COURT OF APPEALS
OF THE STATE OF NEW YORK

ON

APPEAL FROM APPELLATE DIVISION—FIRST DEPARTMENT

GEORGE TAUZA,
Plaintiff-Respondent,

against

SUSQUEHANNA COAL COMPANY,
Defendant-Appellant.

PAPERS ON APPEAL

KELLOGG & ROSE,
Attorneys for Defendant-Appellant appearing specially only as stated in the Notice of Appeal,
Office and Post Office Address:
No. 115 Broadway,
Borough of Manhattan,
City of New York.

JOSEPH LEVY,
Attorney for Plaintiff-Respondent,
Office and Post Office Address:
No. 27 William Street,
Borough of Manhattan,
City of New York.

LAPLANTE & DUNKLIN PRINTING CO.
24-26 South William Street
New York

Jan. 10, 1917 - Franklin Kreiss for Applt.
Frank J. Tullock for Respt.

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Notice of Appeal.

NEW YORK SUPREME COURT

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

2

SIRS:

PLEASE TAKE NOTICE that the defendant Susquehanna Coal Company hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order of Hon. Thomas F. Donnelly, one of the Justices of the New York Supreme Court, New York County, dated the 17th day of May, 1916, and filed in the office of the Clerk of the County of New York on the 17th day of May, 1916, denying the motion made by the 3
said defendant Susquehanna Coal Company to set aside, vacate and hold for naught the alleged service of the summons and complaint claimed to have been made on the said defendant on the 11th day of January, 1916, as more particularly set forth in said order, and the defendant Susquehanna Coal

Company hereby appeals from the whole of said order and each and every part thereof.

Dated, New York, May 18th, 1916.

Yours, &c.,
KELLOGG & ROSE,
Attorneys for Defendant Susquehanna Coal Company, appearing specially for the purpose of the motion heretofore made herein to set aside the alleged service of the Summons herein and appearing specially for the purpose of this appeal and not appearing generally for the said defendant Susquehanna Coal Company in this action.

To:

JOSEPH LEVY, ESQ.,
Attorney for Plaintiff,
27 William Street,
New York City.

WILLIAM F. SCHNEIDER, ESQ.,
Clerk of the Supreme Court
in and for the County of New York.

Order Appealed From.

Index Number 2464. Year 1916

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

SPECIAL TERM—PART I.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

Present:

HON. THOMAS F. DONNELLY, *Justice.*

The following papers, numbered 1 to 16, read on this motion, argued this 16 day of May, 1916. Calendar No. 128:

	Papers Numbered
Order to Show Cause and Affidavits Annexed	1 to 6
Answering Affidavits	7 to 8
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Stipulations	9 to 13

Upon the foregoing papers this motion is denied. (As to service see Jackson *vs.* Schuylkill Silk Mills, 92 Misc. 442.)

Dated May 17th, 1916.
Plaintiff's Brief.
Defendant's Brief.
Filed May 17, 1916.

T. F. D.,
J. S. C.

10 **Order to Show Cause, read in Support of Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
11 *Defendant.*

Special Term, Part I. Papers Submitted May 16, 1916. No. 1.

Upon the annexed affidavit of Abram J. Rose, verified the 21st day of January, 1916, the affidavit of George H. Ross, verified the 20th day of January, 1916, the affidavit of Walter Peterson, verified the 20th day of January, 1916, with the papers thereto annexed, the Summons herein, dated the 8th day of January, 1916, and the affidavit of service thereof, and upon motion of Kellogg & Rose, appearing specially for the defendant Susquehanna Coal Company for the purpose of this mo-
12 tion only and for no other purpose, and not appearing generally for the said defendant Susquehanna Coal Company.

Let the plaintiff, or his attorney, show cause at a Special Term, Part I, of this Court, to be held at the County Court House, in the Borough of Manhattan, City, County and State of New York, on the 1st day of February, 1916, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the pretended service of the summons herein upon the defendant Susque-

hanna Coal Company should not be set aside, vacated and held for naught, upon the ground that said alleged service is in violation of the Constitution and Laws of the United States, particularly Section I of the Fourteenth Amendment of the Constitution of the United States, the alleged cause of action, if any, for which this suit is brought having arisen outside of the State of New York, and said alleged cause of action, if any, not having arisen out of any business, if any, which the said defendant Susquehanna Coal Company may be doing within the State of New York, upon the further ground that no service of said summons was made upon any person designated or specified by Section 432 of the Code of Civil Procedure, the defendant Susquehanna Coal Company being a foreign corporation, and for such other and further relief as to the Court may seem just and proper.

It is further ordered that pending the hearing of this motion and until the hearing and determination thereof and the entry and service of any order that may be entered thereon, all proceedings on the part of the plaintiff be stayed.

Let service of a copy of this order and the annexed affidavits on the plaintiff's attorney on or before the 27th day of January, 1916, be sufficient.

Dated, New York, January 26th, 1916.

JOSEPH E. NEWBURGER,
Justice of the Supreme Court
of the State of New York.

16 **Affidavit of Abram J. Rose, read in Support of Motion.**

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,
against
SUSQUEHANNA COAL COMPANY,
Defendant.

Special Term, Part I. Papers Submitted May 16, 1916. No. 2.

17 STATE OF NEW YORK, }
County of New York, } SS.:

ABRAM J. ROSE being duly sworn, deposes and says, that he is one of the members of the firm of Kellogg & Rose, who appear as attorneys for the defendant Susquehanna Coal Company specially for this motion only and for no other purpose, and not appearing generally for said defendant.

That this motion is one to set aside the alleged service of a summons on one Walter Peterson on the 11th day of January, 1916. That a copy of said summons is hereto annexed and marked Exhibit "C".

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That no copy of the complaint was annexed to the aforesaid summons. That said case is not at issue.

That no previous application has been made to any Court or Judge.

That the reason why an order to show cause is asked for is that it is desired to secure a stay of all proceedings in the action so that there may be no chance of there being any default against the defendant Susquehanna Coal Company.

ABRAM J. ROSE.

Sworn to before me this }
21st day of January, 1916. }
WILLIAM H. O'BRIEN,
Notary Public, Westchester County.

Affidavit of George H. Ross, read in Support of Motion.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA, *Plaintiff,* *against* SUSQUEHANNA COAL COMPANY, *Defendant.*	Special Term, Part I. Papers Sumbitted May 16, 1916. No. 3.

STATE OF NEW YORK, }
County of New York, } ss.:

GEORGE H. ROSS, being duly sworn, deposes and says, that he is the Vice-President and Secretary of the defendant Susquehanna Coal Company.

That the Susquehanna Coal Company does not do business within the State of New York, within what deponent understands to be the meaning of the Corporation Law; that the only transactions which the defendant Susquehanna Coal Company has in the State of New York are the deliveries of such coal or cargoes of coal as may be sold through the efforts of its salesmen, Walter Peterson, or some of the other salesmen employed by this defendant; that all payments for coal sold or delivered by it are made through the Philadelphia office.

The defendant Susquehanna Coal Company is a Pennsylvania Corporation. That said defendant has not secured any certificate from the Secretary of State of the State of New York permitting it to do business within the State of New York.

22 *Affidavit of George H. Ross*

That the principal office of the defendant Susquehanna Coal Company is maintained in the City of Philadelphia, State of Pennsylvania, at which office are kept the cash books of the company and its general books of account. All banking accounts of the Company except a small petty cash account from which strictly petty cash payments are made, being the account mentioned in the affidavit of Walter Peterson, are kept in the State of Pennsylvania. The stock and transfer books of the corporation are kept at its office in the City of Phila-
23 delphia, State of Pennsylvania, where are also kept its regular business ledgers, and from which office all general correspondence in relation to the Company's business is conducted. That all general indebtedness of the Company and, in fact, all its indebtedness excepting for strictly cash disbursements of the New York Sales Agent are paid by checks drawn, signed and forwarded from the Philadelphia office.

That deponent has read the affidavit of Walter Peterson in this action, verified the 20th day of January, 1916. That said affidavit correctly states
24 and sets forth the said Peterson's connection with the Susquehanna Coal Company. That Mr. Peterson's duties are limited to such duties as are stated in his affidavit; that beyond such duties as therein stated, Mr. Peterson has performed no duties or functions for the Susquehanna Coal Company, and has exercised no judgment or discretion in its affairs, and has nothing to do with the general management or conduct of its affairs, either generally or particularly relating to New York State, and, in fact, has no duties or functions except as stated in his affidavit. That the said Walter Peterson, as salesman for the defendant Susque-

hanna Coal Company, is subordinate to deponent as Vice-President thereof, and subject to the directions and to the control of deponent in regard thereto. That Mr. Peterson's duties are defined by deponent, both as to their extent and manner of execution. That deponent desires to incorporate in and make a part of this affidavit the statements contained in the affidavit of Walter Peterson, verified the 20th day of January, 1916, in which he sets forth his duties, employment and connection with the defendant Susquehanna Coal Company, which deponent knows to his own knowledge is a correct statement of said duties.

That deponent, from his knowledge of the affairs of the defendant Susquehanna Coal Company knows that the plaintiff has no cause of action, nor can claim any cause of action arising within the State of New York, as against this defendant.

Wherefore, deponent asks for an order to show cause why said pretended service of said summons should not be vacated, set aside and held for naught, and why in the meantime and until ten days after the hearing and determination of this motion and the entry and service of any order that may be entered thereon, all proceedings on the part of the plaintiff should not be stayed.

That the reason an order to show cause is asked for is in order that a stay may be procured as prayed for.

GEO. H. ROSS.

Sworn to before me this
20th day of January, 1916.

WILLIAM H. O'BRIEN,
Notary Public, Westchester County.
New York Co. Clerk's No. 26.
New York Co. Register's No. 6060.

28 **Affidavit of Walter Peterson, read in Support of Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
29 *Defendant.*

Special Term, Part I. Papers Submitted May 16, 1916. No. 4.

STATE OF NEW YORK, }
County of New York, } ss.:

WALTER PETERSON, being duly sworn, deposes and says that he is a sales agent employed by the Susquehanna Coal Company, the defendant in the above entitled action.

That the defendant is a Pennsylvania corporation.

That deponent is neither the President, Vice-
30 President, Treasurer, Assistant Treasurer, Secretary or Assistant Secretary of the defendant Susquehanna Coal Company, holds no office whatsoever in said Susquehanna Coal Company, and performs no functions similar to those which would be performed by any officer above named, or corresponding to any officer above named under any other name or title.

That neither at the time of the alleged service hereinafter referred to, or at any other time, has deponent ever held or filled any of the offices last referred to.

That deponent is not now and was not at the time of the alleged service of the summons, or at any other time either cashier, director or managing agent of the corporation either within the State of New York, or for the State of New York, or for the State of Pennsylvania, or in any other State or place, nor does deponent in any way exercise the functions or duties of cashier, director or managing agent, or exercise functions or duties similar to those which would be exercised by a cashier, director or managing agent of a corporation, nor has deponent any responsibility or right to exercise judgment or discretion in respect to the affairs of said defendant Susquehanna Coal Company.

That deponent's sole duties as an employee of the defendant are to sell coal. That deponent's employment by the defendant corporation might well be described as sales agent in the sale of coal in the territory adjacent to New York Harbor.

That the said Susquehanna Coal Company does not maintain any yard or docks within the State of New York, and does not maintain any office within the State of New York, except an office at No. 120 Broadway, New York City, where deponent and the other salesmen employed by said defendant make their headquarters.

That deponent in acting as head salesman or sales agent for the defendant Susquehanna Coal Company performs functions and duties and carries on the selling of coal for the said defendant in the following manner: The prices for the different kinds of coal mined and produced by the said Susquehanna Coal Company at its mines in Pennsylvania are named to deponent from time to time by

the executive officers of the defendant Susquehanna Coal Company in Pennsylvania, and deponent's sole function and duty thereafter is to solicit, and if possible, secure orders for the sale of coal so mined, and produced by said defendant, at the prices named and given to him by the executive officers of said defendant.

That deponent has no authority whatever to deviate from the prices named to him as aforesaid, and any question involving deviation from said prices or deduction from said prices, or involving credit or long terms of credit, cannot be settled by deponent, but must be settled by the executive officers of the defendant corporation in Pennsylvania.

That as a matter of fact, the executive officer of the Susquehanna Coal Company from whom deponent receives prices and under whose orders deponent acts,, and to whom deponent submits any question involving deviation from said prices is George H. Ross, the Vice-President and Secretary of the defendant corporation Susquehanna Coal Company. That ordinarily all questions in regard to deviation from the prices named or questions of credit or long terms of credit, or any other matter involving the exercise of discretion and judgment are submitted to the said Ross, or, if for any reason he is absent from the office of the Susquehanna Coal Company in the City of Philadelphia, then to some other officer or officers of the said defendant corporation at Philadelphia.

That deponent in the performance of his duties has no power beyond the making of sales of coal mined by the defendant Susquehanna Coal Company at such prices as may be named by some officer of the said defendant corporation, ordinarily

Mr. George H. Ross, Vice-President and Secretary, at the office of the defendant company in Philadelphia, naming such price, and is governed in making his prices by schedules of possible deliveries given to him in the same manner and by the same officer or officers of the said defendant corporation. 37

That deponent has no power to make any contracts for future or long-term deliveries, he being limited in regard thereto to negotiating tentative propositions which, however, are of no effect or validity, and cannot become contracts until submitted to the executive officers of the said defendant corporation, usually to Mr. George H. Ross, Vice-President and Secretary of the defendant corporation, and until approved by Mr. Ross or some other officer of the said Susquehanna Coal Company, no contract of the character referred to becomes valid or binding. 38

Deponent further states that all payments for coal sold by deponent for the said defendant Susquehanna Coal Company are made directly to the said Company, and deponent has no power to receive or endorse said checks, but same are sent direct to the Philadelphia office of the said defendant corporation. That copies of the ordinary billheads of the said Susquehanna Coal Company for coal sold in New York are hereto annexed and marked "A" and "B". 39

That the only bank account maintained by the defendant within the State of New York is a petty cash account out of which strictly petty cash disbursements are paid. That all payments for coal sold or moneys received therefor are sent to the Philadelphia office of the defendant, and deponent

has no control over the same and all receipts for payments made for coal sold by deponent, are sent out from the Philadelphia office.

That deponent has no authority to exercise judgment or discretion in any matter involving the general affairs of the said Susquehanna Coal Company within the State of New York, and has no authority to exercise judgment or discretion in any matter or thing in connection with the management of the Susquehanna Coal Company, his duties being limited as above set forth. That de-
41 ponent is limited in his authority and duties to making sales of coal under the conditions hereinbefore stated.

That deponent has no authority to bind the said defendant Susquehanna Coal Company in any way as to contracts other than those for the sale of coal, and as to contracts for the sale of coal his authority is limited under the conditions stated above.

That deponent's authority in the sale of coal is further limited in that no sale of coal or contract for coal deliveries is binding upon the defendant corporation until approved by the President or
42 Vice-President of the defendant corporation at the Philadelphia office.

That in soliciting orders all purchasers of coal are given to understand that orders and contracts solicited by deponent are not binding on the defendant Susquehanna Coal Company until approved by the Philadelphia office.

That the paper purporting to be a summons in the above entitled action, a copy of which is hereto annexed, was handed to deponent on the 11th day of January, 1916. That when said paper or sum-

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mons was handed to deponent, the person handing same to deponent asked deponent if he was the Manager of the Susquehanna Coal Company. That deponent stated that he was not the Manager of the Susquehanna Coal Company, that he was a sales agent employed by it. That the person who handed the paper to deponent said that he desired to serve the paper upon deponent, and thereupon left the paper with deponent, notwithstanding deponent's statement that he was a sales agent for the defendant and was not its Manager.

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WALTER PETERSON.

Sworn to before me this
20th day of January, 1916.

WILLIAM H. O'BRIEN,
Notary Public, Westchester County.
New York Co. Clerk's No. 26.
New York Co. Register's No. 6060.

45

46 **Exhibit A, read in Support of Motion.**

MAKE CHECK TO ORDER OF SUSQUEHANNA COAL CO.
REMIT TO TREASURER, 910 COMMERCIAL TRUST BUILDING,
PHILADELPHIA, PA.
For Information concerning this Bill, communicate with Comptroller,
737-8 Commercial Trust Building, Philadelphia, Pa.

S. A. No. 37-1M-1-16

WALTER PETERSON,
Sales Agent,
120 Broadway, N. Y.

TERMS CASH
on 10th of month following date of shipment.

SUSQUEHANNA COAL CO.

47 Sale No. *Philadelphia, Pa.*,
Sold to
Folio
All Rail From Consigned to
Invoice No. L.

GROSS TONS AND DECIMALS.—PRICES ARE F. O. B. MINES WITHOUT TAX.

Date	Car	Broken	Egg	Stove	Nut	Pea	Bwht. 1	Bwht. 2	Bwht. 3

48

Exhibit B, read in Support of Motion. 49

MAKE CHECK TO ORDER OF SUSQUEHANNA COAL CO.
REMIT TO TREASURER, 910 COMMERCIAL TRUST BUILDING, PHILADELPHIA, PA.
For information concerning this Bill, communicate with Comptroller, 737-8 Commercial Trust Building, Philadelphia, Pa.

S. A. No. 34-1M-1-16

TERMS, CASH IN 30 DAYS

WALTER PETERSON,
Sales Agent,
120 Broadway, N. Y.

All shipments at consignee's risk unless we have instructions to insure.

SUSQUEHANNA COAL CO. 50

Sale No. *Philadelphia, Pa.,*
Sold to
Folio
Per
Invoice No. A

From South Amboy N. J., Consigned to

Description	Size	Gross Tons and Decimal	Price Without Tax	Amount

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52 **Summons, read in Support of Motion.**
Exhibit C.

SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
53 *Defendant.*

Special Term, Part I. Papers Submitted May 16, 1916. No. 5.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

54 Dated New York, January 8, 1916.

JOSEPH LEVY,
Attorney for Plaintiff,
27 William Street,
Borough of Manhattan,
City of New York.

Stipulation dated April 26, 1916 read in Support of Motion. 55

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

Special Term, Part I.
Papers Submitted May 16, 1916.
No. 12. 56

It is hereby stipulated and agreed that the motion made herein to set aside, vacate and hold for naught the alleged service of a summons, dated January 8th, 1916, upon the defendant Susquehanna Coal Company, by an alleged service upon one Walter Peterson, on the 11th day of January, 1916, which is returnable at Special Term, Part I, of the New York Supreme Court, New York County, on the 27th day of April, 1916, be and the same hereby is adjourned to the 12th day of May, 1916, stay contained in the order to show cause, 57 dated January 26th, 1916, to continue in the meantime; and

It is further stipulated and agreed that this and all prior adjournments of the aforesaid motion have been had at the express request of the attorney for the plaintiff, and that this and any prior adjournment of the aforesaid motion which have been had shall be without prejudice to the motion, nor will the attorney for the plaintiff construe or attempt to construe this or any prior adjournment

58 *Stipulation dated April 26, 1916*

of the aforesaid motion, which has heretofore been had, as a general appearance on the part of the defendant Susquehanna Coal Company, in the above entitled action.

Dated, New York, April 26th, 1916.

JOSEPH LEVY,
Attorney for Plaintiff.

KELLOGG & ROSE,
Attorneys for defendant Susquehanna Coal Company, appearing specially herein for the purpose of this motion only and not appearing generally.

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Stipulation dated April 7, 1916 read in Support of Motion.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

60

GEORGE TAUZA, *Plaintiff,* *against* SUSQUEHANNA COAL COMPANY, *Defendant.*	Special Term, Part I. Papers Submitted May 16, 1916. No. 10.

Stipulation dated April 7th, 1916

January 8th, 1916, upon the defendant Susquehanna Coal Company, by an alleged service upon one Walter Petersen, on the 11th day of January, 1916, which is returnable at a Special Term, Part I, New York Supreme Court, New York County, on the 7th day of April, 1916, be and the same hereby is adjourned to the 27th day of April, 1916, stay contained in the order to show cause, dated January 26th, 1916, to continue in the meantime; and

It is further stipulated and agreed that this and all prior adjournments of the aforesaid motion have been had at the express request of the attorney for the plaintiff, and that this and any prior adjournment of the aforesaid motion which have been had shall be without prejudice to the motion, nor will the attorney for the plaintiff construe or attempt to construe this or any prior adjournment of the aforesaid motion, which has heretofore been had, as a general appearance on the part of the defendant Susquehanna Coal Company, in the above entitled action.

Dated, New York, April 7th, 1916.

JOSEPH LEVY,
Attorney for Plaintiff.

KELLOGG & ROSE,
Attorneys for defendant Susquehanna Coal Company, appearing specially herein for the purpose of this motion only and not appearing generally.

64 **Stipulation dated March 13, 1916 read in Support of Motion.**

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,
against
SUSQUEHANNA COAL COMPANY,
Defendant.

Special Term, Part I, Papers Submitted May 16, 1916. No. 11.

65 It is hereby stipulated and agreed by and between the attorneys representing the respective parties hereto, that the motion made herein to set aside, vacate and hold for naught the alleged service of a summons, dated January 8th, 1916, upon the defendant Susquehanna Coal Company by an alleged service upon one Walter Petersen, on the 11th day of January, 1916, which is returnable at a Special Term, Part I, New York Supreme Court, New York County, on the 15th day of March, 1916, be and the same hereby is adjourned to the 7th day of April, 1916, stay contained in the order to show
66 cause, dated January 26th, 1916, to continue in the meantime; and

It is further stipulated and agreed that this or any subsequent adjournment of the aforesaid motion shall be without prejudice to the motion, nor will it be construed or attempted to be construed by the attorney for the plaintiff, as a general appearance on the part of the defendant, Susquehanna Coal Company.

Dated, New York, March 13th, 1916.

JOSEPH LEVY,
Attorney for Plaintiff.
KELLOGG & ROSE,
Attorneys for defendant Susquehanna Coal Company, appearing specially herein for the purpose of this motion only and not

Stipulation dated Feb. 14, 1916 read in Support of Motion. 67

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA, *Plaintiff,* *against* SUSQUEHANNA COAL COMPANY, *Defendant.*	Special Term, Part I, Papers Submitted May 16, 1916. No. 9.

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It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the motion made herein to set aside, vacate and hold for naught the alleged service of Summons and Complaint upon the defendant Susquehanna Coal Company be and the same hereby is adjourned to the 15th day of March, 1916; stay contained in the order to show cause, dated January 26th, 1916, to continue in the meantime; and

It is further stipulated and agreed, that this or any subsequent adjournment of the aforesaid motion shall be without prejudice to the motion, nor 69
will it be construed or attempted to be construed by the attorney for the plaintiff as a general appearance on the part of the defendant Susquehanna Coal Company.

Dated, New York, February 14th, 1916.

JOSEPH LEVY,
Attorney for Plaintiff.

KELLOGG & ROSE,
Attorneys for defendant Susquehanna Coal Company, appearing specially herein for the purpose of this motion only and not appearing generally.

70 **Stipulation dated January 29, 1916 read in Support of Motion.**

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

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Special Term, Part I, Papers Submitted May 16, 1916. No. 13.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the motion made herein to set aside, vacate and hold for naught the alleged service of Summons upon the defendant Susquehanna Coal Company be and the same hereby is adjourned to the 15th day of February, 1916; stay contained in the order to show cause, dated January 26th, 1915, to continue in the meantime; and

It is further stipulated and agreed, that this or any subsequent adjournment of the aforesaid motion shall be without prejudice to the motion, nor will it be construed or attempted to be construed by the attorney for the plaintiff as a general appearance on the part of the defendant Susquehanna Coal Company.

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Dated, New York, January 29, 1916.

JOSEPH LEVY,
Attorney for Plaintiff.

KELLOGG & ROSE,
Attorneys for defendant Susquehanna Coal Company, appearing specially herein for the purpose of this motion only and not appearing generally.

Affidavit of Service of William H. Schaaf, read in Support of Motion. 73

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,
against
SUSQUEHANNA COAL COMPANY,
Defendant.

Special Term, Part I, Papers Submitted May 16, 1916. Paper No. 15.

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STATE OF NEW YORK,
City of New York,
County of New York, } ss.:

WILLIAM H. SCHAAF, being duly sworn, deposes and says:

I am over the age of twenty-one years; that on the 11th day of January, 1916, at No. 1 Broadway, in the suite of offices Number 59, on the 4th floor, in the Borough of Manhattan, City of New York, I served the annexed Summons upon the defendant Susquehanna Coal Company, a corporation, in this action, by delivering to and leaving personally with Walter Peterson, a true copy thereof. 75

Deponent further says that he believes the person so served, as aforesaid, to be the managing agent in charge of the office, office equipment, employees, property and business within the State of New York of the defendant corporation, Susquehanna Coal Company, mentioned and described in said Summons.

WILLIAM H. SCHAAF.

Sworn to before me this
11th day of January, 1916.
ONA RODER,
Comm. of Deeds #76,
New York City.
Commission expires January 20, 1916.

76 **Order Filing Summons Nunc Pro Tunc read in Support of Motion.**

At Special Term, Part II, of the Supreme Court, held in and for the County of New York at the Court House in the Borough of Manhattan, City of New York, on the 26th day of January, 1916.

Present:

HON. JOSEPH E. NEWBURGER, *Justice.*

77 GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

Special Term, Part 1, Papers Submitted May 16, 1916. No. 16.

Upon the annexed affidavit of William H. Schaaf, verified the 11th day of January, 1916, upon the original Summons and affidavit of service thereof, and upon all the proceedings herein, on
78 motion of Joseph Levy, attorney for plaintiff in said action, it is

Ordered that the said plaintiff be permitted and authorized to file the original Summons in this action with the affidavit of service thereof *nunc pro tunc* in the office of the Clerk of the County of New York, with the same force and effect as if the same had been originally duly filed within the time provided by law and the rules and practice of this Court.

And the Clerk of the County of New York is hereby authorized and directed to accept and re-

ceive such original Summons with affidavit of service thereof for filing in his office, and that he file the same therein accordingly, pursuant to the rules and practice of this Court.

Enter,

J. E. N.,
J. S. C.

SUPREME COURT,

NEW YORK COUNTY.

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GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

} Affidavit.

STATE OF NEW YORK,
City of New York,
County of New York, } ss.:

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WILLIAM H. SCHAAF, being duly sworn, deposes and says:

I am of full age, and am connected with the office of Joseph Levy, attorney for the plaintiff in above entitled action, and have had charge of the service of the Summons upon the defendant herein, and of the subsequent filing of said Summons, as provided by law and the rules and practice of this Court.

That as appears by the annexed affidavit verified by me on the 11th day of January, 1916, I duly served the annexed Summons upon the defendant

82 *Order Filing Summons Nunc Pro Tunc*

in said action on said 11th day of January, 1916, as more particularly appears in said affidavit of service annexed hereto.

That owing to an unintentional oversight on my part and being very busy with other matters connected with said attorney's office, and in attendance at court upon the trial of certain actions connected with said office, I omitted to file the original Summons in this action with the affidavit of service thereof, in the Office of the Clerk of the County of New York, within the time provided by law and
83 the rules and practice of this Court.

That I have attempted to file the said Summons with affidavit aforesaid in the said County Clerk's Office, but that the person in charge of said office, to receive such papers for filing therein, refused to accept such Summons and affidavit of service for filing, unless accompanied by an order of this Court for that purpose.

That for the reasons aforesaid and by reason of the unintentional neglect and omission on my part to file the said Summons and affidavit of service within the time provided, I hereby respectfully ask
84 for an order of this Court permitting the filing of such Summons with affidavit of service, *nunc pro tunc,* and that the Clerk of the said County of New York be authorized to receive such original Summons with affidavit of service for filing in his office, as provided by the rules and practice aforesaid.

That no previous application has been made for this order.

WILLIAM H. SCHAAF.

Sworn to before me this
26th day of January, 1916.

E. G. DELANEY,
Notary Public, Kings Co. (160).
Cert. filed in New York Co. (203).

Opinion of Appellate Division Second Judicial Department Rendered May 12, 1916 read in Support of Motion. 85

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

JENKS, *P.J.*;
THOMAS, CARR, RICH and PUTNAM, *JJ.*

SIMON KAROSAS, Etc., *Appellant,* 86 *against* SUSQUEHANNA COAL COMPANY, *Respondent,* Impleaded with the PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Special Term, Part I, Papers Submitted May 16, 1916. No. 14.

Appeal by the plaintiff from an order of the Special Term, made on the 8th day of June, 1915, and entered in the office of the Clerk of the County 87 of Westchester.

ALVIN C. CASS, *for the Appellant.*
FRANKLIN NEVIUS (WILLIAM H. O'BRIEN with him on the Brief), appearing specially, for the purpose of the motion, *for the Respondent.*

CARR, *J.:*

The plaintiff appeals from an order of the Special Term in Westchester County that vacated an

attempted service of a Summons upon one Bressette as the defendant's "managing agent" in New York City. No complaint was served. The defendant, Susquehanna Coal Company, moved to vacate the attempted service chiefly upon the ground that Bressette was not a "managing agent." There is nothing in the record that discloses whether the plaintiff is a resident of this State, nor the nature of his cause of action, nor when or where it arose. The defendant is a foreign corporation, with its chief office in the city
89 of Philadelphia, Pennsylvania. Section 1780 of the Code of Civil Procedure defines the cases in which the courts of this State may take jurisdiction of actions against foreign corporations, as to the subject matter of the actions. Owing to the silence of the motion papers, we do not know whether the court has jurisdiction of the subject matter of this action, unless it be on the theory that the defendant is doing business within this State. It maintains an office in New York City as an agency for the sale of coal. Bressette is apparently at the head of this office, and is described by the defendant, and by himself, as a "sales agent,"
90 or "head sales agent" in New York City. He and the men associated with him solicit orders for the defendant for the sale of coal at prices fixed by the head office in Philadelphia, from which prices he has no power to deviate without instructions from his superior officers. He has no power to make contracts for long periods nor to extend credits beyond the fixed period of thirty days. The defendant has a bank account in the City of New York for the purpose of paying the current expenses of its sales agency. It is not necessary on

this appeal to determine whether Bressette was a "managing agent" nor whether the defendant was "doing business" within this State. The defendant filed no designation of a person upon whom process may be served within this State. The plaintiff contends that the service of the summons was regular under Section 432 of the Code of Civil Procedure, which defines the method of service of a summons, within this State, upon a foreign corporation. Assuming, but not deciding, that Bressette was a "managing agent", the question arises whether the attempted service was regular 92
under Section 432. The affidavits interposed by the plaintiff on the defendant's motion are wholly silent as to whether the plaintiff attempted to find within this State any of the defendant's officers therein specified, nor do these affidavits state, even in the barest manner, any "due diligence" in an attempt to find them before attempting service upon Bressette as "managing agent". In *Vitolo* v. *Bee Publishing Co.* (66 App. Div. 582), the same question arose, and it was held that, before service of a summons could be made upon a "managing agent", it must appear affirmatively that the plain- 93
tiff used due diligence in an attempt to serve some of the specified officers of the corporation. This case was followed in *Doherty* v. *Evening Journal Association* (98 App. Div. 136), and I do not find that it has ever been criticised or departed from.

There is a wide range of discussion in the respective briefs, which sometimes goes far apart from the real question involved in this appeal. The respondent cites *Bagdon* v. *Philadelphia and Reading C. & I. Co.* (217 N. Y. 432), but that case has no relevancy to the one at bar, for there the

defendant did designate a person upon whom process might be served within this State, and the court said: "We are not required to consider how service could be made if the defendant had declined to file a stipulation" (p. 436). The plaintiff-appellant contends that the question of the regularity of the attempted service cannot be raised by a motion to vacate, but must be raised by demurrer or answer, and cites *Barber* v. *Barber* (137 App. Div. 665). There the summons *and complaint* were served under an order of substi-
95 tuted service by publication. The grounds set forth in the application to vacate the service were really objections to the court's jurisdiction of the subject matter of the plaintiff's alleged cause of action, and not as to jurisdiction of the person acquired through service of process. Where the latter question is involved, the long-settled practice has been to entertain motions to vacate the attempted service and the cases in which such motions have been entertained and passed upon are too numerous and continuously uniform to require citation.

The order should be affirmed, with $10 costs and
96 disbursements.

Affidavit of Joseph Levy, read in Opposition to Motion. 97

SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

Special Term, Part I, Papers Submitted May 16, 1916. No. 7. 98

STATE OF NEW YORK,
City of New York,
County of New York, } ss.:

JOSEPH LEVY, being duly sworn, deposes and says:

I am the attorney for the plaintiff in the above entitled action. The action is brought to recover damages for personal injuries sustained by the plaintiff, through the alleged negligence of the defendant, and was commenced by the service of a 99 summons herein upon the defendant, on the 11th day of January, 1916.

That thereafter the defendant obtained an order to show cause in this court, dated January 26, 1916, and returnable the 1st day of February, 1916,

> "why the pretended service of the summons herein upon the defendant, Susquehanna Coal Company should not be set aside, vacated and held for naught"

upon the grounds set forth in the order to show cause aforesaid, and as more fully set forth therein.

100 *Affidavit of Joseph Levy*

The order to show cause, dated January 26, 1916, as aforesaid, contained an order that "all proceedings on the part of the plaintiff be stayed," until after the hearing and determination of the motion, and the entry and service of any order that may be entered thereon, and permitted service of a copy of the order, and the affidavits annexed thereto, to be served on the plaintiff's attorney, on or before the 26th day of January, 1916, and declaring the same to be sufficient service thereof.

The motion of the defendant, upon the order to
101 show cause aforesaid, was based upon the affidavit of Abram J. Rose, one of the members of the firm of Kellogg & Rose, who claim to appear as attorneys for the defendant specially on this motion, verified January 21, 1916, and which affidavit states the nature of the motion as being one to set aside the service of the summons herein, "on one Walter Peterson," on the 11th day of January, 1916, and annexing a copy of the summons to said affidavit. The affidavit further sets forth that no copy of the complaint was annexed to the summons, served as aforesaid, and that the case is not
102 at issue, and that no previous application has been made to any court or judge, and stating as a reason why the order to show cause is asked for, is that

> "it is desired to secure a stay of all proceedings in the action, so that there may be no chance of there being any default against the defendant, Susquehanna Coal Company."

The affidavit of George H. Ross, verified January 20, 1916, annexed to the order to show cause, and upon which defendant's motion was based, sets forth that he is the vice-president and secre-

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tary of the defendant corporation, and that as he "understands to be the meaning of the corporation law," the Susquehanna Coal Company does not do business within the State of New York, and he further states in said affidavit that the only transactions which the defendant corporation has in the State of New York are deliveries of coal or of cargoes of coal as may be sold through the efforts of Walter Peterson, or some of the other "salesmen" employed by the defendant.

That affidavit also states at Fol. 4 thereof, that "a small petty cash account from which strictly 104
petty cash payments are made" is the only account kept in the State of New York, and outside the State of Pennsylvania, where the defendant claims to have its office in the City of Philadelphia, and what he describes as strictly cash disbursements of the New York Sales Agents are made in the State of New York, and that all other indebtedness of the defendant corporation are paid by checks, forwarded to New York from the Philadelphia office. (Fol. 5 of Aff.)

The said George H. Ross proceeds to state in his affidavit that he has read the affidavit of Walter Peterson, verified herein on January 20, 1916, and 105
says that such affidavit correctly sets forth the facts with respect to Peterson's connection with the defendant corporation, and said Ross then attempts to legally define the character and nature of the duties which he asserts are performed by Walter Peterson, and the manner of their execution.

106 *Affidavit of Joseph Levy*

At. folio 8 of his affidavit, said Ross states as follows:

> "That deponent, from his knowledge of the affairs of the defendant Susquehanna Coal Company knows that the plaintiff has no cause of action, nor can claim any cause of action arising within the State of New York, as against this defendant."

That this statement of George H. Ross, the vice-president and secretary of the defendant corporation aforesaid, deponent verily believes consti-
107 tutes a plea to the merits of the action on the part of the defendant corporation, and a submission to the jurisdiction of this court.

He, the said Ross, the vice-president and secretary of the defendant corporation, asks this court for an order to show cause, why the service of the summons herein should not be vacated, set aside and held for naught, and why, "in the meantime and until ten days after the hearing and determination of this motion and the entry and service of any order that may be entered thereon, all proceedings on the part of the plaintiff should not be stayed," and concludes said affidavit by stating
108 that the reason the order to show cause is asked for, is that the stay prayed for by the defendant may be procured.

The affidavit of Walter Peterson, verified January 20, 1916, attached to defendant's order to show cause, and upon which also defendant's motion herein is based, describes himself as a "sales agent employed by the Susquehanna Coal Company," the defendant herein, which he says is a Pennsylvania corporation.

Said Peterson, at fol. 4 of his affidavit, states as follows:

> "That deponent's sole duties as an employee of the defendant are to sell coal. That deponent's employment by the defendant corporation might well be described as sales agent in the sale of coal in the territory adjacent to New York Harbor.
>
> That the said Susquehanna Coal Company does not maintain any yard or docks within the State of New York, and does not maintain any office within the State of New York, except an office at No. 120 Broadway, New York 110
> City, where deponent and the other salesmen employed by said defendant make their headquarters.
>
> That deponent in acting as head salesman or sales agent for the defendant, Susquehanna Coal Company performs functions and duties and carries on the selling of coal for the said defendant." * * *

Said Peterson does admit, however, at fol. 11 of his affidavit, that the defendant maintains a bank account within the State of New York, and that from such account, petty cash disbursements are paid. The remainder and concluding portion of 111
said affidavit of Peterson is devoted to a statement of the conception by him of what he considers his legal duties and position with respect to the defendant corporation, and his authority to bind the said defendant corporation in any way.

That deponent believes that from the aforesaid admissions in the moving papers of the defendant, it clearly appears that the defendant does business within the State of New York, within the meaning of that rule of law which requires that it shall do

112 business within the State of New York before it can be legally served with process here.

Deponent verily believes that the admissions of the aforesaid Walter Peterson, as to his duties, stripped of his legal conclusions, with reference thereto, constitute complete proof of the fact that he is the managing agent of the defendant within the State of New York, within the meaning of Section 432 of the Code of Civil Procedure, which provides in part as follows:

113 "Sec. 432. Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section sixteen of the general corporation law."

114 That deponent is informed and believes that the defendant Susquehanna Coal Company has property within the State of New York, as appears from the moving papers herein, and keeps and maintains a large suite of offices at No. 120 Broadway, in the Borough of Manhattan, City of New York, upon the door of which the name "Susquehanna Coal Company" appears, and also that of "Walter Peterson," and many desks, furniture and office equipment are at the office above mentioned, and that Walter Peterson employs about eight salesmen in the City of New York, who meet at the office at

115

No. 120 Broadway, in the City and State of New York, every working day morning and receive instructions from the said Walter Peterson, and in the afternoon return to the office and make their several reports to said Peterson, and said Peterson pays the wages of the salesmen and other employes in the City and State of New York.

Deponent has retained and requested various persons to make investigations with respect to the defendant, Susquehanna Coal Company, whether or not it was doing business and had property within the State of New York, prior to and at 116
the time of the commencement of this action, and such persons reported to me that the coal sold by the defendant, Susquehanna Coal Company, to various firms in the State of New York, is sold on a thiry days credit basis, that is, the buyers have thirty days time within which to make payment, claimed of them by the Susquehanna Coal Company, in the State of New York. I was also informed that the defendant, Susquehanna Coal Company, at the time of the commencement of the action and prior thereto, did business within the State of New York at No. 1 Broadway, from which offices the defendant moved to No. 120 Broadway, 117
in the City and State of New York, where it now does business on a large scale, and defendant, at the time of the commencement of this action had and now has property within the State of New York.

That by reading the affidavit of George H. Bressette in various cases which were instituted in the State of New York against the defendant, Susquehanna Coal Company, and from investigations made and caused to be made by me, I verily be-

118 *Affidavit of Joseph Levy*

lieve that the facts stated in the opposing papers herein are true and correct.

At my request, Miss Ona Roder visited the defendant's offices at No. 120 Broadway, in the City and State of New York, for the purpose of ascertaining the business and manner of doing business of the defendant, Susquehanna Coal Company, and the affidavit of Ona Roder, hereto annexed, states and sets forth more fully the particulars of the knowledge and information gained by her with respect to the business and business operations of
119 the defendant, and with respect to the property of the defendant, within the State of New York.

That as deponent is informed and verily believes, the Susquehanna Coal Company is physically within the State of New York, and that the fact of its doing business within this State and to maintain property here, in the flagrantly notorious manner that it does, then to claim that it is not subject to suit in this State, is for it to establish a position so inconsistent and irreconcilable with the facts, that no court will tolerate it.

That as appears from the records of the United
120 States District Court, for the Southern District of New York, the Susquehanna Coal Company is now prosecuting an action within the State of New York against the Dollard Coal Sales Company for One Hundred and Forty Thousand Dollars for coal claimed to have been delivered by Susquehanna Coal Company, within the State of New York.

Upon information and belief, that the plaintiff prior to and at the time of the commencement of this action was and now is a resident of the State of New York, and an alien and subject of the Czar of Russia, and the defendant, a foreign corpora-

tion, organized and existing under and by virtue of the laws of the State of Pennsylvania.

That before the service of the summons in this action was made on the defendant, by delivering the same to Walter Peterson, the managing agent of the defendant, this deponent made and caused to be made diligent efforts to find within the State of New York, any of the officers of the defendant, mentioned and described in the laws and rules of the State of New York, but that deponent and his employees and persons retained by him were and have been unable to find any of such officers or 122 persons for that purpose, or any person who was the designated agent of the defendant, pursuant to the laws of the State of New York, except Walter Peterson, who is in charge of the defendant's property and business within the State of New York, and in charge of the offices, furniture, files and banking accounts of the defendant, kept within the State of New York, and in charge of various employees, sales agents, stenographers, bookkeepers, at No. 120 Broadway, in the City and State of New York.

That the plaintiff has fully and fairly stated the facts in this case to deponent, and after such statement made as aforesaid, deponent verily believes 123 the plaintiff has a good and meritorius cause of action against the defendant.

Wherefore, deponent prays that the motion of the defendant, to set aside the service of the summons herein, be denied with costs.

JOSEPH LEVY.

Sworn to before me this }
15th day of May, 1916.}
E. G. DELANEY,
Notary Public, Kings Co. (160).
Cert. filed in New York Co. (203).

124 **Affidavit of Ona Roder, read in Opposition to Motion.**

SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
125 *Defendant.*

Special Term, Part I, Papers Submitted May 16, 1916. No. 8.

STATE OF NEW YORK,
City of New York,
County of New York, } ss.:

ONA RODER, being duly sworn, deposes and says:

That I visited the Equitable Building, at No. 120 Broadway, Borough of Manhattan, City of New York. That the name "Susquehanna Coal Company" appeared on the bulletin board down stairs with a certain room number, and that I went to the room indicated as being occupied by the said
126 company. That there appeared on the door of this room the name "Susquehanna Coal Company," and also the name of Walter Peterson, with the words "sales agent" after his name.

That I thereupon entered into the room, which was the outer office of a large imposing looking and handsomely furnished suite of offices. That there were about eleven desks and ten chairs and *a general air of doing* business pervaded the office. That deponent inquired from the person who approached her as to whether this was the office

of the Susquehanna Coal Company, and said person replied that it was. Some time prior hereto deponent was requested to make inquiries about the said defendant, Susquehanna Coal Company, at the time when the defendant maintained its office at No. 1 Broadway, in the City and State of New York, and that deponent visited the offices of the defendant at No. 1 Broadway, aforesaid at various times from which offices the defendant moved to the offices now being occupied by them at No. 120 Broadway, in the City and State of New York. That deponent at the office No. 1 Broadway, saw a large safe with the name "Susquehanna Coal Company" written on it and a large number of employees working in said office for the defendant, Susquehanna Coal Company, and was informed by other persons who were retained to make complete and true investigation about this defendant, whether or not it was doing business within the State of New York, and to what extent, *and deponent was informed by various persons* that about eight salesmen meet at the office of the Susquehanna Coal Company every day and received instructions from George H. Bressette, who was then managing agent for the defendant. The said Bressette has since retired from his position and his place was taken by Walter Peterson, who is now, and at the time of the commencement of this action, was in charge of the defendant's office, in charge of the defendant's banking account in the City of New York, and in charge of all employees and salesmen employed by the defendant. The said Peterson pays the salaries of the employees of the defendant, Susquehanna Coal Company, in the City and State of New York.

130 *Deponent was informed* that a long time prior, and at the time of the commencement of this action, that the defendant Susquehanna Coal Company, was now and now is selling coal throughout the State of New York in large quantities and on a thirty-day credit basis, and that at all of the times and at the time of the commencement of this action the defendant did and now does business on a large scale within the State of New York and that Walter Peterson is in full charge of the office, employes and property of the defendant, within
131 the State of New York and that no other person could be found with due diligence within the State of New York that occupies a higher authority than Walter Peterson, and no service of summons could be made on any officer or other person holding a higher position than Walter Peterson within the State of New York, after due diligence had been used, and that Walter Peterson is the only person upon whom service of process could be made within the State of New York against the defendant corporation, Susquehanna Coal Company.

That I was requested by other persons on various occasions to serve process in actions brought
132 against this defendant, and many efforts I made to serve this defendant within the State of New York was a failure, except by the service on the managing agent, Walter Peterson, who is in charge of the property and business of the defendant corporation within the State of New York.

ONA RODER.

Sworn to before me this }
15th day of May, 1916.}

E. G. DELANEY,
Notary Public, Kings Co. (160).
Cert. filed in New York Co. (203).

Affidavit of No Opinion. 133

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,
against
SUSQUEHANNA COAL COMPANY,
Defendant.

STATE OF NEW YORK, }
County of New York, } ss.: 134

LAWRENCE L. CASSIDY, being duly sworn, deposes and says that he is the managing clerk for Kellogg & Rose, the attorneys for the defendant in the above entitled action, who appear specially only for the purpose of the motion heretofore made to set aside the alleged service of a summons herein and for the purpose of the appeal taken herein and who do not appear generally for the said defendant in this action.

Upon information and belief that no opinion was rendered by Mr. Justice Thomas F. Donnelly upon his decision of the motion herein, except the following, which appeared in the *New York Law Journal* on May 18, 1916. 135

> "Tauza *v.* Susquehanna Coal Co. Motion is denied (as to service see Jackson *v.* Schuylkill Silk Mills, 92 Misc. 442)."

LAWRENCE L. CASSIDY.

Sworn to before me this 31st }
day of May, 1916. }
WM. H. O'BRIEN,
Notary Public, Westchester County.
New York Co. Clerk's No. 12.
New York Co. Register's No. 8022.

136 **Stipulation Waiving Certification.**

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed, consist of true and correct copies of the Notice of Appeal, the Order Appealed From, and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York. Certification thereof, in pursuance of Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, New York, May 31st, 1916.

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KELLOGG & ROSE,
Attorneys for Defendant-Appellant Susquehanna Coal Company, appearing specially only for the purpose of the motion heretofore made herein and for the purpose of the appeal taken herein and not appearing generally for the said Defendant-Appellant in this action.

JOSEPH LEVY.
Attorney for Plaintiff-Respondent.

138

Order of Appellate Division Appealed From. 139

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of June, 1916.

Present:

HON. JOHN PROCTOR CLARKE,
Presiding Justice;

" CHESTER B. McLAUGHLIN,
" FRANCIS M. SCOTT, 140
" WALTER LLOYD SMITH,
" ALFRED R. PAGE,
Justices.

GEORGE TAUZA,
Respt.,

vs.

SUSQUEHANNA COAL COMPANY,
Applt.

} Affirmance of Order.

141

An appeal having been taken to this Court by the defendant from an order of the Supreme Court entered on the 17th day of May, 1916, denying defendant's motion to set aside alleged service of Summons and Complaint, and said appeal having been argued by Mr. Franklin Nevius of counsel for the appellant, and by Mr. Frank J. Felbel of counsel for the respondent; and due deliberation having been had thereon, it is hereby ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements.

Enter,

J. P. C.

142 **Order of Appellate Division Granting Leave to Appeal to the Court of Appeals and Certifying Questions.**

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, in the County of New York, on the 10th day of July, 1916.

Present:

HON. JOHN PROCTOR CLARKE,
Presiding Justice;

143

" FRANCIS M. SCOTT,
" WALTER LLOYD SMITH,
" ALFRED R. PAGE,
" VICTOR J. DOWLING,
Justices.

GEORGE TAUZA,
Plaintiff-Respondent,

against

SUSQUEHANNA COAL COMPANY,
144 *Defendant-Appellant.*

The above named appellant having appeared specially in the above entitled action for the purpose of moving to set aside the pretended service of a summons herein, and for the purpose of an appeal taken from the order denying said motion, and for the purpose of a motion made in this Court for leave to appeal to the Court of Appeals from an order of this Court, entered the 23rd day

of June, 1916, affirming the order appealed from, and for a stay pending the appeal to the Court of Appeals, and said defendant-appellant not having appeared generally in this action, and it appearing to our satisfaction from the record herein, that questions of law have arisen in this case which ought to be reviewed by the Court of Appeals, now, upon reading and filing the order to show cause herein, dated the 28th day of June, 1916, with the proof of due service thereof, the affidavit of Franklin Nevius and the affidavit of George H. Ross, each verified the 27th day of June, 1916, in support of said motion, and the affidavit of Edward C. Delaney, verified the 5th day of July, 1916, in opposition thereto, and after hearing Franklin Nevius, Esq., appearing specially as aforesaid for the said defendant-appellant, in support of said motion, and Frank J. Felbel, Esq., in opposition thereto, and due deliberation having been had thereon,

Now, on motion of Kellogg & Rose, attorneys appearing specially for the defendant-appellant, Susquehanna Coal Company, as aforesaid, it is

ORDERED, that the said defendant-appellant, Susquehanna Coal Company, be and it hereby is granted leave to appeal to the Court of Appeals from the order and determination of this Court, entered herein on the 23rd day of June, 1916. And it is

FURTHER ORDERED, that pending and until after the hearing and determination of the said appeal by the Court of Appeals, and the entry of an order thereon, all proceedings on the part of the plaintiff-respondent and his attorney be and they hereby are stayed; and it is

148 *Order of Appellate Division*

FURTHER ORDERED, that the following questions be and the same are hereby certified by this Court as questions of law which have arisen in this case and which should be reviewed by the Court of Appeals, to wit:

I. Was the defendant, at the time of the service of the summons herein doing business within the State of New York within the meaning of Section 1780, Subdivision 4, of the Code of Civil Procedure?

149 II. Has the plaintiff shown such due diligence in attempting to serve one of the officers specified in Section 432, Subdivision 1, of the Code of Civil Procedure as to permit service to be made upon the managing agent of the defendant corporation?

III. Were the duties of and the authority conferred upon Walter Peterson, the defendant's sales agent, such as to constitute him a managing agent of the defendant corporation within the meaning of Subdivision 3, Section 432 of the Code of Civil Procedure?

IV. Are Sections 1780 and 432 of the Code of
150 Civil Procedure, or either of them, unconstitutional so far as they attempt to confer jurisdiction on the courts of the State of New York over foreign corporations which are not doing business in this State within the meaning of the term "doing business" as used in Subdivision 4, Section 1780 of the Code of Civil Procedure, and have not filed a designation pursuant to Section 16 of the General Corporation Law in cases where the causes of action did not arise within this State or

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out of any transaction carried on within this State by such foreign corporation?

V. Are Sections 1780 and 432 of the Code of Civil Procedure, or either of them, unconstitutional so far as they attempt to confer jurisdiction on the courts of the State of New York over foreign corporations which are doing business in the State within the meaning of the term "doing business" as used in Subdivision 4, Section 1780 of the Code of Civil Procedure, and have not filed a designation pursuant to Section 16 of the General Corporation Law, in cases where the causes of action did not arise within this State or out of any transaction carried on within this State by such foreign corporation?

152

Enter,

F. M. SCOTT,
J. S. C.

153

154 **Notice of Appeal to the Court of Appeals.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff-Respondent,

against

155 SUSQUEHANNA COAL COMPANY,
Defendant-Appellant.

SIRS:

PLEASE TAKE NOTICE, that the Defendant-Appellant, Susquehanna Coal Company, appearing specially, hereby appeals, pursuant to permission granted by the Appellate Division of the Supreme Court, First Judicial Department, to the Court of Appeals of the State of New York, from the order of the said Appellate Division of the Supreme
156 Court, entered in the Office of the Clerk of said Court on the 23rd day of June, 1916, and in the Office of the Clerk of the County of New York on the 4th day of August, 1916, affirming the order made at Special Term denying the motion made by Defendant-Appellant to set aside the alleged service of a Summons on it herein, and Defendant-

Notice of Appeal to the Court of Appeals 157

Appellant appeals from each and every part of said order as well as from the whole thereof.

Dated, New York, August 5th, 1916.

Yours, etc.,
KELLOGG & ROSE,

Attorneys for Defendant-Appellant, Susquehanna Coal Company, appearing specially for the purpose of the motion heretofore made herein to set aside the alleged service of the Summons herein, and for the purpose of this appeal, and not appearing generally in this action for the said Defendant-Appellant, 158

Office & Post Office Address:
115 Broadway, Manhattan,
New York City.

To:

JOSEPH LEVY, ESQ.,
Attorney for Plaintiff-Respondent,
27 William Street, New York City.

WILLIAM F. SCHNEIDER, ESQ.,
Clerk of the Supreme Court in and for the County of New York. 159

160 **Stipulation Waiving Certification.**

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff-Respondent,

against

SUSQUEHANNA COAL COMPANY,
Defendant-Appellant.

161 It is hereby stipulated that the foregoing is the return to the Court of Appeals herein, that it consists of true and correct copies of the order of the Appellate Division affirming the order of Special Term denying the motion to vacate an alleged service of the summons herein and of all the papers upon which the said order was made, the order of the Appellate Division allowing an appeal therefrom to the Court of Appeals, and of the whole of each thereof and every part thereof now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk of the County of New York, pursuant to
162 Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, New York, August 25th, 1916.

KELLOGG & ROSE,
Attorneys for Defendant-Appellant, Susquehanna Coal Company, appearing specially only for the purpose of the motion heretofore made herein to set aside the alleged service of the Summons herein, and for the purpose of this appeal to the Court of Appeals, and not appearing generally in this action for the said Defendant-Appellant.

JOSEPH LEVY,
Attorney for Plaintiff-Respondent.

Affidavit of No Opinion by the Appellate Division. 163

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

GEORGE TAUZA,
Plaintiff,

against

SUSQUEHANNA COAL COMPANY,
Defendant.

164

STATE OF NEW YORK, }
County of New York, } ss.:

LAWRENCE L. CASSIDY, being duly sworn, deposes and says that he is the managing clerk for Kellogg & Rose, the attorneys for the defendant in the above entitled action, who appear specially only for the purpose of the motion heretofore made to set aside the alleged service of a summons herein and for the purpose of the appeals taken herein and who do not appear generally for the said defendant in this action.

Upon information and belief that no opinion 165
was rendered by the Judges of the Appellate Division, First Department, upon their decision affirming the order of Mr. Justice Thomas F. Donnelly appealed from, except the following which appeared in the *New York Law Journal* on June 24th, 1916:

"By CLARKE, *P.J.*; MCLAUGHLIN, SCOTT, SMITH, and PAGE, *J.J.*

"Order affirmed, with $10 costs and disbursements. No opinion. McLaughlin and Scott, *J.J.*, dissenting. Order filed."

LAWRENCE L. CASSIDY.

Sworn to before me this 25th }
day of August, 1916. }
WM. H. O'BRIEN,
Notary Public, Westchester County.

Argued by
Franklin Nevius.

IN THE
COURT OF APPEALS
OF THE STATE OF NEW YORK.

GEORGE TAUZA,
Plaintiff-Respondent,

against

SUSQUEHANNA COAL COMPANY,
Defendant-Appellant.

BRIEF FOR APPELLANT.

Statement.

This is an appeal by permission of the APPELLATE DIVISION in the FIRST DEPARTMENT, from an order affirming BY A DIVIDED VOTE an order of the SPECIAL TERM denying a motion on behalf of the defendant (a foreign corporation) appearing specially, to set aside a pretended service upon it of the summons herein upon the ground that said alleged service was in violation of the CONSTITUTION of the UNITED STATES because the alleged cause of action did not arise within the State of New York and did not arise out of any business which the defendant may have been doing within this State; and upon the further ground that the service was not made upon a person designated

or specified by SECTION 432 of the CODE of CIVIL PROCEDURE regulating the service of process on foreign corporations.

See Order Special Term, p. 3, fols. 7-9;
See Order of Appellate Division, p. 47, fols. 139-141.
See Order of Appellate Division Granting Leave to Appeal, pp. 48-51, fols. 142-152;
See Notice of Appeal, pp. 52-53, fols. 154-158.

By the order of the APPELLATE DIVISION granting leave to appeal, the following questions of law were certified as having arisen, which should be reviewed by this Court:

I. Was the defendant, at the time of the service of the summons herein **doing business** within the State of New York within the meaning of SECTION 1780, SUBDIVISION 4, of the CODE of CIVIL PROCEDURE?

II. Has the plaintiff shown such **due diligence** in attempting to serve one of the officers specified in SECTION 432, SUBDIVISION 1, of the CODE of CIVIL PROCEDURE as to permit service to be made upon the managing agent of the defendant corporation?

III. Were the duties of and the authority conferred upon Walter Peterson, the defendant's sales agent, such as to constitute him a **"managing agent"** of the defendant corporation within the meaning of SUBDIVISION 3, SECTION 432, of the CODE of CIVIL PROCEDURE?

IV. Are SECTIONS 1780 and 432 of the CODE of CIVIL PROCEDURE, or either of them, unconstitutional so far as they attempt to confer jurisdiction on the courts of the State of New York over

foreign corporations which **are not doing business in this State** within the meaning of the term "doing business" as used in SUBDIVISION 4, SECTION 1780, of the CODE of CIVIL PROCEDURE, and **have not filed a designation** pursuant to SECTION 16 of the GENERAL CORPORATION LAW, in cases where the causes of action DID NOT ARISE WITHIN THIS STATE OR OUT OF ANY TRANSACTION CARRIED ON WITHIN THIS STATE BY SUCH FOREIGN CORPORATION?

V. Are SECTIONS 1780 and 432 of the CODE of CIVIL PROCEDURE, or either of them, unconstitutional so far as they attempt to confer jurisdiction on the courts of the State of New York over foreign corporations which **are doing business in this State** within the meaning of the term "doing business" as used in SUBDIVISION 4, SECTION 1780, of the CODE of CIVIL PROCEDURE, and **have not filed a designation** pursuant to SECTION 16 of the GENERAL CORPORATION LAW, in cases where the causes of action DID NOT ARISE WITHIN THIS STATE OR OUT OF ANY TRANSACTION CARRIED ON WITHIN THIS STATE BY SUCH FOREIGN CORPORATION?

See Order of Appellate Division Granting Leave to Appeal and Certifying Questions, pp. 50-51, fols. 148-151.

Facts.

The action is brought to recover damages for personal injuries, alleged to have been occasioned by the defendant's negligence (see p. 33, fols. 98-99).

While no complaint was served with the summons, it appears without contradiction that the cause of action did not arise within the State of New York (see p. 9, fol. 26).

The plaintiff, it is alleged on information and belief, is an alien and subject of the Czar of Russia but a resident of the State of New York (see p. 40, fol. 120).

The defendant is a foreign corporation organized under the Laws of the State of Pennsylvania, and is engaged in the mining of coal in that State (see pp. 11-12, fols. 33-34). It has never obtained or applied for a certificate to do business in this State. (See p. 7, fol. 21.)

It does not maintain any yards or docks in the State of New York, but for the purpose of selling its coal in this State it employs a sales agent whose sole duty is to solicit orders for coal (see p. 11, fol. 32).

The prices for the different kinds of coal mined by the defendant are fixed by its executive officers in Pennsylvania and the sales agent solicits orders for coal at the prices fixed by the executive officers, and without any discretion on his part to change the same, or fix other prices than those named to him (see pp. 11-12, fols. 32-34).

No orders or contracts secured by the sales agent are binding on the defendant until approved by its officers at its Philadelphia office, and this is clearly understood by all prospective purchasers (see p. 14, fol. 42).

All questions of credit or long terms of credit or any other matters involving the exercise of judgment and discretion are submitted to some officer of the defendant at Philadelphia (see p. 12, fols. 34-36).

All payments for coal sold by the sales agent are made directly to the company at its Philadelphia office (see p. 13, fols. 38-39; see Exhibits A and B annexed to affidavit of Walter Peterson, pp. 16-17).

The sales agent appointed by the defendant for New York City and vicinity is Walter Peterson, the person upon whom the service sought to be set aside was made. Service was made on January 11th, 1916, by delivering to him simply a copy of the summons without any copy of the complaint (see Summons, Exhibit C, attached to Affidavit of Walter Peterson, p. 18, fols. 52-54; see Affidavit Abram J. Rose, p. 6, fol. 18).

Thereafter the defendant appeared specially and moved to set aside the service of the summons on the ground that it was invalid and unauthorized (see Order to Show Cause, pp. 4-5, fols. 12-14; see Affidavit Abram J. Rose, p. 6, fol. 18).

In support of the motion, the defendant submitted affidavits by Mr. Peterson, its sales agent, and by its executive officers, expressly defining his relation to the defendant and the powers and duties conferred upon him to represent it in the sale of its product.

As to the position held by him and his authority to act for the defendant, Mr. Peterson swore:

> "That deponent is neither the President, Vice-President, Treasurer, Assistant Treasurer, Secretary or Assistant Secretary of the defendant Susquehanna Coal Company, holds no office whatever in said Susquehanna Coal Company, and performs no functions similar to those which would be performed by any officer above named, or corresponding to any officer above named under any other name or title.
>
> * * * * * *
>
> "That deponent is not now and was not at the time of the alleged service of the summons, or at any other time either cashier, director or managing agent of the corporation either within the State of New York, or for the State of New York, or for the State of

> Pennsylvania, or in any other State or place, nor does deponent in any way exercise the functions or duties of cashier, director or managing agent, or exercise functions or duties similar to those which would be exercised by a cashier, director or managing agent of a corporation, nor has deponent any responsibility or right to exercise judgment or discretion in respect to the affairs of said defendant Susquehanna Coal Company" (see pp. 10-11, fols. 29-32).

As to his specific duties and authority, Mr. Peterson swore:

> "That deponent's sole duties as an employee of the defendant are to sell coal. That deponent's employment by the defendant corporation might well be described as sales agent in the sale of coal in the territory adjacent to New York Harbor.
>
> "That the said Susquehanna Coal Company does not maintain any yard or docks within the State of New York, and does not maintain any office within the State of New York, except an office at No. 120 Broadway, New York City, where deponent and the other salesmen employed by said defendant make their headquarters.
>
> "That deponent in acting as head salesman or sales agent for the defendant Susquehanna Coal Company performs functions and duties and carries on the selling of coal for the said defendant in the following manner: The prices for the different kinds of coal mined and produced by the said Susquehanna Coal Company at its mines in Pennsylvania are named to deponent from time to time by the executive officers of the defendant Susquehanna Coal Company in Pennsylvania, and deponent's sole function and duty thereafter is to solicit, and, if possible, secure orders for the sale of coal so mined, and produced by said defendant, at the prices named and

given to him by the executive officers of said defendant.

"That deponent has no authority whatever to deviate from the prices named to him as aforesaid, and any question involving deviation from said prices or deduction from said prices, or involving credit or long terms of credit, cannot be settled by deponent, but must be settled by the executive officers of the defendant corporation in Pennsylvania.

"That as a matter of fact, the executive officer of the Susquehanna Coal Company from whom deponent receives prices and under whose orders deponent acts, and to whom deponent submits any question involving deviation from said prices, is George H. Ross, the Vice-President and Secretary of the defendant corporation Susquehanna Coal Company. That ordinarily all questions in regard to deviation from the prices named or questions of credit or long terms of credit, or any other matter involving the exercise of discretion and judgment are submitted to the said Ross, or, if for any reason he is absent from the office of the Susquehanna Coal Company in the City of Philadelphia, then to some other officer or officers of the said defendant corporation at Philadelphia.

"That deponent, in the performance of his duties has no power beyond the making of sales of coal mined by the defendant Susquehanna Coal Company at such prices as may be named by some officer of the said defendant corporation, ordinarily Mr. George H. Ross, Vice-President and Secretary, at the office of the defendant company in Philadelphia, naming such price, and is governed in making his prices by schedules of possible deliveries given to him in the same manner and by the same officer or officers of the said defendant corporation.

"That deponent has no power to make any contracts for future or long-term deliveries, he being limited in regard thereto to negotiat-

ing tentative propositions which, however, are of no effect or validity, and cannot become contracts until submitted to the executive officers of the said defendant corporation, usually to Mr. George H. Ross, Vice-President and Secretary of the defendant corporation, and until approved by Mr. Ross or some other officer of the said Susquehanna Coal Company, no contract of the character referred to becomes valid or binding.

"Deponent further states that all payments for coal sold by deponent for the said defendant Susquehanna Coal Company are made directly to the said Company, and deponent has no power to receive or endorse said checks, but same are sent direct to the Philadelphia office of the said defendant corporation.

* * * * * *

"That the only bank account maintained by the defendant within the State of New York is a petty cash account out of which strictly petty cash disbursements are paid. That all payments for coal sold or moneys received therefor are sent to the Philadelphia office of the defendant, and deponent has no control over the same and all receipts for payments made for coal sold by deponent, are sent out from the Philadelphia office.

"That deponent has no authority to exercise judgment or discretion in any matter involving the general affairs of the said Susquehanna Coal Company within the State of New York, and has no authority to exercise judgment or discretion in any matter or thing in connection with the management of the Susquehanna Coal Company, his duties being limited as above set forth. That deponent is limited in his authority and duties to making sales of coal under the conditions hereinbefore stated.

"That deponent has no authority to bind the said defendant Susquehanna Coal Company in any way as to contracts other than

those for the sale of coal, and as to contracts for the sale of coal his authority is limited under the conditions stated above.

"That deponent's authority in the sale of coal is further limited in that no sale of coal or contract for coal deliveries is binding upon the defendant corporation until approved by the President or Vice-President of the defendant corporation at the Philadelphia office.

"That in soliciting orders all purchasers of coal are given to understand that orders and contracts solicited by deponent are not binding on the defendant Susquehanna Coal Company until approved by the Philadelphia office" (see pp. 11-14, fols. 31-42).

Annexed to Mr. Peterson's affidavit are copies of the billheads in use by the defendant in billing its coal to customers (see Exhibits A and B annexed to Affidavit of Walter Peterson, pp. 16-17, fols. 46-50).

In support and in corroboration of the affidavit of the defendant's sales agent is that of its Vice-President and Secretary George H. Ross, who swears:

"That the principal office of the defendant Susquehanna Coal Company is maintained in the City of Philadelphia, State of Pennsylvania, at which office are kept the cash books of the company and its general books of account. All banking accounts of the Company except a small petty cash account from which strictly petty cash payments are made, being the account mentioned in the affidavit of Walter Peterson, are kept in the State of Pennsylvania. The stock and transfer books of the corporation are kept at its office in the City of Philadelphia, State of Pennsylvania, where are also kept its regular business ledgers, and from which office all general correspondence in relation to the Company's busi-

ness is conducted. That all general indebtedness of the Company, and, in fact, all its indebtedness excepting for strictly cash disbursements of the New York Sales Agent are paid by checks drawn, signed and forwarded from the Philadelphia office.

"That deponent has read the affidavit of Walter Peterson in this action, verified the 20th day of January, 1916. That said affidavit correctly states and sets forth the said Peterson's connection with the Susquehanna Coal Company. That Mr. Peterson's duties are limited to such duties as are stated in his affidavit; that beyond such duties as therein stated, Mr. Peterson has performed no duties or functions for the Susquehanna Coal Company, and has exercised no judgment or discretion in its affairs, and has nothing to do with the general management or conduct of its affairs, either generally or particularly relating to New York State, and, in fact, has no duties or functions except as stated in his affidavit. That the said Walter Peterson, as salesman for the defendant Susquehanna Coal Company, is subordinate to deponent as Vice-President thereof, and subject to the terms and to the control of deponent in regard thereto. That Mr. Peterson's duties are defined by deponent, both as to their extent and manner of execution" (see pp. 7-9, fols. 20-25).

On these facts it was contended by the defendant, both before the Special Term and the Appellate Division, that Mr. Peterson was not a "managing agent" upon whom service of the summons could be made in the State of New York under the provisions of SECTION 432 of the CODE.

It also was contended that due diligence had not been exercised by the plaintiff in attempting to serve the officers of the defendant, and that without the exercise of due diligence and inability to find such officers, service on Mr. Peterson as

managing agent was, in any event, not authorized.

In support of such contention, it was pointed out that the affidavits relied upon by the plaintiff as showing due diligence on its part to serve the defendant's officers contained mere conclusions on the part of the affiants without the statement of any facts to show such diligence (see Affidavit Joseph Levy, p. 40, fols. 118-119; p. 41, fols. 121-122; see Affidavit Ona Roder, pp. 42-44, fols. 124-132).

The motion came on for hearing before Mr. Justice Donnelly, at Special Term, Part I., and was denied on the authority of Jackson *v.* Schuylkill Silk Mills (92 Misc. 442; see Order p. 3, fols. 7-9).

No other ground was stated (see Affidavit, p. 45, fols. 134-135).

On appeal to the Appellate Division, the order was affirmed without opinion by a divided Court, Justices McLaughlin and Scott dissenting (see p. 55, fol. 165; see Order of Appellate Division, p. 47, fols. 139-141).

In the following points the questions certified by the Appellate Division for review will be considered *seriatim*.

POINT I.

The defendant at the time of the service of the summons herein was not "doing business" within the State of New York within the meaning of Section 1780, Subdivision 4, of the Code of Civil Procedure.

FIRST: By SECTION 1780 of the CODE as amended in 1913, it is provided:

> "An action against a foreign corporation may be maintained **by a resident of the State, or by a domestic corporation, for any cause of action.** An action against a foreign corporation may be maintained **by another foreign corporation, or by a non-resident, in one of the following cases only:**
>
> "1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.
>
> "2. Where it is brought to recover real property situated within the State, or a chattel, which is replevined within the State.
>
> "3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
>
> **"4. Where a foreign corporation is doing business within this State."**

See Code of Civil Procedure, Sec. 1780.

The last subdivision was added by the amendment of 1913.

There is no sufficient statement appearing in the answering affidavits as to the place of residence of the plaintiff.

The only statement is one made by the attorney for the plaintiff upon information and belief that the plaintiff at the time of the commencement of the action was, and now is a resident of the State of New York. This statement made without disclosing the sources of information or ground of the belief of the attorney, is wholly insufficient. The defendant could not state affirmatively on this subject for the reason that no record could be found by it of the plaintiff's actual residence. The defendant could state nothing except that the cause of action did not arise in New York, for it could find no record of any such person as the plaintiff in connection with its books or records.

SECOND: The defendant is not "doing business" within the State within the meaning of the section referred to.

(1st) THE DEFENDANT IS WHOLLY ENGAGED IN THE MINING OF COAL IN THE STATE OF PENNSYLVANIA AND TRANSACTS NO BUSINESS IN THIS STATE EXCEPT TO SOLICIT ORDERS FOR THE SALE OF ITS PRODUCT THEREIN.

The defendant does not maintain any yard or docks within the State of New York, nor does it maintain any office therein except at 120 Broadway, New York City, as the headquarters of the salesmen employed by it (see p. 11, fols. 32-33). The sole functions and duty of such salesmen are to solicit and secure orders for the sale of the coal mined at prices named and given to them by the executive officers of the defendant (see p. 12, fol. 34). The principal office of the defendant is at Philadelphia, in the State of Pennsylvania, and at said office all banking accounts of the Company, except a small petty cash account, from which strictly petty cash payments are made, are kept

(see p. 8, fol. 22). The stock and transfer books of the corporation are kept at its office in Philadelphia, where are also kept its regular business ledgers and from which office all general correspondence in relation to the company's business is conducted (see p. 8, fols. 22-23). All general indebtedness of the company, excepting for strictly cash disbursements of the New York sales agents, are paid by checks drawn, signed and forwarded from the Philadelphia office (see p. 8, fols. 22-23). The sales agents employed in New York exercise no judgment or discretion in the defendant's affairs, and have nothing to do with the general management or conduct of its business either generally or particularly relating to New York State (see p. 8, fol. 24) and have no duties or functions except to solicit sales at such prices as are named by the defendant, and all contracts to be valid or binding must be approved by the defendant's officers in Philadelphia (see pp. 12-13, fols. 36-38).

It is true, on the door of the offices maintained in New York the name of the defendant appears (see p. 38, fol. 114), but no business is conducted thereat other than such as is carried on by its sales agents, and it is maintained solely as a headquarters for them and for their convenience (see p. 11, fols. 32-33).

The defendant has never applied for any certificate to authorize it to do business in this State (see p. 7, fol. 21).

It, therefore, appears that all of the defendant's business is carried on outside of the State of New York except such as is necessary for, and incidental to the sale of its coal in New York State and that the only things done by defendant in this State are in furtherance of the transaction of interstate commerce.

(2nd) UNDER SUCH CIRCUMSTANCES THE DEFENDANT IS NOT "DOING BUSINESS" IN THIS STATE.

Hovey *vs.* DeLong Hook & Eye Co., 211 N. Y., 420;
Green *vs.* Chicago, Burlington & Quincy Railway Co., 205 U. S., 530, 51 L., Ed. 916.

In HOVEY *vs.* DELONG HOOK & EYE CO. (*supra*), the defendant was organized under the Laws of the State of Pennsylvania, and in that State had its factory and general offices. It sold its goods in the State of New York through traveling salesmen who took orders which were transmitted to the office in Pennsylvania subject to approval, and which, if accepted, were filled by shipment from the factory in that State. It rented an office in the City of New York for the purpose of furnishing headquarters for salesmen traveling in that locality where they might meet customers and conduct correspondence. No bank account was maintained in that city, no books of account or goods for sale were kept there, and no collections for goods sold were made from that office. No stock transfer books were kept there, and no meeting of stockholders, directors or officers was ever held there. It was held that the company was not doing business within the State of New York within the meaning of the Stock Corporation Law so as to make it subject to the penalty therein prescribed for failure to keep a stock book at such office in the State of New York for the inspection of its stockholders and judgment creditors.

It was said by this Court:

"As has already been stated, the defendant was organized under the Laws of the State of Pennsylvania and in that State had its factory and general offices. It sold its goods in the State of New York through traveling salesmen who took orders which were transmitted to the office in Pennsylvania subject to approval and which, if accepted, were filled by shipment from the factory in said State. It rented the office in question in the City of New York, and while some general expressions were used on the trial concerning its nature and the position of the man who had charge of it, and while upon its door there was a sign giving the name of the defendant and the names of two individuals respectively as vice-president and manager, the evidence shows without dispute that the office was kept there simply for the accommodation of traveling salesmen who made it their headquarters for the purposes of correspondence and meeting their customers. A small amount of cash was forwarded thither from the office in Pennsylvania which was used for buying postage, paying car fare, etc., and accounted for to the Pennsylvania office. The office was equipped with a stenographer, typewriter and ordinary office furniture. No bank account was maintained in New York. No books of account or goods for sale were kept there, and no collections for goods sold were made from that office. No stock transfer books were kept there, and no meeting of stockholders, directors or officers was ever held there. The entire arrangement may be fairly summarized as furnishing and constituting a headquarters for salesmen traveling in that locality where they might meet customers and conduct correspondence.

"Without attempting for the moment either to differentiate or to interpret as meaning the same thing such expressions as 'to do busi-

> ness,' or 'doing business,' or 'carrying on business,' or 'transacting business,' the important provisions designed for the supervision and regulation of foreign corporations prosecuting business in this State are to be found in the General Corporation Law, the Stock Corporation Law and the Tax Law."

And after reciting the provisions of the statutes referred to, the learned Judge continued:

> "Thus we find a systematic series of provisions intended for the supervision, regulation and taxation of foreign corporations described under varying phrases as prosecuting their business in this State. As the question has come before the Courts for their determination, what constituted carrying on or doing or transacting business within these provisions, no decision, so far as I am aware, has held that a case was made out against a corporation by the doing of such things simply as the defendant did in this State. * * * * * * The contrary has been broadly held under the provisions of the General Corporation Law and Tax Law." (Citing cases.)

The learned Judge then pointed out that there was a fundamental reason for the decisions excluding a corporation under such circumstances from the provisions of the statutes, and continued:

> "Independent of any constitutional question, a foreign corporation owing no debt to this State for its corporate existence, having its place of business in and conducting its business from another State, except as it may use incidental and very limited agencies in this State for the sale of its goods, might and would properly be exempted from regulations, restrictions and burdens which, with entire justice, would be imposed on a foreign corporation coming into our State and taking

> advantage of its protection and laws for the purpose of here prosecuting its business under the same general methods and perhaps to the same degree as in the State where it was organized."
>
> Hovey *vs.* DeLong Hook & Eye Co. (*supra*).

And in GREEN *v.* CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY (*supra*) it was expressly held by the Supreme Court that the soliciting through its district freight and passenger agent in Philadelphia of freight and passenger traffic for a railway company incorporated in Iowa, and having its eastern terminal at Chicago was not doing business within the State of Pennsylvania in such a sense that process could be served upon the corporation there.

MR. JUSTICE MOODY, writing for the Court, said:

> "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."
>
> Green *v.* Chicago, Burlington & Quincy Railway Company (*supra*).

These decisions, it is submitted, are precise authority to the effect that the defendant is not doing business in this State within the meaning of SECTION 1780 of the CODE.

(3rd) NOR IS THE DECISION BY THIS COURT IN POMEROY *v.* HOCKING VALLEY RAILWAY COMPANY, DECIDED JULY 11TH, 1916, 113 NORTHEASTERN REPORTER, P. 504 (NOT YET OFFICIALLY REPORTED), IN ANY WAY TO THE CONTRARY.

In that case the Chesapeake & Ohio Railroad Company, the principal owner of defendant's capital stock, maintained a suite of offices in New York City, and certain rooms in that suite were used by the defendant for its office; its name appeared upon the doors thereof, and several meetings each year of its Board of Directors and Executive Committee were held there. A number of its directors and members of its Executive Committee resided in New York City, and the Chairman of the Board of Directors, as well as the President of the company, when in New York City, used offices in said suite. The Secretary of the defendant had his only office as such at said location where he kept the minutes of the Board of Directors and of the Executive Committee and conducted correspondence relating to the business of the defendant. From these same offices were paid by the Treasurer certain obligations of the defendant including the interest on bonds and notes, dividends, claims for legal services and incidental expenses. The defendant's stock was transferred in New York, and interest upon bonds and various obligations not paid directly by the Treasurer were paid through fiscal agents residing in New York. The defendant paid the Chesapeake & Ohio Railroad Company for its office facilities and clerical work furnished by the latter company at said location. It was held that these facts permitted the conclusion that the defendant was transacting business in New York State. No such state of facts is present in the case at bar.

As a matter of fact, we find on examining the Pomeroy case that upon facts similar to those shown in the case at bar, this Court stated expressly, "These, facts of course, negative the conclusion that the defendant is transacting business within this State."

THIRD: To hold that the defendant is "doing business" within the meaning of the Code provision so as to subject it to the service of process within this State would, moreover, be a violation of its constitutional rights.

(1st) IN MINING AND SELLING ITS COAL, THE DEFENDANT IS ENGAGED IN PRODUCING AND SELLING AN ARTICLE OF INTERSTATE COMMERCE, AND ITS RIGHT TO SELL THE SAME IS NOT CONFINED TO THE STATE OF ITS CREATION, VIZ., THE STATE OF PENNSYLVANIA, BUT INCLUDES THE RIGHT TO SELL THE SAME IN ANY OTHER STATE AS WELL.

The sale by defendant of the coal mined by it in Pennsylvania was simply an act in furtherance of its right to engage in interstate commerce.

International Text Book Company *v* Pigg,
217 U. S., 91, 54 L. Ed. 678.

In BROWN *v.* MARYLAND (12 Wheaton, 419), it was said by CHIEF JUSTICE MARSHALL:

> "Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic when given in the most comprehensive terms with the intent that its efficacy should be complete should cease at the point when its continuance is indispensable to its value. To what purpose would the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? **Sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient,**

> as indispensable to the existence of the entire thing then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell."
>
> Brown *v.* Maryland, 12 Wheaton, 419, at p. 446.

And in *In re* MINOR (69 Fed. Rep., 233), at p. 236, it was also said:

> "The right to purchase in one State carries with it the right to sell the article so purchased in another State regardless of laws and independent of local interests and jealousies. Were this not so, the commerce between the States could be, and in many instances would be, entirely destroyed."
>
> *In re* Minor, 69 Fed. Rep., 233, at p. 236; See also Addystone Pipe & Steel Co. *v.* U. S., 175 U. S., 211.

This right to sell, it has also been decided, carries with it not only the right of the party himself to sell, but to appoint an agent for that purpose.

> Schollenberger *v.* Pennsylvania, 171 U. S., p. 1.

In that case it was said by MR. JUSTICE PECKHAM:

> "The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States of the Union."
>
> Schollenberger *v.* Pennsylvania (*supra*).

(2nd) THIS RIGHT TO SELL IT HAS ALSO BEEN EXPRESSLY HELD, MUST BE LEFT UNTRAMMELED AND FREE, EXCEPT AS REGULATED BY FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

In LEISY *v.* HARDIN (135 U. S., 100), it was said by the SUPREME COURT:

> "Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, SALE and exchange of commodities, is national in its character, and must be governed by uniform system, **so long as Congress does not pass any law to regulate it or allowing the States so to do, it thereby indicates its will that said commerce shall be free and untrammeled."**

In Sioux Remedy Co. *v.* Cope, 235 U. S., 197, 59 L. Ed. 193, it was said by the Supreme Court:

> "Through a long series of decisions dealing with the scope and effect of the commerce clause it has come to be well settled that a State, while possessing power to adopt reasonable measures to promote and protect the health, safety, morals, and welfare of its people, even though interstate commerce be incidentally or indirectly affected, has no power to exclude from its limits foreign corporations or others engaged in inter-

state commerce, or, by the imposition of conditions, to fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection. Crutcher *v.* Kentucky, 141 U. S., 47, 35 L. Ed. 649, 11 Supp. Ct. Rep. 851; Minnesota Rate Cases (Simpson *v.* Shepard), 230 U. S., 352, 401, 402, 410, 57 L. Ed. 1511, 1542, 1543, 1546, 48 L.R.A. (N.S.) 1151, 33 Supp. Ct. Rep. 729, and cases cited; Barrett *v.* New York, 232 U. S., 14, 31, 58 L. Ed. 483, 490, 34 Supp. Ct. Rep. 203, and cases cited. * * * * * * * * * * We think that when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the State cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled."

Sioux Remedy Co. *v.* Cope (*supra*).
See also Schollenberger *v.* Pennsylvania, 171 U. S., p. 1;
People *v.* Hawkins, 157 N. Y., p. 1.

And this right to conduct interstate business, without restriction by State laws, was clearly recognized, although not expressly decided by this Court in Hovey *vs.* DeLong Hook & Eye (*supra*).

It was there pointed out that to hold that the defendant was subject to the pains and penalties imposed by the statute there under consideration "might precipitate embarrassing constitutional

"questions. **The defendant has the right, without inter-"ference by the State, to conduct interstate business which "would doubtless include selling its goods in this State.** "(Norfolk & W. R. R. Co. *v.* Penn., 136 U. S., 114; "Crutcher *v.* Kentucky, 141 U. S., 47; Green *v.* "Chicago, B. & Q. Ry. Co., 205 U. S., 530; Int. "Nat. Textbook Co. *v.* Pigg, 217 U. S., 91; Atty.-"Genl. *v.* Elec. Storage Battery Co., 188 Mass., "239.)"

Hovey *v.* DeLong Hook & Eye Co. (*supra*).

Thus it has been expressly laid down by the Supreme Court of the United States and recognized by this Court that a foreign corporation engaged in the sale of an article of commerce has the right to import its product into this State and to sell the same therein, and for that purpose to appoint an agent to solicit sales thereof without, as a condition thereof, being subject to any restriction or interference by State legislation.

(3rd) AS THE DEFENDANT IS ENGAGED ONLY IN THE EXERCISE OF ITS RIGHT TO IMPORT AND SELL COAL—AN ARTICLE OF COMMERCE—IN THE STATE OF NEW YORK TO HOLD THAT BECAUSE OF SUCH IMPORTATION AND SALE IT IS "DOING BUSINESS" THEREIN WITHIN THE MEANING OF THE SECTION REFERRED TO, WOULD BE A VIOLATION OF ITS CONSTITUTIONAL RIGHTS.

Norfolk & Western R. R. Co. *v.* Pennsylvania, 136 U. S., 114;

Crutcher *v.* Kentucky, 141 U. S., 57;

International Textbook Co. *v.* Pigg, 217 U. S., 91;

N. K. Fairbank & Company *v.* Cinn. N. O. & T. Ry. Co., 54 Fed., 420;

Earl *v.* Chesapeake & Ohio Ry. Co., 127 Fed. Rep., 235.

In NORFOLK & WESTERN RAILROAD COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA (*supra*), the business of the plaintiff railroad, a Virginia corporation, consisted of a through line in part for carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. Holding that under the guise of a license tax the State of Pennsylvania could not exclude from its jurisdiction a foreign corporation engaged in interstate commerce NOR IMPOSE ANY BURDENS UPON SUCH COMMERCE WITHIN ITS LIMITS, it was said by the Supreme Court:

> "Again, the plaintiff in error does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purpose thereof. Before establishing its office in Philadelphia it obtained from the secretary of the Commonwealth the certificate required by the Act of the State Legislature of 1874 enabling it to maintain an office in the State. THAT OFFICE WAS MAINTAINED BECAUSE OF THE NECESSITIES OF THE INTERSTATE BUSINESS OF THE COMPANY, AND FOR NO OTHER PURPOSE. **A tax upon it was therefore a tax upon one of the means or instrumentalities of the Company's interstate commerce, and as such was in violation of the commercial clause of the Constitution of the United States."**
>
> Norfolk & Western Railroad Co. *v.* Commonwealth of Pennsylvania (*supra*).

It is therefore submitted, that the defendant cannot be held to be "doing business" within the meaning of SECTION 1780 of the CODE, and that the first question certified to this Court for review should be answered in the negative.

POINT II.

The plaintiff has not shown due diligence in attempting to serve one of the officers specified in Section 432, Subdivision 1, of the Code so as to permit service to be made upon the "managing agent" of the defendant corporation.

FIRST: As to service of process upon a foreign corporation, it is provided:

> "Section 432. Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:
>
> "1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.
>
> "2. To a person designated for the purpose as provided in section sixteen of the general corporation law.
>
> "3. If such a designation is not in force, or if neither the person designated **nor an officer specified in subdivision first of this section, can be found with due diligence,** and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a MANAGING AGENT of the corporation, within the State. * * * (See Code of Civil Procedure, Sec. 432.)

Before process can be served on the managing agent of a corporation, it must therefore appear:

(1) That the President, Vice-President, Treasurer, Assistant Treasurer, Secretary or Assistant Secretary or officers performing corresponding functions under another name cannot be found with "DUE DILIGENCE."

(2) That no person has been designated upon whom service can be made.

(3) That the corporation has property within the State, or that the cause of action arose therein.

SECOND: There is no proof in the case at bar that one of the persons mentioned in Subdivision 1 could not be found with "due diligence."

On the question of the diligence exercised by the plaintiff, the affidavits of JOSEPH LEVY, the plaintiff's attorney, and ONA RODER were submitted. By the affidavit of Mr. Levy it is sworn:

> "That before the service of the summons in this action was made on the defendant, by delivering the same to Walter Peterson, the managing agent of the defendant, this deponent made and caused to be made diligent efforts to find within the State of New York, any of the officers of the defendant, mentioned and described in the laws and rules of the State of New York, but that deponent and his employees and persons retained by him were and have been unable to find any of such officers or persons for that purpose, or any person who was the designated agent of the defendant, pursuant to the laws of the State of New York, except Walter Peterson, who is in charge of the defendant's property and business within the State of New York, and in charge of the offices, furniture, files and banking accounts of the defendant, kept within the State of New York, and in charge of various employees, sales agents, stenographers, bookkeepers, at No. 120 Broadway, in the City and State of New York."
>
> See Affidavit Joseph Levy, p. 41, fols. 121-122.

By the affidavit of Ona Roder, it is sworn:

> "That I visited the Equitable Building, at No. 120 Broadway, Borough of Manhattan,

City of New York. That the name 'Susquehanna Coal Company' appeared on the bulletin board down stairs with a certain room number, and that I went to the room indicated as being occupied by the said company. That there appeared on the door of this room the name 'Susquehanna Coal Company,' and also the name of Walter Peterson, with the words 'sales agent' after his name."

And after describing what she saw on her visit, her affidavit continues:

"DEPONENT WAS INFORMED that a long time prior, and at the time of the commencement of this action, that the defendant Susquehanna Coal Company, was now and now is selling coal throughout the State of New York in large quantities and on a thirty-day credit basis, and that at all of the times and at the time of the commencement of this action the defendant did and now does business on a large scale within the State of New York and that Walter Peterson is in full charge of the office, employees and property of the defendant, within the State of New York and that no other person could be found with due diligence within the State of New York that occupies a higher authority than Walter Peterson, and no service of summons could be made on any officer or other person holding a higher position than Walter Peterson within the State of New York, after due diligence had been used, and that Walter Peterson is the only person upon whom service of process could be made within the State of New York against the defendant corporation, Susquehanna Coal Company.

"That I was requested by other persons on various occasions to serve process in actions brought against this defendant, and many efforts I made to serve this defendant within the State of New York was a failure, except by the service on the managing agent, Walter

Peterson, who is in charge of the property and business of the defendant corporation within the State of New York."

See Affidavit Ona Roder, p. 42, fol. 125; p. 45, fols. 130-132.

By the affidavit of Mr. Levy, of course, nothing was shown other than that he says he made and directed other persons to make service upon the defendant's officers, and that such service could not be made.

By the affidavit of Ona Roder it appears simply that she was informed that no persons holding a higher position than Walter Peterson could be found within the State of New York for the service of process, without, however, any statement as to the person by whom she was informed; and that after many efforts had been made by her, she had been unable to make service, without stating what the efforts were, or the facts which led her to believe that no officers higher than Peterson could be found within the State.

In other words, in neither affidavit were any facts stated upon which the Court could base a finding that "due diligence" had been used, but simply conclusions of law by the affiants themselves that due diligence had been used.

THIRD: Under the third subdivision of Section 432, it has been repeatedly held that to sustain service on a managing agent it is necessary that facts be presented showing due diligence in attempting to serve one of the officers named in Subdivision 1, and that the exercise of such due diligence is a condition precedent to sustaining service under the third subdivision.

Gursky *v.* Blair, 218 N. Y., 41, at p. 46;
Vitolo *v* Bee Publishing Co., 66 App. Div. 582, at pp. 585-586;
Doherty *v.* Evening Journal Association, 98 App. Div., 136;

Wilcox *v.* Philadelphia Casualty Co., 136 App. Div., 626;

Karosas *v.* Susquehanna Coal Company, 158 N. Y. Supp., 1021 (a copy of which opinion is printed in Papers on Appeal, pp. 29-32, fols. 85-92).

In VITOLO *v.* BEE PUBLISHING COMPANY (*supra*) the action was brought to recover damages for an alleged libel published in the State of Ohio where the defendant's paper was printed, and in the State of New York by the sale of the paper containing the article here.

An attempted service of summons was made upon a person who conducted a newspaper advertising agency in New York City, and in the course of his business solicited advertisements for a number of newspapers, one of which was the defendant, and who it was claimed was a managing agent of the defendant in this State.

In reversing an order denying the defendant's motion to set aside the service of the summons and complaint, and granting said motion it was said by the APPELLATE DIVISION, in the FIRST DEPARTMENT:

> "Aside from this question, however, we think the proof insufficient to show that the Court acquired jurisdiction of the defendant by the attempted service. As already appears under subdivision 3 of Section 432 of the Code of Civil Procedure, service is not authorized upon a managing agent unless there is a failure to designate a person upon whom service can be made, or there being neither of the officers specified in subdivision 1 of the section, who can, by the exercise of due diligence, be found within the State, and the corporation has property within the State or the cause of

action arose therein. **It is a condition precedent to a valid service upon a managing agent that the proof show these facts, and that due diligence has been used to find the persons specified without success, as it is only upon such proof that service upon the agent is authorized."**

Vitolo *v.* Bee Publishing Co. (*supra*).

FOURTH: What the diligence used has been must be shown by facts, and not by mere conclusions.

Carlton *v.* Carlton, 85 N. Y., 313;
McCracken *v.* Flanagan, 127 N. Y., 493;
Kennedy *v.* Lamb, 182 N. Y., 228;
Romig *v.* Gillette, 187 U. S., 111;
McDonald v. Cooper, 32 Fed. Rep., 745;
Wilcox v. Philadelphia Casualty Co., 136 App. Div., 626;
McLoughlin *v.* McCann, 123 App. Div., 67.

In McCracken *v.* Flanagan (*supra*) holding that an order for the publication of a summons under the Code based upon an affidavit stating "that defendant is a non-resident of this State, nor can be found therein" was wholly insufficient, and did not give the Court jurisdiction to make the order, it was said by this Court:

"Besides, it is a fundamental rule that when facts are to be found by a judge or jury, the evidence of the existence of the requisite facts must be presented, **and not the conclusion or inference of the affiant or witness that the requisite facts exist.** If this were not so, the judicial function of the Court or Jury would be superseded and the conclusion of the affiant or witness would be substituted instead of the judgment of the court or jury. It is plain, from a consideration of the law, that jurisdiction of a court to render a judgment against a party to an action is ordinarily acquired by the personal service of the process, as well as from the phraseology

> of section 135, that the order for a different mode of service may only be granted upon proof by affidavit of the existence of certain facts, **and hence the fact and the mode of establishing it is jurisdictional."**
>
> McCracken *v.* Flanagan (*supra*).

In McDonald *v.* Cooper (*supra*) it was held that an affidavit for an order for service of summons by publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the State after due diligence, and that the mere assertion of the fact was insufficient. This Court said:

> "That diligence has been used to find the defendant within the State must appear from the affidavit, and a mere statement or assertion therein that the party is a non-resident thereof is not sufficient. Nor is such a statement or assertion that diligence has been used a compliance with the statute. **The affidavit must contain some evidence of the ultimate fact besides the assertion of the affiant on which the judicial mind may act in granting the order,** and however slight and inconclusive this evidence may be if it has a legal tendency to prove the diligence, and that the defendant could not be found in this state it is sufficient to give the Court jurisdiction and sustain the order against a collateral attack, **but where there is no evidence of such diligence, except the bald assertion of the fact, or that of non-residence, the order is void and the Court does not acquire jurisdiction."**
>
> McDonald *v.* Cooper (*supra*).

In Romig *v.* Gillette (*supra*) the cases of McDonald *v.* Cooper, Carlton *v.* Carlton and McCracken *v.* Flanagan (*supra*) received the ex-

press approval of the Supreme Court of the United States.

In WILCOX *v.* PHILADELPHIA CASUALTY COMPANY (*supra*) the summons was served upon a person alleged to be the cashier of the defendant, and the defendant moved to set aside the service on the ground that the person served was not its cashier, while the affidavit supporting the service merely alleged conclusions as to attempts to serve the officers named in the statute.

Reversing an order denying a motion to vacate the service it was said by the APPELLATE DIVISION, FIRST DEPARTMENT:

> "The mere conclusion alleged in the affidavit that diligent attempt had been made to serve the manager without setting forth those attempts is not sufficient; * * *."
>
> Wilcox *v.* Philadelphia Casualty Co. (*supra*).

In the case at bar the affidavits merely state the conclusions of the affiants without stating any facts on which the Court could base a finding that due diligence has been used, and are clearly insufficient within the rule laid down in the decisions referred to.

FIFTH: Moreover, the averments in the affidavits to the effect that none of the officers mentioned in Subdivision 1 could be found in this State are based wholly upon information and belief without stating either the sources of information or the grounds on which the belief was based.

Mr. Levy simply states that he made and caused to be made diligent efforts to serve an officer of the defendant, and that such officers could not be found in this State, notwithstanding the exercise of due diligence (see Affidavit Joseph Levy p. 41, fols. 121-122).

Ona Roder merely states that she was informed that service could not be made on any higher authority than Walter Peterson.

> "Deponent was informed * * * that Walter Peterson is in full charge of the office, employees and property of the defendant within the State of New York, and that no other person could be found with due diligence within the State of New York that occupies a higher authority than Walter Peterson," etc., etc.
>
> See Affidavit Ona Roder, p. 44, fols. 130-132.

Who it was that gave Miss Roder the information to which she swears is not shown, and whether such person was in a position to know the facts to which she swears, does not appear.

Such statements have no probative force whatsoever.

> Murphy *v.* Jack, 142 N. Y., 215;
> Lehmaier *v.* Buckner, 14 App. Div., 263;
> Dains Sons Company *v.* McNally, 13 App. Div., 857.

In MURPHY *v.* JACK (*supra*), an attachment was granted upon an affidavit of plaintiff's attorney, and the averments therein were stated to be upon information and belief, the grounds thereof being statements of plaintiff who was in Boston, and his counsel residing there, and who, as the affidavit stated, had talked to the affiant over the 'phone from Boston.

Holding that the affidavit was insufficient, it was said by this Court:

> "To authorize an attachment to issue upon the affidavit furnished here was in disregard of the rule which requires THAT THE SOURCE

OF INFORMATION SHALL BE DISCLOSED IN SUCH A WAY AS TO ENABLE THE COURT TO DECIDE UPON THE PROBABLE TRUTH OF THE STATEMENTS AND THE AUTHENTICITY OF THE JURISDICTIONAL FACTS."

Murphy *v.* Jack (*supra*).

On both grounds, therefore, that the averments as to due diligence contained in the affidavits were mere conclusions and not statements of fact, and that the averments therein were wholly upon information and belief without the sources of the information or the grounds of the belief being shown, the service upon Walter Peterson as "managing agent" was wholly unauthorized, and the second question certified for review should also be answered in the negative.

POINT III.

The duties of and the authority conferred upon Walter Peterson, the defendant's sales agent, were not such as to constitute him a "managing agent" of the defendant corporation within the meaning of Subdivision 3 of Section 432 of the Code.

FIRST: The sole duty of Mr. Peterson is to sell coal in the territory adjacent to New York Harbor (see p. 11, fol. 32). The prices for the different kinds of coal mined by the defendant at its mines in Pennsylvania are named to him from time to time by the executive officers of the defendant in Pennsylvania (see pp. 11-12, fols. 33-34). He has no authority whatever to deviate from the prices

named, and any question involving credit cannot be settled by him, but must be settled by the executive officers of the defendant in Pennsylvania (see p. 12, fol. 35).

No contracts for future or long term deliveries can be entered into by him until submitted to the executive officers of the defendant and approved by them (see p. 13, fols. 37-38).

All payments for coal sold by him are made directly to the defendant, and he has no power to receive or endorse checks, but the same are sent direct to the Philadelphia office of the defendant corporation (see p. 13, fols. 38-39).

The only bank account maintained by the defendant within the State of New York is a petty cash account out of which strictly petty cash disbursements are paid, and all receipts for payments made for coal sold are sent out from the Philadelphia office (see pp. 13-14, fols. 39-40).

In soliciting orders, all purchasers of coal are given to understand that no orders and contracts solicited by him are binding on the defendant until approved by the Philadelphia office (see pp. 10-15, fols. 28-43; see Affidavit, pp. 7-9, fols. 20-26).

SECOND: Under all the authorities Peterson is not a "managing agent" within the meaning of the Code.

Taylor *v.* Granite State Provident Association, 136 N. Y., 343;

Beck *v.* North Packing & Provision Co., 159 App. Div., 418;

Union Associated Press *v.* Times Star Co., 84 Fed. Rep., 419;

Cramer *v.* Buffalo Union Furnace Co., 132 App. Div., 415;

Fontana *v.* Post Printing & Publishing Co., 87 App. Div., 233;

Moore *v.* Monumental Mutual Life Ins. Co., 77 App. Div., 205;
Vitolo *v.* Bee Publishing Co., 66 App. Div., 582.

In TAYLOR *v.* GRANITE STATE PROVIDENT ASSOCIATION (*supra*), it was said by this Court:

> "A managing agent must be some person invested by the corporation with general powers involving the exercise of judgment and discretion as distinguished from an ordinary agent or attorney who acts in an inferior capacity and under the direction and control of superior authority both in regard to the extent of his duty and the manner of executing it."
>
> Taylor *v.* Granite State Provident Association (*supra*).

And that a mere selling agent is not a managing agent within the meaning of the Code has been expressly held.

In BECK *v.* NORTH PACKING & PROVISION COMPANY (*supra*), the defendant was incorporated under the statutes of the State of Maine and maintained an office for the transaction of business in Massachusetts. None of its officers, directors or any person having any connection with the company lived in New York except one Snow to whom the summons was delivered and who, it was claimed, was a "managing agent" within the meaning of the Code. The defendant's business in part was dealing in provisions, and Snow, as a member of the New York Produce Exchange, represented defendant as sales agent in New York City. His duties consisted in obtaining orders and transmitting the same to defendant. He had no discretion as to prices, all of which were fixed

and communicated to him in advance of an order taken. He had no authority to accept an order. All he could do was to obtain one and then send it to the defendant's office in Massachusetts for acceptance. If accepted that office made the shipment direct to the customer from whom it received payment.

Holding that Snow was not a managing agent within the Code provisions, it was said by the APPELLATE DIVISION in the FIRST DEPARTMENT:

> "Upon the foregoing facts, it seems to me clear that Snow is not a managing agent of the defendant in the sense in which those words are used in the section of the Code referred to. His duties are of the most specific character, and he is not invested with any discretion whatever. He does simply what he is told to do by the defendant, and nothing else."
>
> Beck *v.* North Packing & Provision Co. (*supra*).

So, likewise, it has been held that an assistant superintendent of a corporation, who had no general supervision over its affairs, and whose duties were substantially those of a foreman (Cramer *v.* Buffalo Union Furnace Co., 132 App. Div., 415), an advertising solicitor (Fortunato *v.* Post Printing & Publishing Company, 87 App. Div., 233), a person who collected dues for a mutual benefit association and transmitted them to the home office outside the State (Moore *v.* Monumental Mutual Life Insurance Company, 77 App. Div., 209), and a person authorized to make contracts for advertisements in a newspaper published outside the State (Vitolo *v.* Bee Publishing Company, 66 App. Div., 582) were not managing agents within the meaning of the Code provision.

In the case at bar the person served as the "managing agent" of the defendant is simply a sales agent whose duties are limited to the selling of coal, and who has no authority to exercise any judgment or discretion whatsoever, but can only do what he is told to do by his superior officers.

THIRD: Nor does the fact that the defendant actually received from Peterson information of the service in any way affect the question.

Beck *v.* North Packing & Provision Co. (*supra*).

It was there said:

> "But the validity of the service does not depend upon what is done with the summons after the service is made. If Snow were a managing agent then the service upon him would have bound the defendant, even though he failed to notify it. The statute prescribes the method by which jurisdiction of a foreign corporation can be obtained and unless that method be followed the Court acquires no jurisdiction. Defendant's knowledge of the attempt made to acquire jurisdiction in no way affects the matter." (Citing cases.)

Beck *v.* North Packing & Provision Co. (*supra*).

It, therefore, is respectfully submitted that the third question certified to this Court for review should also be answered in the negative.

POINT IV.

Sections 1780 and 432 of the Code are in violation of the Federal Constitution and particularly of Section 8, Clause 3, Article 1, and of Section 1 of the Fourteenth Amendment thereto, insofar as they attempt to confer jurisdiction on the Courts of this State over foreign corporations which are not doing business in this State within the meaning of the term "doing business" as used in Subdivision 4, Section 1780, of the Code of Civil procedure, and have not filed a designation pursuant to Section 16 of the General Corporation Law, in cases where the cause of action did not arise within this State, or out of any transaction carried on within this State by such foreign corporation.

FIRST: The question as to the constitutionality of §432 was raised on the argument before this Court by the defendant's counsel in the recent case of POMEROY *v.* HOCKING VALLEY RAILWAY COMPANY decided July 11th, 1916, 113 Northeastern Reporter, 504 (not yet officially reported), but this Court did not consider that the point was directly presented for decision by the question certified, and refused to consider or decide it.

JUSTICE HISCOCK, referring to the contention by the defendant in that case, said:

> "Counsel for the defendant has argued with much earnestness another proposition. Ad-

mitting that jurisdiction of a foreign corporation doing business within the State may be obtained by our Courts by service of summons upon an officer, such as defendant's secretary was, within the State on business of the corporation, he calls our attention to the reverse rule undoubtedly now established by the cases last cited that jurisdiction cannot be thus obtained by service upon a foreign corporation not doing business within this State through delivery to any official thereof incidentally in the State. He then calls our attention to the fact that Subdivision 1 of Section 432 already quoted by its literal terms provides just as much for service upon a foreign corporation under the circumstances last stated as in the case where it is doing business within the State and may be properly served, and therefrom he argues that the entire provision is unconstitutional and void because the void purposes of the statute cannot be detached from the constitutional ones and the whole statute must go down, and nothing be left authorizing the service which was made.

"For some reason the respondents' counsel have deemed it unnecessary to consider at all this proposition which, if it is here is much the most important one before us, and we are therefore without the benefit of any answer which they might have made.

"If the proposition were fairly presented by the question certified to us I am not at all prepared to say that it might not be a subject for consideration, but I do not think it is fairly here."

Pomeroy *v.* Hocking Valley Railway Co. (*supra*).

In the present case, the precise question is presented whether §§1780 and 432 are, or either of them is, unconstitutional so far as they attempt to confer jurisdiction over a foreign corporation

which is not doing business in this State and has not filed a designation pursuant to the General Corporation Law, where the cause of action did not arise within this State or out of any transaction carried on by such foreign corporation therein.

SECOND: A corporation cannot migrate beyond the State creating it (Bank of Augusta vs. Earle, 13 Peters, 519), and at common law process must be served on its principal officer within the jurisdiction of the sovereignty where the corporate body exists. It can, however, waive this requirement and consent to be served in a different manner, and when it avails itself of the privilege of doing business as distinguished from the carrying on of interstate commerce in a State whose laws authorize it to be sued there by service of process upon an agent its assent to that mode of service may be implied.

Lafayette Insurance Co. *v.* French, 18 How., 404;
Railroad Co. *v.* Harris, 12 Wallace 81;
St. Clair *v.* Cox, 106 U. S., 350;
Merchants Mfg. Co. *v.* Grand Trunk Ry., 13 Fed., 358;
Denver & Rio Grand Ry. Co. *v.* Roller, 100 Fed. Rep., 738.

By its implied consent, however, a foreign corporation can only be sued in a foreign State on causes of action arising therein or growing out of business transacted therein.

Old Wayne Mutual Life Association *v.* McDonough, 204 U. S., 8;
Simon *v.* Southern Railway Company, 236 U. S., 115.

THIRD: The defendant is not exercising any privilege granted by the State of New York, nor is it doing any business therein under license or by permission of this State, but it is only exercising the right granted to it by the Federal Constitution to import and sell in any State whatsoever an article of interstate commerce, and therefore cannot be held to have assented to service of process outside the State of its domicile.

As we have already called to the attention of the Court, the defendant is engaged wholly and solely in the mining of coal, an article of commerce within the State of Pennsylvania, and the sale of its product in the State of Pennsylvania and other States, and for that, and for no other purpose, it has appointed a selling agent within this State.

In so doing, it does not act under any permission granted by the State of New York, but solely in the exercise of the right granted to it by the Federal Constitution, and which right it is entitled to exercise without interference or condition imposed by the State legislature.

Brown *v* State of Maryland, 12 Wheaton, 419;
Schollenberger *v.* Pennsylvania, 171 U. S., 1;
Sioux Remedy Co. *v.* Cope, 235 U. S., 197, 59 L. Ed. 193;
People *ex rel.* Treat *v.* Coler, 166 N. Y., 144, at p. 150;
People *v.* Hawkins, 157 N. Y., 1;
People *v.* Buffalo Fish Co., 164 N. Y., 93;
In re Minor, 69 Fed. Rep., 233.

FIFTH: Insofar, therefore, as §1780 and §432 attempt to impose on the defendant as a condition of such importation and sale that service of process may be made on its officer or agent within this State, they are wholly unconstitutional and void as an attempted limitation on the right to carry on interstate commerce and as contrary to the provisions of the Commerce Clause of the United States Constitution.

This clearly raises a federal question, to wit, the unwarranted interference under Sections 1780 and 432 of the Code of Civil Procedure with the right to carry on interstate commerce as guaranteed by the United States Constitution.

Crutcher *v.* Kentucky, 141 U. S., 47;
International Textbook Company *v.* Pigg, 217 U. S., 91.

In the latter case, a foreign corporation conducted a correspondence school and its business involved the solicitation of students in Kansas by local agents who were to collect and forward to the home office the tuition fees, and the systematic intercourse by correspondence between the company and its scholars and agents wherever situated, and the transportation of the needful books, apparatus and papers. It was held that the business conducted was interstate commerce within the meaning of the Federal Constitution, and that a statute of the State of Kansas prohibiting the maintaining of an action in the Kansas Courts by any corporation doing business in the State which had not filed with the Secretary of State the statement of its condition provided for by that section was unconstitutional AS IMPOSING A CONDITION ON THE DOING OF INTERSTATE BUSINESS.

MR. JUSTICE HARLAN, after holding that the business of the corporation by means of correspondence through the mails and otherwise between Kansas and Pennsylvania was interstate in its nature, said:

> **"Was it competent for the State to prescribe as a condition of the right of the Textbook Company to do interstate business in Kansas, such as was transacted with Pigg, that it should prepare, deliver, and file with the secretary of state the statement mentioned in §1283? The above question must be answered in the negative upon the authority of former adjudications by this court.** A case in point is Crutcher *v.* Kentucky, 141 U. S., 47, 56, 57 * * * often referred to and never qualified by any subsequent decision. That case arose under a statute of Kentucky regulating agencies of foreign express companies. The statute required as a condition of the right of the agent of an express company not incorporated by the laws of Kentucky, to do business in that commonwealth,

to take out a license from the state auditor, and to make and file in the auditor's office a statement showing that the company had an actual capital of a given amount, either in cash or in safe investments, exclusive of costs. These requirements were held by this court to be in violation of the Constitution of the United States in their application to foreign corporations engaged in interstate commerce."

And quoting from the opinion in that case, the learned Judge continued:

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

And again quoting from the same decision the learned Justice said:

> "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulation as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such."

And in conclusion it was said:

> **"It is the established doctrine of this Court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business."**
>
> International Textbook Company *v.* Pigg, (*supra*).

So, likewise, when as a condition for the transacting of its interstate business in this State the legislature prescribes that a corporation so engaged shall submit itself to the jurisdiction of the Courts of this State by the service of process therein on an officer or agent of the corporation so engaged, it places a burden upon the right of the corporation to lawfully engage in interstate business just as much as if it imposed a license fee for the doing of such business or required the filing of statements showing the amount of its capital stock, its assets and liabilities, and a list of its stockholders and the shares held and paid for by each.

FOURTH: While so far as the present action is concerned it is only necessary that the sections referred to, be held to be unconstitutional as to a corporation engaged wholly in interstate business, nevertheless it would seem that they cannot be held invalid simply insofar as they relate to corporations so engaged, but must be held to be altogether invalid and void.

> International Textbook Company *v.* Pigg, (*supra*).

In that case, holding that the statute was invalid as a whole as well as to the part relating to corporations engaged in interstate commerce, it was said by the Supreme Court:

> "The several parts of the section are not capable of separation if effect be given to the legislative intent. It is well settled that if a

statute is not constitutional, the whole statute must be held to be invalid if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or if so enforced, will not effectuate the manifest intent of the Legislature. In Allen *v.* Louisiana, 103 U. S., 80-84, referring to the rule obtaining in cases of statutes in part constitutional and in part unconstitutional that eminent jurist said: 'But if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.' * * *''

International Textbook Company *v.* Pigg (*supra*).

It, therefore, is respectfully submitted that the sections of the Code, at least, insofar as they provide for service in this State on an officer or agent of a foreign corporation engaged wholly in interstate business are unconstitutional and void, and that the fourth question certified for review by this Court should be answered in the affirmative.

POINT V.

Sections 1780 and 432 are also unconstitutional so far as they attempt to confer jurisdiction on the Courts of this State over foreign corporations which are doing business in the State within the meaning of the term "doing business" as used in Subdivision 4, Section 1780, and have not filed a designation pursuant to Section 16 of the General Corporation Law, in cases where the cause of action did not arise within this State or out of any transaction carried on within this State by such foreign corporation.

FIRST: Under the preceding point, we have contended that the sections are unconstitutional insofar as they attempt to confer jurisdiction over foreign corporations NOT DOING BUSINESS IN THIS STATE, OR DOING ONLY AN INTERSTATE COMMERCE BUSINESS THEREIN.

Under this point our contention is that even as to corporations DOING BUSINESS IN THIS STATE within the meaning of the sections referred to, but have not filed a designation pursuant to the General Corporation Law, they are unconstitutional insofar as they attempt to confer jurisdiction **where the cause of action did not arise within this State, or out of any transaction carried on therein by such foreign corporation.**

SECOND: As we have argued, the right of a State to subject a foreign corporation to suit in its Courts is based on the consent of the corporation to be sued therein, and which consent may be

either express or implied. It is held to be EXPRESS when the corporation accepts the privilege of doing a general business within the foreign State, AND PURSUANT TO THE STATUTES THEREIN FILES A PAPER WITH THE SECRETARY OF STATE OR OTHER OFFICER DESIGNATING A PERSON ON WHOM SERVICE OF PROCESS MAY BE MADE ON ITS BEHALF.

It is held to be IMPLIED when the corporation, ALTHOUGH NOT FILING A DESIGNATION APPOINTING A PERSON ON WHOM SERVICE CAN BE MADE, nevertheless, does business in the State. But an IMPLIED consent as distinguished from an express consent **extends only to causes of action arising in suits in which the business is being done in the State or out of a transaction taking place therein.**

This distinction was expressly pointed out by this Court in

Bagdon *v.* Philadelphia & Reading C. & Reading C. & I. Co., 217 N. Y., 432.

In that case the corporation HAD DESIGNATED A PERSON as an agent upon whom process against it might be served as provided in the General Corporation Law, Section 16, and it was held that the agency of such person was not limited to causes of action arising in this State or growing out of a transaction therein but covered actions of every kind and nature.

JUSTICE CARDOZO, writing for this Court, said:

> "The State of New York has said that a foreign corporation other than a money corporation shall not do business here until it has obtained a certificate from the Secretary of State. The penalty is that it may not maintain any action in our Courts 'upon any contract made by it in this State unless before the making of the contract it has procured

> such certificate.' (Gen. Corp. L., §15, Consolidated Laws, Chap. 23.) The business, though unlicensed, is not illegal; the contract is not void. It may be enforced in other jurisdictions. All that is lost is the right to sue in the Courts of the State (citing cases). To obtain such a certificate, however, there are conditions that must be fulfilled. One of them is a stipulation to be filed in the Office of the Secretary of State 'designating a person upon whom process may be served within this State.' (Gen. Corp. Law, §16.) There is no alternative provision for service on a public officer if the stipulation is not filed. The only result of the omission to file it is that the certificate does not issue. The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served.' The actions in which he is to represent the corporation are not limited. The meaning must, therefore, be that the appointment is for any action which under the laws of this State may be brought against a foreign corporation. (Code Civil Procedure, §1780, 432.) The contract deals with jurisdiction of the person which does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject is present service on the agent shall give jurisdiction of the person.''

And then pointing out the distinction between the effect of an express and an implied consent, JUSTICE CARDOZO continued:

> ''The distinction is between a true consent and an imputed and implied consent, between a fact and a fiction. * * * If consent is withheld, but the privilege of doing business is exercised, the Courts must say to what ex-

> tent the corporation shall be charged with the same consequences as if it had consented. In marking the limits of this estoppel, they are not construing a contract, but defining a duty imposed and implied by law irrespective of contract. Two views are conceivable. On the one hand, we may say that the estoppel extends to causes of action of every nature, to causes of action which would have arisen even though the corporation had never gone beyond the State of its domicile. **On the other hand, we may say that the estoppel should be limited to causes of action which owe their origin to the transaction of business in defiance of the statutory restrictions. IT IS THIS LATTER AND NARROWER VIEW OF THE LIMITS OF THE ESTOPPEL WHICH HAS PREVAILED."**

And it was held that as in that case the corporation HAD FILED A CONSENT DESIGNATING A PERSON ON WHOM SERVICE COULD BE MADE, service on the person so designated conferred jurisdiction on the Court over any cause of action whether arising within the State or not, or whether or not it grew out of transactions and business done therein.

Bagdon *v.* Phil. & Reading C. & I. Co. (*supra*).

That case is authority then for the proposition that when a foreign corporation HAS EXPRESSLY DESIGNATED A PERSON UPON WHOM SERVICE OF PROCESS ON ITS BEHALF MAY BE MADE in compliance with a statute authorizing it to do business in a State, such act on its part operates as a consent and contract by it to be "found" in such State for suit on any cause of action whether arising therein or not, or whether arising out of the transaction of business therein or not, **but expressly leaves open for consideration and decision the question of the effect of an im-**

plied consent where the corporation, though availing itself of the privilege of doing business, has failed to comply with the State statute requiring an agent to be appointed for the service of process.

While, as we have said, this question was not decided in the BAGDON case (*supra*), nevertheless this Court recognized that in such cases the narrower view has prevailed that the estoppel should be limited **"to causes of action which owe their origin to the transaction of business in defiance of the statutory restrictions"** (217 N. Y., at bottom of p. 437).

THIRD: Although the question was not decided, but was expressly left open in the BAGDON case, the precise point was decided by the Supreme Court of the United States in the two cases referred to by this Court in its opinion, viz.:

> Old Wayne Mutual Life Association *v.* McDonough, 204 U. S., p. 8; and
> Simon *v.* Southern Ry. Company, 236 U. S., 115.

In OLD WAYNE MUTUAL LIFE ASSOCIATION *v.* MCDONOUGH (*supra*), it was expressly held that the IMPLIED assent of a foreign insurance company transacting business in Pennsylvania without complying with the Pennsylvania statute that service of process in a suit brought against it there in respect of business transacted in that State might be made upon the State Insurance Commissioner, **did not extend to a suit by a citizen of that State on a contract of insurance executed in another State.**

MR. JUSTICE HARLAN, writing, said:

> "But even if it be assumed that the insurance company was engaged in some business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into

Court in respect of all business transacted by it, no matter where, with, or for the benefit of, citizens of Pennsylvania. Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without filing the written stipulation specified in its statute. * * * Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, **such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania.** Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that commonwealth,—'in this State.' While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms **as to business there transacted by it,** it would be going very far to imply, and we do not imply such assent **as to business transacted in another State,** although citizens of the former State may be interested in such business."

Old Wayne Mutual Life Association *v.* McDonough (*supra*).

A precisely similar view was taken in SIMON *v.* SOUTHERN RAILWAY COMPANY (*supra*). It was there held that service of process on the State officer designated by the Act of Louisiana for that purpose was not effective to give a Court of that State jurisdiction of a suit against a foreign corporation doing business within the State **as to a cause of action arising in another State.**

MR. JUSTICE LAMAR said:

"Subject to exceptions not material here every State has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service in proper cases may be made upon an officer designated by law (citing cases). **But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law.** Otherwise, claims on contracts wherever made and suits for torts wherever committed might, by virtue of such compulsory statute, be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra territorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightly exerted. But this possible inconvenience served to emphasize the importance of the principle laid down in Old Wayne Life Association *v.* McDonough, 204 U. S., 22, **that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States."**

Simon *v.* Southern Ry. Company, 236 U. S., 115;

See also to same effect Tackas *v.* Philadelphia & Reading Ry. Co., 228 Fed. Rep., 728.

These decisions then are directly to the effect that where the corporation fails to file the consent

required by the statute, and therefore, effect is to be given to its IMPLIED, as distinguished from its EXPRESS consent to be sued, a statute attempting to confer jurisdiction over a foreign corporation doing business therein on a cause of action NOT ARISING WITHIN THE STATE OR GROWING OUT OF THE TRANSACTION OF BUSINESS THEREIN BY SERVICE ON AN OFFICER OR AGENT WITHIN THE STATE IS UNCONSTITUTIONAL AND VOID.

The fifth question certified to this Court for review should, therefore, also be answered in the affirmative.

POINT VI.

The intolerable condition which will result, and in fact has resulted from statutes permitting the acquiring of jurisdiction over foreign corporations on causes of action arising outside of the State, has been clearly recognized.

In PIETRAROIA *v.* N. J. & H. R. R. & F. COMPANY (197 N. Y., 434) it was said by this Court:

> "As a question of policy, it is intolerable that our courts should be impeded in their administration of justice, and that the people of the State should be burdened with expense, in redressing wrongs committed in another State, for the benefit, solely, of its citizens, and where the remedy is in the enforcement of its statutes."

Pietraroia *v.* N. J. & H. R. R. & F. Co. (*supra*).

And in WAISIKOSKI *v.* PHILADELPHIA & READING C. & I. COMPANY (173 App. Div., p. 538), it was said:

> "There is not the slightest relation between the tort and the business doing in this State. And a statute that affords jurisdiction perforce of such a condition is benign and carries comity to the extreme, beyond any substantial reason that rests in justice."
>
> Waisikoski *v.* Philadelphia & Reading C. & I. Co. (*supra*).

And in the same case, on the return of the case by the Appellate Division to the Supreme Court for the exercise of its discretion as to whether it would entertain jurisdiction or not, it was said by MR. JUSTICE KELLY:

> "The plaintiff in this case resides in Pennsylvania. The defendant is a foreign corporation organized under the Laws of Pennsylvania. The accident occurred in that State and all of the witnesses on both sides reside there. The case turns largely if not altogether upon the interpretation of the mining laws in that State. It is said that defendant transacts business in this State, but as Judge Jenks remarks in his opinion: 'There is not the slightest relation between the tort and the business doing in this State.' No reason is given for bringing the action here, and we can only imagine the reason. **In the printed record on appeal, we find advertisements published in the newspapers in the mining districts of Pennsylvania inviting law suits, offering free advice, stating that the best and largest sums of money are won in cases of injuries, signed by a man with an office in Nassau Street, New York, who, it is stated, employed the plaintiff's attorney.** This adds to the intolerable condition referred to by the Court of Appeals."
>
> Waisikoski *v.* Philadelphia & Reading C. & I. Co., Opinion KELLY, J. (New York Law Journal, August 3rd, 1916.)

It is submitted, this Court should not be astute to discover reasons for holding the statutes constitutional, at least insofar as they attempt to confer jurisdiction over foreign corporations of causes of action not arising in this State, or out of the business being transacted by the corporation therein.

POINT VII.

It therefore is respectfully submitted that the First, Second and Third Questions should be answered in the negative, and that the Fourth and Fifth Questions should be answered in the affirmative.

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To be Argued by
FRANK J. FELBEL.

Court of Appeals

OF THE STATE OF NEW YORK.

GEORGE TAUZA,
Plaintiff-Respondent,

against

SUSQUEHANNA COAL COMPANY,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

This is an appeal from an order of the Appellate Division of the First Department which affirmed an order denying a motion to set aside the service of summons upon the ground that said service is in violation of the Constitution and laws of the United States, and particularly Sec. 1 of the 14th Amendment thereof, for the reason that the alleged cause of action arose outside of the State of New York, and not out of any business which the de-

fendant does within the State of New York, and upon the further ground that the summons was not served upon a person designated or specified by Sec. 432 of the Code of Civil Procedure.

The facts are stated at length in the answering affidavits of the plaintiff (fols. 97-132) and to some extent in the moving affidavits of the defendant (fols. 20-44). Practically all of the facts claimed by the plaintiff either have been or must be admitted by the defendant. So far as there is any conflict, the decision of the lower court must be taken, like the verdict of a jury, to have resolved them in favor of the plaintiff. This rule was stated in Taylor vs. G. S. P. Association, 136 N. Y., 343, where the Court of Appeals said at page 346,

> "Where there is conflicting evidence with respect to a disputed fact arising upon a motion, it is the province of the court, in which the motion was made, to settle the conflict, and this court will not interfere with the result."

The situation is, therefore, as follows:

The defendant is a foreign corporation, organized under the laws of Pennsylvania, and with its principal office in that state. It maintains an office of considerable size and with numerous employes at No. 120 Broadway, in the Borough of Manhattan, City of New York. This office is in charge of Walter Peterson, the person who was served with the summons herein. No complaint was served with the summons or has ever been served herein. Mr. Peterson's duties consist of running and managing an office which the defendant maintains in the State of New York. His

chief duties are naturally the selling of coal, since it is for the purpose of selling coal that the defendant maintains its large office within the State of New York. It further appears that Mr. Peterson has certain other and incidental duties. He is required to see that this office is properly managed and conducted, to control the employes therein, to instruct the salesmen, to send and receive letters, to keep a bank account and draw checks and to pay the employes. His chief business is of course to sell coal, and the prices are apparently fixed by the company at the home office. In discussing the two grounds upon which the defendant's motion is based, it should be noted that as no complaint has yet been served in the action, it is impossible for the defendant to establish its claim that the cause of action arose outside of the State of New York, or is not connected with the business which the defendant does within the State of New York. The statement to that effect, in the affidavit of George H. Ross (fol. 26), is necessarily upon information and belief, and shows no source of information or ground of belief as a basis therefor.

POINT I.

The motion was properly denied, since service of the summons cannot be set aside on the ground that the service violated the Constitution of the United States.

In the first place, the order to show cause asks for the setting aside and vacating of the service of the summons, on the ground that the service violated the Constitution of the United States, and particularly the 14th Amendment thereof (fol.

13). It is submitted that the Supreme Court could not concern itself with the question of whether or not the Constitution of the United States has been violated.

It appears that no complaint has been served and no steps taken by the plaintiff up to the present time, other than the service of a summons. It is submitted that if this court considers at all the question of whether or not the United States Constitution has been violated, it must decide that there is not and cannot be a violation of the Constitution of the United States, or the 14th Amendment thereof, merely by the service of a summons. The 14th Amendment of the Constitution of the United States, provides as follows:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There is no depriving the defendant of property, nor denying it equal protection of the laws, merely by the service of a summons. This point was clearly expressed by Mr. Justice Leventritt in the case of *Grant* vs. *Green,* 59 Misc. (N. Y.), 1, where the court said at page 17:

> "The next point urged is that the order for publication is a violation of the 14th Amendment of the Federal Constitution. * * *

> There is nothing in the mere service of the summons that contravenes any provision of this amendment or raises a federal question, though such a question might arise upon the attempted enforcement of a judgment; but in serving the summons, the defendant is not interfered with either in person or property. The method of such service is regulated by the Code which defines the procedure requisite to obtain the jurisdiction over foreign corporations."

Clearly the United States Constitution is not concerned with methods of service in state courts. The preliminary objection is, therefore, raised that the motion was properly denied in so far as it asked for the setting aside and vacating of the service of the summons on the ground that it violates the Constitution of the United States.

POINT II.

The motion was properly denied for the reason that the jurisdiction of the court cannot be attacked by motion, but only by demurrer or answer.

Since the service cannot be in violation of the Constitution of the United States, the only question which the defendant can intend to raise is that this Court has not acquired jurisdiction over the person of the defendant, by reason of such service. It is submitted that this question could not be considered on a motion, under the wording of the order to show cause, and the relief therein asked for. However, if the court holds that under the

terms of the order to show cause, the defendant is entitled to show that the lower court did not acquire jurisdiction over the defendant by the service of the summons which was admittedly a correct service under the law of the State of New York, then it is submitted that the jurisdiction of the court over the person of the defendant is being attacked on this motion. It has been held in a long line of cases that the question of jurisdiction of the court cannot be raised by motion, but only by demurrer or answer. The Code provides the remedies when the court is without jurisdiction. Section 488 provides that the defendant may demur to the complaint where it appears upon the face thereof:

> "1. That the court has not jurisdiction of the person of the defendant.
>
> 2. That the court has not jurisdiction of the subject of the action."

Section 498 provides:

> "Where any of the matters enumerated in Section 488 of this Act, as grounds of demurrer, do not appear on the face of the complaint, objection may be taken by answer."

Nowhere in the Code, or in any of the statutes of the State of New York, is there any provisions for the raising of an objection to the jurisdiction of the court by motion. On the contrary, it has been distinctly held that this practice is not correct and will not be upheld by the courts.

In the case of *Atlantic & Pacific Telegraph Co.* vs. *Baltimore & Ohio R. R.*, 87 N. Y., 355, an action was brought for an injunction. A motion was made by the defendant to set aside the service of the summons on the grounds:

1. That the service on the President of the Company was obtained by trick.

2. That the court did not acquire jurisdiction over the defendant by the delivery of the summons to Garrett.

3. That it was apparent on the face of the papers that the court had no jurisdiction of the case, and that the preliminary injunction was defective and void. The court held that on a motion to set aside the service of the summons, the legality and the regularity of the service were the only points to be considered and that the question of the jurisdiction of the court does not properly arise on such a motion; that this objection must be taken by demurrer or answer.

To the same effect is the case of *Manning* vs. *Canadian Locomotive Co.*, 120 A. D., 735. Here there was an action by a foreign corporation against another corporation, and the complaint failed to allege whether the defendant was a foreign or domestic corporation. It set forth the making of a contract, but not the place where the contract was made. The defendant appeared specially and moved to set aside the service which had been made upon a general agent within the State of New York, and set up in affidavits, that the defendant was a foreign corporation, and that the cause of action arose out of the State, and that, therefore, the court had no jurisdiction under Section 1780 of the Code. Some of these allegations were controverted in answering affidavits of the plaintiff.

The court held that the question could not be tried out on affidavits and that the only question raised by the motion was the regularity of the service which, as in this case was obviously properly made. The Appellate Division of the First

Department reversed the order of the Supreme Court, setting aside the service of the summons.

The case of *Barber* against *Barber*, 137 A. D., 665, at page 667, is also very much in point. Here there was an action for separation. The complaint alleged that the plaintiff and defendant had married out of the State, but resided here for one year, but that the plaintiff was still resident. Summons was served by publication, and the defendant moved to vacate the service of the summons on an affidavit stating,

1. That he had never been a resident of New York, and

2. That the parties had been divorced in another State.

The Supreme Court of this County granted the motion of the defendant to set aside the service. On appeal to the Appellate Division this order was reversed, the Court saying:

> "It is well settled that jurisdictional questions must be disposed of in an orderly way and after a proper trial; all the issues cannot be decided, and the plaintiff's rights decided merely upon affidavits. * * * When a complaint upon its face shows facts which demonstrate that the court has no jurisdiction of the subject matter of the action, or of the parties, then the proper practice is to demur; if on the other hand the facts which deprive the court of jurisdiction either of the subject matter or the parties, do not appear upon the face of the complaint, then the only remedy is by answer."

The same principle was set forth in the case of *Johnson* vs. *Adams Co.*, 14 Hun, 89, and again in the recent case of *Mallory* vs. *The Virginia Hot*

Springs Co., 157 A. D., 253, where the Court said at page 256:

> "The proper method of raising the question of jurisdiction is by demurrer or answer, and not by motion."

POINT III.

The motion was properly denied, for the reason that the service of the summons herein is not in violation of the Constitution of the United States or any part thereof.

Attention is again called to the fact that mere service of the summons cannot be in violation of the United States Constitution, and that from the peculiar wording of the order to show cause, the service is the only thing attacked. Clearly if the defendant rests on this narrow ground, the motion must be denied, and as has been demonstrated in the second point of this memorandum, if the defendant claims the right to attack the jurisdiction of the court, from the wording of the order to show cause, the motion must be denied, since the proper practice, and the only practice, is to demur or answer. If, however, the court shall decide that the question of jurisdiction may be raised in this manner, it is submitted that, nevertheless, the defendant's rights under the Constitution of the United States are not violated by compelling the defendant to subject itself to the jurisdiction of this court. Since the only provision of the United States Constitution which is referred to in the order to show cause in Section 1 of the 14th Amendment thereof, it must be presumed that this is the only section upon which the defendant bases its rights. This section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It will be observed that only the last two clauses of this section can apply to the defendant, since it is a corporation, and the first part of the section refers only to citizens of the United States. Obviously a corporation is not, and cannot be a citizen.

> *Norfolk & Western R. R.* vs. *Commonwealth & Pa. R. R. Co.*, 136 U. S., 394;
> *C. G. Blake, etc.* vs. *McClung and others*, 172 U. S., 432.

The sole questions, therefore, are whether compelling the defendant to submit to the jurisdiction of this Court,

1. Deprives it of property without due process of law, or

2. Denies it the equal protection of the laws.

At first glance, it may seem that this question is a much vexed and complicated one. In some cases it must be admitted that the courts of this country have taken widely divergent views on this subject. When this practice of objecting to the jurisdiction of the court was commenced by so-

called foreign corporations, the interesting theory was advanced that if the corporation was a creature of one state, it could not be held accountable in the courts of another state. This it will be observed, is not an objection concerning the serving of process, but assumes, as in the present case, that process was served strictly in accordance with the laws of the state in which the action is brought. Clearly there is no denial of the equal protection of the laws in such a case, and wherein there is a taking of property without due process of law, it is difficult for anyone to see. If a non-resident of this state comes to New York, he may be served in an action by a resident and brought before the courts of this state and subjected to their jurisdiction. If a foreign corporation comes to this state, there is clearly no reason why the same should not be true. But when does a foreign corporation come to this State? This was the question which was agitated and it was urged upon the courts that such a highly incorporeal and evasive body as a corporation, cannot be considered as coming into a state merely because one of its officers comes; in other words, that because a corporation has filed its certificate of incorporation in the State of New Jersey, that when an officer crosses the river to the State of New York, he has lost all connection with the corporation, and that in some mysterious way his acceptance or receipt of process from the New York courts was ultra vires. Some courts have agreed with this view, but all courts have laid down the principle that where a corporation organized under the laws of one state does business in another state, that it may be considered as having actually come into the latter state, and so becomes subject to suits in the courts of such state.

Let us review for a moment the situation in this case. Under Section 1780 of the Code, an

action against a foreign corporation may be maintained by a resident of the State of New York for any cause of action, and by a non-resident, where the foreign corporation is doing business within the state. It is obvious from the defendant's moving papers that the defendant does business within the State of New York, and as only a summons was served, it does not appear in the record whether the plaintiff is a resident or not.

The basis of this motion is the case of *Simon* vs. *Southern Railway,* 236 U. S., 115, decided in January 25, 1915, which has served as a ground for the making of motions such as this by numerous corporation defendants within this state. The case has been made to stand for a number of things which it was never intended to stand for, but a recent decision of the Court of Appeals of this state has finally cleared the atmosphere to some extent.

In the *Simon* case, the plaintiff brought a bill in equity for the purpose of restraining the defendant from enforcing a judgment obtained by him in the State of Louisiana. The railroad company asked for relief on three grounds:

1. That it was not doing business within the State of Louisiana.

2. That the service of process which was made upon the assistant secretary of state was void.

3. That the judgment was obtained upon false and fraudulent testimony and without notice.

It seems that under the laws of Louisiana, service upon a foreign corporation may be made by serving the Secretary of State. The Supreme Court of the United States summarized the situation as follows:

"The Master found, as a fact, that the Southern Railway was doing business within the State of Louisiana; that there had been no fraud in the procurement of the judgment; but that the service on the assistant, was not the service on the Secretary of State, required by the statute. He therefore recommended that a decree be entered enjoining the plaintiff from enforcing the judgment obtained in the District Court of the Parish of Orleans. The Circuit Court made no finding on the question of fraud, but ruled that the service was void, because Act 54 was unconstitutional in that it contained no provision requiring the Secretary of State to give the foreign corporation notice that suit had been brought and citation served."

This decision of the Circuit Court was solely on the two grounds mentioned:

1. That the service had been made on the assistant secretary instead of the secretary, as provided by the statute, and,

2. That the statute was unconstitutional because it did not require the Secretary of State to give notice to the foreign corporation.

The Supreme Court even went out of its way to avoid passing on any other questions than those presented to it. This appears clearly in that part of the opinion at page 128, which reads as follows:

"The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the Court. We therefore purposely refrain from passing on either of the propositions decided in the courts below and with-

> out discussing the right to sue on a transitory cause of action, and serve the same on an agent voluntarily appointed; we put the decision here on the special fact relied on in the court below, that in this case the cause of action arose within the State of Alabama and the summons was served on an agent designated by the Louisiana statute."

There is considerable irrelevant discussion by the late Mr. Justice Lamar with reference to the instituting of actions in one state, the cause of which arose in another state. The learned Justice did not think that such actions should be commenced unless they arose out of the business which the defendant corporation did within the state where the action was commenced. This, however, was simply his opinion and had nothing to do with the decision in the case. The language, however, has been seized upon by the attorneys for foreign corporations and they have endeavored to render themselves immune from suits in this state by reason of that decision. For a short time there was a conflict between the first and second departments on this point, which, however, has been cleared up by the decision of the Court of Appeals in the case of *Bagdon* vs. *The Philadelphia & Reading Coal & Iron Company*, decided March 14, 1916, 217 N. Y., 432, reversing a decision of the Appellate Division of the Second Department.

In that case the cause of action arose without the state and not in connection with any business which the defendant did within the state. Service was made on a designated agent, but the Court says in its opinion:

> "The service of the summons on the defendant's designated agent had, we think, the same

effect as if it had been made on the defendant's president (Code of Civ. Proced., Sec. 432). The purpose of the stipulation was to insure the presence in this state of some one with authority equal to the president in respect of the service of process. It is true that even the president of a foreign corporation may be here without bringing the corporation itself within this jurisdiction. He must be here officially representing the corporation in its business. * * * To give judgment in violation of that rule is to condemn the corporation unheard and to ignore the objections of due process of law. * * * *But when a foreign corporation is engaged in business in New York, and is here represented by an officer, he is its agent to accept service though the cause of action has no relation to the business here contracted.* * * *The same reasoning that sustains the service of process on the president or resident officer, irrespective of the nature of the cause of action, sustains the service on its agent.* Officers and agents alike are in the service of a corporation engaged in business in this state. Their presence in that service has brought the corporation within our jurisdiction and in coming here it has become subject to the rule that transitory causes of action are enforceable wherever the defendant may be found."

The nature of the business which the defendant in the Bagdon case transacts within the State of New York is identical with that transacted by the present defendant. They are both coal companies. They are both Pennsylvania corporations, having their main office and place of business in Pennsylvania. Both have agents within the State of New

York for the primary purpose of selling coal, and for the incidental purpose of performing such other functions as it may be necessary for an agent to perform, who is in charge of the selling organization of a large coal company in the largest industrial center of the United States. The Philadelphia & Reading Coal & Iron Company was honest enough to admit that it was doing business within the State of New York, and to designate an agent for service of process, but it claimed that process could not be served in an action which did not arise in connection with the business that it did in this state. That contention has now been disposed of by the Court of Appeals.

The Susquehanna Coal Company, the defendant in this action, in a precisely similar situation to the defendant in the previous action, refuses to admit that it does business, while at the same time again asserting the now exploded theory that the cause of action in this case did not arise out of the business which it admits and must admit it transacts within this State.

It is obviously impossible for the defendant to claim that it does no business within the State of New York, since it is apparent on the face of the moving papers that it does. The situation is very similar to that which appeared in the case of *Oravecz* vs. *The Philadelphia & Reading Railway Company,* decided April, 1915, but not reported.

In that case a motion was made to set aside the service of the summons, and it was stipulated that the defendant had certain property within the State of New York consisting of freight cars sent over the lines of connecting carriers, and also a bank account and a lease of an office in Rochester and one in New York, and office fittings. These offices, it appeared, were used by the defendant

only in the solicitation of freight business to go over the defendant's lines. The motion was decided by Mr. Justice Newburger in April, 1915, in a written opinion in which the following appeared:

> "As was said by Mr. Justice Scott in *Sadler* vs. *The Boston & Bolivia Rubber Co.*, 140 A. D., at page 368, 'decided by the rule laid down in *Pope* vs. *The Terre Haute Car Co.*, 87 N. Y., 137, and never explicitly overruled or rescinded, the service was good at least in so far as to confer jurisdiction upon the defendant by the courts of this state. Decided by the rule repeatedly laid down by the Supreme Court of the United States the service was bad. (See also *Tuchband* vs. *Chicago & Alton Ry. Co.*, 115 N. Y., 438).' The motion to vacate the service of the summons herein must be denied."

The order entered upon this decision was affirmed by the Appellate Division on December 11, 1915. It should be borne in mind that the question which was thus decided by the Appellate Division, First Department was that when a foreign corporation comes into the State of New York and does such things as this defendant has done, it is doing business within the State of New York. In other words, it is here in tangible form exactly as a natural person, a non-resident would be here. That is the question which has been decided by the law of the State of New York, and it has been conclusively established that if the defendant is here within the borders of this State, that there cannot be a violation of the Constitution of the United States in compelling it to submit to the jurisdiction of the courts of this state. It is quite

true that in the Bagdon case (supra), Mr. Justice Cardozo discussed the question there involved from the standpoint of estoppel, and held that the filing of a designation by the Philadelphia and Reading Coal and Iron Company precluded it from attacking the service of the summons. As he said in his opinion "We are not imposing or implying a legal duty. We are construing a contract." In the present case there is no contract to construe. Nor is there any legal duty to impose. Aside from the injustice that would result from penalizing a foreign corporation which obeys the law and designates an agent, and freeing from such obligations a corporation like the defendant which violates the New York law, there remains the simple question whether or not the Constitution of the United States is violated by compelling this corporation to subject itself to the jurisdiction of the courts of this state. There is no question of estoppel. There is simply the question whether or not the Constitution is violated. The defendant is doing business in this state; so it is here. There is no other way in which it can be here. If it is here, does it deprive it of its property without due process of law or deny it the equal protection of the laws to hold that it can be sued here? If it is here, it can be sued here, and if it is here and can be sued here, how can it be deprived of its property or denied the equal protection of the laws, because the cause of action arose elsewhere than in this state? If it is here for one purpose, it is here for all purposes. No doubt it would be competent for the Legislature to make such a distinction, but how can a Court do so on a question of Constitutional construction? The Fourteenth Amendment has been stretched very far; the defendant's contention carries it to the point of absurdity.

Moreover, it must not be overlooked that there is no proof before the Court that the cause of action did not arise within the State of New York or that the plaintiff is a non-resident. There was nothing but a summons served in this case, and no complaint has yet been served. The discussion up to this point assumes that the Court is satisfied with the proof that the defendant is "doing business within the State of New York, under the meaning of Section 1780 of the Code of Civil Procedure." Any doubts that there may be on this score are set at rest by the recent decision of this Court in the case of Pomeroy vs. The Hocking Valley Railway Company, 218 N. Y., 530. In that case it appeared that the corporation had no certificate permitting it to do business within the state, that its principal office and all its physical property were outside of the state, and that it had no agency within the state. All that there was in New York was an office maintained by another company which owned most of the capital stock of the defendant, and had the defendant's name on its doors, and received pay from the defendant for the use of its office. It also appeared that the defendant's secretary had his office there; that certain meetings were held there, and certain moneys paid by the treasurer from this place. The defendant in that case did not even have an office of its own within the state; nevertheless this Court held that the service upon the corporation was good.

This decision is unquestionably in line with numerous decisions of the Supreme Court of the United States, the facts of which have considerable bearing on the point here involved.

In *Washington-Virginia Railway Company* vs. *Real Estate Trust Co.*, 238 U. S., 196, it appeared that suit was begun in the United States District

Court, Eastern District of Pennsylvania, by Real Estate Trust Company against Washington-Virginia Railway Company, a Virginia corporation, to recover judgment on bonds made by Washington-Alexandria & Mt. Vernon Railroad Company, a Virginia corporation, payment of which bonds was assumed by Washington-Virginia Railway Company. Summons was served upon the president of the defendant railway company in Philadelphia. The District Court found the following facts: The defendant was successor to two electric railway companies, one of which was the Washington-Alexandria & Mt. Vernon Railway Company, which issued the bonds upon which the present suit was brought. Prior to the commencement of this action the Washington-Alexandria & Mt. Vernon Railroad Company maintained an office in Philadelphia, which office was leased by the president of that company to one C. P. King, who subsequently became president of the merged company, and who was succeeded by Frederick K. Treat, president of the defendant, at the time of the service of the writ. The defendant company paid rental to Mr. King at the rate of $50 per month, which covered the right of desk room for its president, treasurer and bookkeeper, and the use of furniture, fixtures and telephone in the office, and kept books, business ledgers and conducted correspondence in relation to its business. The contention of the defendant is that the service is void and the court without jurisdiction, because at the time of service of process defendant corporation was not doing business in the Eastern District, where service was made, and that keeping books in Philadelphia was only for convenience of the president. The District Court retained jurisdiction of the action, the case proceeded to trial,

judgment was rendered for plaintiff, and defendant sued out a writ of error to the United States Supreme Court, which, affirming the District Court, in its opinion said as follows:

> "We think the mere recital of these facts makes it evident that the corporation was properly served. It had submitted itself to the local jurisdiction and there enjoyed the protection of the laws. In that jurisdiction, by duly authorized agents, it was, at the time of service, transacting an essential and material part of its business."

In *Pennsylvania Lumberman's Mutual Fire Insurance Co.* vs. *Meyer,* 197 U. S., 407, it appeared that the plaintiff, a citizen and resident of the State of New York, brought suit in the Supreme Court of the State of New York against Pennsylvania Lumberman's Mutual Fire Ins. Co., a Pennsylvania corporation, by service of summons on a director, resident of the State of New York. Defendant appeared specially and removed the action to the United States Circuit Court, Western District of New York, on the ground of diversity of citizenship and moved to set aside service of summons because the Court had no jurisdiction. All transactions with the insured were by correspondence. Plaintiff wrote to Philadelphia, defendant wrote to plaintiff to Rochester, N. Y. Three of defendant's directors resided in New York, but the only act they did was to attend meetings of directors of the defendant held in Philadelphia. They never performed any duties for the company in New York. The defendant had no office in New York, and had never been authorized to do business in New York. All applica-

tions for insurance were made by mail addressed to Philadelphia.

The plaintiff obtained judgment. Defendant sued out a writ of error to this Court to review the judgment. The United States Supreme Court, affirming the judgment of the District Court, in its opinion says as follows:

> "We think the service of the summons within the State of New York upon a director residing in that state was, under the facts of this case, a good service. * * * Although doing no particular act in the state for this company, such directors are, nevertheless, members of and policy holders therein, and are a part of the governing body of the company, and are, by their position, so far representative thereof, as in our judgment, to render service of process upon them in the state of their residence, when the company is doing business therein, a good service upon the company itself. Service upon them, it may be assumed, would certainly result in notice to the company itself, which is at least one of the reasons for holding a service on an agent good."
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> *St. Louis Southwestern Raiway Company of Texas* vs. *Alexander*, 227 U. S., 218.

In this case the plaintiff, resident of New York, brought suit for breach of contract in the Supreme Court, New York County, against St. Louis Southwestern Railway Company of Texas, a Texas corporation. Summons was served on a director of the defendant. The defendant appeared specially and removed the action to the United States Circuit Court, Southern District of New York, on the

ground of diversity of citizenship, and then moved to set aside the service of summons and dismiss the cause "for want of jurisdiction over the person, of the defendant, for the reason that defendant was a foreign corporation and was not doing business within the state and is not amenable to service therein and has not waived due service of summons herein."

The Circuit Court denied the motion, holding that the service was in accordance with New York laws. The trial was had and judgment entered for plaintiff. The defendant sued out a writ of error to the United States Supreme Court, which affirmed the District Court and the judgment for plaintiff, and, in its opinion, says as follows:

> "We reach the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This Court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and the laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process. Lafayette vs. French, 18 How., 407; 15 L. Ed., 452; Green vs. Chicago, B. & Q. R. Co., 205 U. S., 532; 51 L. Ed., 917; 27 Supt. Ct. Rep., 595. * * * In this situa-

tion we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there."

International Harvester Co. vs. *Kentucky*; 234 U. S., 577.

This case presents the question of the sufficiency of the service on an alleged agent of the International Harvester Company, in a criminal proceeding in Kentucky, where an indictment had been returned against the Harvester Company for an alleged violation of the anti-trust laws of the State of Kentucky. The Harvester Company moved to quash the return, substantially upon the ground that the service had not been made upon an authorized agent of the defendant, and that the company was not doing business within the State of Kentucky, and it set up that any action under the attempted service would violate the due process and commerce laws of the Federal Constitution. The Court overruled the motion, and the case being called for trial, and the Harvester Company failing to appear or plead, judgment by default for $500 penalty was entered against it. The Harvester Company, upon the motion, tried to prove that their agents did only the following acts:

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the state, and all goods must be shipped from outside of the state, after the orders have been approved. They have no authority to

make contracts of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. All contracts of sale must be made f. o. b. from some point outside of Kentucky, and the property of the purchaser is delivered to the carrier outside of that state. All contracts of any kind and every kind made with the people of Kentucky must be made outside of the state."

The Supreme Court of the United States, affirming the lower Court, in its opinion said:

"We are satisfied that the presence of a corporation within a state, necessary to the service of process, is shown when it appears that the corporation is there carrying on business in such a sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state."

Herndon-Carter vs. *James N. Norris Son & Co.*, 224 U. S., 494.

In this case an action was brought by Herndon-Carter Co., a Kentucky corporation, against James N. Norris & Co., a New York corporation, in the Western District of Kentucky. Summons was served upon W. J. Adams, agent of the company, in the District. The defendant entered a special appearance and filed objection and pleaded to the jurisdiction, setting up that it was a corporation of the State of New York; that for several years the company did not do any business in that state, and that for the same length of time had no agent

in the State of Kentucky, and that W. J. Adams was not, at the time of service, manager and officer or agent of the defendant. Adams was employed by the defendant two years before, but his connection with the defendant was severed a long time prior to the service. The Circuit Court sustained the plea to the jurisdiction and dismissed the suit. Upon the motion for dismissal the bookkeeper of the defendant was examined and her testimony showed that Adams had no connection of any kind with the defendant, at the time of the service. The plaintiff, somehow or other, brought facts to the attention of the Court, tending to show that the defendant was sued several times, and introduced letters in former actions, as well as verified answers, which showed that Adams was then the agent of the defendant in Kentucky, and had sole charge of its business. Also a letter introduced in another action which contained the following: "Our Mr. Adams, who runs our house in Louisville." But nevertheless the action was dismissed. The United States Supreme Court, reversing the District Court, and remanding the action for further proceedings, in its opinion said:

> "Reaching this conclusion we are constrained to hold that the Court below erred in quashing the return of the subpoena, and in dismissing the case; and, therefore, the judgment must be reversed and the case remanded, with directions to overrule the order quashing the return and to set aside the decree denying the jurisdiction of the Court."

The defendant will probably cite a number of decisions of the courts of the State of New York on the question of what constitutes the doing of business within this state. These cases all involve the question of whether or not the foreign cor-

poration is doing business within the meaning of the corporation law, which permits it to maintain an action within the State of New York only after compliance with certain statutory requirements, providing it is actually doing business within this state. It is not necessary or proper to burden the Court with a discussion of these cases. They are clearly not in point on the present question. The right of a foreign corporation to maintain an action here is limited by statute, and the Courts have been disinclined to throw out an action by a foreign corporation simply because of a failure on its part to comply with the technicalities of the corporation law. It has accordingly been held that the mere sale of goods within this state does not preclude a foreign corporation from maintaining an action here, even though it has not filed a copy of its certificate, and designated an agent. Even in this class of cases there is no case in which a foreign corporation has gone as far as the present defendant. But in any event, it should be borne in mind that the rule which requires that service of process shall be made on a foreign corporation only when it is doing business within this state is a very different rule from the requirement of the corporation law as to the filing of a certificate and the right of the foreign corporation to maintain an action.

The reason for the service of process rule is, as was pointed out in the Bagdon case, so that the corporation shall be physically present within the state before service can be made upon it. It is difficult to conceive of a more perfect illustration of the physical presence of a foreign corporation within the State of New York than is presented by the magnificent suite of offices which the Susquehanna Coal Company maintains in the Equitable Building.

POINT IV.

The motion was properly denied for the reason that the person served with process was the managing agent of the defendant, and this question of fact has been resolved against the defendant below.

It will not be necessary to devote much attention to this point. In the first place, by raising the question as to whether or not the defendant is doing business within the State of New York, so as to render it amenable to suit, the defendant has waived the objection that the service was not made upon a proper person.

> Farmer vs. National Life Association, 138 N. Y., 265.

This is a highly technical objection at the best, and, as it appears from the affidavit of George H. Ross, the vice-president and secretary of the defendant, that he knows all about the matter, not much sympathy can be wasted on the defendant's plea that Walter Peterson was not such a person as is described in Section 432 of the Code of Civil Procedure.

The undersigned has devoted considerable space under the previous point on the question of whether or not the defendant is doing business within the State of New York. If it has been established to the satisfaction of the Court that the defendant is doing business within the State of New York, then it must follow as a corollary that the person who is in charge of this business is a managing agent within the meaning of the Code.

Russell vs. Washington Life Insurance Co., 62 Misc., 403, where the Court said at page 409:

"Where a corporation has an office in this State which is in charge of a person who acts for the corporation, doing business for it, and so manages its business, he is within the meaning of the Statute a Managing Agent."

R. H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co., 48 Hun, 190, 192.
Belmont vs. Penn. R. R. Co., 35 Hun, 369; aff'd 99 N. Y., 679.
Ives vs. Metropolitan Life Ins. Co., 78 Hun, 32, 33.
Barrett vs. American Telephone & Telegraph Co., 138 N. Y., 491.

It has been decided over and over again by the Courts of this state that a managing agent is a person whose duties and position are such that he would naturally bring to the attention of the company the fact that a summons had been served upon it; in other words, a person of authority.

It is indeed a poor title that the defendant has conferred upon Mr. Peterson in calling him sales agent, but if one ventures down to 120 Broadway he may feel that Mr. Peterson is compensated by being put in charge of such a handsome office, and given the control and management of such a large and important business as that conducted by the Susquehanna Coal Company within the State of New York.

So far as the question of service is concerned the decision in the lower court was based upon the case of Jackson vs. Schuylkill Silk Mills, 92 Misc., 442, which is exactly in point. That was a decision of the Appellate Term of the First Department made in December, 1915, in which the opinion of Mr. Justice Guy was concurred in by Mr. Justices Page and Philbin. The facts appear, so far as are

necessary, from the following quotation from the opinion:

> "Plaintiff claimed to have acquired jurisdiction of the defendant, a foreign corporation organized under the Laws of Pennsylvania, by service of the summons herein in this city upon William M. Roach, stated to be a managing agent of the defendant. From the order vacating the service, plaintiff appeals.
>
> "In support of the motion, the defendant, whose business is the manufacturing of silk gloves and underwear, presented the affidavit of Roach, who swears that he was employed by the defendant with the title of 'General Sales Manager,' but at all times under the direction and control of the officers of the silk mills; that his duties are to visit customers, show goods, transmit orders for the same to the home office in Pennsylvania for approval, and subject to the direction and approval of the defendant to hire and discharge traveling salesmen, to receive and transmit to the home office their reports of sales, and to act in all respects subject to the control of the defendant. * * * It also appears that the defendant had an office at No. 220 Fifth Avenue in this city; that it owned certain property therein; that said office was occupied by Roach as sole representative of the company, that defendant had no other place for the transaction of business, or office or factory in the State of New York, and that no person had been designated for service of process upon the defendant in New York."

The Court held that upon this state of facts Roach was a managing agent of the defendant, and

the order setting aside service of the summons was reversed. The duties of the agent in that case are practically identical with those of the agent who was served in the case at bar, as appears from his own affidavit. At folio 32 he says that he is employed by the defendant to sell coal in the territory around New York; at folio 33 that he makes his headquarters with other salesmen at an office of the defendant at No. 120 Broadway, within the City of New York, and that he is the head salesman; at folio 34 that he solicits orders for the sale of coal in all under the direction and control of the defendant; and at folio 39, that the defendant maintains a bank account within the State of New York, out of which he pays the cash disbursements. In addition to these admissions there appear the statements in the opposing affidavits which must, after the decision of the lower Court, be taken as true; at folios 114 and 126, that the defendant occupies a large suite of offices at No. 120 Broadway, Borough of Manhattan, City of New York, with its name on the door and on the bulletin board, and also the name of the person served, and that there is considerable office furniture and business going on within the said office, and at folio 129 that Walter Peterson, the person served, pays the salaries of the employees of the defendant in the City and State of New York, and at folio 127 that the person in charge of this office stated that it was the office of the Susquehanna Coal Company, and at folio 120 that the defendant Susquehanna Coal Company is actually maintaining at the present time within the State of New York an action to recover One hundred and forty thousand ($140,000) Dollars, for coal claimed to have been delivered by it within the State of New York.

If all these things do not constitute doing business within this State, then it is impossible to conceive of any state of facts which would lead to such a conclusion. The case of Beck vs. The North Packing Company, 159 A. D., 418, was referred to and distinguished in the Jackson case (supra), and is equally distinguishable from the case at bar, as appears from the following quotation from the opinion in the Beck case:

> "The defendant was incorporated under the statutes of the State of Maine and maintains an office, * * * in Massachusetts. *It owns no property in the State of New York.* None of its officers, directors or any person having any connection with the Company lives in this State, except one Snow to whom the summons was delivered. It is claimed that the service was valid because Snow is a 'managing agent' within the meaning of Section 432 of the Code. Defendant's business in part at least is dealing in provisions. Snow is a member of the New York Produce Exchange and represents the defendant as sales agent, in so far as it has one in the City of New York. His duties consist in obtaining orders and transmitting the same to defendant. He has no discretion as to the prices, all of which are fixed and communicated to him in advance of an order taken. He had no authority to accept an order. All he can do is to obtain one and then send it to the defendant's Massachusetts office for acceptance. If accepted, that office makes the shipment direct to the customer from whom it receives payment. Snow occasionally purchases goods for defendant on the floor of the Exchange,

but in each case under specific order. *He acts in a similar capacity for various other companies,* and maintains an office, consisting of a portion of one room, in the Produce Exchange building, the expense of which is borne in part by the defendant. The latter's name appears in the telephone and general directories, but its telephone number and address are not alleged to be the same as Snow's."

This Court held that on the state of facts thus set forth, Snow was not a "managing agent" and that the service should be set aside. The case need have gone no further than to state as it did that the defendant owned no property in the State of New York. Section 432 of the Code reads as follows:

"Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this sec-

tion, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the state.

4. If the person designated as provided in section 16 of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the state and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the state, process against the corporation in an action upon any liability incurred within this state or if the corporation has property within the state may after such death, removal or revocation and before another designation is made be served upon the Secretary of State."

It is apparent from subdivision 3 thereof that if the defendant has no property within the state, service on a managing agent is not good. There is no question in the present case as to that point. It is conceded as set forth above that the defendant has property within the state. Moreover, in the Beck case the defendant had no regular office such as in the case at bar, but merely employed an agent to buy for it on the Produce Exchange. He was not the sole agent of the defendant and he appeared to have no authority whatever, except that of making oral bids on the floor of the Produce Exchange. Obviously, the duties of Walter Peterson in the present case far exceed that of the person referred to in the Beck opinion, and the same Appellate Division which decided the Beck case has

so held. Moreover, this Court cannot overlook its decision in the case of Tuchband vs. The Chicago & Alton Railroad Co., 115 N. Y., 437. In that case the Court said, at page 440:

> "When the corporation has an office in this State where a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a 'managing agent' in this State, and where a corporation created by the laws of any other state does business in this State, the person who, as its agent, does that business, should be considered its managing agent, and more especially should that be so when the foreign corporation has an office or place of business in this State, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute 'a managing agent.'
>
> Corporations of this description have become very numerous. They carry on an extensive business in this State. They may sue in our courts and be required to answer as defendants in the same tribunals, and if they have notice to do so in the simple and summary manner described by statute, the ends of justice will be attained.
>
> It was the duty of Oberg, the person served, to send the papers he received to his principal, and it was his declared intention to do so. It was, in fact, done and the defendant appears,

not to answer to the suit, but to complain of the insufficiency of service. We think the objection unavailing."

See also

Grant vs. The Cananea Copper Co., 189 N. Y., 241.

Both of the above cases are still the law in this State, and the statement in the Bagdon case (supra) with reference thereto was simply that the dicta therein contained as to the validity of service of process upon an officer of a foreign corporation which does no business within this State, must yield to the later decisions of the Supreme Court of the United States. In the present case there is no question that the defendant is doing business within this state, and service upon the managing agent was therefore good.

The discussion up to this point assumes that this question can be raised in this Court, an assumption which is by no means warranted. The Code provides that questions of law may be certified to the Court of Appeals. But such a question as this is analogous to that which arises on a conflict of evidence. The decision of the Special Term, affirmed by the Appellate Division, is conclusive that the person served was a "managing agent." This Court should not be asked to reopen the question and sift the evidence again for the purpose of re-determining this fact.

POINT VI.

The motion was properly denied for the reason that the provisions of Section 432 of the Code were complied with, as the Courts below have finally determined.

On the argument of the motion in the lower courts, the defendant endeavored to make a great point of the decision of the Appellate Division in the Second Department in the case of Karosas vs. The Susquehanna Coal Co., decided May 16, 1916, and which appears in full at pages 29 and 32 of the case on appeal.

In that case the Court refused to pass upon the question as to whether or not the person served with a summons was the managing agent, but affirmed the order setting aside the service on the ground that it did not appear from the record in the case that the plaintiff used due diligence in an attempt to serve some of the specified officers of the corporation before serving the person claimed to be the managing agent (fol. 93). To the same effect is the recent case of Gursky vs. Frank, 218 N. Y., 41. Of course these cases go no further than to restate the statutory requirements of Section 432 of the Code. In the present case, however, there can be no such obection. In the first place, there appears at folio 121 of the affidavit of Joseph Levy, submitted in opposition to the motion, a statement that efforts were made by him to find any of such officers of the defendant within the State of New York, and that he was unable to do so, and that Walter Peterson, the person served with the summons, was in charge of the offices, furniture, files, banking accounts and employees of the defendant within the State of New York. This fur-

ther appears from the affidavit of Ona Roder at folios 130 and 131, and at folio 132 there is shown the right of said affiant to state of her own knowledge that there are no officers of the defendant within the State of New York, since she was requested on various occasions to serve process in actions against this defendant, and made many efforts to find such other persons.

In any event, if there is any defect in the plaintiff's papers in regard to the diligence used in endeavoring to find an officer of the defendant within the State, this is clearly remedied by statements in the defendant's moving papers. At folio 33, in the affidavit of Walter Peterson, it appears,

> "that the said Susquehanna Coal Co. does not maintain any yards or docks within the State of New York, and does not maintain any office within the State of New York, except an office at 120 Broadway, New York City, where deponent and the other salesmen employed by said defendant make their headquarters."

At folio 36, in the said affidavit, it appears,

> "that deponent, in the performance of his duties, has no power beyond the making of sales of coal mined by the defendant Susquehanna Coal Co., at such prices as may be named by some officer of the defendant corporation, ordinarily Mr. George H. Ross, Vice-President and Secretary, at the office of the defendant company in Philadelphia. * * *"

And at folio 41, from the said affidavit,

> "that deponent's authority in the sale of coal is further limited in that no sale of coal or

> contract for coal deliveries is binding upon the defendant corporation until approved *by the President or Vice-President of the defendant corporation at the Philadelphia office.*"

These statements clearly dispose of any possibility that the President, Vice-President or Secretary of the defendant need be looked for within the State of New York, and the Exhibit A, read in support of the motion, and appearing at page 16, contains the following words: "Remit to Treasurer, 910 Commercial Trust Building, Philadelphia, Pa." It further appears from the affidavit of George H. Ross, read in support of the motion, at folio 20, that he is the Vice-President and Secretary of the defendant Company, and at folio 21, that

> "the defendant Susquehanna Coal Company is a Pennsylvania corporation. That said defendant has not secured any certificate from the Secretary of State, State of New York, permitting it to do business within the State of New York."

At folios 22 and 23 there are further allegations to the effect that the principal office of the defendant is in Philadelphia, Pa., and at folio 25 the aforesaid affidavit of Walter Peterson is incorporated in and made a part of the affidavit of the Vice-President and Secretary of the defendant company. Under these circumstances how idle and useless it would be for a person desiring to serve the defendant company with a summons to go wandering around the State of New York, trying to find an officer, when it is obvious from the statements of the defendant's representatives that all

the officers are in Philadelphia! Moreover, the extremely technical qualities of the objection thus made must not be overlooked by the Court. A substantial compliance with Section 432 of the Code has been made, and the ends of justice would best be served by a sufficiently broad construction of this statute, so as not to require the performance of acts which would be clearly and obviously futile. The justice and propriety of the opinion in the case of Tuchband vs. The Chicago & Alton Railroad Co. (supra) cannot be denied, and its application to the present case is indisputable. The following quotation, appearing at page 441, bears directly on the present point:

> "It was the duty of Oberg, the person served, to send the papers he received to his principal, and it was his declared intention to do so. It was, in fact, done, and the defendant appears not to answer to the suit, but to complain of the insufficiency of service. We think the objection unavailing."
>
> Pennsylvania Insurance Co. vs. Meyer, 197 U. S., 407 (supra).

See also Perrine vs. Ransom Gas Machine Co., 60 A. D., 32, where the Appellate Division of the First Department, said at page 37:

> "The defendant is right in contending that under the Code, before there can be service upon a managing agent, it must be made to appear that no person has been designated upon whom service could be made and that the other officers enumerated cannot with due diligence be found within the State. But al-

though these facts must appear, in determining the amount of proof that should be given by the plaintiff, it is important to keep in mind the manner in which the question is usually, as it is here, presented to the court. The plaintiff, in the first instance, assumes the responsibility of serving the proper party. Should the defendant then desire to have such service set aside, he proceeds to do so upon a motion and by affidavits tending to show that the person served was not the proper party. If upon his showing it appears that no person was designated upon whom service could be made, and that the other officers of the corporation specified could not with due diligence be served within the State, it is entirely unnecessary for the plaintiff to affirmatively make proof of what is admitted."

To the same effect, see

Belmont vs. Cornen, 82 N. Y., 256.
Sinnott vs. Ennis, 105 N. Y. Supp., 218.

It is also true that all that has been said under the previous point with regard to the conclusiveness of the decisions in the lower courts applies with greater force to the point now under discussion. It is obvious that the question of whether or not acts performed constitute due diligence, is a conclusion of fact, and this Court will not go into the evidence, after the decision of the Courts below.

And, finally, this objection was not raised in the moving papers and is not referred to in the order to show cause as a ground of the motion (fols. 13 and 14), *and cannot therefore be considered by the Court.*

POINT V.

The acts of the defendant have constituted a general appearance and a waiver of the right to object to the jurisdiction of the Court or the service of process.

The defendant in this case did not proceed as in the ordinary manner by notice of motion, but obtained an order to show cause containing a stay of all proceedings on the part of the plaintiff (fol. 15). It is submitted that by so doing defendant waived whatever rights it may have had to set aside the service and appeared generally in the action. It has been repeatedly held that where a defendant obtains relief from a court, and particularly an extension of time, which the stay is intended to operate as, that the defendant has indicated its intention of submitting itself to the jurisdiction of the court, and will not thereafter be heard to say that the court has not obtained jurisdiction over it.

La Mothe Mfg. Co. vs. *Nat. Tube Works Co.*, Fed. Case, No. 8033.

The obtaining of an order for further time to answer on motion of the attorneys for a defendant, and an affidavit served on plaintiff's attorneys gives the court jurisdiction over the defendant.

Manning vs. *Amy*, 140 U. S., 137-141.

The defendant waived and is estopped from asserting any right it may have had to remove a suit from the State Court to the Circuit Court of the United States by obtaining from the State

Court, if the defendant's attorneys had full and positive information of the amount of the charge demanded by the plaintiff in the complaint, the order staying proceedings.

Farmer vs. *National Life Association*, 138 N. Y., 265.
In re Walden Estate, 168 Cal., 759.

It is a voluntary appearance giving jurisdiction, where defendant appears and asks relief which can be granted only on the hypothesis that the court has jurisdiction.

Also to the same effect

O'Deal vs. *Rogers*, 44 Wis., 136.
Yale vs. *Edgerton*, 11 Minn., 271.

In another case the defendant appeared specially and moved to set aside the summons, and pending the proceeding on such motion, he applied for an extension of time to the court to answer. Held, that such an application amounts to a general appearance.

Porter vs. *Chicago & N. W. R. R. Co.*, 1 Neb., 14.

A party who by motion or any other form of application to the court, asks to bring its powers into action, may be deemed to have appeared generally.

Belknap vs. *Charlton*, 25 Ore., 41, 34 Pac., 758.

Where defendant appears and asks relief which can only be granted on the hypothesis that the court has jurisdiction, the appearance is general.

Upper Mississippi Trans. Co. vs. *Whitaker*, 16 Wis., 220.

Special appearance was entered by the defendant for the sole purpose of moving to set aside the service of the summons. The court added to the order overruling the motion, a provision that the defendant should have ten days' time to answer and staying judgment for that time. Held, that if such provision was entered in the order overruling the motion to dismiss on the application of the defendant, it was a waiver of previous defects in the service of process.

Kneeland vs. *Martin et al.*, N. Y. Law Bulletin, May, 1890. The Court held as follows:

> "An order extending the defendant's time to answer is equivalent to a notice of appearance, particularly if the usual affidavit of merits is served with the order containing the extension of time (citing Quinton vs. Titon, 2 Duer, 649). In Krauss vs. Averill, 66 How. Pr., 97, it was held as follows:
>
> 'An order extending time to answer is equivalent to a notice of appearance.'"

In *Ayres* vs. *Western Ry. Corp.*, 48 Barb., 132, the Court held as follows:

> "The defendant, by obtaining time to answer, by order from the court, and serving it with notice signed by an attorney as an attorney, did what was equivalent to an appearance."

See also

Farmer vs. *National Life Association*, 138 N. Y., 265.

Matter of McCauley, 27 Hun, 517 (affirmed 95 N. Y., 574).

It may be interesting in this connection to note the recent case of *McClure Syndicate* vs. *Times Printing Co.*, 164 A. D., 108. In that case, the defendant moved to set aside service of summons made on one S. T. Beckwith, the president of S. C. Beckwith Agency, a New York corporation, on the ground that it was not sufficient service of summons on the Times Printing Company, a foreign corporation. Before the motion was decided the defendant served an answer, reciting that it appeared specially for the sole purpose of contesting the service of the summons and the jurisdiction of the court. It was held that the service of this answer went further than was necessary for the obtaining of the relief sought by the defendant, and was equivalent, therefore, to a general appearance in the action. The Appellate Division held that the granting of the motion to set aside the summons, after the service of the answer, was improper.

POINT VII.

The order appealed from should be affirmed, with costs.

Respectfully submitted,

JOSEPH LEVY,
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