§5.1. Foreign corporations: Maintenance of sales office not "doing business" for purposes of qualification. The highly publicized Northwestern-Stockham decision of the United States Supreme Court,\(^1\) confirming the power of the states to tax the income of foreign corporations engaged exclusively in interstate commerce, has focused new attention on the problems faced by foreign corporations that do business beyond the borders of their domiciliary states. Congress reacted to the Northwestern-Stockham decision by hastily enacting legislation that curbed the power of the states to tax when the only domestic activity of the foreign corporation consisted of the solicitation of orders for the sale of merchandise to be shipped from outside the state.\(^2\) The statute, obviously intended as a stopgap,\(^3\) provides only limited relief, since it does not purport to exempt a foreign corporation that goes beyond mere solicitation and, for example, maintains an office or stores merchandise in the taxing jurisdiction.

Aside from its narrow scope, the federal statute deals exclusively with the power to tax. The corporation's extraterritorial activities may also subject it to service of process or an obligation to register or "qualify" in one or more of the jurisdictions in which these activities occur. The foreign corporation in determining its responsibilities in these areas must rely upon the statutes and decisions of the states in question.

In Remington Arms Co. v. Lechmere Tire & Sales Co.,\(^4\) the plaintiff, a Delaware corporation, brought a suit in equity under the state Fair Trade Law\(^5\) to enjoin the defendant, a Massachusetts corporation,

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\(^3\) The statute (§§201 and 302) directed Congressional committees to study the matter of state taxation of income derived from interstate commerce and to recommend proposed legislation on or before July 1, 1962.
\(^5\) G.L., c. 93, §§14A-14D.
from selling the plaintiff's trade-marked rifles and ammunition at
prices below the established minimum retail prices. Lechmere con­
ceded the violation but asserted that Remington's failure to comply
with the provisions of G.L., c. 181, deprived it of the right to maintain
the suit. 6

Remington's products were manufactured in factories located out­
side of Massachusetts, but it maintained a leased office in Boston serv­
iced by a district manager and a secretary. The former's principal
activities consisted of the solicitation of orders from wholesalers
throughout New England, occasional calls on retailers, and checking
the maintenance of fair trade prices. All orders were accepted at
Remington's home office and were shipped f.o.b. the factory. Aside
from office furniture, a few sample guns, some advertising material and
a small bank account, the plaintiff had no property in Massachusetts.

Remington contended that as a foreign corporation engaged solely
in interstate commerce it was not obliged to comply with the qualifica­
tion requirements of Chapter 181. The case was reported without
decision and the Supreme Judicial Court sustained Remington's posi­
tion. The Court relied upon earlier precedents exempting companies
engaged exclusively in interstate commerce, and pointed out that the
maintenance of the office and bank account, the employment of sales­
men and a stenographer, and the presence of samples had been held
to be merely incidental to the conduct of interstate commerce. 7

What gave the Court pause was the rather elaborate machinery set
up by Remington to enforce its fair trade policy. Although notices
to alleged violators were mailed from the home office, the district
manager often followed these up by personal visits, and professional
shoppers were used as the basis for filing fair trade visits. The Court
concluded, however, that these activities designed to protect the plain­
tiff's good will were part of its interstate business.

Although the Court did not cite Northwestern-Stockham, it con­
ceded that recent decisions of the United States Supreme Court would
justify broadening the scope of Chapter 181. 8 Thus under North­
western-Stockham the Commonwealth undoubtedly has the legislative
power to levy a fairly apportioned tax on the income derived from
Remington's Massachusetts business. Yet the Supreme Judicial Court

6 Chapter 181 requires certain foreign corporations, principally those which "do
business" or "have a usual place of business" in the Commonwealth, to appoint
the Commissioner of Corporations and Taxation as their attorney for the service
of process ($5), and to file with him copies of their charters and other information
($5), together with annual certificates of condition ($12). Failure to comply with
these sections subjects corporate officers to certain penalties, including personal
liability for debts and contracts entered into within the Commonwealth ($5). The
corporation itself is barred from maintaining any action in the state courts ($5).
7 Marconi Wireless Telegraph Co. of America v. Commonwealth, 218 Mass. 558,
106 N.E. 310 (1914).
8 Although no specific cases were cited, the Court undoubtedly had in mind,
in addition to Northwestern-Stockham, such decisions as International Shoe Co. v.
Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945), and Wisconsin v.
had in earlier cases exempted from the Massachusetts corporation exercise foreign corporations whose activities were comparable to those carried on by Remington.9 These tax decisions in the light of the present case confirm the general rule that the obligation of a foreign corporation to qualify and its liability to local income taxation are normally determined by the same criteria.10 The Court in Remington, however, was obviously reluctant in the absence of legislative action to broaden the scope of Chapter 181 merely because the United States Supreme Court had ruled that the states had broader powers to regulate foreign corporations engaged in interstate commerce than Massachusetts had seen fit to exercise.

In addition to its potential qualification and tax obligations, the foreign corporation that ventures abroad may find itself subject to service of process in a nondomiciliary jurisdiction, even when its local activity is isolated or insubstantial. The plaintiff in Remington, for example, conceded that it was probably subject to service of process in Massachusetts,11 and recent decisions confirm the validity of this concession.12 The applicable statute subjects the foreign corporation to service of process not only when it has a usual place of business in the Commonwealth, but even when it “is engaged in or soliciting business in the commonwealth, permanently or temporarily.” 13 In Thurman v. Chicago, Milwaukee & St. Paul Ry.14 the Supreme Judicial Court held, on constitutional grounds, that the mere soliciting of business was insufficient to confer jurisdiction despite the literal wording of the statute. More recent cases,15 however, while recognizing that something more than mere solicitation is required, have impliedly criticized the constitutional fears expressed in Thurman. Accordingly, a foreign corporation that accompanies its solicitation of business in Massachusetts with any type of promotional work, investigation of complaints, servicing, or the like will probably be subject to service of process.16

§5.2. The “corporate opportunity” doctrine: Director’s liability to corporation for commission paid him. That a director owes a fidu-

9 See the cases cited in note 7 supra.
13 G.L., c. 223, §38.
15 See the cases cited in note 12 supra.
16 See the cases cited in note 12 supra; Schmikler v. Petersime Incubator Co., 77 F. Supp. 11 (D. Mass. 1948). However, although the “solicitation plus” activities have been held to give Massachusetts jurisdiction over the foreign corporation, service upon the Commissioner of Corporations and Taxation will not be effective under G.L., c. 181, §3A, unless the cause of action arose out of business done within the Commonwealth. Nichols v. Cowles Magazines, Inc., 105 F. Supp. 864 (D. Mass. 1952).
ciary duty to his corporation is a well-recognized principle, but its application often raises subtle questions of business ethics. When the so-called “corporate opportunity” doctrine is involved, the issue for the court's determination is whether the director has profited personally from a transaction whose benefits should have flowed to the corporation.¹

*Weismann v. Snyder*² was such a case. The corporation's business was acting as broker for food manufacturers and canners in the sale of their products to wholesale grocers and jobbers. The defendant Snyder, who was president, manager and owner of half the corporate stock, learned while making a business call that one of the corporation's customers, Pappas Company, a wholesale grocer, desired to sell its Springfield branch. Through Snyder's efforts a sale of Pappas's Springfield business to another customer of the corporation was arranged, and Snyder was paid a commission for his services. The trial court in dismissing a suit brought by the corporation's trustee in liquidation ruled as a matter of law that there had been no wrongful pre-emption by Snyder of a corporate opportunity.

On appeal, the evidence was reported and the Supreme Judicial Court, holding that the trial judge had failed to make ultimate conclusions of fact decisive to the case, remanded it so that such ultimate findings could be made. The Court clearly intimated that certain additional facts could be found on the evidence that would lead to a different result. Among these were findings that the corporate charter powers were broad enough to include sales activity such as that involved in the Pappas sale; that Snyder had used corporate time and perhaps minor corporate expense money in making the sale; and that he had not made full disclosure of the progress and details of the Pappas transaction to the other stockholder.³

In thus impliedly holding that the director had seized a corporate opportunity, the Court followed a line of decisions in which the fiduciary has been ordered to make restitution to the corporation.⁴ The guiding principle was defined, in *Durfee v. Durfee & Canning, Inc.*,⁵ as the unfairness of a director's taking advantage of an opportunity for personal profit “when the interests of the corporation justly call for protection,” a doctrine that “calls for the application of ethical standards of what is fair and equitable.”⁶ In recent years the only Massachusetts case in which the fiduciary has prevailed was *Black v.*

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³ 338 Mass. at 505-506, 156 N.E.2d at 23.
⁶ 323 Mass. at 199, 80 N.E.2d at 529.

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http://lawdigitalcommons.bc.edu/asml/vol1959/iss1/9
Parker Manufacturing Co., in which the principal corporate officer had invested substantial amounts of his own capital in ventures which were at most ancillary to the business of the corporation. After these ventures proved to be profitable, their acquisition was challenged by a minority stockholder under the corporate opportunity doctrine. Relief was denied principally upon the ground that the defendant had apparently fully disclosed his acquisitions and, in risking his own money rather than the corporation's, had acted in good faith and had erred, if at all, only in judgment.

The clear implication in the Weismann case that Snyder had overreached, together with the general body of Massachusetts decisions in this field unfavorable to the fiduciary, should deter corporate officers from embarking upon ventures that bear any relationship to the corporation's business. If the fiduciary, however, in advance makes full disclosure of the opportunity to the board of directors, normally he will be protected if he thereafter proceeds on his own with the knowledge of the board.

§5.3. Stockholder status recognized despite nonobservance of corporate formalities. Counsel acting for closely held corporations frequently omit the observance of certain formalities, typically with respect to the issuance of shares and the holding of corporate meetings. These loose practices may be due in part to a feeling of self-consciousness, an awareness that the small businessman acting in the corporate form often becomes impatient with the usual corporate paraphernalia of waivers of notice, formal minutes of meetings held most informally, proxies, and the like. In most instances the departures from good corporate practice are harmless. Occasionally, however, the victim of these lapses may have to establish his rights by costly litigation.

The tortuous litigation among members of the Kaneb family, which has twice within three years reached the Supreme Judicial Court, demonstrates the dangers inherent in the nonobservance of corporate formalities. In the more recent case the key issue was whether the plaintiffs, sisters of Albert Kaneb, had derived any rights from him as stockholders in Central Oil Company. Central had originally been a partnership owned equally by Beton Kaneb and his sister Rachel. They and their two brothers, Albert, a lawyer, and Kenneth, decided to transfer the business to a newly organized corporation, and the articles of organization contained subscriptions for forty shares for Beton and twenty shares each for Rachel, Albert and Kenneth. Albert died within a week after the articles of organization were filed with the Secretary of State, and his property passed intestate to

8 329 Mass. at 113, 106 N.E.2d at 550.
9 See the cases cited in note 4 supra.

his mother who died three years later. No bill of sale transferring the assets of the partnership to the corporation was ever executed, and no stock certificates were issued until eleven years after the corporation was organized. The master before whom the case was tried found that upon the filing of the articles of organization the corporation immediately acquired the assets of the partnership. In payment therefor the four subscribers became entitled to the agreed-upon amounts of stock, although Albert and Kenneth, who had no interest in the partnership, were deemed to have received gifts of their shares from Beton and Rachel. The plaintiffs as next of kin of their deceased mother thus acquired ownership of a part of Albert's shares, even though the inventory of neither estate listed any stock in Central.

In upholding this finding the Supreme Judicial Court decided that "in this laxly handled family situation, where no rights of creditors or outsiders are involved," standards of corporate procedure applicable to more widely owned business corporations need not be followed. This result, which clearly carried out the parties' express intentions, can hardly be quarreled with, yet it points out the dangers inherent in noncompliance with corporate formalities. Here the laxity stemmed originally from the untimely death of Albert, but the parties had ample opportunity thereafter to correct the situation. It is, of course, hornbook law that the issuance of a stock certificate is not necessary to make a person a shareholder. Yet missing or improperly designated stock certificates, which almost every lawyer dealing with family corporations encounters from time to time, indicate that an excessive reliance is being placed upon this principle.

§5.4. The pre-emptive right: Dilution of stockholder's interest forbidden on equitable principles. Although a stockholder in a Massachusetts corporation has no statutory pre-emptive right to subscribe to newly issued shares, he is not without remedy if the new shares improperly dilute his interest. In the Samia case, discussed in the immediately preceding section, the Kaneb brothers had not only appropriated Albert's stock interest for their own benefit, but they had also subsequently subscribed to additional stock at the price of $200 per share. The Supreme Judicial Court, after awarding the plaintiffs their inherited portions of Albert's stock, conceded that they probably had no pre-emptive right to subscribe to additional shares. However, in order to avoid an unfair dilution of the plaintiffs' interests, the Court, in accordance with familiar equitable doctrine, gave the

sisters the right to subscribe for proportional amounts of additional stock at the price of $200 per share, the same basis upon which the brothers had purchased their shares.

§5.5. Minority stockholders' suit: Direct relief to stockholders granted to avoid unjust enrichment. The Samia case, a treasure trove of corporate law problems, produced another novel question for the Court to decide. Among other acts that the plaintiffs complained of was the organization by the defendants of a separate corporation, Union Oil Company, to operate a deep-water fuel oil terminal near Boston. Under familiar doctrine discussed above, the Court found that the incorporation of Union and the issuance of its shares to the defendants was an improper seizure of a corporate opportunity belonging to Central Oil Company, particularly when the bulk of the initial financing necessary for the operation of Union came from Central. The Court also found that Central had suffered damage in the amount of $75,000 as a result of the organization of Union.

The plaintiffs, after alleging and establishing their status as shareholders of Central, were minority stockholders seeking on behalf of Central relief against the conduct of the defendants in misappropriating the Union Oil venture. Normal relief against this seizure would have been an order directing the defendants to transfer their Union stock to Central, since in the typical derivative stockholders' suit all recovery flows to the wronged corporation. But, under the peculiar facts of the Samia case, such an order would have given one of the wrongdoing defendants practical control of both Central and Union.

Faced with this problem the Court found precedents in other jurisdictions, together with a dictum in an older Massachusetts case, that authorized more flexible relief. Instead of ordering a transfer of the Union stock held by the defendants to Central, the Court decreed that each of the plaintiffs should be permitted to purchase from the defendants an equitable proportion of the Union shares by paying to them an aliquot part of the original subscription price of the Union stock. This decree, on the surface at least, appears to accomplish more substantial justice than would have been afforded by the traditional method of awarding all relief directly to the corporation. In any event, the Court's willingness to break new ground in an effort to avoid a rigid result is certainly praiseworthy.


2 See §5.2 supra.


4 May v. Midwest Refining Co., 121 F.2d 431 (1st Cir. 1941), cert. denied, 314 U.S. 668 (1941); Brown v. De Young, 167 Ill. 549, 47 N.E. 863 (1897); Joyce v. Congdon, 114 Wash. 239, 195 Pac. 29 (1921).
