

Opinion No. 145**Corporations—Process—Service—Secretary of State.**

Held: In an action against a foreign corporation the Secretary of State of Montana, or, in his absence from his office, the Deputy Secretary of State, should decline service of process when such service is attempted pursuant to Section 93-3008, Revised Codes of Montana, 1947, as amended by Chapter 135, Laws of 1949, and when the foreign corporation being served has not filed a copy of its charter in the office of the Secretary of State of Montana. Therefore, in these cases, the duties imposed by Section 93-3010, Revised Codes of Montana, 1947, do not apply.

December 30th, 1950.

Honorable Sam W. Mitchell
Secretary of State
Capitol Building
Helena, Montana

Dear Mr. Mitchell:

You have asked whether or not you, or, in your absence from your office, your deputy, should decline service of process in actions against foreign corporations when such service is attempted pursuant to Section 93-3008, Revised Codes of Montana, 1947, as amended by Chapter 135, Laws of 1949, and when the foreign corporation being served has not filed a copy of its charter in the office of the Secretary of State of Montana. You have also asked me the applicability of Section 93-3010, Revised Codes of Montana, 1947, in these cases.

Section 93-3008, as amended, permits service of process upon the Secretary of State, or, in his absence from his office, upon the Deputy Secretary of State, as statutory agent for (among others) a corporation organized under the laws of any other State or country **that has filed a copy of its charter in the office of the Secretary of State of Montana** and has qualified to do business in this State, upon any cause of action arising within this State. Before such service can be made on the Secretary of State a court order must be obtained directing service to be made in this manner. This order is based upon an affidavit which must state,

among other things, that none of certain enumerated persons connected with the foreign corporation can be found within the State upon whom service of process can be made.

Section 93-3010 Revised Codes of Montana, 1947, reads as follows:

"Upon such service being so made upon the Secretary of State or his deputy, the said Secretary of State or his deputy shall promptly mail the copy of summons and complaint, and copy of the order, by registered mail to the address of such corporation, at its principal home office, **as shown by the papers on file in the office of the Secretary of State**, and shall make out and mail to the Clerk of the Court in which the action is pending a certificate of such mailing, which shall have attached thereto the registry receipt for such letter." (Emphasis supplied.)

A State may impose certain conditions upon foreign corporations in consideration of allowing the corporation to do business within the State:

"A principle implicit in any consideration of the status, rights, and powers of foreign corporations is that the right to conduct business in the form of a corporation is not a natural or fundamental right. A corporation is a creature of the law; and a State, in authorizing its own corporations or those of other states to carry on business and employ men within its borders, may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient, in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact."

23 Am. Jur., page 27.

Montana, in Sections 15-1701 to 15-1712, inclusive, Revised Codes of Montana, 1947 has demanded certain requirements of foreign corporations before they can lawfully do business within the State. One of these requirements is the filing in the office of the Secretary of State a certified copy of the corporation's charter. In these sections are also provisions for penalties for violations or non-compliance of these requirements.

Under an implied consent theory, foreign corporations that come into Montana and qualify to do business in this State, consent to be served with process as provided for in Section 93-3008.

"A foreign corporation which, in order to secure the right to do business in the State, qualifies under a statute providing that it shall be subject to the jurisdiction of the local courts by some form of notice consistent with due process of law, such as a valid substituted service, or which complies with a statutory requirement as to the appointment of a State officer or other person as its local agent to receive service of process, consents to all the terms of the statute, and assumes the duties and liabilities thereby imposed,

becomes subject, in personam, to the jurisdiction of the courts of that state in all litigations growing out of the business it is therein privileged to do."

23 Am. Jur., pages 492-493.

Those foreign corporations which do business in Montana without filing a copy of their charter in the office of the Secretary of State are subject to the penalties found in Sections 15-1701 to 15-1712, but because Section 93-3008 does not include foreign corporations that have not filed a copy of their charter they are not deemed to have consented to have the Secretary of State, or his deputy, appointed agent of such corporations for service of process.

This presents an unfortunate situation because those foreign corporations that do comply with our laws before doing business in our State can be served by following the procedures of Section 93-3008, as amended, while corporations that fail to comply by filing a copy of their charter can escape being served in Montana if a qualified representative of their corporation cannot be found in the State.

Perhaps under a doctrine of purely implied consent 93-3008 could be amended to include all foreign corporations that do business in Montana whether they file a copy of their charter or not.

"The general rule is that a foreign corporation tacitly submits itself, when it voluntarily enters the State and engages in business there, to the valid laws of such State and to the jurisdiction and process of its courts to the extent required by such laws. Amenability of the corporation to suit and judicial process in respect of causes of action arising out of the business done in the State follows as a legal consequence of doing business therein, if the law of the State makes provision therefor, either as an express condition upon which the corporation can legally transact its corporate business there or as a condition implied from provision made for service of process upon its agents in the State or upon an official designated for the purpose by statute."

23 Am. Jur., page 498.

I suggest it might be well to call this matter to the attention of the Legislature. Because neither the Secretary of State, nor his deputy is an agent for service of process under Section 93-3008 for a foreign corporation that has not filed a copy of its charter, the duties imposed by 93-3010 of mailing copies of the summons and the complaint and mailing a certificate are inapplicable. Besides, if the foreign corporation has not filed a copy of its charter in the office of the Secretary of State, the chances are good that the address of the corporation is not of record in that office. Section 93-3010 does not require the Secretary of State to look outside the papers on file in his office for the address of the corporation. Neither does the law require the Secretary of State to do a useless act in mailing the certificate when the law does not

designate him agent for service of process of a corporation that has not filed a copy of its charter in his office.

It is my opinion that in an action against a foreign corporation the Secretary of State of Montana, or, in his absence from his office, the Deputy Secretary of State, should decline service of process when such service is attempted pursuant to Section 93-3008, Revised Codes of Montana, 1947, as amended by Chapter 135, Laws of 1949, and when the foreign corporation being served has not filed a copy of its charter in the office of the Secretary of State of Montana. Therefore, in these cases, the duties imposed by Section 93-3010, Revised Codes of Montana, 1947, do not apply.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.