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Corporations—Jurisdiction over Foreign Corporations Not Qualified to Transact Business in North Carolina

In 1955 the North Carolina Legislature enacted two statutes that govern in personam jurisdiction over foreign corporations that are not qualified to transact business in North Carolina. These statutes concern corporations that have either transacted business in the state or have committed some act within the state which would

1 "A proceeding in personam is a proceeding to enforce personal rights and obligations brought against the person and based on jurisdiction of the person . . ." 1 Am. Jur. 2d Actions § 39 (1962). "A proceeding in rem is essentially a proceeding to determine the right in specific property, against all the world, equally binding on everyone." 1 Am. Jur. 2d Actions § 40 (1962).

2 N.C. Sess. Laws 1955, ch. 1143, § 1. These statutes were first codified into law as N.C. Gen. Stat. §§ 55-38.05, -38.1 (Supp. 1955) to go into effect upon adoption. Six days later the Legislature adopted the Business Corporation Act, N.C. Sess. Laws 1955, ch. 1371, § 1, which was not to go into effect until July 1, 1957. When the Business Corporation Act went into effect, N.C. Gen. Stat. §§ 55-38.05, -38.1 were recodified as N.C. Gen. Stat. §§ 55-144, -145 (1960). The language was not changed.

Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served.


Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

(1) Out of any contract made in this State or to be performed in this State; or
(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without this State; or
(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or
(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

subject them to jurisdiction. The North Carolina Supreme Court recently decided cases that invoke each of the statutes.

In *Byham v. National Cibo House Corp.*, the plaintiff, a North Carolina resident, sought rescission on grounds of fraud of a chain restaurant franchise contract. The defendant, a Tennessee corporation, contended that the North Carolina courts did not have jurisdiction because the contract was made not in North Carolina but in Tennessee when it was accepted in defendant's home office. The court found that the contract was to be performed in North Carolina and held that the North Carolina court had in personam jurisdiction on the basis of the minimum contact statute, section 55-145(a) of the Business Corporation Act.

In *Abney Mills, Inc. v. Tri-State Motor Co.*, the plaintiff, a South Carolina corporation, was seeking damages for an alleged breach of contract by the defendant, a Delaware corporation having its principal place of business in Missouri. The contract, made in South Carolina, stated the defendant would purchase a fifty-seven per cent interest in Kilgo Motor Freight, a North Carolina corporation owned by the plaintiff and others. While awaiting approval from the Interstate Commerce Commission, the parties to the contract made an agreement that the defendant would have temporary management control and would be substituted for Kilgo's board of directors. The defendant's president came to North Carolina and took over active management control of Kilgo for seven months. At the time the transfer was to be completed, the defendant did not have funds available to consummate the sale, and it terminated the management control agreement. The plaintiff instituted proceedings in the North Carolina court. The defendant contended this court did not have jurisdiction because the action did not arise out of any business transacted in North Carolina. The trial court dismissed the action. The Supreme Court remanded the suit for further findings of facts to determine if the defendant's activities in North Carolina were sufficient to subject it to the transacting business

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\[\text{footnotes}

\text{265 N.C. 50, 143 S.E.2d 225 (1965).}

\text{There was evidence that the defendant had solicited for customers in North Carolina by mail and in newspaper advertisements, but the court did not mention this as a basis for jurisdiction under § 55-145(a) (2) (business solicited in this state). Nor did it mention § 55-145(a) (4) (tortious conduct in this state) concerning the defendant's alleged fraudulent representation as a basis.}

\text{265 N.C. 61, 143 S.E.2d 235 (1965).}
Historically, jurisdiction over foreign corporations has been granted on such theories as implied consent or presence while the corporation was doing business within the state. The modern, more liberal view originated in *International Shoe Co. v. Washington,* a landmark decision expressing approval of a "minimum contacts test" whereby it becomes unnecessary for the corporation to be transacting business in the forum state. This theory has been held valid when there was as little as one contact, an insurance contract renewal, with the forum state. The Court attributed the trend to this liberal view to improved transportation and communication. It recognized that the burden of a party having to defend himself in a state where he had engaged in economic activity had been reduced. But later, in *Hanson v. Denckla,* the Court cautioned that the trend did not remove all restrictions on the personal jurisdictions of state courts.

What, then, are the limits within which North Carolina courts may exercise jurisdiction over corporations not qualified to transact business in North Carolina? This is a question of whether or not the state statute meets the due process requirement of the fourteenth amendment and whether or not the defendant has committed the activities designated by the statute. While a particular decision can serve as a guide for future litigants, each holding in this area is necessarily limited to the particular facts before the court.

Section 55-144 replaced the jurisdictional statute in effect prior to 1955; the present statute uses the term "transacting business" instead of "doing business," the term used in the earlier statute.

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*See Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).*

*See Barrow Steamship Co. v. Kane, 170 U.S. 100 (1898).*

*326 U.S. 310 (1945).*

*[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, 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."

*Id.* at 316.


*Id.* at 222, 223.

*357 U.S. 235 (1958).*

*Id.* at 251.

*N.C. Sess. Laws 1901, ch. 5. [Last codification was N.C. GEN STAT. § 55-38 (1950).]*
Only in *Worley's Beverages, Inc. v. Bubble Up Corp.*\(^{16}\) has a court noted this substitution prior to the North Carolina Supreme Court in *Abney Mills*. In *Worley's* the United States District Court for the Eastern District of North Carolina said that changing the statute from "doing business" to "transacting business" only had the effect of liberalizing the statute.\(^{16}\)

Thus, it would seem that any factual situation litigated prior to 1955 that was held to constitute "doing business" would still be good authority for "transacting business" today. However, the authority of a decision that held the activities did not constitute "doing business" prior to 1955 would seem to be weakened. If the substitution did liberalize the statute, some of these activities might conceivably be considered as "transacting business" now.

Apparently the courts have not considered the substitution of tremendous import because later decisions still wrestle with the question of the corporation's "doing business," making no reference to "transacting business."\(^{27}\) But, the court has used "transacting business" and "doing business" interchangeably.\(^{18}\)

In *Abney Mills* the court has given a qualified definition of "transacting business." It relied upon previous holdings in *Lambert v. Schell*\(^{10}\) and *Ruark v. Virginia Trust Co.*\(^{20}\) for definitions of

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\(^{16}\) Id. at 504.
\(^{27}\) Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956); Housing Authority v. Brown, 244 N.C. 592, 94 S.E.2d 582 (1956). In Harrington v. Croft Steel Prods., Inc., *supra*, the trial court had found jurisdiction on the basis of §§ 55-38 and 55-38.1(a)(1), (3) [now § 55-145(a)(1), (3)]. The court said: "We conclude the evidence before the trial court was sufficient to support the finding the defendant was doing business in North Carolina. . . . It becomes unnecessary to consider or pass upon the constitutionality of G.S. 55-38.1(1)(3) . . . ." Id. at 678, 94 S.E.2d at 805-06. [The court, throughout the decision, referred to the statute as G.S. 55-38.1(1)(3) instead of G.S. 55-38.1(a)(1), (3).] It is true N.C. GEN. STAT. § 55-38 (1950) was still in effect at this time, but so was N.C. GEN. STAT. § 55-38.05 (Supp. 1955). See text accompanying note 2, *supra*. Section 55-38.05 has been mentioned in only one decision, Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). The court said the plaintiff sought service of process pursuant to § 55-38.05, but in the opinion, the court talked about why the plaintiff could not have service of process according to § 55-38.1


\(^{19}\) Doing business in this State means doing some of the things or
"doing business" and said these same definitions applied to "transacting business." But, the court cautioned that these definitions were definitely not an all-embracing rule as to the meaning of "transacting business."\textsuperscript{21}

Courts have pointed out that of the two statutes, section 55-144, the transacting business statute, is the only one available to a nonresident plaintiff or to a plaintiff that does not have a usual place of business in North Carolina.\textsuperscript{22} The North Carolina Supreme Court has also pointed out that to make the transacting business statute applicable, two requirements must be met: (1) the defendant must have transacted business in North Carolina; and (2) the cause of action must have arisen out of such business.\textsuperscript{23}

Section 55-145(a), the minimum contact statute, grants jurisdiction in four specific instances though the corporation is not transacting business in North Carolina: (1) if the corporation makes a contract in this state or one to be performed in this state; (2) if the corporation solicits business in this state; (3) if the corporation can reasonably expect its goods to be used in this state; or (4) if the corporation commits a tort in this state. The statute applies "whether or not such corporation is transacting or has transacted business in this State . . . ."\textsuperscript{24} However, if the corporation is transacting business, jurisdiction would attach by virtue of the transacting business statute, so for all practical purposes, the statute need apply only in cases in which the corporation has not transacted exercising some of the functions in this State for which the corporation was created. And the business done by it here must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State.

\textsuperscript{20} "The expression 'doing business in this state,' . . . means engaging in, carrying on, or exercising, in this State, some of the things, or some' of the functions, for which the corporation was created." 206 N.C. 564, 565, 174 S.E. 441, 442 (1934).
21 265 N.C. at 71, 143 S.E.2d at 242.
24 N.C. GEN. STAT. § 55-145(a) (1965).
business in North Carolina. Nevertheless, if the corporation has not transacted business, the rule of the "minimum contacts test" must be met to assure that due process is satisfied.

The court in Byhain set forth the factors it will consider in determining if the "minimum contacts test" and "fair play" required in International Shoe have been met. These are:

(a) Did the form of substituted service reasonably assure that notice to the defendant would be actual?
(b) Did the defendant do some act invoking the benefits as well as the burdens of the forum state's laws?
(c) Did the forum state have an interest of its residents to protect?
(d) Did the defendant have access to the courts of the forum state to enforce obligations of its residents?
(e) Was the defendant caused great inconvenience in defending a suit away from home?
(f) Were the witnesses and material evidence to be found in the forum state?
(g) Would it be economically practical for plaintiff to pursue his suit in defendant's home state?
(h) If the suit was based on a contract, did it have a substantial connection with the forum state?

It is possible that a corporation could be transacting one type of business in North Carolina and another type in State A. If the plaintiff brings suit in North Carolina because defendant manufactured goods in State A that it could reasonably expect to be used in North Carolina, his suit would have to be brought under § 55-145(a) (3) instead of § 55-144. Under § 55-144, the cause of action must arise out of the business transacted in North Carolina. In this hypothetical the business transacted in North Carolina has no connection with plaintiff's cause of action, so it is conceivable that a corporation admittedly transacting business within the state would be subject to § 55-145(a). It is obvious that this is a possibility that will rarely occur.

Ibid.
How much authority has been given the courts by the legislature of the forum state?

The court deems (a), (b) and (i) essential to meet due process requirements, while consideration will be given to (c), (d), (e), (f), (g) and (h). Factor (d) seems to be redundant in that it is included in (b). Factors (e), (f) and (g) are the hardship criteria as they affect the defendant, the claimant, or the witnesses and material evidence. Actually these factors seem to be more related to making a determination of whether or not the doctrine of forum non conveniens applies than they do to determine whether or not jurisdiction has attached. Since a liberal trend in jurisdiction is evolving, these factors should have a lessening weight in the ultimate determination because of decreasing hardships. But they should certainly be considered to prevent gross miscarriages of justice.

Subsection (1) (contract made or to be performed in this state) of section 55-145(a), the minimum contact statute, has been held valid as the sole basis for granting jurisdiction to North Carolina courts, as have subsections (3) (reasonable expectation goods will be used in this state) and (4) (tortious conduct in this state). The courts have yet to rule on the validity of subsection (2) (business solicited in this state) alone as a basis for jurisdiction, but they have held it valid in conjunction with one of the other subsections in some cases.


265 N.C. at 56, 143 S.E.2d at 231.


Painter v. Home Fin. Co., 245 N.C. 576, 96 S.E.2d 731 (1957). The defendant was guilty of wrongfully taking plaintiff's automobile by duress without any legal process or right, and of invading plaintiff's privacy causing public humiliation.

Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958); Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963). In Worley's the court found jurisdiction on basis of §§ 55-144, -145(a) (1)-(3). The defendant's representatives had personally solicited the plaintiff to handle defendant's product in North Carolina. In Farmer the court found jurisdiction on the basis of § 55-145(a) (1)-(4). The defendant had solicited its orders by advertisements in Billboard magazine and also had sent mimeographed lists of products for sale to customers in North Carolina.
It has been held unconstitutional to apply subsection (3) to the facts of a particular case on two occasions,\(^4\) and in conjunction with subsection (4) on one occasion.\(^4\) Subsection (4) has been

\(^4\)Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). In *Putnam* the plaintiff, a North Carolina resident, sued the defendant, a Delaware corporation having its principal place of business in Pennsylvania, for libel and invasion of privacy for an article in defendant’s magazine. The defendant had sold the magazines to independent wholesalers in North Carolina, but title had passed outside the state. Defendant’s only contact with North Carolina was that three of its representatives entered North Carolina two to five times a year to promote sales to news dealers and television stations. The court held that the defendant did not have sufficient ties with North Carolina to satisfy due process requirements and that N.C. GEN. STAT. § 55-38.1(a)(3) [now § 55-145(a)(3)] would be unconstitutional if applied to the facts in this case. *Id.* at 443, 96 S.E.2d at 454. The court in *Worley’s* said that did not mean that the statute would not be constitutional under a different set of facts. 167 F. Supp. at 505-06. For a criticism of the court’s decision in *Putnam*, see 7 DUKE L.J. 135 (1958). In *Erlanger Mills* the plaintiff, a North Carolina corporation, placed an order with the defendant, a New York corporation having its principal place of business in New York, for some yarn after plaintiff’s representative visited the defendant’s mill in New York. The contract was accepted in New York and the goods were shipped f. o. b. New York. Plaintiff found some defective yarn in the shipment and sued to recover damages. The defendant’s only contact with North Carolina was that its general manager came to plaintiff’s plant in North Carolina to discuss the complaint. Service was made on the general manager while he was here and not through the Secretary of State as prescribed in § 55-146. The court held that to sustain jurisdiction would be offensive to the due process clause. 239 F.2d at 507. Judge Sobeloff posed this hypothetical:

“To illustrate the logical and not too improbable extension of the problem, let us consider the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires. As in the hypothetical case, the sale in the principal case was ‘with the reasonable expectation that these goods are to be used or consumed in [the vendee’s domicile] and are so used and consumed.’ It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states.”


\(^4\)Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961). The plaintiff, a North Carolina resident, was injured by an object thrown by a lawn mower manufactured by the defendant, an Illinois corporation with its principal place of business in Illinois. The lawn mower was being used by a city employee. The manufacturing defendant had sold the mower to a distributor and independent contractor in Virginia, who had in turn sold it to a retail dealer in Winston-Salem, who in turn had sold it to the city. The manufacturing defendant had no representatives in North Carolina and had never been present in North Carolina. The court said the defendant had no contacts with North Carolina that would make it amenable to process from the courts of North Carolina, based on the *Putnam* decision. *Id.* at 484, 119 S.E.2d at 448.
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held unconstitutionally applied to particular facts in only one case.43

Occasionally the court is faced with a jurisdictional claim based on both the transacting business statute and the minimum contact statute and has decided on the "transacting business" basis, refusing to consider the constitutionality of the subsections of section 55-145(a).44

Only two cases holding application of the statutes to the particular facts of the cases unconstitutional have been decided by the North Carolina Supreme Court.45 On the other hand, in every case except one46 that has been decided in a federal court, sufficient "minimum contacts" have been held to be lacking47 or the defendant corporation has been deemed not to be "transacting business."48

This indicates that the North Carolina Supreme Court is more ready to grant jurisdiction to protect North Carolina residents, quite naturally, and that it has taken the supposedly liberal interpretation

43 Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960). The plaintiff, a North Carolina resident, was injured because of the alleged negligence of the defendant, a South Carolina corporation with its principal place of business in South Carolina, in repairing her car. Defendant's contacts with North Carolina were occasional visits to the Chrysler assembly plant in North Carolina to see new automobiles, for which he was a dealer, and telephoning or writing the regional office in North Carolina. The court said to sustain jurisdiction would be offensive to the due process clause, relying on the Erlanger Mills case. Id. at 3.

44 Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956), see note 17 supra. In Spartan Equip. Co. the trial court found that jurisdiction could be had on the basis of § 55-145(a)(1)-(4), but the appellate court ignored the applicability of § 55-145(a) and found that the defendant was "doing business" in North Carolina. 263 N.C. at 556, 140 S.E.2d at 9. The court made no mention of "transacting business" in the opinion, but did refer to § 55-144. When referring to International Shoe, the court referred to "continuous and systematic activities" instead of "minimum contacts." Ibid.

45 Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). In Atlantic Coast Line R.R. v. J. B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963), the court did not grant jurisdiction because the alleged tort was committed in Virginia instead of North Carolina, so the North Carolina statute was not applicable.


offered by *International Shoe* more to heart than have the federal courts.

The drafters of the Business Corporation Act intended that the local residents should have as much protection as possible.

It is thought the wise policy favors subjecting such foreign corporations to suit here for the convenience of residents of this state where it is *constitutionally* possible, since the alternative is to force our residents to bring their actions in foreign jurisdictions.  

While the decisions in the *Byham* and *Abney Mills* cases are not earth-shaking deviations from a trend, the guidelines furnished by the North Carolina Supreme Court as to what it considers to be "transacting business" in section 55-144 and what constitutes "minimum contacts" in allowing jurisdiction under section 55-145(a) are useful. Nevertheless, the basic problem of applying these concepts to the particular activities of the defendant corporation will continue to confront the court. It is inconceivable that this problem can be alleviated by substitution of legal rule for *ad hoc* judgment.

**Harold D. Colston**

**Criminal Law—Credit for Time Served Under a Vacated Judgment Upon Retrial and Second Conviction**

In the recent case of *State v. Weaver* the North Carolina Supreme Court reversed its former position and allowed the time served in prison by the defendant prior to his collateral attack upon the previous proceedings and subsequent retrial and conviction, to count toward his prison sentence resulting from his second trial.

Defendant was first tried in May 1963 and pleaded *nolo contendere* to a charge of felonious assault. He was sentenced to imprisonment for a term of not less than five or more than seven

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2. *Id.* at 687, 142 S.E.2d at 637.


   Any person who assaults another with a deadly weapon with the intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked under the supervision of the State Highway and Public Works Commission for a period of not less than four months nor more than ten years.