec. 3648.

In determining this motion to quash the service of the alternative writ of mandamus it should be remembered that such alternative writ must be served in the same manner as a summons in a civil action, and that when a peremptory writ has been issued and directed to any corporation, board or person upon whom it has been personally served, then if such person “without just excuse” (quoting the statute) has refused or neglected to obey the same, the Court may upon motion impose a fine not exceeding \$500. (Sections 104-68-13 and 104-68-14, Utah Code Annotated.)

The alternative writ in this case has been served upon L. M. Pratt, Jr., who has no other function or power than that of soliciting orders. It is difficult for one to assume that any court would attempt the enforcement of a writ of mandate against some employee, officer or even a board when such employee, officer or board had no lawful power or authority to comply with the directions of the mandate.

The defendant Kemmerer Coal Company respectfully contends that without an amendment of its articles of incorporation as they now exist, and as they have existed since it was organized in 1897, it could not lawfully establish a place of business in this state. Any one of its stock-

holders, all of whom reside beyond the confines of Utah, could enjoin the corporation from carrying on any of its business outside of the State of Wyoming. These stockholders have a right to confine this corporation in the carrying on of its business and every part thereof either to Kemmerer, Wyoming, or such other places in the State of Wyoming as the directors shall designate. In order for this corporation to do business in any other state than Wyoming, it must have a legislative grant of power from Wyoming. It could obtain that power only by its incorporators stating in the articles signed by them that the corporation being formed had as one of its purposes the carrying on of business outside of the State of Wyoming. If the corporation had the consent of its creator, the State of Wyoming, then in order for it to carry on business in the State of Utah the consent of the latter would be necessary, but without the authority of the former, the consent of the latter is of no consequence.

Surely the courts of Wyoming will not compel a violation of the laws of Utah, nor will the courts of Utah compel a violation of the laws of Wyoming. In the language of Justice Black, "It is strange that the attorney general, or anybody else, should complain against a company that keeps itself within bounds." (67 Am. Dec. 471, *supra*.) This company has kept itself within bounds, and these bounds are the boundaries of Wyoming.

As early as 1913, the Honorable John A. Marshall, judge of the United States District Court for the district of Utah, held in a contested case entitled "*Onisha v. Kem-*

merer Coal Company," No. 947, that the Kemmerer Coal Company could not under the law be served with summons in this jurisdiction. That order sustaining a motion to quash was dated August 11, 1913.

Erwin Davis v. Flagstaff Silver Mining Co.,
2 Utah 74 (1878).

In this early case the Territorial Supreme Court of Utah said:

"A corporation has no powers but such as are granted either in express terms or by direct and necessary implication."

Railroad v. Power Co., 23 Utah 22; 63 Pac. 995
(1901).

In this case Mr. Justice Miner, speaking for the Supreme Court of this state, said:

"A corporation of Colorado coming into this state cannot bring with it powers with which it is not endowed in Colorado. It can only have an existence under the express laws of the state where it is created, and can exercise no power which is not granted by its charter or some legislative act."

If this corporation cannot under its charter voluntarily come into this state, then it is submitted that this court will not compel this corporation to do that which would be unlawful. The function of a writ of mandamus is to enforce obedience to law and not disobedience, and where it appears that the acts sought to be coerced are unauthorized or forbidden by law, or that they tend to aid an unlawful purpose, the writ will be denied. Mandamus will not lie to compel

one person to do a particular thing which he has no power or authority to do.

It is submitted that this corporation has no right or authority under its charter to submit itself to the jurisdiction of this court in this proceeding. Even if it shall be assumed that the defendant corporation has been doing business in this state, which assumption under the facts as shown by the record would be erroneous, still this court will be without power in this proceeding to compel a further violation of law on the part of the defendant.

State v. National Salt Co., 126 Mich. 644; 86 N. W. 124 (1901).

In this case the Supreme Court of Michigan held that if the corporation *did business* in the State of Michigan without a compliance with the state law, it did so at its own risk; that it was subject to a suit by quo warranto, or perhaps to criminal penalties, but that a writ of mandamus could not be obtained.

It cannot be anticipated that a writ of mandamus would be issued to compel this corporation to do that which would be a violation of its charter and therefore illegal.

POINT II

THE DEFENDANT IS OUTSIDE OF THE STATE; IT HAS NEVER COME INTO THIS STATE. IT IS NOT NOW DOING BUSINESS IN THE STATE OF UTAH AND NEVER HAS DONE BUSINESS IN THE STATE OF UTAH; THEREFORE IT IS NOT AMENABLE TO THE PROCESS OR JURISDICTION OF THIS COURT.

1. *The Corporation:* It was organized under the laws of the State of Wyoming August 11, 1897, under the general laws of that state. Its principal place of business was at Kemmerer, Uinta County, Wyoming (now Lincoln County), "and the business of said corporation shall be carried on in Uinta County, Wyoming, and at such other places in the State of Wyoming as the trustees shall designate." Under the statute of Wyoming then existing, and still existing, if any corporation was formed under the laws of Wyoming for the purpose of carrying on any part of its business in any place outside of the State, its certificate or articles were required to state that fact. These articles or this certificate of this company did not state such fact, but limited the directors to designating places in the State of Wyoming.

2. *Business and Extent Thereof:* The corporation immediately after its organization commenced to mine and produce coal at or near Kemmerer—the place called "Frontier" being really a part of Kemmerer. For the last fifteen years, and prior thereto, it has produced large quantities of coal and has sold the same at Kemmerer, free on board the coal cars of the Oregon Short Line Railroad Company, now the Union Pacific. This coal has been shipped to fourteen different states, Iowa and Minnesota being the eastern limits and the Pacific Coast states the western limits. During the last fifteen years it has produced an average of 400,000 tons per year. All contracts for the sale of coal have been made at its home and only office at Kemmerer, Wyoming. The consumer has paid the freight. It has sent solicitors from time to time into practically all of these

fourteen states for the purpose of soliciting business to be accepted by the company for the purchase of coal. No one has had any authority to make any contract for this company outside of the State of Wyoming, and no one has attempted to exercise any such power or authority.

3. *Activities in the State of Utah:* For over thirty years it has had some man or men in the State of Utah for the purpose of keeping the company acquainted with the business opportunities as they existed in this intermountain country. The company has recognized that Salt Lake City and Ogden are common points, so far as railroads are concerned, and that the State of Utah is a great producer of coal, and that the mines operating in Utah are strong competitors in the coal business when there is any coal business.

4. *Coal Consumed in Utah and Market Conditions:* In the last fifteen years there has been shipped into the State of Utah for consumption therein less than one-half of one per cent. of this company's annual output; putting it in another way, about 1500 tons per year. In fact, there has been no substantial market in Utah for this company's coal. The reason is explained in the affidavit filed in support of the motion to quash, and that reason is that the mines of Utah produce more coal many times over than can be consumed in this state, and the freight rates between Kemmerer and Salt Lake City are twenty-five cents per ton higher on Wyoming coal than on Utah coal. This would mean the consumer would pay twenty-five cents more a ton if he burned Wyoming coal than if he burned Utah coal, and the coal from one state is equal in quality to the coal from the other state.

At times, on account of some difficulty, the Utah mines have been unable to satisfy the needs of the people of Utah, and the Wyoming mines have stepped in and relieved the difficulty, but instances of this character have been exceptional and occur only when such difficulties exist. It is sufficient to say that there has been no continuous flow of the products of the defendant into the State of Utah. Of course, at the present time, on account of war conditions, all coal companies are inactive in their solicitation of orders. Everybody is seeking to buy and the companies are engaged in explaining why they cannot deliver, but the foregoing statements refer to normal conditions.

5. *The Office in Utah and its Three Employees:* For many years, even prior to the year 1913, this company has had what is generally called a "sales agency" in Utah, that is, it has had one or more men situated in Utah and traveling out from Utah to the northwestern states, and these men have solicited persons using coal to buy coal from the Kemmerer Coal Company. Whenever a customer is found and an order obtained from him, that order is sent to the home and only office of the Kemmerer Coal Company at Kemmerer, Wyoming. If the order is accepted, the coal ordered is loaded on cars and by the railroad transported to the buyer.

At the present time R. A. Davis, George F. Eble and L. M. Pratt, Jr., are the employees who live in the State of Utah. For their convenience an office has been provided for them, situated at 412 Boston Building, Salt Lake City, Utah. That office is equipped with telephone connection, and there has been inserted in the Salt Lake City Directory a statement

giving the location of the office and that the company produces coal at its mines situated in the State of Wyoming. The office is maintained for the purpose of facilitating the work of these men in obtaining orders throughout the western states and for no other purpose. By maintaining such room and allowing those men to reside in the State of Utah, they can keep acquainted with the conditions in Utah and at the same time avoid traveling a considerable distance to the territory where they may find customers in other states. Similar offices are maintained by the company in Grand Island, Nebraska, and at Walla Walla, Washington.

These men have no authority to bind the company with any contract, and occupy, when they are in Salt Lake City, this office for their convenience. The company has in that office desks and chairs and other office furniture, having a value not to exceed \$400; and these men have three automobiles which from time to time come into Utah from the State of Wyoming, bearing Wyoming licenses, and are from time to time for temporary purposes and convenience kept here in this state.

T. J. O'Brien was the predecessor of R. A. Davis as a director of the sales force out of Utah. T. J. O'Brien has lived in Salt Lake City for many years; maintains a home at the Alta Club in this city. He is now seriously and hopelessly ill. It so happened that in 1933, he was elected president of this company, and he did not change his residence on that account, but he does and has done no official corporate act in this city. He, of course, when able and when necessary, gives directions to these men who solicit orders.

So far as his duties as president might be involved, he performs all of those official duties entirely in the State of Wyoming.

When the company was first organized, M. S. Kemmerer of Mauch Chunk, Pennsylvania, was president. When he died in 1924, Patrick J. Quealy of Kemmerer, Wyoming, became president, and upon his death, John L. Kemmerer of Short Hills, New Jersey, became president. He resigned in October, 1933, and T. J. O'Brien became president. (The company was not *in Pennsylvania* when M. S. Kemmerer was president; nor was it in New Jersey when his son was president; nor is it in Utah because O'Brien is president.)

This company has acted in perfect good faith about this matter, and has believed that what, if anything, was done in the State of Utah was in accord with the laws of said state. In 1913, the suit of *Onisha vs. Kemmerer Coal Company* was brought in the United States District Court for the District of Utah. Service was made upon Mr. O'Brien, who was then the so-called "sales agent" of this company, having his office at 160 South Main Street. A special appearance was made by the Kemmerer Coal Company in the suit referred to and the defendant moved to quash the service of the summons on the ground it was not amenable to process in this state because it was not doing business in said state. This motion was fully and fairly presented to the judge of the United States District Court, the Honorable John A. Marshall. After argument, that motion was sustained and the company continued to act as it had theretofore acted, believing that it had a right to solicit orders in the State of

Utah if it saw fit, but on account of the market conditions and the freight rates above explained, it has not been able to market any substantial quantity of coal for consumption in the State of Utah. Whatever coal has been produced by it that has been consumed in the State of Utah has been inconsiderable in amount, not to exceed an average of 1500 tons per year.

These are substantially the facts as they exist and have existed since the organization of the defendant company in 1897. If any fact relative to the question before the Court has been omitted from this statement, the omission is unintentional. The company has in good faith never complied with the laws of this state relative to foreign corporations, and as is indicated in Point I of this brief, does not believe that it has any corporate power to establish a place of business in any other state than that of Wyoming.

Under the facts as stated, this company contends that it has not done any business in the State of Utah, and that therefore service upon L. M. Pratt, Jr., or R. A. Davis or upon anyone, cannot be made under the law. The solicitor's office is not a "place of business" within the meaning of Section 104-5-11 Utah Statutes.

The defendant, in support of its contention that it is not amenable to the process of the courts of this state because it is not doing and has not done business within this state, will cite and discuss certain precedents which it believes to be controlling, and which it believes will aid this court in determining the question presented. The defendant does not pretend that the cases hereinafter cited are in any

sense exhaustive; neither does defendant contend that the term "doing business" has any well defined meaning. As one author put it, "what is meant by 'doing business' in a given state or other locality is something approached from so many angles that the subject appears a mass of confusion."

Generally speaking, the United States Supreme Court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes "doing business" by a foreign corporation in such a manner as to subject it to a given jurisdiction. The business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and the laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process. The corporation, according to the prevailing authorities, must be present. It must be there in fact, or, as some of the cases say, it must be actually transacting business in the state with a fair measure of permanence and continuity. Some substantial part of its main business must be done within the state.

After these statements have been made the problem still remains unsolved. We have entered a revolving door, and after one revolution of that door we find that the point of exit is identical with the point of entrance.

When is the corporation present? When the word "presence" is used in the solution of this question we mean actual presence. Jurisdiction does not rest upon the fiction

of constructive presence. A corporation may have agents in every state other than that of its creation, and yet it may be actually present only in the state where it is organized. Before it can be amenable to the process of any other state it must be actually present in that state.

Bank of America v. Whitney National Bank,
261 U. S. 171; 67 L. Ed. 594 (1923).

In this case Mr. Justice Brandeis, speaking for a unanimous court, said:

“The sole question for decision is whether, at the time of the service of the process, the defendant was doing business within the district in such a manner as to warrant the inference that it was present there.”

And again he said:

“In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and, hence, was not found within the district, is clear.”

In the same year the same justice held a statute of Minnesota invalid under the commerce clause of the Federal Constitution. This statute provided:

“Any foreign corporation having an agent in

this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state may be served with summons by delivering a copy thereof to such agent."

The Court held:

"Solicitation of traffic by railroads, in states remote from their lines, is a recognized part of the business of interstate transportation."

and that such a statute as that above quoted was invalid in that it unduly obstructed and burdened interstate commerce.

Davis v. Farmers' Co-operative Equity Co., 262 U. S. 312; 67 L. Ed. 996 (1923);
Green v. C. B. & Q. Ry., 205 U. S. 530; 51 L. Ed. 916 (1907);
Sioux Remedy Co. v. Cope, 235 U. S. 197; 59 L. Ed. 193 (1914);
Riverside Cotton Mills v. Menefee, 237 U. S. 189; 59 L. Ed. 910 (1910);
Bank of America v. Whitney Central National Bank, 261 U. S. 171; 67 L. Ed. 594 (1923);
Consolidated Textile Corporation v. Gregory, 289 U. S. 85; 77 L. Ed. 1047 (1923).

These cases, in connection with those cited and considered in the opinions rendered in such cases, thoroughly illustrate the law as declared by the United States Supreme Court.

Devaga, Inc. v. Lincoln Mfg. Co., 29 Fed. (2d) 164 (1928);
Roark v. American Distilling Co., 97 Fed. (2d) 297 (1938);

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 100 Fed. (2d) 770 (1938) ;
Whitaker v. McFadden Pub. Co., 105 Fed. (2d) 44 (1939) ;
Eastern Livestock Co. v. Dickinson, 107 Fed. (2d) 116 (1939).

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Farmers Union Livestock Commission, Inc., v. District Court, 93 Utah 181; 72 Pac. (2d) 488 (1937) ;
Park, Davis & Co. v. Fifth Judicial District Court, 93 Utah 217; 72 Pac. (2d) 466 (1937) ;
Kansas City Wholesale Grocery Co. v. Weber Packing Co., 93 Utah 414; 73 Pac. (2d) 1272 (1937) ;
Shambe v. Delaware & Hudson Ry. Co., 288 Pa. 245; 135 Atl. 757 (1927).

Of the cases above cited the *Green* case may be said to be the leader. The opinion was written by Mr. Justice Moody in 1907. It was at one time designated as somewhat extreme. It was followed and relied upon by United States District Judge Marshall in the *Onisha* case in 1913. (This is the case where the Kemmerer Coal Company was involved.) As one reads the decisions he seems to discern a tendency on the part of the courts to depart from the doctrine of the *Green* case, and then after a few years the courts have gone back, and now seem to unhesitatingly follow that case.

In the case of *Whitaker v. McFadden Pub. Co.*, 105 Fed. (2d) 44, the United States Court of Appeals for the District

of Columbia, speaking by Associate Justice Edgerton, with whom concurred Justices Stephens and Groner, said:

“A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.” (Citing authorities.) “It is elementary that not all economic activity amounts to ‘doing business’ in this sense.”

The Court then referred to the facts in the *Green* case, pointing out that the railroad had maintained in Pennsylvania an office and a district, freight and passenger agent and special employees who solicited passenger and freight business. These agents did not sell tickets over defendant's lines but they sold “prepaid orders” which entitled the holder to receive a ticket in Chicago.

The Supreme Court said it was “obvious that defendant was doing” in Pennsylvania “a considerable business of a certain kind.” Yet the Court ruled that “The business shown in this case was in substance nothing more than that of solicitation,” and that the defendant was not, in the jurisdictional sense, doing business in the state.”

The Court referred to the *American Tobacco* case and said:

“There the American company sold goods to Louisiana jobbers, who sold to retailers. The company sent drummers into the state to solicit orders from retailers, to be turned over to the jobbers. These drummers made no sales, collected no money, and extended no credit. The Supreme Court held that the company was not doing business in Louisi-

ana so as to permit service of process upon it. The Court distinguished *International Harvester Co. v. Kentucky*, 234 U. S. 579, on the ground that there the agents not only solicited business but received payment."

In the case of *Davega, Inc., v. Lincoln Mfg. Co.*, 29 Fed. (2d) 164, the Circuit Court of Appeals for the Second Circuit in the year 1928, had before it the question of the validity of the service of process. The opinion by Circuit Judge Augustus N. Hand is concurred in by Circuit Judges Swan and Learned Hand. The Court said that the "case is a close one," and under the facts as they are stated in the opinion, everyone must concede that Judge Hand was right in making that statement. The soliciting agent obtained orders in New York for the New York Company, amounting to about \$20,000 per year. Sometimes he sold samples furnished by the company to people who were badly in need of furniture. Whenever such sales were made he received cash at the list price, and even extended credit in the case of accounts known to be acceptable to the company. The sales of these samples amounted to approximately \$1000 per year. The Lincoln Company had two bank accounts in New York. It was listed in the directory of a building where it displayed its samples.

We cannot review the facts in the Lincoln case and then compare those facts as they are set forth in the case at bar without coming to the conclusion that in this Kemmerer Coal Company case there can be no doubt that the Kemmerer Coal Company is not now doing and has not done business in the State of Utah.

The Kemmerer Coal Company mines its coal in Wyoming. It, of course, cannot content itself with a mere mining of coal. It must sell that coal in order to carry on business. Sales of the coal are necessary to the company's existence. It sells this coal at Kemmerer, in the State of Wyoming. It sends or has agents from time to time in fourteen different states, and, when conditions are normal and regular, these agents make all reasonable efforts to induce the consumers of coal to buy from the Kemmerer Coal Company. The solicitations, when successful, are followed by orders or offers to buy, and these orders or offers to buy are sent to the Kemmerer Coal Company, where at Kemmerer they are either accepted or rejected. It is true that contracts result from the acts of solicitation, but the contracts executed constitute the business, and the contracts are made at Kemmerer and executed at Kemmerer, in the State of Wyoming, and not elsewhere. No one of these solicitors does anything but obtain the order and send it to the home and only office of the Kemmerer Company. No coal is shipped to any solicitor or any person in the State of Utah, or in any other state, except as stated herein. The company has never had in the State of Utah any coal for sale.

Now, it is not believed that any state in this Union can prohibit either a corporation of some other state or some natural person residing in some other state from soliciting customers to buy products produced in the sister state.

In 1890, Mr. Justice Bradley, speaking for the United States Supreme Court, said:

"To carry on interstate commerce is not a fran-

chise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

“It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would anyone pretend that a State Legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation.”

Crutcher v. Commonwealth of Kentucky, 141
U. S. 47; 35 L. Ed. 649 (1890).

In the case of *Shambe v. Delaware R. R. Co. from Pennsylvania*, *supra*, the court of that state gives a somewhat complete review of all the national cases upon the question involved herein. It states six requisite essentials to constitute doing business:

1. The company must be present in the state.
2. By an agent.
3. Duly authorized to represent it in the state.

4. The business transacted therein must be by and through such agent.

5. The business engaged in must be sufficient in quantity and quality.

6. There must be a statute making such corporations amenable to suit.

And in the opinion it cites authorities for each of the six requisites. It discusses the Green and the Harvester cases, and compares one with the other, and finally concludes that the trial court was right in sustaining the defendant's motion to quash.

The true meaning of the Utah Statutes relating to foreign corporations and service of process thereon should be ascertained, if possible. Sections 18-8-1 to 18-8-6, both inclusive, Utah Code Annotated, in effect provide that every corporation not organized under the laws of this state, except insurance companies, before doing any business within this state, shall file with the county clerk of the county in which its principal place of business in the state will be situated, a copy of its articles of incorporation and an acceptance of the provisions of the Constitution of the state, together with the designation of some person residing in said county upon whom all legal process may be served; and the same chapter also requires a filing of the foregoing papers with the Secretary of State.

Section 18-8-5 states the disability of non-complying foreign corporations "doing business within this state."

Section 104-5-11 states the rule for service of process

upon foreign corporations, and designates certain officers, and then says:

“If there is none of such persons in this state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in the state, then upon the person doing such business or in charge of such office or place of business.”

It has already been pointed out in this brief that an alternative writ of mandate must be served in the same manner as a summons in a civil suit. (Section 104-68-13, Utah Statutes.)

It is submitted and contended by this Kemmerer Coal Company that it has never been present in the State of Utah; that it has never done any business in the State of Utah; that it has no agent in the State of Utah who has any authority to represent it in such state; that the office maintained at 412 Boston Building, or, in former years at 160 South Main Street, Salt Lake City, Utah, was and is not a “*place of business*”; that the defendant has not violated any statute of this state; that it has never been here to violate a statute; that while it has sold coal in Wyoming, to be consumed in thirteen other states than Wyoming, it has not done business in any of those states. It has carried on all of its business in the State of Wyoming. It has not made a contract in the State of Utah, even in interstate commerce.

Of course, when one engages in interstate commerce he is doing business. There can be no question about that, but the state statutes which require corporations to comply

with state laws, in order to be qualified to do business in some state, have no application to transactions wherein interstate commerce is being carried on, and if it shall be said that the Kemmerer Coal Company is engaged in interstate commerce, still, nevertheless, the Kemmerer Coal Company is not present in the State of Utah. To engage in interstate commerce a corporation may or may not be present in some given state.

Indulge illustration: There are in the State of Utah certain mining companies which have been organized and exist under the laws of other states. They own no property in the states where they are created. All of their property is situated in the State of Utah, and all of their work is done in the State of Utah. These companies are here in this state. One large railroad company is organized and exists by virtue of the laws of the State of Delaware. Its line of railroad extends from Denver, Colorado, to Salt Lake City, Utah. It transports freight and passengers back and forth between Colorado points and Utah points. It is engaged in interstate commerce. It is present in both Colorado and Utah. It is amenable to the service of process here because of its presence. The corporation is actually here. It advertises in Chicago and San Francisco but is neither in Chicago nor San Francisco.

Take the case of *Advance-Rumely Thresher Co., Inc. v. Stohl*, 75 Utah 124; 283 Pac. 731 (1929). The plaintiff was a New York corporation, with head offices at La Porte, Indiana. It sold to the defendant a combination harvester. He gave notes secured by a chattel mortgage on the har-

vester. The action was to foreclose that chattel mortgage. It was contended that the plaintiff was a foreign corporation, and, not having complied with the laws of the state permitting it to do business within the state, the notes sued on were void, and that the plaintiff had no standing to prosecute its suit in the courts of Utah.

One Winchester, operator of a garage and service station at Tremonton, Utah, was designated as the local dealer, dealing in the machinery of the plaintiff. He had parts of machinery, for which he was personally responsible to the company, which he kept for sale. He advertised and solicited orders for this machinery and received commissions on sales made by and through him, according to the terms of the written contract between him and the company. He had no power to bind the company in any respect. The contract made by the defendant Stohl was in writing, and was in the form of an order signed by the defendant Stohl at Tremonton, Utah. The order went through the branch office located at Pocatello, Idaho, to the branch office of the company at La Porte, Indiana, where it was accepted in writing on July 5, 1927.

The harvester which was the subject of contract was shipped by freight from La Porte, Indiana, via McCammon, Idaho, to Deweyville, Utah, and the defendant was notified that the harvester was at Deweyville. The defendant thereupon went to the bank at Tremonton, Utah, and executed a receipt for the machinery and the notes and chattel mortgage involved in the suit. The defendant took possession of the machinery at Deweyville and took it to Tremonton.

This Court held that "the transaction in suit is an interstate one." (75 Utah 131.) The mere fact that the machinery was set up by experts of the vendor, and adjusted so that it would work satisfactorily, did not make the transaction intrastate as distinguished from interstate. The execution of the notes and mortgages in Utah did not take the transaction out of interstate commerce, and it was held that the plaintiff was entitled to maintain its action, notwithstanding it had never complied with the laws of Utah with respect to foreign corporations doing business within the state. The Thresher Co. was not here. It came voluntarily for suit but not to do business.

It must be clear that before a foreign corporation can be required to comply with the laws of this state it must be doing an intrastate business in Utah. No one should contend that any foreign corporation can lawfully do an intrastate business in Utah without complying with the laws of Utah relative to foreign corporations. If it comes into this state and does an intrastate business herein, then it cannot set up its non-compliance with the laws of Utah respecting foreign corporations to prevent its amenability to the service of process. No rational person would so contend. But no one should contend that the office or place of business referred to in Section 104-5-11 can include such an office or place of business as was maintained by Winchester at Tremonton, Utah, in the Thresher case. (75 Utah 124.)

It seems to follow that no one should contend that merely because the Kemmerer Coal Company has afforded its solicitors an office at 412 Boston Building, Salt Lake

City, where they can facilitate their work of soliciting orders, principally in the Northwestern and Pacific Coast states, that such an office is the office referred to in Section 104-5-11 of the Utah statutes.

L. M. Pratt, Jr., the person served with the alternative writ in this case, was not in charge of a place of business, nor was he doing the business of the Kemmerer Coal Company in this state. He had no authority to bind the company with any contract. He was nothing but a solicitor of orders. He was a mere traveling man who, for his convenience, at times sat down at a desk in an office situated in Salt Lake City, Utah. The company did not advertise or hold itself out as having a place of business in the State of Utah. It did have a telephone connection and it carried an advertisement in the Salt Lake City Directory as having mines at Kemmerer, Wyoming. The mere fact of such advertisement did not bring the defendant corporation into the State of Utah for the purpose of carrying on business in such state, or for any other purpose. The defendant, by reason of its charter, could not come into this state and *it did not come in.*

It is well established by the authorities that the maintenance of a solicitor's office within a state does not necessarily and of itself establish or constitute a doing business there, so as to subject it to service of process.

18 Fletcher's Cyclopedia Corporations, Sec. 8717;

Layne v. Tribune Co., 71 Fed. (2d) 223 (1934).

The plaintiff brought suit for libel in the District of Columbia against the Tribune Company, an Illinois corporation engaged in publishing the Chicago Daily Tribune at Chicago, Illinois. The summons and a copy of the declaration were served upon Arthur S. Henning, an employee of the defendant company in charge of the collection of news in the City of Washington. He forwarded such news to the Tribune office in Chicago. The evidence disclosed that the defendant maintained an office in Washington, in charge of Henning; that there were three other reporters and two telegraph operators employed in that office. The defendant company maintained a leased telegraph wire between Washington and Chicago, its home office.

The business of Henning and his associates was to collect news in Washington and send it to Chicago. The news articles were there examined and used or discarded by defendant company and supplied to other newspapers. Henning had authority to purchase supplies for the office and maintain a telephone therein; employ, when business required, additional telegraph operators; all of which items were put in his expense account, which was paid from the Chicago office. Henning's and the other employees' salaries were paid directly from the Chicago office. The rent and furnishings of the office in Washington were paid for directly from the Chicago office. It also appeared that the defendant company made no contracts of any nature in the District of Columbia, and that no employee of the defendant was authorized to enter into any contract outside of the State of Illinois.

On this statement the lower court held that the defendant was not doing business in the District of Columbia within the meaning of the the terms of the statute, and could not be held subject to service of process there.

On appeal Justice Van Orsdel, speaking for a unanimous court, held that the defendant was not amenable to the service of process in the District of Columbia, and if one will examine the list of cases relied upon he will find the *Green* case at the top of that list.

Layne v. Tribune Co., 293 U. S. 572; 79 L. Ed. 670 (1934).

On October 8, 1934, the Supreme Court of the United States denied a writ of certiorari in this *Layne* case.

It was correctly stated by Justice Folland of this court, and has been stated by some of the present justices, that:

“The question is a federal one and we are bound by the decisions of the Supreme Court of the United States.” (75 Utah, 131.)

Wells Fargo & Co. of Mexico v. McArthur Brothers Mercantile Co., 42 Ariz. 405; 26 Pac. (2d) 1021 (1938).

Here was a case where the trial court read the Arizona statute and gave it a *literal* construction. If one will read Section 104-5-12 of the Utah statutes, and construe its language literally, he can arrive at a conclusion somewhat logical but nevertheless one hundred per cent. wrong, that a defendant residing in Iowa, or some other state, who has never been in the State of Utah, can be sued in this state and summons served upon the defendant by publication.

One of our eminent district judges, now deceased, enjoyed telling a story about a certain lawyer in this district, also deceased, who without attachment or any sequestration of property, sued upon a promissory note made by some defendant in Iowa. This attorney for the plaintiff attempted to take a default upon service by publication, and when the judge stated that he did not believe the Court had any jurisdiction of the person of the defendant, this attorney for the plaintiff seemed to feel sorry for the judge and called his attention to the provisions of the Utah statute above cited, and the judge suggested that the attorney for the plaintiff should read *Pennoyer v. Neff*, 95 U. S. 714; 24 L. Ed. 565 (1877), and thereupon the proceeding ended without judgment.

The Arizona Supreme Court in the case above cited did not take the *literal* view taken by the trial court. Among other things it said:

“That a foreign corporation may, with immunity from service of process, maintain an office for its own soliciting agent, has been held several times by the United States Supreme Court.” (Citing the *Green* and *McKibben* cases.)

It is not believed that it is necessary to cite further authorities to support the proposition that the defendant Kemmerer Coal Company is outside of the state and not in the State.

Just recently, in December, 1943, this Court said:

“Thus a corporation, other than a domestic corporation, since it can act only through its agents, is

‘out of the state’ under that term as used in the statute, where it is not required to and does not maintain any agent within this state whose duty it is to look after such claims.”

In re Ewles’ Estate, 143 Pac. (2d) 903 (1943).

POINT III

TO CONSTRUE THE STATUTES OF UTAH SO AS TO MAKE THIS KEMMERER COAL COMPANY AMENABLE TO THE PROCESS OF THE UTAH COURTS VIOLATES THE CONSTITUTION OF THE UNITED STATES IN THREE PARTICULARS: (a) SUCH A CONSTRUCTION OF THE UTAH STATUTES IS REPUGNANT TO AND IN VIOLATION OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, WHICH PROVIDES THAT THE FEDERAL CONGRESS SHALL HAVE POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES, BECAUSE SUCH STATUTES OF UTAH SO CONSTRUED IMPOSE A SERIOUS, UNREASONABLE AND UNLAWFUL BURDEN UPON INTERSTATE COMMERCE; (b) SUCH STATUTES SO CONSTRUED ARE REPUGNANT TO AND IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT SUCH STATUTES OF UTAH SO CONSTRUED DENY TO THE DEFENDANT THE EQUAL PROTECTION OF THE LAW; AND (c) SUCH STATUTES OF UTAH SO CONSTRUED ARE REPUGNANT TO AND IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF

THE UNITED STATES IN THAT SUCH STATUTES SO CONSTRUED ABRIDGE THE PRIVILEGES AND IMMUNITIES OF THE DEFENDANT AND DEPRIVE SAID DEFENDANT OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

Whether a corporation has submitted itself to the laws of a state other than that of its origin in such a way as to be bound by service of process therein is one of general and not of local law, and in its final analysis it is one of due process of law under the Constitution of the United States. The decisions of the Supreme Court are not merely advisory but are absolutely controlling.

If the Utah statute expressly provided that service of process could be made upon the defendant by leaving a copy of the summons or other writ with a solicitor of orders, such as L. M. Pratt, Jr., then such a statute would be unconstitutional and void because it would violate not only the commerce clause of the Constitution of the United States, but also the due process of law provision, and it would interfere with the right of the defendant to sell its product. It is a proper rule of construction that statutes should be construed and applied so as to avoid not only the conclusion that such statutes are unconstitutional, but also to avoid grave doubts upon that score.

International Fuel & Iron Corporation v. Donner Steel Co., 242 N. Y. 224; 151 N. E. 214 (1926) ;

Automotive Material Co. v. Standard M. P. Corporation, 327 Ill. 367; 158 N. E. 698 (1927).

In the New York case Mr. Justice Crane delivered the opinion, and with him concurred Chief Justice Hiscock, Justice Cardozo and Justice Lehman. Justices Pound, McLaughlin and Andrews dissented. Chief Justice Crane said:

“One other principle we must mention. As the foreign corporation has the right without interference by the state to conduct interstate business, which would doubtlessly include selling goods in this state (*Hovey v. De Long Hook & Eye Co.*, *supra*), we must avoid such an application of this statute to the facts as may amount to an unlawful interference with interstate commerce. *Tauza v. Susquehanna Coal Co.*, 115 N. E. 915, 917, 220 N. Y. 259, 267. A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *U. S. v. Jin Fuey Moy*, 36 S. Ct. 258, 241 U. S. 394, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.” (For quotation see 151 N. E. 216.)

In the *Tauza* case the opinion was written by Justice Cardozo. That case is often cited to support the contention that a foreign corporation is doing business in some state. In view of the fact that he concurred in the case cited in 151 N. E. 214, it is not believed that the *Tauza* case is in conflict with that case.

In the Illinois case, 158 N. E. 638, Mr. Justice Duncan, speaking for a unanimous Illinois Supreme Court, said:

“It is well established by the authorities of this country that a foreign corporation is not doing, carrying on, transacting, or engaging in business in a state, within the meaning of statutes like ours now under consideration, by merely appointing an agent

for the transaction of such future business therein. The qualifying of such agent for the transaction of such future business by taking a bond from such agent does not come within the meaning of the statute." (Citing authorities) "It is also established by the authorities of this country that a foreign corporation is not doing, transacting, carrying on, or engaging in business in a state, within the meaning of such statutes, by the doing of acts therein which are merely preliminary to the transaction of the business in which the corporation is to engage, such as offering bids in the state on work to be performed therein, entering into a contract to perform such work, or by giving a bond to secure performance of such contract." (Citing authorities.)

And again :

"It is pointed out in those decisions that entering into a contract similar to the one now under consideration, is undoubtedly 'transacting business' within the *unlimited* meaning of that term, *but that such is not the sense in which the term is used in the statutes*, and that it means carrying on work or transacting the business for which the corporation was organized or in which it is to engage, and that it means performing the work or business called for by the contract. If such is not the true interpretation of the statute, foreign corporations in many instances would be compelled to incur the expense of becoming licensed to do business in another state without any assurance whatever that they could contract to do such business or do such business after being licensed to do the same." (Italics inserted.)

Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222; 271 N. W. 204; 110 A. L. R. 1414 (1937).

In the course of its opinion the Iowa Court said :

“The Legislature had no constitutional power or authority to acquire jurisdiction over a citizen of a foreign state by service outside of the state of Iowa, by registered mail sent to an address beyond the borders of this state, and such service did not confer jurisdiction upon the commissioner to render a decision fixing a personal liability upon the appellee corporation located in the state of West Virginia. To hold otherwise would render section 1459 unconstitutional. Every presumption must be indulged in support of the constitutionality of an act, and it will be presumed that the lawmaking body intended the law to have force and effect within the constitutional limitations.”

North Wisconsin Cattle Co. v. Oregon Short Line R. R. Co., 105 Minn. 198; 117 N. W. 391 (1908).

In this suit the Oregon Short Line Railroad Company, a Utah corporation, was served with summons by leaving a copy with D. M. Collins at the City of Minneapolis, Minnesota. Collins engaged in influencing shippers of freight and prospective passengers to use the lines of the Union Pacific Railroad Company. He induced various persons to buy tickets over the Union Pacific and Oregon Short Line. He was soliciting business for and advertising his employer. The company carried on this “business” in the State of Minnesota and had a permanent office in that state, as the Court said, “on a fairly extensive scale.”

In affirming the order quashing the service of summons, the Minnesota Court said :

“Whether such a corporation is doing business in

the state is a question of jurisdiction, and in its last analysis it is one of due process of law under the Constitution of the United States."

It then cited the *Green* case and held the service invalid.

This case is quoted from by the Arizona Court, 26 Pac. (2d) 1025.

Davis v. Farmers' Co-op. Equity Co., 262 U. S. 312; 67 L. Ed. 996 (1923) (Supra)

The State of Minnesota had a statute authorizing service of process to be made on an agent employed for the solicitation of passenger and freight traffic. The Supreme Court of the United States, speaking by Mr. Justice Brandeis, held that such statute violated the commerce law of the Federal Constitution.

These men, Pratt, Eble and Davis, under the affidavit filed in support of the motion to quash, are employed by the defendant by virtue of contracts of employment made in the State of Wyoming. They travel back and forth from Wyoming and the Pacific Coast. Pratt works in Idaho; Davis has jurisdiction from Laramie, Wyoming, west. They make no contracts for the defendant. They get no substantial number of orders from Utah. Because of the reasons hereinbefore set forth, they live in Salt Lake City, and when they are here they use the office provided for their convenience. They do not sell any coal and they have no property of the company in their possession.

The office is provided with furniture having a value of not over \$400, and this is an extreme statement. They operate from time to time automobiles of the company.

These automobiles are driven back and forth, under Wyoming licenses, to the states in the Northwest. At times they are temporarily stopped in Utah. These men do not assist in the delivery of coal. The coal is put on the railroad cars at Kemmerer, at the mines of the defendant, and from that time on the company is done with the transaction, except for the collection of its money when the coal is not paid for in cash. These three solicitors do not collect any of the money, except, possibly, it might be assumed that they would carry a check for the same if it were offered to them, but it is no part of their duties to collect accounts. If it can be said that they have done any business in Utah, then that business is interstate and not intrastate. The commerce is between the State of Wyoming and the state where the buyer of the coal may reside.

Let us assume that these men are employed in interstate commerce, still the defendant is not doing business in the State of Utah. (158 N. E. 703.) To come in as an agent under Section 104-5-11 of the Utah statutes, the agent must be one having in fact a representative capacity and a derivative authority. Such an agent must be one actually appointed and representing the corporation as a matter of fact. The corporation cannot be represented here in this state unless it is doing business in Utah. (117 N. W. 392, *supra*.)

The Minnesota court said:

“Therefore, a foreign corporation sending its agents into this state impliedly consents that if they do for it any acts which constitute doing business within the state, as that term is defined by its courts, process against it may be served on such agents. The

solicitation of passenger and freight traffic in the state is not within that term."

Spohn v. Industrial Commission, 138 O. St. 42;
32 N. E. (2d) 554; 133 A. L. R. 951.

In this case the Supreme Court of Ohio held that the legislature of that state "*cannot, without placing an undue burden on interstate commerce*, require a non-resident employer engaged in interstate commerce, whose employees enter the state in the course of their employment, to comply with the State Workmen's Compensation Law."

Harrington v. Industrial Commission, 96 Utah
544, 88 Pac. (2d) 548 (1939).

In this case a brakeman was struck by a motor truck while he was crossing the street to open the gates which were maintained across an industrial railroad track to move two intrastate cars which were obstacles to the movement of a feed car to the official place of spotting on the industrial track, where it would cease to move in interstate commerce. In other words, he was engaged in interstate commerce at the time he was killed by being struck by a motor truck on the highway. There was no liability against the railroad company because there was no negligence. The Federal Employers' Liability Act gave no relief. This Court held that the Industrial Commission of Utah was without jurisdiction to proceed with the cause or award compensation under the Workmen's Compensation Act, and affirmed the act of the Industrial Commission in dismissing the application for want of jurisdiction.

It should be presumed that the State of Wyoming has

a compensation law. These three men, Davis, Pratt and Eble, are working out from Wyoming. Their legal residence and that of their families is not important or even material. Their contracts of employment are Wyoming contracts, and the place from which they work is Kemmerer, Wyoming. That is the place from which they get their compensation, and that is the place to which they make their official reports and from which they receive their instructions. The mere fact that they do not physically travel to Kemmerer at the end of each week's work is of no legal consequence.

In re Byrne, 53 Wyo. 519; 86 Pac. (2d) 1095 (1939).

In this case the Supreme Court of Wyoming gave an extra-territorial effect to its Workmen's Compensation Act. In 1941 the legislature of Wyoming *expressly* extended the benefits of that Workmen's Compensation law to employees hired and regularly employed in Wyoming receiving personal injuries or accident arising out of and in the course of such employment *outside of the state*.

Chapter 47, Session Laws of Wyoming, 1941.

An award of compensation under Wyoming's law would be a bar to any recovery for the same injury under Utah's law.

Magnolia Petroleum Co. v. Hunt, 88 L. Ed. 161, decided by the United States Supreme Court Dec. 20, 1943. Lawyers Co-operative Publishing Co. Advance Sheet No. 4.

These men from a legal standpoint can work for the defendant but that work is Wyoming work wherever it may

be performed, because the defendant cannot and does not carry on its business in any other place than that state.

Before a state may compel a foreign corporation to submit to its jurisdiction, or before such a corporation may be served with process in another state, *it* must be present in the state. An attempt to bring it into the state by service upon some agent or officer who does not carry with him his *official* character or function, is to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. Solicitation of orders for business is not doing business, and the orderly, effective administration of justice demands an interpretation of these Utah statutes such as has been given by this Court in the numerous cases which it has decided, notably those contained in Volume 93 of the Utah State Reports.

The defendant does not believe it is necessary to discuss the effect of the residence of T. J. O'Brien, except to say that he has lived here for many years. Since 1933 he has been president of this company, but his residence and his presidency are in no wise connected. In the beginning, M. S. Kemmerer of Mauch Chunk, Pennsylvania, was president. No one would have the temerity to contend that because Mr. Kemmerer lived in Pennsylvania the corporation was doing business in such state. On Mr. Kemmerer's death, P. J. Quealy became president. His residence and that of the defendant corporation were in the same state and in the same county of that state, but there is no legal connection between the residence of P. J. Quealy and that of the Kemmerer Coal Company.

On Mr. Quealy's death, John S. Kemmerer of Short Hills, New Jersey, became president. Will anyone contend that the corporation was doing business in New Jersey because John Kemmerer lived in that state? For reasons of his own, and perhaps on account of his years, he resigned, and the stockholders elected T. J. O'Brien.

CONCLUSION

It is respectfully submitted that the service of the alternative writ of mandate made upon L. M. Pratt, Jr., should be quashed, because that service is illegal and void.

Respectfully submitted,

MAHLON E. WILSON,

*Attorney for Defendant, specially
appearing in support of defen-
dant's motion to quash service.*