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Engaging in Business under Rule 4 (e) (3) of the North Dakota Rules of Civil Procedure

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NOTE

ENGAGING IN BUSINESS UNDER RULE 4 (e) (3) OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE

The recent adoption of the North Dakota Rules of Civil Procedure[1] has made it possible to obtain personal jurisdiction on a nonresident individual *engaging in business* in North Dakota. This provision is the substance of Rule 4 (e) (3)[2] of the Rules. This Rule raises the following question: what constitutes *engaging in business?*[3]

Decisions on what constitutes *engaging in business,* or its synonymous counterpart *doing business,* by an individual are relatively few as a non-corporate business crosses state lines infrequently. Further, rules providing for personal service on nonresident individuals are quite recent and have not been adopted by all states. At least ten states in addition to North Dakota have similar rules.[4] To supplement the cases concerning nonresident individuals, decisions determining the quesion of *engaging in business* by foreign corporations will be interspersed as the question is similar in both instances.[5]

It is important to note that New York decisions may be particularly significant as the North Dakota Rule was adopted from Section 229 (b) of the New York Civil Practice Act.[6]

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1. N.D. Rev. Code tit. 28, N.D.R.Civ. Proc., (Supp. 1957).

2. *Id.* at Rule 4 (e). "PERSONAL SERVICE OUTSIDE THE STATE. Personal service outside the state may be made: (3) When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, by delivering a copy of the summons to the person who at the time of service is in charge of any business in which the defendant or defendants are engaged within this state, if there is such, and such service shall be of the same force and effect as if served personally within the state . . . provided that a copy of such summons together with a notice of such service upon such persons in charge of such business . . . shall be sent forthwith to such nonresident person or persons by registered or certified return receipt requested mail . . . ."

3. In dealing with a specific question such as this, many collateral questions appear and must be considered, although sparingly, to treat fully the subject *engaging in business.* Examples of these collateral questions are termination of agency, agency for one purpose but not for purpose of service, and agents with interests adverse to their principals.

4. States having statutes or rules similar to the N.D.R.Civ. Proc. 4 (e) (3) include: Alabama, Arkansas, Florida, Illinois, Maryland, Mississippi, New York, Pennsylvania, Rhode Island, and Utah.

5. Debry v. Hanna, 182 Misc. 824, 45 N.Y.S.2d 551 (Sup. Ct. 1943) (dictum) (The phrase "engage in business" as used in the statute relating to service of process on nonresident individuals is equivalent to the phrase "doing business" used in the statute relating to foreign corporations.). See also Restatement, Judgments § 22, comment b (1942).

6. Letter to the Editor, 34 N. Dak. L. Rev. 200, "Actually, we adopted our Rules from Section 229 (b) N.Y.C.P.A." (Eugene A. Burdick, District Judge).

HISTORICAL DEVELOPMENT

At common law,[7] and under the due process clause of the Fourteenth Amendment,[8] there exist three judisdictional principles. First, a personal judgment is void if rendered by a court which does not have jurisdiction over the defendant. Second, a court does not have personal jurisdiction merely because the defendant owns property in the forum. Third, if a court does not have personal jurisdiction over a nonresident defendant, the court cannot acquire jurisdiction through publication of summons or by service outside the state.[9] These principles, which applied to both corporations and individuals, ill-fit nationwide corporate business; for this reason the Supreme Court in *Lafayette Ins. Co. v. French*,[10] 1855, held that a state could require consent to be sued in that state as a condition to permitting a foreign corporation to do business there. Foreign corporations which had not consented to be sued were, nevertheless, held amenable to service on the theory that such corporations were present within the forum by virtue of *doing business* there.[11] This applied only to corporations and other abstract entities, as it could not be said a nonresident individual was present within a state by a mere showing that he was transacting business there. Logically then, a nonresident individual was not bound by statutes authorizing service of process on foreign corporations.[12]

However, in 1916 the United States Supreme Court upheld New Jersey's nonresident motorist statute which provided for service of process on a state official who was made the defendant's agent by the statute.[13] This was the first decision upholding a statute providing for personal service on a nonresident individual. Then in 1935 the Supreme Court upheld an Iowa statute providing for service of process on the agent of a nonresident individual doing business in the state in actions arising out of that business.[14]

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7. Historical and Practice Notes, Ill. Ann. Stat. c. 110, § 17 (1956) (Years ago personal jurisdiction was acquired and civil actions were commenced by the arrest of the defendant under a capias and service of process then made. This limited in-personam jurisdiction to the territorial limits of the state. Later, actions were commenced by service of summons but the concept of requiring physical power over the defendant was retained.).

8. Pennoyer v. Neff, 95 U.S. 714 (1877).

9. Ill. Ann. Stat., *supra* note 6 (The physical power concept was also applied to corporations making them subject to suit only in the state of incorporation as they, in theory, only existed there.).

10. 59 U.S. (18 How.) 404 (1855).

11. St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1912); Barrow S.S. Co. v. Kane, 170 U.S. 100 (1897). See Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264 (1917).

12. Hensley v. Green, 36 F. Supp. 671 (W.D.S.C. 1940).

13. Kane v. New Jersey, 242 U.S. 160 (1916). See also Hess v. Pawloski, 274 U.S. 352 (1927).

14. Henry L. Doherty & Co. v. Goodman, 194 U.S. 623 (1935).

The Supreme Court later abandoned the theories of "consent"[15] and "presence"[16] and required "certain minimum contacts with the forum" so as to make it reasonable that the defendant defend the particular suit brought.[17] This is necessary to meet the requirements of due process.

ENGAGING IN BUSINESS

DEFINITION. Innumerable definitions of what constitutes *engaging in* or *doing business* have failed to produce an accurate, workable criterion which can be applied to any given set of facts and result in a just determination of the question. Ballentine defines *doing business in the state* as: "The transaction within the state of some substantial part of a party's ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligation."[18] The Utah Supreme Court stated: "No inflexible formula can determine what activity constitutes 'doing business' in the jurisdictional sense, nor can a court by abacus or sliderule calculate the qualitative and/or quantitative activity factors constituting such business so as to make the process server's efforts effective. All it can do is examine each case as it arises . . ."[19]

ESSENTIALS TO INVOKE RULE. To avail himself of Rule 4 (e) (3) a litigant must meet certain requisites. These requirements are manifested by the Rule itself[20] and by court decisions from states having similar rules.[21] The North Dakota Rule requires: that the nonresident is *engaging in business* within the state and that this be shown;[22] that service be made on one in charge of the business;[23]

15. See note 9 *supra*.

16. See note 10 *supra*.

17. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (" . . . [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ").

18. Ballentine, Self-Pronouncing Law Dictionary (2d Students Ed. 1948).

19. Dykes v. Reliable Furniture & Carpet, 3 Utah 2d 34, 277 P.2d 969, 971 (1954). See also Melvin Pine & Co. v. McConnell, 273 App. Div. 218, 76 N.Y.S.2d 279, 283 (1st Dep't), *aff'd*, 298 N.Y. 27, 80 N.E.2d 137 (1948) ("In cases of this sort it is the cumulative significance of all the activities conducted in this jurisdiction rather than the isolated effect of any single activity that is determinative on the question of doing business in the State.").

20. See note 2 *supra* for text of Rule.

21. See note 4 *supra*.

22. See Interchemical Corp. v. Mirabelli, 269 App. Div. 224, 54 N.Y.S.2d 522 (Sup. Ct. 1945) (The plaintiff, to avail himself of § 229 (b) N.Y.C.P.A., must first show that the nonresident was engaging in business, and second, that the cause of action arose out of such business.).

23. Yeckes-Eichenbaum, Inc. v. McCarthy, 290 N.Y. 437, 49 N.E.2d 517, 520 (1943); Levin v. Frank, 141 N.Y.S.2d 70 (Sup. Ct. 1955) (Section 229 (b), N.Y.C.P.A., New York's equivalent to North Dakota's rule 4 (e) (3), is not satisfied unless the person in charge of the business is invested with general powers of judgment and discretion.).

and that the cause of action arises out of such business.[24]

AGENTS' ACTIVITIES CONSTITUTING BUSINESS. As has been observed,[25] there is not, nor can there be, a test that can be applied to a given set of facts to determine whether or not those facts constitute *engaging in business*. The courts can do no more than examine each case as it arises.

For good examples of this, the following decisions are illustrative. Several defendants, sued as individuals, maintained their partnership offices and factory in Ohio and also resided in Ohio. Resident representatives in New York, who were independent contractors, were paid by salary and bound by contractual duties. All orders were subject to acceptance or rejection at the factory. The facts further disclosed that nearly all business was completed by three of the New York agents who were in charge of the defendants' New York business. The court held that these representatives were in charge of the defendants' New York business, declaring that the cumulative significance of all the activities conducted in the state must control the question rather than the isolated effect of any single activity.[26]

In a similar case, a nonresident individual had a sales representative who was an independent contractor paid on a commission basis. The nonresident defendant had no office, bank account, telephone, directory listing, employees, merchandise, or samples in the state, the sales representative being the nonresident's only contact with the forum. The court had little trouble determining that the defendant was not *engaging in business* for purposes of service of process.[27] The opposite result was reached where a nonresident individual maintained a stock of goods in the state and allowed his agent-in-charge access to fill orders solicited.[28]

Where a plaintiff was injured in one of several buildings in New York owned by a nonresident individual and managed by a real estate corporation, plaintiff served an officer of the corporation. The court held that the real estate corporation was in charge of the business and properly served. The court further held that owning and operating real estate

24. Yeckes-Eichenbaum, Inc. v. McCarthy, *supra* note 22 (Requirements of sec. 229 (b) N.Y.C.P.A. are not satisfied where business, if any, carried on in New York by the defendant did not give rise to the cause of action.).

25. See note 18 *supra*.

26. Melvin Pine & Co. v. McConnell, 273 App. Div. 218, 76 N.Y.S.2d 279 (1st Dep't) *aff'd*, 298 N.Y. 27, 80 N.E.2d 137 (1948).

27. O'Hagen v. Caballero, 52 N.Y.S.2d 863 (Sup. Ct.), *aff'd mem.*, 269 App. Div. 981, 59 N.Y.S.2d 300 (1st Dep't 1945); Dykes v. Reliable Furniture & Carpet, 3 Utah 2d 34, 277 P.2d 969 (1954).

28. Super Products Corp. v. Parkin, 20 F.R.D. 377 (S.D.N.Y. 1957).

for profit is *engaging in business.*[29] It has also been held that acquiring land and contracting for construction of an apartment building with the intent of renting for income production is a business venture warranting application of the rule.[30]

Of the three requirements under "Essentials to Invoke Rule", the foregoing decisions make it apparent that a finding of *engaging in business* is of paramount importance. The questions concerning the two remaining requisites, that the agent was in charge of the business and that the cause of action arose out of such business, exist only on a finding of *doing business.*

AGENTS' ACTIVITIES NOT CONSTITUTING BUSINESS. The cases are in agreement that a nonresident may have an agent in charge for various business purposes without compelling a finding of *engaging in business.* For example, it has been held that: an agent empowered with a power of attorney from a nonresident,[31] an agent for the purpose of selling tickets on nonresident's busline,[32] and an attorney empowered to complete negotiations commenced by the nonresident[33] were all agents, but service was invalid as the nonresidents were not *engaging in business* for purposes of the Rule.

In many instances the applicability of the Rule is challenged by the defendant by asserting that the act or acts alleged as *engaging in business* are no more than "mere solicitation" or than an "isolated transaction." The courts are agreed that mere solicitation does not constitute *engaging in business* under the Rule.[34] The dilemma is evidenced when these same courts attempt to determine what is mere solicitation and what is a course of business. In *Frene v. Louisville Cement Co.*,[35] the court observed that mere solicitation is not business, but that a regular course of solicitation and "other

29. Miller v. Swann, 176 Misc. 607, 28 N.Y.S.2d 247 (City Ct. of New York, 1941).

30. Wm. E. Strasser Constr. Corp. v. Linn, 97 So.2d 458, (Fla. 1957). See also Armi v. Huckabee, 266 Ala. 91, 94 So.2d 380 (1957) (The court held that undertaking to operate an apartment house is *engaging in business.*).

31. Alward v. Green, 122 Utah 35, 245 P.2d 855 (1952) (Nonresident scheduled appearances for performers and also contracted with the performers to appear. Performer had power of attorney to cash checks received for his services for the nonresident. The court *held* the defendant was not *engaging in business* in Utah either himself or through the entertainers for purposes of the rule.).

32. Travis v. Fuqua, 121 Ind. App. 440, 97 N.E.2d 867 (1951).

33. Levin v. Frank, 141 N.Y.S.2d 70 (Sup. Ct. 1955) (A Holland resident empowered his attorney to complete negotiations for dramatization of his deceased daughter's book *Diary.* Nonresident was not involved in production of the play and it was held that defendant was not *engaging in business* within the state.).

34. *E.g.*, Green v. C. B. & Q. Ry. Co., 205 U.S. 530 (1907); Fritchey v. Summar, 86 F. Supp. 391 (W.D. Ark. 1949) (Mere solicitation whether on a casual or occasional or regular, continuous and long continued business does not constitute doing business in a foreign state.); McWhorter v. Anchor Serum Co., 72 F. Supp. 437 (W.D. Ark. 1947).

35. 134 F.2d 511 (D.C. Cir. 1943).

activities" is business. "And very little more than 'mere solicitation' is required . . . ."[36]

The Supreme Court was confronted with this question in two early cases involving foreign corporations.[37] In the first case the Philadelphia agent for the defendant railroad which was incorporated in Iowa and which had its eastern terminal in Chicago, regularly accepted money from prospective customers to purchase tickets to Chicago on another railroad. With these tickets, the agent gave the customers prepaid orders entitling them to tickets on the defendant's railroad from Chicago westward. The court held there was no showing of *doing business* by the defendant in Philadelphia for purposes of service of process.[38]

In the second case, decided seven years later, agents for the foreign corporation solicited orders in Kentucky and sent them outside the state where the contracts were drawn. The agents in this case, as in the former, were permitted to accept payment. The court held that this was more than mere solicitation and was a course of business.[39] In both cases the nonresident defendant was furthering its business by solicitation through agents. In the first case customers acquired only a right to a ticket upon presentation of the prepaid order at the defendant's eastern terminal. The latter case, however, involved both sale and receipt of merchandise in the state with the contract being executed outside the state. The distinguishing factor is that in the first case the court regarded the transactions as merely solicitation, and the transactions in the second as a course of business.

The North Dakota Supreme Court, in *Ellsworth v. Martindale-Hubbell Law Directory*,[40] has also determined the point using a realistic approach. In this case an agent of a foreign corporation annually entered North Dakota and solicited orders for a book which were subject to acceptance or rejection at the home office. The agent also gathered material for the book and made collections. The court held that gathering material for publication was a material part of the defendant's business and, therefore, this was more than solicitation and was *doing business* in North Dakota. The same result was reached where an agent in North Dakota systematically solicited

36. *Id.* at 515.
37. See note 5 *supra.*
38. Green v. C. B. & Q. Ry. Co., 205 U.S. 530 (1907).
39. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).
40. Ellsworth v. Martindale-Hubbell Law Directory, 65 N.D. 297, 258 N.W. 486 (1935).

contracts for approval by a foreign corporation resulting in a continuous flow of goods into the state.[41]

In contrast to these decisions, an agent, who was an independent contractor procuring orders on a commission basis to be accepted outside the state had the nonresident's firm name, among others, on his letterhead. This was held to be no more than solicitation.[42] This is also true of the independent contractor who places the defendant's name on a door, in a phone book or directory, or keeps samples.[43] Advertising and goodwill operations in a jurisdiction are not *engaging in business* for purposes of service of process.[44]

The second major challenge to the applicability of the rule is that the act in controversy is an isolated transaction and hence not *engaging in business.*[45] The North Dakota Supreme Court has held, in a case involving a foreign corporation, that a single business transaction in a state does not constitute *engaging in business.*[46]

In New York, agents offered in isolated instances oil leases for sale. This was the defendant's only business in the state. The court held that such did not constitute a systematic and continuous course of business.[47]

TERMINATION OF AGENCY. Upon termination of an agency the service will be held invalid despite the existence of all requisites for application of the rule. Where it is to the agent's interest to suppress the fact of service, it is invalid even though the rule expressly provides for the service.[48] The service in such an event would be insufficient as due process requires that the method of service of process be reasonably calculated to give the defendant notice of the action and an opportunity to defend.[49]

Termination of the agency does not necessarily coincide with cessation of business in the state. Upon dissolution of a particular

41. Wheeler v. Boyer Fire Apparatus Co., 63 N.D. 403, 248 N.W. 521 (1933).
42. Dykes v. Reliable Furniture & Carpet, 3 Utah 2d 34, 277 P.2d 969 (1954).
43. Debrey v. Hanna, 182 Misc. 824, 45 N.Y.S.2d 551 (Sup. Ct. 1943).
44. Kaffenberger v. Kremer, 63 F. Supp. 924 (E.D. Pa. 1945) (The defendant had an office in the state to instruct in the use of its beauty products, no goods were kept for sale, no orders received, no advertising originated there, and bills were paid by the home office. The court stated that doubtless these efforts were to increase retailers' sales and hence increase the defendant's indirectly. The court held that this practice was a mere incident to the defendant's business and did not constitute doing business under the rule.).
45. Restatement, Judgments § 22, comment b (1942) (" . . . [D]oing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intent of thereby initiating a series of such acts . . . .").
46. State v. Robb-Lawrence Co., 15 N.D. 55, 106 N.W. 406 (1906).
47. Petroleum Finance Corp. v. Stone, 111 F. Supp. 351 (S.D.N.Y. 1953).
48. John W. Masury & Son v. Lawther, 299 Mich. 516, 300 N.W. 866 (1941).
49. Restatement, Judgments § 22, comment c (1942).

business there are, as a practical matter, many acts pending which delay final closing of an office or agency. Service of process after discontinuance of the nonresident's actual business but while the agent was engaged in winding-up the business has been held valid.[50]

NATURAL PERSON OR PERSONS. Rule 4 (e) (3) applies to "any natural person or persons."[51] There is doubt as to whether this Rule contemplates only individuals or also includes partnerships or other unincorporated associations. Since North Dakota's Rule was derived from that of New York,[52] it is logical to consider the problem in that jurisdiction.

In *Amon v. Moreschi*,[53] the Court of Appeals of New York held that the term "natural person or persons" as used in the New York rule does not include unincorporated associations. The same court held in *Melvin Pine & Co. v. McConnell*,[54] a suit involving nonresident partners, that jurisdiction over the defendants was properly obtained under the New York rule. However, the litigation was instituted against the partners as individuals and not in the partnership name. The only point considered by the court was whether or not the defendants were *engaging in business* in New York.

In the first case the court pointed out that several other sections of the New York Civil Practice Act provided for service on unincorporated associations and concluded that the legislature had distinguished between unincorporated associations and natural persons for purposes of service. North Dakota also provides for substituted service on unincorporated associations in Rule 4 (d) (4).[55]

It is the writer's opinion that Rule 4 (e) (3) does not include unincorporated associations. Hence, in the case of a nonresident partnership, jurisdiction can be acquired only by suing the partners as individuals and showing that they are *engaging in business* as individuals under a common name. It is also submitted that to obtain service on other unincorporated associations, resort must be had to Rule 4 (d) (4).

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50. Stoner v. Higginson, 316 Pa. 481, 175 Atl. 527 (1934).
51. See note 2 *supra*.
52. See note 6 *supra*.
53. Amon v. Moreschi, 296 N.Y. 395, 73 N.E.2d 716 (1947).
54. Melvin Pine & Co. v. McConnell, 273 App. Div. 218, 76 N.Y.S.2d 279 (1st Dep't), *aff'd*, 298 N.Y. 27, 80 N.E.2d 137 (1948).
55. See note 1 *supra*.

CONCLUSION

Prior to the adoption of the Rule a plaintiff was forced to follow the defendant to the forum of his residence to bring suit. This involved the expense and inconvenience of travel, including the cost of transporting witnesses, etc. Due to these impediments, smaller claims were often abandoned and justice thwarted.

Since adoption of Rule 4 (e) (3) it is possible for all causes of action, arising out of a nonresident's business, to be prosecuted where they arise. The Rule has thereby eliminated an obstacle which stood in the way of administration of justice.

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