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Solicitation As Doing Business—A Review of New York and Federal Cases

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PERSONAL service of process upon a foreign corporation within the forum state presents two problems. The plaintiff must first assure himself that his adversary is subject to personal service. Ordinarily this amenability to service is a result of doing business within the state of the forum. Next he is obliged to consider if there is, within the jurisdiction, a representative of the corporation who may properly be served with the summons. It is only with the first question that this article will concern itself.1

DOING BUSINESS

It is commonly misconceived that the test of “doing business” is only a quantitative one; for example, that the particular practice relied upon by the plaintiff to establish the court’s jurisdiction must be continuous, systematic and regular; that the corporation must be engaged in the forum state “with a fair measure of permanence and continuity”;2 and that the activity engaged in must be a “substantial part” of the main business of the defendant.3 However, the “doing business” enigma has another facet, for the courts have had much difficulty in deciding what the qualitative test should be—that is, what kinds of activities of a foreign corporation should be held to be of a business nature for the “doing business” requirement.4

1. Three theories have been advanced to sustain personal jurisdiction over corporations foreign to the forum state: (1) The consent theory; (2) The presence theory; (3) The submission theory. Prashker, Service of Summons on Non-Resident Natural Persons Doing Business in New York, 15 ST. JOHN’S L. REV. 1 (1940).

2. See generally, 18 FLETCHER, Cyc. Corp. § 8718 (Perm. ed. 1933); 2 MOORE’S FEDERAL PRACTICE 969 et seq. (2d ed. 1948); Cahill, Jurisdiction Over Foreign Corporations, 30 HARV. L. REV. 676 (1917); Holzer v. Dodge Bros., 233 N. Y. 216, 221, 135 N. E. 268, 269 (1922).


SOLICITATION AS DOING BUSINESS

SOLICITATION OF BUSINESS

By solicitation is here meant that practice of business which is the foundation of sales, a practice perhaps best exemplified by the so-called "drummers" who cover the countryside and procure orders for their employers. Customarily these orders are made subject to acceptance at the home office and are fulfilled by dispatching the product directly to the customer from the home office outside the state.

Solicitation is essential to the success of any large business enterprise dependent upon selling to the public, and is often the vital part of the whole sales transaction. Surely no business man would argue that solicitation is not "doing business." Yet, because of an old Supreme Court decision, courts for years have held that "mere solicitation" is not that type of activity which satisfies the qualitative requirement of "doing business."

The judicial history of solicitation of business as it relates to our jurisdictional problem commenced with Green v. Chicago, B. & Q. Ry. in 1907. The Railway defendant had its business organization and trackage not in the forum state of Pennsylvania but in another jurisdiction. Suit was brought in a Pennsylvania Federal District Court and the defendant denied its corporate presence within the forum. It admitted that the agent who had been served with process was employed to solicit freight and passenger traffic to be transported over its roads, and that for this purpose he was given an office and was furnished clerks and traveling passenger and freight agents who reported to him. He also performed other minor services, but he sold no tickets and received no payment for the transportation of freight. Mr. Justice Moody stated the holding of the U. S. Supreme Court:

"The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

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9. Id. at 533.
Since that time it has become almost axiomatic that mere solicitation does not constitute "doing business." Examination of the Green case reveals, however, that more than solicitation was carried on by the railroad in Pennsylvania, and it is not unlikely that the Supreme Court was influenced in large measure by the fact that suit had been brought on a cause of action which had arisen outside the forum. Moreover, the injury asserted was not a result of the activities carried on within the forum state. Accurate as this analysis may be, however, it is still true that the Green decision stood for years, and as will be shown, may still stand, as the primary precedent for all "solicitation" cases. But that Mr. Justice Moody and his associates may have been actuated by principles of fairness should not be overlooked in the light of recent developments in this field.10

The highest Court handled the question again in 1914, in International Harvester Co. v. Kentucky.11 This case is treated generally as making Green of dubious reliability, but it is difficult to apprehend why this should be so. Admittedly the Court here characterized the earlier decision as an "extreme case," but by the same token it expressly disavowed any intention of overruling what was even at this time showing signs of being a problem child of adjective law.12 Instead, the Court distinguished the earlier case and found that in addition to solicitation of orders there was, as a result of these orders, a continuous stream of shipments of machines into Kentucky, the forum state. It was also pointed out that the agents in Kentucky were authorized to receive payment in money, or draft, and could take notes payable at Kentucky banks.13 Two years later, in another "doing business" case, the Supreme

10. Farmers’ Merchants’ Bank v. Federal Reserve Bank, 286 Fed. 566, 568, 579 (E. D. Ky. 1922) sets out a detailed analysis of the Green case along the lines here suggested. For a modern exposition of the "fair play" formula see International Shoe Co. v. Washington, 326 U. S. 310, 319 (1945); Hutchinson v. Chase & Gilbert, 45 F. 2d 139, 141 (2d Cir. 1930); Frene v. Louisville Cement Co., 134 F. 2d 511, 518 (D. C. Cir. 1943) (concurring opinion of Judge Edgerton). See also Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148 (S. D. N. Y. 1915); cf. Davega v. Lincoln Furniture Co., 29 F. 2d 164, 166 (2d Cir. 1928): "Nor is the fact . . . that the cause of action asserted here arose in New York material, unless the corporation was doing business in the sense that is required to subject it to jurisdiction. . . ." Bomze v. Nardis Sportswear Inc., 165 F. 2d 33, 35 (2d Cir. 1948), reversing 68 F. Supp. 156 (S. D. N. Y. 1946): "We understand that since Tauza v. Susquehanna Coal Co. . . . the law of New York has been that a foreign corporation is either 'present' or it is not; and once it is found to be 'present,' it becomes subject to process, regardless of whether the particular liability in suit has arisen out of the activities which collectively constitute the 'presence.'"

11. 234 U. S. 579 (1914).
12. Id. at 586.
13. Judge Learned Hand stated in Hutchinson v. Chase & Gilbert, 45 F. 2d 139, 141 (2d Cir. 1930): "Possibly the maintenance of a regular agency for the solicitation of
Court did not feel constrained to mention this decision which had made *Green* "somewhat doubtful," and, quite to the contrary, cited the latter holding to support a finding that a foreign corporation defendant was not "doing business" within the state of New York.\(^{14}\) Admittedly the reference made by Mr. Justice Brandeis was dictum, but the Court nevertheless made clear that it regarded *Green* as being of full and undiminished vigor, *International Harvester* notwithstanding.\(^{16}\)

The next year, 1918, in *People's Tobacco Co. v. American Tobacco Co.*,\(^{16}\) the high tribunal reaffirmed its faith in the *Green* decision when it vacated service of process upon a soliciting foreign corporation, again because "mere solicitation" was not "doing business" for purposes of corporate "presence." *International Harvester Co. v. Kentucky* was shrugged off as involving in addition to a continuous course of solicitation the factor of authority on the part of agents to receive payments on behalf of their employer.\(^{17}\)

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\(^{15}\) That this was dictum seems clear. The points of contact within the assertive state were certain displays of the defendant company's name in a local terminal maintained by another railroad, a New York City telephone listing paid for by that other railroad, and finally, the presence of certain subsidiary companies within New York State. Some evidence was also introduced to show that the defendant company connected outside New York with carriers operating within New York and that the local carrier sold tickets for the through trip. In his opinion Mr. Justice Brandeis gave no intimation that he saw here any issue of solicitation.

\(^{16}\) 246 U. S. 79 (1918). Here the so-called solicitors did not directly obtain contracts. Instead they promoted purchases by retailers from jobbers, and the latter would then buy from the employer of the agent. W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723 (1915).


A newspaper maintaining a Washington, D. C. office for collecting and reporting news, was held not to be doing business within the District, Neely v. Philadelphia Inquirer Co., 62 F. 2d 873 (D. C. Cir. 1932). This was held to be so even where its chief correspondent
Solicitation in the Lower Federal Courts

After the Tobacco Company decision of 1918 even the most unyielding had to acknowledge that International Harvester was to be viewed in a new light, and the courts commenced to use it as the bulwark for the thesis that solicitation and something more constituted “doing business.” The lower federal courts, and the state courts as well, were to spend many years and decide many cases in what appears to have been an unsuccessful attempt to arrive at a definitive rule of law regarding what practices, when added to solicitation, sufficed to satisfy the qualitative test of “doing business.”

In Davega v. Lincoln Furniture Co. a foreign corporation employed a soliciting agent within New York State and he sent his orders to the home office for acceptance. Shipments were then made to customers f.o.b. the home office. The agent rendered no invoices and kept no accounting records, but upon occasion he would try to assist in the collection of overdue accounts and was empowered to make adjustments subject to company approval. Infrequently he would sell goods which had previously come into New York as samples. The court stated unequivocally that mere renting of an office and solicitation of business in a foreign state were insufficient to make for corporate “presence” there. Furthermore, those additional activities, generally required beyond mere solicitation, were not engaged in by the defendant in the case at bar. Hence service was vacated. The court was of the mind that settlement of claims by the soliciting agent was too sporadic and that the sales of samples formed too small a part of the total business of the corporation to be considered as a material addition to the solicitation. Here then was what the “solicitation plus” formula had conceived. We were back at the quantitative test, and the additional activities had to be regular and not sporadic; and there was also the suggestion that they had to constitute a substantial part of the total business of the foreign corporation.

18. 29 F. 2d 164 (2d Cir. 1928). Judge Augustus Hand wrote the opinion in which Judges Learned Hand and Swan joined. This was an action which started in the New York County Supreme Court and was removed to the United States District Court. The latter had then set aside service of process.

19. Id. at 167: “The acts had no substantial bearing upon the general conduct of its business.” The court distinguished the case at bar from Penn. Lumbermen’s Mutual Fire Ins. Co. v. Meyer, 197 U. S. 407 (1905). In the latter case it had been held that sending agents into a foreign state to adjust fire insurance losses on policies covering property within that state was doing business. Judge Hand had this to say: “But such adjustments are unlike the settlement of occasional disputes with customers, who have purchased merchandise, and are rather the inevitable and constant incidents of an insurance business.
Two years later, and in the same Circuit Court of Appeals, the vexing question came up again. The foreign corporation defendant leased an office in New York City from which certain soliciting activities were directed. A lone stenographer was employed in the office. It also appeared that a small bank account was maintained in New York. The directors and shareholders always met in Boston, except that once, on two successive days the directors met in New York, and on one of these days the shareholders also convened there. The name of the corporation of course appeared in the appropriate New York City telephone directory and also upon the office door. On the other hand, all corporate records were in Boston and all the directors resided there. The court again decided that there was not sufficient additional business activity over and above solicitation to justify a departure from the Green rule.

In his opinion, Judge Learned Hand laid down a standard for guidance in "doing business" cases, a standard which was to find expression several years later in a Supreme Court decision. It was the standard of fairness. He felt that in the final analysis it was fairer that the plaintiffs should be required to go to Massachusetts than to hold that the defendant should be burdened with defending in New York: "... all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it."

While the hammering out of rules of law to accord with the Green rule was continuing apace, the rule itself was undergoing severe criticism in Frene v. Louisville Cement Co., a case in which the late Mr. Justice Rutledge, then a Circuit Court of Appeals judge, wrote the majority opinion. In deciding that solicitation and something more constituted "doing business," he stated:

"The tradition has grown that personal jurisdiction of a foreign corporation cannot be acquired when the only basis is 'mere solicitation' of business within... We regard sporadic settlements of claims such as are disclosed in the present record as entirely different. ..." 29 F. 2d 164, 166 (2d Cir. 1928); cf. St. Louis S. W. Ry. v. Alexander, 227 U. S. 218 (1913).

20. Hutchinson v. Chase & Gilbert, Inc., 45 F. 2d 139 (2d Cir. 1930). Judges L. Hand, who wrote the opinion, A. Hand and Swan sat in this case. This cause also was removed from the state court.


22. 45 F. 2d 139, 142 (2d Cir. 1930).

the borders of the forum's sovereignty. And this is true, whether the solicitation is only casual or occasional or is regular, continuous and long continued.²⁴

He then proceeded to show that jurisdiction had been extended to include many types of occasional acts and he therefore reasoned that the rule of Green was a legal anachronism. He also devoted a part of his opinion to the stressing of the vital part solicitation plays in business affairs, and he closed with a plea for an abandonment of the "mere solicitation" rule, the integrity of which "has been much impaired by the decisions which sustain jurisdiction when very little more than 'mere solicitation' is done."²⁵

In Barnett v. Texas & Pacific Ry. the Court of Appeals for the Second Circuit found the requisite additional activities over and above solicitation and sustained service.²⁶ The acts deemed material were the selling of tickets for transportation on the defendant's own lines and the issuing of bills of lading, all of which was done in New York, the forum state. The court denied that the defendant was within the Green rule.²⁷

There is an implication in at least one federal case that employment of independent brokers to solicit business may cause the courts to require additional activities to an even greater degree than ordinarily, before they will find corporate "presence."²⁸ In this case there was

²⁴. Id. at 514.  
²⁵. Id. at 517 (referring to Farmers' Merchants' Bank v. Federal Reserve Bank, 286 Fed. 566 (E. D. Ky. 1922); see note 10 supra).  
²⁶. 145 F. 2d 800 (2d Cir. 1944). Judge Frank wrote the prevailing opinion in which Judge Clark joined. Judge Swan dissented on the basis that the case was controlled by Philadelphia & Reading Ry. v. McKibbin, 243 U. S. 264 (1917). Judge Frank stated: "Here there were more than 'slight additions', i.e., the actual selling of tickets for transportation on defendant's line and the issuance of bills of lading in New York (to say nothing of the handling of complaints). It is urged that not many of these acts occurred each year. But those acts were authorized by defendant which put no limit on the number of such acts that its employees might perform. We think that the authorized performance of such acts constitutes doing business in New York, even if the volume of freight and passenger business initiated in New York is not as great as, we may surmise, defendant would like it to be." 145 F. 2d 800, 804 (2d Cir. 1944).  
²⁷. The defendant had apparently stated that it had established its New York office as well as its mode of conduct in reliance upon Green. Judge Frank was unsympathetic. He said that International Harvester and Hutchinson v. Chase & Gilbert had given warning that such precedents as Green were not likely to protect the defendant, since it carried on other activities in addition to solicitation. Significantly, Judge Frank made mention of Mr. Justice Rutledge's opinion in the Frene case, but stated that he was not citing it as precedent because it dealt with a commercial business and not with a railroad.  
²⁸. Deutsch v. Hoge, 146 F. 2d 201 (2d Cir. 1944), cert. denied, 325 U. S. 852 (1945). The defendants herein were individuals from Ohio who were in "business" in New York, and jurisdiction was asserted over their persons by virtue of service of process pursuant to N. Y. Civ. Prac. Act § 229-b: "When any natural person or persons not residing in
present a material contact within the foreign state, namely, authority in the soliciting agent to accept funds from purchasers, which in *International Harvester* had been very persuasive on the Supreme Court. Nonetheless, service was vacated because the defendant was held not to be within the jurisdiction of the court.

Seldom has a decision been arrived at in a more interesting manner than was that of Judge Rifkind in *Snyder v. J. G. White Engineering Corporation*. A third party defendant here sought to vacate service this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served, etc. . . ." Judge Chase wrote the opinion, joined by Judge A. Hand, and stated that "principles determining what is or is not engagement in business by a corporation hold true equally in respect to an individual, and so decisions on that issue are directly in point on the question here presented. . . ." *Id.* at 203. *Accord, N. Y. Automatic Canteen Corp. v. Keppel & Ruof, 195 Misc. 526, 90 N. Y. S. 2d 454 (Sup. Ct. 1949). Cf. Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., 299 N. Y. 205, 211, 86 N. E. 2d 564, 565 (1949): 'The circumstances that the foreign corporate defendant is represented in its local activities by a separate individual or by a separate corporation and not by a directly controlled subsidiary or branch office is not in itself determinative." But *cf. Berman v. Affiliated Enterprises, 17 F. Supp. 305 (D. C. Me. 1936)."

29. The court merely stated that *International Harvester* had been distinguished in the *Davega* decision and that it was distinguishable from the instant case "for the same reasons." *Id.* 146 F. 2d 201, 203 (2d Cir. 1944).

30. In his dissent Judge Learned Hand stated that the statute required that the cause of action upon which suit was brought had to be one which arose out of activity carried on within the state, and that therefore the statute was narrower in scope than "the full power of the state." (citing Hess v. Pawloski, 274 U.S. 352 (1927).) Therefore he would look not to the federal court decisions, which erect constitutional limits, but to the state decisions, *e.g.*, *Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917)*, for construction of the phrase "engaging in business."

A federal court, in deciding whether a foreign corporation is doing business so as to be subject to service, should look not to state but to federal decisions, treating the question as purely one of jurisdiction and within Rule 4 (d) (3) of the Federal Rules of Civil Procedure. Mechanical Appliance Co. v. Castleman, 215 U. S. 437 (1910); Goldey v. Morning News, 136 U. S. 518 (1895); Myers Motors v. Kaiser-Frazer Sales Corp., 76 F. Supp. 291 (D. C. Minn. 1948); Hedrick v. Canadian Pac. Ry., 28 F. Supp. 257 (S. D. Ohio 1939). There would appear to be some question, however, where process is served pursuant to Rule 4 (d) (7) of the Federal Rules of Civil Procedure which states that service is sufficient "if the summons and complaint are served . . . in the manner prescribed by the law of the state in which the service is made. . . ." *Kelly v. Delaware, L. & W. R. R., 170 F. 2d 195, 196 (1st Cir. 1948)."

The dissenting opinion in *Deutsch v. Hoge*, 146 F. 2d 201, 203 (2d Cir. 1944), also carries a warning that care must be taken to distinguish between what will support service, from what will be a defense on the merits when a foreign corporation, unlicensed to do business, sues upon a contract made within the forum state.

of process because it contended it was not "doing business" within New York State, where service had been made. It maintained an office in New York City and the name of the company appeared upon the office door and in the Manhattan telephone directory. Counsel for the company had planned well in avoiding local contacts. All orders obtained by the solicitor were subject to acceptance at the main office; and all shipments were made directly from the home office to the customer. The latter made his remittance not to the solicitor but to the home office. However, the solicitor upon occasion would receive a check from a customer (which he would immediately transmit to the home office), and very infrequently the solicitor investigated complaints, although adjustments were effected by the home office. The solicitation had continued for several years and had resulted in a continuous stream of sales to customers in New York State.

First, Judge Rifkind reviewed the leading decisions in the Second Circuit and concluded that there was a hopeless division of opinion among the judges as to what constituted "doing business." He next cast his eyes in the direction of the Supreme Court cases. Referring to a minority statement in Georgia v. Pennsylvania R. R., he discovered that the late Chief Justice Stone, ex-Justice Roberts, and Justices Frankfurter and Jackson had there stood for the following proposition:

"A corporation both is 'found' and 'transacts business' in a district in which it operates a railroad or in which it maintains an office for the solicitation of freight or passenger traffic."

To these four Justices he added Justice Rutledge on the basis of his Frene opinion, and Judge Rifkind thereby secured a majority of the then Supreme Court bench which apparently subscribed to the view that "the maintenance of an office, plus the regular solicitation of busi-

said: "The current development of the doctrine of what constitutes doing business leaves little doubt that defendant is doing business in this district. . . . I recently took note of the new trend in Snyder v. J. G. White Engineering Corp. . . . Since then, that trend has been confirmed by the Supreme Court. International Shoe Co. v. State of Washington, 1945, 326 U. S. 310. . . ."

32. He referred to all of the Second Circuit cases heretofore discussed and then stated that he found such a division of opinion on what constituted doing business that he was obliged to make a forecast; "and to use for such purpose whatever straws are available."

33. 324 U. S. 439 (1945). Georgia, by a motion for leave to file a bill of complaint, sought to invoke the original jurisdiction of the Supreme Court under Art. III, § 2 of the Federal Constitution. The Court granted the motion in this case in which was involved a charge by the state that certain railroads had conspired in restraint of trade in the fixing of rates discriminating against Georgia. As a subsidiary issue the question was presented whether the defendant was doing business in Georgia.

34. Id. at 471.
ness, constitutes 'transacting business,' for the purpose of subjecting a corporation so engaged to a given jurisdiction.\textsuperscript{35}

\textbf{INTERMENT OF THE GREEN RULE?}

To those who were seeking to excise the rule of \textit{Green v. Chicago, B. \& Q. Ry.} from our body of jurisdictional principles of law, \textit{International Shoe Co. v. Washington} came as great encouragement.\textsuperscript{30} There the defendant company was supplying each of its thirteen Washington salesmen with a line of samples to be displayed to prospective purchasers. Occasionally, sample rooms were rented by these salesmen, and the cost of such rentals was paid by the company. The authority of the salesmen was limited to exhibiting their samples and soliciting orders from customers, at prices and terms fixed by the defendant. Orders were transmitted to the home office for acceptance or rejection, and when they were accepted they were filled by shipments directly from the home office to the customer. No salesman had authority to enter into contracts or to make collections.

The Supreme Court held that the activities of the defendant were sufficient to constitute "doing business," and that therefore the corporation was amenable to suit in the Washington state courts to recover payments due to the State Unemployment Compensation Fund.

The opinion echoed the "fair play" sentiments of Judge Learned Hand, referred to at an earlier point in this paper. For Chief Justice Stone, author of the majority opinion, the test was not whether the activity was "a little more or a little less." Instead, he saw satisfaction of due process as depending "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."\textsuperscript{37} He also had recourse to the often maligned doctrine of "obligations commensurate with benefits" in the following passage in his opinion:

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within


\textsuperscript{36} 326 U. S. 310 (1945).

\textsuperscript{37} \textit{Id.} at 319; see Latimer v. S/A Industrias Reunidas F. Matarazzo, 175 F. 2d 184 (2d Cir. 1949).
the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. 38

Did this mean that the general rule of the Green case, namely, that mere solicitation of itself was not doing business, was now being discarded in favor of the "fairness" rule? Was International Shoe to be held closely to its facts, the most important of which indicated that the cause of action arose out of activities carried on in the assertive state? It will be recalled that in Green, suit had been brought in Pennsylvania on a cause of action which arose outside the state, and it was because of this distinction between these two cases that it was pointed out earlier that the "mere solicitation" rule of Green should not be accepted without some reservations. 39 It may well be that the Supreme Court, when faced with the problem, will hold that because of the distinction above mentioned, Green and International Shoe stand side by side.

Important in this regard is the case of Lasky v. Norfolk & W. Ry. 40 This was an action for damages for wrongful death and the court cited International Shoe to support a holding that the defendant corporation was "present." 41 The facts of the case placed it almost on all fours with Green, and it was clear that the cause of action had arisen out of activities carried on outside the jurisdiction of the court. Nevertheless the rule of fairness, as expounded by Chief Justice Stone, was referred to and it weighed heavily in the determination of the court. Obviously the court did not feel that International Shoe should be confined to tax matters, 42 and there is no evidence to be gleaned from the opinion that the court hesitated even slightly in rendering its decision because the cause of action had arisen outside of its jurisdiction. 43

38. Ibid.
39. Id. at 318.
41. The federal district court had vacated process upon the authority of Philadelphia & Reading Ry. v. McKibbin, 243 U. S. 264 (1917), and counsel for the railway supplemented the record on appeal with the Green case.
42. Cf. Nippert v. City of Richmond, 327 U. S. 416, 426 (1946): "In view of the ruling in International Shoe Co. v. Washington . . . we put aside any suggestion that 'solicitation,' when conducted regularly and continuously within the State, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable." (italics supplied).
43. There was another basis for reaching the same decision in this case. The defendant railroad had trackage within the Southern District of Ohio, and its solicitation activities occurred in the Northern District. Service was made in the Northern District, the venue of the action. Under Rule 4 (f) of the Federal Rules of Civil Procedure "all process may be served anywhere within the territorial limits of the state in which the district court
There was an attempt made by a federal district court, in *Bomze v. Nardis Sportswear, Inc.* to circumscribe very narrowly the Supreme Court decision. The court vacated process and found the *Shoe* case inapplicable since it merely decided that a Washington state court's construction of a local statute was not violative of the Fourteenth Amendment. Furthermore, suggested the court, "the fact that the proceeding concerned a special tax statute might preclude the application of the decision in general jurisdictional matters." On appeal to the Court of

is held" (in the absence of special statute), and the court felt that inasmuch as the summons could have reached to the Southern District, there was a necessity for upholding the service of process; *cf.* Mississippi Publishing Corp. v. Murphree, 326 U. S. 438 (1946).


44. 68 F. Supp. 156 (S. D. N. Y. 1946).

45. *Id.* at 158. The district court judge pointed out that service of process under the statute there under construction could be made by mail when the employer could not be found within the state; and that therefore it might well be that the "presence" required in order to be subject to the tax is "somewhat less than the usual contacts requisite to general jurisdiction."
Appeals of the Second Circuit, the lower court was reversed. Judge Learned Hand, writing the opinion, found that under the construction given "doing business" by the New York state courts, the defendant was "present." Because the cause of action had arisen out of activities carried on within the jurisdiction of the court, any federal question was set at rest. In his discussion of International Shoe, Judge Hand gave no intimation that he considered that case limited in its application for the reasons advanced by the district court.

In view of the generally favorable reception accorded the Shoe decision, it is not too much to hope that the quick rule of thumb provided by the Green rule will soon have expired. The new explanation of corporate presence will certainly have a place for the "mere solicitation" axiom, but only as one factor figuring in the final decision. "Solicitation plus," the formula engendered by the International Harvester decision, seems destined for like treatment. The constitutional limits of the "doing business" concept will have been extended, and the courts will be at liberty to accredit great persuasive force to solicitation which is regular, continuous, and responsible for substantial sales; and this will also be true, of course, of those causes of action which arise out of the solicitation carried on within the state of the forum. The businessman to whom solicitation bulks large in the corporate scheme of things may presently find the courts in full accord with his way of thinking.

Counsel seeking to defeat defendant's motion to dismiss will generally follow the same procedure pursued under the "solicitation plus" doctrine. As much evidence as possible will be amassed pointing to the end that it will be more in keeping with principles of fairness to retain jurisdiction over the defendant. All the additional activities, heretofore heaped atop "mere solicitation," under present day procedure will still prove useful where available to the plaintiff. To this extent all of the earlier cases are important. Green has not been overruled; but before long it may be found to have been quietly interred.

SOLICITATION AND DOING BUSINESS IN NEW YORK STATE

In a state court action in which the validity of service of process is challenged, the first problem to resolve is purely one of state law: under the circumstances does the forum state treat a foreign corporation as being "present"? The extent to which a state desires to exercise jurisdiction over a foreign corporation—and there is nothing that compels such action—is a matter for each state to decide. It is only after juris-

46. 165 F. 2d 33 (2d Cir. 1948).
47. But see Goldey v. Morning News, 156 U. S. 518, 520 (1895).
48. See note 29 supra.
diction has been asserted that the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the Federal Constitution.  

The time-honored Tauza v. Susquehanna Coal Co. is accepted as stating the New York test of “doing business”: that the corporation must be engaged in the forum state with a “fair measure of permanence and continuity,” and that the activity carried on must be regular and systematic. Important from our point of view, Tauza involved a “regular and systematic” course of solicitation which resulted in a steady stream of shipments into New York State, not unlike the Supreme Court case of International Harvester v. Kentucky mentioned earlier. The usual devices were resorted to in order to avoid amenability to service. All orders obtained by the solicitors had to be approved by the Pennsylvania home office, and shipments were made directly from the home office to the customers. The latter made their payments directly to the home office. On the other side of the ledger, the defendant maintained an office and a bank account in New York, the latter being used for the payment of salaries and for petty cash disbursements incidental to office upkeep. That the cause of action sued upon had no relation to the business transacted within the forum state was held not to cause a failure of jurisdiction.

Holzer v. Dodge added the point that the business carried on within the assertive state must be a substantial part of the whole, and the holdings of this case and Tauza have proved to be the foundation for the law of “doing business” in New York.

In any solicitation case where there is no resultant flow of goods into New York, or where the solicitation is less regular, Tauza of course would not be conclusive in its application. In such cases the method generally followed is to use as a point of departure the language of Tauza which laid down as the test of corporate “presence” whether activities sufficiently extensive and substantial are carried on within the state. Thence the courts proceed in many different ways, and seemingly forget at times that the many federal court cases in this field do not purport to advise how far the New York courts should go, but rather how far they may go before Constitutional limits are transcended. Put another


The court in the Pulson case, although it applied state law, suggested that the constitutional boundaries in existence when the state law was laid down had been extended by International Shoe.

50. 220 N. Y. 259, 267, 115 N. E. 915, 917 (1917).

51. 233 N. Y. 216, 221, 135 N. E. 268, 269 (1922).
way, the state courts frequently depend upon federal cases upholding jurisdiction to support their own decisions. This coalescence of how far New York will go, with how far it may go, should not be lost sight of when one attempts to predict the outcome of any litigation concerning solicitation of business as “doing business.”

**VITAL CONTACTS IN NEW YORK**

A study of New York cases reveals that there is a tendency to hold certain contacts vital in influencing a decision that a foreign corporation is “present” within this jurisdiction, when those contacts occur in addition to solicitation that is not of the nature found in the *Tauba* case. Perhaps use of the word “vital” is not strictly accurate since the courts, upon occasion, have said that it is only the cumulative effect of the contacts which is significant; but it certainly can be said that certain factors are more important than others.

In addition to soliciting business, many foreign corporations maintain offices in New York. The New York Court of Appeals made much of the fact that one such corporation with an office in New York City paid an occupancy tax to the city, and stated that “payment is consistent only with the doing of business here.” While the appropriate section of the City Code calls for payment when premises are occupied “for any gainful purpose,” it still is difficult to comprehend why payment in itself should be so important. We know that merely maintaining an office in addition to solicitation is insufficient to make for “doing business.”

The highest court of New York has also held that a foreign corporation is not within the state solely by reason of the fact that it is wholly owned by a New York corporation, even though the latter may control all of its policies. This is a realistic approach and squares with the holding that a corporation is not to be considered “present” solely by reason of the fact that its subsidiary is present there.

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54. N. Y. C. ADMIN. CODE c. 17, tit. C § C17-4.0(a) formerly c. 44, tit. B § 1012-1.0(a).
55. This is the holding of the *Green* case. Here of course a federal case is important since it was decided that to hold a foreign corporation amenable to process under such circumstances would be a denial of due process.
57. That a subsidiary company does business within a state does not warrant a finding that the parent is present there for purposes of service of process: Consolidated Textile Corp. v. Gregory, 289 U. S. 85 (1933); Peterson v. Chicago, Rock Island & Pac. Ry.,
Remembering that it is the cumulative effect of all the contacts which is important, and that rarely, if ever, will one be determinative, the corporation which desires to avoid New York "presence" should religiously avoid any reference in reports, advertising or letterheads to a New York office. Telephone directory listings should be omitted, and the same applies to listing in the directories found in building lobbies. Use should be made of independent solicitors, if necessary, to avoid these particular contacts.

Profiting from one lesson of International Shoe, frequently cited by New York courts, solicitors should preferably be non-residents of New York. Of course they should have no authority to contract in connection with any matter in behalf of their employer, and all orders which they obtain should be made subject to approval at the home office so that the contract is completed outside the state. In addition, they should be enjoined from taking any payments; instead, all payments should be made directly to the home office by the customer. Naturally, shipments should be made f.o.b. the home office situs to the customer directly, and there should be no intrastate shipments. The solicitors should not settle claims or adjust complaints.

There should be no bank account maintained within New York, if this is possible without causing unreasonable inconvenience, and salaries, rents and taxes can be paid directly from the home office. Probably a stock transfer office can safely be kept within the state, and the same is true of a financial office for paying interest on corporate bonds. Certainly these things are not a part of the business conducted by the commercial corporation here under discussion.

No corporate books should be allowed to rest within the state, and

59. Name listings alone are of negligible importance, but when added to other contacts they may become material. McCaskell Filters Inc. v. Goslin-Birmingham Mfg. Co., 81 N. Y. S. 2d 309 (Sup. Ct. 1948).
61. Barnett v. Texas & Pacific Ry., 145 F. 2d 800 (2d Cir. 1944); Deutsch v. Hoge, 146 F. 2d 201 (2d Cir. 1944), cert. denied, 325 U. S. 852 (1945); Davega v. Lincoln Furniture Co., 29 F. 2d 164 (2d Cir. 1928).
64. Toledo Rys. & Light Co. v. Hill, 244 U. S. 49, 53 (1917).
there should be no stock of inventory in storage here.\textsuperscript{65} Samples may be shipped in to solicitors, and may even be sold if such sales occur very infrequently, although the latter act should be avoided where possible.\textsuperscript{66} However, the use of permanent sample rooms for display of wares with the corporate principal paying the rent is enjoined under \textit{International Shoe}.

Carriers cannot issue bills of lading or sell passenger tickets in addition to solicitation of traffic.\textsuperscript{67} What is more, as little service as possible should be given to the customer in arranging for through traffic. Obviously no trackage can be located within New York.

Executives of our foreign corporations should not maintain any offices within New York, and as few officers and directors as possible should reside there. Boards of directors, executive committees, and even stockholders should conduct their meetings elsewhere than in New York.\textsuperscript{68}

\textbf{CONCLUSION}

It is still impossible to state with assurance that \textit{Green} and its “mere solicitation” holding has been absorbed by the more expansive approach to the solicitation problem taken in \textit{International Shoe}. The reception accorded the later case does indicate, however, that before long, if it has not already occurred, “mere solicitation” may be sufficient for corporate “presence” if it is carried on in such a manner that it becomes “fair” that the corporation be subjected to the jurisdiction of the local courts. \textit{Green} surely is out of line with the realities of business affairs, and should be discarded in favor of the “fairness” test.

Cases in the upper and lower courts of New York State indicate that those courts have just about decided that the limits of how far they will go and how far they can go constitutionally are co-terminous. This is to be gathered from the frequency with which federal cases, deciding constitutional questions, are cited to support state court holdings. If this theory is correct, a knowledge of state and federal decisions is a requisite for one planning the scheme of business for a large corporation.\textsuperscript{69}

\textsuperscript{66.} Davega v. Lincoln Furniture Co., 29 F. 2d 164 (2d Cir. 1928).
\textsuperscript{67.} Barnett v. Texas & Pacific Ry., 145 F. 2d 800 (2d Cir. 1944).
\textsuperscript{68.} Pomeroy v. Hocking Valley Ry., 218 N. Y. 530, 113 N. E. 504 (1916); cf. Garson v. Richmond, F. & P. R. R., 82 N. Y. S. 2d 637 (Sup. Ct. 1948) (residence of two of nine directors within New York and meeting of Board there in itself insufficient. \textit{Pomeroy v. Hocking Valley Ry.}, supra, distinguished because there people were employed in New York and solicitation was carried on).